

(1983) 11 PAT CK 0018

In the Patna High Court

Case No : Appeal from Original Order No. 16 of 1981 (R) and Civil Revision No. 162 of 1983 (R)

Yubrani Lok Rajya Lakshmi

APPELLANT

Vs

Yubraj Brajendra Kishore Singh

RESPONDENT

Date of Decision : 03-11-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107
Hindu Marriage Act, 1955 — Section 10, 13

Citation : (1984) 32 BLJR 182

Hon'ble Judges : Uday Sinha, J;Abhiram Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Uday Sinha, J.—This is an appeal by the wife against a decree for judicial separation on the application of the husband. In this judgment the husband will be referred to as the petitioner and the wife as the respondent.

2. The parties are Hindus. They were married according to Hindu rites in February, 1965. On 14.7.1966 the appellant gave birth to her first child Gajendra Chandra Singh. On 29.9.1967 she gave birth to her second child Hemendra Chandra Singh. In April, 1969 the respondent filed the application before Judicial Commissioner, Ranchi for grant of decree for judicial separation and for continuing to retain custody of the two children. The application was founded on the grounds of desertion and mental cruelty.

3. The plea of desertion is founded on two props. The first is that since the month of February, 1967, shortly after the conception of the second child, without just cause and reason the wife completely refused to cohabit with him. The husband's stand is that despite his persuasion and assurance of adopting improved method of birth control to avoid conception, the latter refused to admit him to sexual intercourse. The second prop is that the wife left the matrimonial home on 18.10.1968 never to return back. She was showing signs of reluctance

to live with her mother-in-law. In that regard she gave out hints to the husband that she would be prepared to live with him, if he separated from his mother. According to the husband, the appellant created an atmosphere which may provide excuse for obtaining separation and ultimately on 18.10.1968 she walked out of the house never to come back again. The averment of the husband is that the parents and brother of the appellant also fanned the situation in order to bring about separation. The husband has averred that in spite of her further requests, the wife refused to come back. It was insinuated in paragraph 17 that the intention of the wife was to go away to America where she was staying before her marriage and not to come back to the petitioner (respondent) or to this country. The desertion commenced in February. 1967. In token of proof of desire to take back the wife, the husband's claim is that he filed a suit for restitution of conjugal rights. Those are the circumstances of the husband (respondent) in regard to desertion.

4. In regard to cruelty as ground for judicial separation, the stand of the petitioner is rather confused and cryptic. The various assertions of the plaintiff put together in regard to cruelty are contained in paragraphs 20, 21 and 23 of the plaint. In paragraph 20 it has been stated that since abandoning the protection of the plaintiff the respondent (wife) has been living a free and easy life and had at least on two occasions behaved cruelly with the plaintiff. In paragraph 21 it has been stated that the wife abused and assaulted the plaintiff on 5.12.1968 and 14.1.1969. That is all the allegation of the husband in regard to cruelty by the wife in the original petition (plaint).

5. Eleven years after the institution of the suit on 15.5.1980 the petitioner filed an application for amendment of the plaint. By this amendment paragraphs 22A, 22B, 22C, and 22D. were prayerd to be added. The trial court rejected the prayer for addition of paragraph 22D The prayer for addition of paragraphs 22A, 22B and 22C were allowed. Paragraphs 22A and 22B related to mutters after the institution of the suit. The prayer for adding them was made on the footing that the "court may take notice of events which has happened since the institution of the suit and pass decree according to the circumstances as they stand at the time the decree is passed". By addition of paragraph 22C it was alleged that the defendant, the wife, was guilty of cruelty to the petitioner inasmuch as she filed a false criminal case in the court of Sub-divisional Magistrate Ranchi on 14.1.1969 being Case No. C-25 of 1969 which was subsequently dismissed.

6. To sum up, cruelty, according to the husband, consisted in abusing and assaulting the husband on 5.12.1968, 14.1-1969 as also in filing a false criminal case of kidnapping in the Court of Sub-divisional Magistrate, Ranchi.

7. By addition to paragraphs 22-A, 22-B and 22-C a new dimension was created in the controversy. It will be a matter for consideration whether the facts asserted in paragraphs 22-A, 22-B and 22-C have been proved or not and how far they are relevant to the prayer for judicial separation.

8. Before the stand of the wife is set out, it must be made absolutely clear that desertion according to the husband consists in the wife not permitting sexual intercourse to the husband from February, 1967 and onwards. The second limb of the same stand is her having walked out from the habitation of the husband.

9. The stand of the wife (respondent) was that she never withdrew herself from the society of the petitioner nor the respondent refused to cohabit with him without just cause and reasons and against the express wishes of the petitioner. In paragraph (a) of the written statement it has been stated that although she was not in perfect health, she submitted to the sexual desires of the petitioner at great risk to her life against medical advice. The first child was born on 14.7.1966 by Ceasarean process. Only six months later she conceived again. During the conception of the second child the respondent was not keeping well and was under medical advice to take complete rest. According to the respondent her health forbade cohabitation. She tried to persuade the petitioner to desist from sexual intercourse, but they went invain. She even received physical assaults on that score at times. Even after the delivery of the second child her categorical stand is that despite medical advice to the contrary, she submitted to the sexual desires of the husband. She denies that she showed signs of reluctance to live with her mother-in-law as alleged by the petitioner. She has stated categorically in paragraph 7 that she was turned out of the house by her mother-in-law and that she was wrongfully restrained on 18.10.1968 from going and living at "Bapsi" the family Home. The allegation of creating scenes and abusing the mother-in-law or the husband has been denied. The charge of her parents fanning her into breaking the marriage tie has also been denied. According to the respondent, she was ill treated, as the sum offered to the mother-in-law by the father of the respondent as "Dulhan Farkaw" were inadequate. Paragraph 9 of the written statement is rather significant which reads as follows:

9. Brought up in a society where the husband is respected and reverred and where the marriage tie is considered indissuable the respondent never could have thought of a judicial separation in spite of all that has been stated above.

In regard to the application filed by the petitioner for restitution of conjugal rights, her stand is that she never resisted it because she never intended to stay away from the Home, but the petitioner finding his trick misfired did not pursue it was dismissed ultimately for non-prosecution. In paragraph 21 she has categorically denied the assertion of the petitioner in paragraph 22 of the plaint that she ceased to cohabit with the petitioner. According to her, she never deserted the petitioner nor did she refuse to live with the petitioner as husband and wife. There was cohabitation between the petitioner and the respondent even after the birth of the second child. Paragraph 23-A of the written statement also is significant which reads as follows:

23-A. The respondent humbly submits that she is not voluntarily staying away from her husband. The atmosphere prevailing in the applicant's house to which

the applicant has largely contributed, is unsafe for the health and peace of mind of the respondent as also likely to have a most deleterious effect on the mind and development of the children. As soon as the applicant is able to provide the respondent a safe and peaceful home and mend his own ways and is in a position to keep her within reasonable limits of parental supermacy to respondent would be willing to return to him. As things however stand and past experiences indicate the applicant's mother is too old to mend, the petitioner is too rigid to change immediately, the respondent has no option but to wait and see and pray for better days to return and better sense to descend and in the meantime the respondent is entitled to be maintained by the applicant and to live in peace with her children.

10. Before embarking upon consideration of the merit of the rival contentions, it should be stated that we probed the possibility of reconciliation between the parties. We called the petitioner and the respondent separately in chambers and impressed upon them the desirability of forgetting the past and forgiving one another. The respondent stated that she was willing to go back to the matrimonial Home provided the petitioner was prepared to give her due honourable place in the family. I must state that such was her stand in paragraph 23-A also in her written statement. She stated that although the proceeding for judicial separation has dragged on for fourteen years without any silver lining in the matrimonial life yet she was not prepared to concede judicial separation. She stated that it was a matter of honour for a Hindu woman to be called a married woman and that a divorce carried stigma. The husband, on the other hand, stated in a gruff manner that there was no question of reconciliation and accepting the respondent in his Home. Our attempt at conciliation having flopped because of the petitioner, the case must be decided upon merit.

11. Upon the respective stand of the parties, it has to be seen how far the assertion of the petitioner has been established and whether he has succeeded in making out a case for grant of decree for judicial separation. In *Bipin Chander Jaisinghbhai Shah Vs. Prabhawati*, , the Supreme Court observed that in proceedings for divorce the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt. To quote the words "though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for the satisfaction of the court". The initial burden is upon the petitioner. The question of onus will become irrelevant where both parties lead evidence. But if the petitioner fails to adduce adequate evidence on any significant aspect, the petitioner must fail. The application for judicial separation was filed on 17.4.1969. In order to obtain a decree for judicial separation on the ground of desertion, it is obligatory on the petitioner to establish desertion for two years prior to the institution of the suit. The stand of the respondent is that according to the petitioner, she left his home on 18.10.1968, the application for judicial separation having been filed within two years on 17.4.1969, it must be rejected outright. To get over this difficulty, the submission on behalf of the petitioner is that desertion commenced in

February, 1967 when the respondent refused to cohabit with the petitioner. We have, therefore, to see whether the refusal of the respondent to permit sexual intercourse, even if established, would amount to desertion. I shall assume for the sake of argument that the assertion of the petitioner is true and then consider whether desertion by the respondent has been established.

12. Section 10 of the Hindu Marriage Act, 1955 provides that either party to a marriage, may present a petition praying for a decree for judicial separation on any of the grounds specified in Sub-section (1) of Section 13. Section 13(1) lays down that any marriage may be dissolved by a decree of divorce on the ground that the other party-

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition of the petitioner.

Thus a decree for judicial separation may be passed on the ground that either party has treated the petitioner with cruelty or has deserted for two years. The word "desertion" has not been defined upto now in any Statute nor is it capable of being encased in a straight jacket. Its content has been spelt out from time to time by Courts in England. Those parameters have been adopted by our Courts as well, in this land. Thus the laws laid down and the cases decided by English Courts in regard to "desertion" are relevant for us as well. The law in regard to "desertion" was analysed by the Supreme Court in *Bipinchandra Jaisinghbai Shah v. Prabhavati*. The Supreme Court approved the Segal position in *Halsbury's Laws of England* (3rd Edn.), Vol. 12, in paras 453 and 454 which read as follows:

In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

In the same decision Sinha, J. (as he then was) observed as follows:

For the offence of desertion, so far the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation and (2) the intention to bring to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned ; (1) the absence of consent, and (2) absence conduct giving reasonable cause to the spouse leaving the matrimonial Home... Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by

those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time.

In the instant case, the plea of the petitioner is that the Animus came into being sometime in February, 1967 and continued all along. Although the respondent deserted the Home in October, 1968, the Animus is reflected, according to the petitioner, in the refusal of the wife to admit the petitioner (husband) to sexual intercourse since February, 1967. A vital question, therefore, falling for consideration in this case is whether the respondent can be said to have deserted the petitioner between February, 1967 and October, 1968 when she was residing with the petitioner discharging all family and filial obligations except sexual intercourse. This aspect of the matter has to be seen from the angle of the law laid down in (1948) 2 All ER 920 *Hopes v. Hopes* 1964 3 All ER 464 *Lebrooq v. Lebrooq* (1924) All ER 19 *Jackson v. Jackson*, and (1947) 1 All ER 563 *Weatherley v. Weatherley*.

13. In (6) *Jackson v. Jackson*, the husband and the wife lived in the same house, but the husband refused to sleep with his wife, and on that ground the wife applied to the justices for judicial separation on the ground of desertion. Sir Henry Duke, p. on appeal observed as follows:

If there is abandonment by one of the spouses of the other, that is desertion. If one of the spouses causes the other to live separate and apart, that is desertion.... I am not aware of any case in which it has ever been said that desertion could be found upon notional grounds while the parties were living together. When one of the parties has deserted the other they are living separate and apart.

It must be noted that in the same case *Hill, J.* although agreeing with Justice Duke struck a slightly different note as follows:

There may be desertion though the husband continues to live under the same roof with the wife, but in such case the facts must be very strong. They must show that the husband really causes the wife to live apart against her will not only sleep apart, but to live apart.

13. In *Weatherley v. Weatherley*, the issue was whether refusal to sexual intercourse could by itself amount to desertion. The House of Lords affirming the Court of Appeal held that it was not. Again in *Lebrooq v. Lebrooq*, the question was considered whether a party to a marriage can be said to have deserted the other party, if they are both living in the same Home under the same roof. While conceding that living under the same roof would not be decisive of the matter and that a party may desert another while living under the same roof, yet merely upon withdrawal from sex by either party, the inference of desertion would not

be fight. (The emphasis is mine). In that case the wife initiated an application for divorce on the ground of cruelty and the husband cross-petitioned for divorce on the ground of desertion by the wife. The parties were married in 1938. They had two daughters borne in 1941 and 1947. Upto 1953 it was a normal happy marriage. Relations deteriorated in 1955. Then started a divorce proceeding. In 1956 the wife wanted the husband to change the matrimonial bed room from the south of the house to the north. The husband concurred tin that and changed the furniture around in company with her, but after he had slept there one night she excluded him from the room in February, 1956 by putting a bolt on the inside of the door. When she went out of it, she locked it with a key. The husband had never been in that room since then. The Appellate Court accepted the findings of the Commissioner that putting up the bolt by the wife in February, 1956 was the cause of the break down of the marital relations. Their Lordships on the plea of the husband based on desertion held as follows:

I do not think that there was desertion here. There was no separation of house holds. There was separation of bed rooms, separation of hearts, separation of speaking; but one household was carried on, one kitchen where -the cooking was done, and they had their meals from the same supply, the husband providing the money and the wife buying the food. It would be carrying the doctrine of desertion, or constructive desertion, beyond anything within my knowledge of this kind of matter if I were to say that there was desertion here.

With the above unanimous observations the cross-petition for divorce on the ground of desertion was dismissed.

14. Learned Counsel for the petitioner relied upon (1946) 2 All ER 366 Wanbon v. Wanbon. Pilcher, J. sitting singly passed the decree nisi for divorce on the footing that for ten years the husband and wife had been completely at arm's length. The wife had withdrawn from the husband's bedroom and had ever since refused to have any marital relations with him. The facts of the case show that for more than ten years the wife had never addressed a word accept to find some fault with him, she had refused to cook dinner for him, make his bed, mend his clothes or perform any duty of wife for him whatsoever. His Lordship observed that the circumstances of the case were very unusual. This case does not support the petitioner, but this case laid down contrary to the rule laid down in (1942) 2 All ER 515 Littlewood v. Littlewood. It was not approved as laying down a correct law in (1948) 2 ER 920 Hopes v. Hopes, as well, in that case Bucknill, L. J., referring to the case of Wanbon. Wanbon at page 924 para D observed as follows:

I must respectfully say that I find it difficult to reconcile this case with the principle laid down in the cases as to what constitutes desertion.

And Denning, L. J., observed as follows:

Relieved of Wanbon v. Wanbon, (supra) land (1947) 2 All ER 656 Evans v. Evans, the law becomes consistent throughout this subject and I agree with all that Bucknill, L. J. has said about it, and as to the application of it to the facts of this

case.

Harman, J., also in the same case held at page 927 that he should not be disposed to follow it.

15. There appears to be thus good authority for the view that mere withdrawal from sexual intercourse by a party does not constitute desertion. It is not for a moment contended that if the parties are residing under the same roof, the plea of desertion must be rejected. In fact, in *Lachman Utamchand Kirpalani Vs. Meena alias Mota*, , in paragraph 48, Subba Rao, J. observed that under certain circumstances the deserted spouse may even stay under the same roof or even in the same bedroom. In fact even in the case of (1921) All ER 19 *Jackson v Jackson*, Hill, J. observed that there may be desertion though the husband continues to live under the same roof with the wife, in such case the facts must be very strong. Denning, L.J., in *Hopes v. Hopes* (supra) posed the question and the effect of separation. Can that exist while the parties are living under the same roof? My answer is "Yes". The husband who shuts himself up in one or two rooms of his house and ceases to have anything to do with, his wife is living separately and apart from her as effectively as if they were separated by the outer door of a flat. "Thus even though the parties reside under the same roof yet there may be desertion by a party to the other. The crucial aspect to be seen is what constitutes desertion is not walking out of a house but withdrawal from a Home. A distinction must be made between a house and a Home. A house is built by hands, but a Home is built by hearts. Mere withdrawal from sex may not constitute withdrawal from Home. It will have to be seen from surrounding circumstances whether the deserting party has withdrawn himself/herself from the Home. Desertion consists in withdrawal not from a place but from a state of things. I cannot restrain myself from quoting the observations of Poti, Acting C.J. in *P. Indira Devi Vs. Kumaran*, where his Lordship observed as follows:

Desertion, in its essence, is the separation of one spouse from the other with intention on the part of the deserting spouse of bringing cohabitation permanently to an end-*vide* (1938) 5 All ER 722 at p. 731 *Herod v. Herod* (1948) 2 All ER 920 at p. 925 *Hopes v. Hopes*.... Desertion is not withdrawal from a place but from a state of things.... The state of things may be termed for short the home (1952) 1 All ER 223 *Lane v. Lane*.

16. Faced with these authorities, mentioned above, Mr. A.K. Banerjee, learned Counsel for the petitioner (husband) conceded, though after much discussion that mere withdrawal from sexual intercourse would not amount to desertion.

17. The position in law thus is that mere denial of sexual intercourse is not sufficient to constitute desertion. Let us, therefore, consider how facts stand in the Instant case. Between the period February, 1967 till October, 1968, the only charge of the husband (assuming it to be correct) is that the wife the respondent in the suit did not admit the petitioner to sexual intercourse. There is neither averment in the plaint nor evidence in Court that the respondent fled from

other obligations of a wife. She had pleaded her own inability, but that apart even if we brush aside her assertion, the position in evidence is that relationship between the parties was cordial despite denial of sexual intercourse. In paragraph 55 the petitioner deposed that the relationship with his wife was cordial for some time despite denial of sexual intercourse. In fact in paragraph 8 of the plaint it has been stated as follows:

and when it became apparent to her that the petitioner will not desert his mother, respondent began to create from March, 1968 in a planned way an atmosphere which may give her a ground for obtaining separation from the petitioner. This was encouraged and helped by her parents, brothers and married sisters.

Thus there was no desertion till March, 1968 by the wife. In paragraph 51 the petitioner made a significant admission. He stated that till August, 1968 the petitioner had no complaint against his wife except that she used to neglect the children. The children were one year and two years old. It would be cheeky on the part of the husband to say that the mother of a year or two years old children was neglecting them. It must, therefore, be accepted that apart from denial of sexual intercourse there was nothing abnormal in the Home. The husband and wife were living together and continuing in a normal manner. It is another matter that relationships between the mother-in-law and daughter in law were less than cordial. Their relationship is besides the point and is irrelevant for our purposes. In the light of the above pieces of evidence and pleadings the assertion of the respondent in paragraph 5 of the written statement that the respondent never withdraw herself from the society of the applicant nor the respondent refused to cohabit with him without just cause and reason and against express wishes of the applicant, and that in paragraph 6 though as a result of the importunities of the petitioner, the respondent had sometime to submit to his will appears to have a ring of truth.

18. There is no averment by the petitioner that the husband and wife were not going to club together or were not calling on friends. The assertion thus is of mere denial of sexual intercourse. This, as I have shown above and as conceded by learned Counsel for the petitioner, is not sufficient to constitute desertion. The respondent, upon the assertion of the petitioner, walked out of the house on 18.10.1968. The earliest, therefore, that can be said that the respondent deserted the petitioner commenced from 18.10.1968. The desertion, therefore, in my concluded opinion, did not commence from February, 1967 but it may well have commenced from 18.10.1968. This conclusion is upon the assumption that the assertion of the petitioner himself is correct. Which of the assertions as to the incident on 18.10.1968 is acceptable is another matter which I shall deal later on. The desertion having commenced on 18.10.1968, the suit thus filed on 17.4.1969 was manifestly premature. The statutory period of two years desertion had not expired when the application for judicial separation was filed. The petition for judicial separation on the ground of desertion by the respondent

must, therefore, fail for the reasons stated above. The pleading itself does not make out any case for desertion between February, 1968 and October, 1968. Failure to look after children and quarrel with the mother-in-law do not constitute desertion. That she walked out of the house and not out of the Home is obvious from the fact that when the petitioner's mother died in 1980, the respondent went to the petitioner's house for condolences, but she was not welcomed and, therefore, she returned back from the door of "Bapsi", the matrimonial Home.

19. Let us now consider whether the assertion of the petitioner that the respondent refused to have sexual intercourse with her from February, 1967 till October, 1968 is acceptable. In this behalf we have only the evidence of the husband on the one hand and of the wife on the other. The husband has asserted that the respondent had denied sex to him without just cause. The respondent has denied the assertion of the petitioner but her pleading does show that she was not very prolific and condescending in matters of sex. In matter like this there cannot be such evidence except those of the husband and wife. The respondent was pleaded that with two child births by Caesarean process in quick succession she had been advised restraint. The submission urged on behalf of the petitioner is that the respondent has not produced any documentary evidence in the shape of medical opinion that she should not indulge in sexual intercourse. It is true that no written medical opinion has been produced on the record by the wife, and therefore, should her stand be rejected as just a lame excuse flung at the Court. I have some difficulty in accepting this submission urged on behalf of the petitioner. Till October or November, 1967 the respondent must have been going to her doctor with her husband the petitioner. If the doctor had given her medical opinion in writing, I would expect it to be in the custody of the petitioner, the husband, if he was a husband discharging his obligations as husband. I would, therefore, not expect the respondent to produce such a document. On the other hand Dr. Quadros, who was the physician of the respondent may not have given any opinion in this regard in writing. One does not know where Dr. Quadros was at the time of trial and whether she would be willing to depose in a dispute between husband and wife. I am more inclined to accept the position that the opinion if any, must have been oral. If it was oral, the respondent cannot be disbelieved for not producing any document to support her stand.

20. The surrounding circumstances show that the assertion of the respondent is more probable. In July, 1967 she had given birth to her first child. Only six months later she had her second conception. It does not surprise me in the least that so soon after the first child birth and that too by Caesarean process, the wife would have been reluctant to go in for sexual intercourse. The evidence of the wife is that her second child was born a month premature by Caesarean process. From this circumstance, I am of the view that sexual intercourse before the second child birth may well have been the cause of premature child. The petitioner has conceded in paragraph 53 of his evidence that Dr. Quadros had advised against sexual intercourse for six weeks after the second child birth

which took place on the 29th of September, 1967. The respondent thus had just cause for refraining from sexual intercourse from August, 1967, till November, 1967. If the petitioner wanted to have sex in that period as well, it was most considerate of him. It was considerate of him not to have taken care to postpone the second conception and it was in considerate of him to expect his wife to offer him sexual life at least between August to November, 1967. I am inclined to accept the respondent's stand that she was averse to sexual intercourse, but off and on the petitioner did have it. This conclusion of mine gets re-inforced by the evidence of the petitioner in paragraph 51 of his evidence. I cannot skip over another piece of damaging admission of the petitioner in paragraph 54 where he deposed that the respondent had told him that she would not allow sexual intercourse without contraceptive. In the very same paragraph he volunteered that the wife had said to that effect in February, 1968. This completely destroys the petitioners case that there had been no sexual intercourse between February, 1967 and February, 1968, was this an unreasonable stand of the respondent? Certainly not. Steeped in antiquated ideas one may say, to procreate is holy, but that is not the modern concept, that is not the cry of the hour in this land of course. The respondent had education for some years in America. She may, therefore, well have been trying to avoid successive quick child birth. In my view she had just cause for refraining from sexual intercourse. In my concluded opinion the stand of the petitioner that the respondent denied sex to him is not acceptable. My second concluded opinion is that even if this assertion is correct, the respondent had just cause for it. Thirdly at least the respondent had good cause for refraining from sexual intercourse from August, 1967 when she was carrying seven months pregnancy till the end of November, 1967 during which period Dr. Quadros had admittedly advised against sexual intercourse. (See PW 1 Para). Even if I were to accept that denial of sex from February 1967 was desertion by the wife, there was a break in that continuous desertion between August and November, 1967 during which time there was just cause for refraining from sexual intercourse. The withdrawal from sex can at the highest be held from February, 1968. The suit filed on 17.4.1969 was within two years of the commencement of the so called desertion. These conclusions of mine do not run counter to my earlier conclusion that the evidence in this case at its highest amounts to mere denial of sexual intercourse which does not amount to desertion. The suit must, therefore, fail on the ground of desertion for the statutory period.

21. I shall now discuss the incidents which took place on 18.10.1968 when the respondent is said to have walked out of the Home of the petitioner. This is the second limb of the petitioner's case in regard to desertions. It should not be forgotten that the stand of the respondent is that she did not walk out, but she was hounded out. At the outset I must observe that the version of the petitioner appears to be rather confusing and topsyturvy. I shall try to put them in some order so far as possible. In paragraph 14 of the plaint it has been stated that in pursuance of some conspiracy, the parents of the respondent came to Ranchi on

15.10.1968 and from the very next day she began to spend almost the entire day with her parents in confabulation and planning. I shall have occasion to discuss the part played by the parents suffice it to say for the present that there is no oral evidence worth the name that when the respondent used to go to her parents place on 16th and 17th October, 1968 there was confabulation and planning. The petitioner never went with her. The charge of confabulation and planning thus appears only to be a cliché. The source of information in this behalf has not been disclosed either in the plaint or in evidence. So on 15th October 1968 the parents of the respondent came to Ranchi. He therefore could not have heard or seen the talks or acts of conspiracy. On the 16th and 17th October, 1968 the respondent went to her parents and stayed with them for long hours. In paragraph the petitioner deposed that the respondent came back in the evening was this very unusual? I regret, I am unable to find any unusual conduct on the part of the respondent. Her parents had come to Ranchi after a long time. It was quite natural for the daughter to have gone to see her parents. Moreso, when the atmosphere at "Bapsi" was not very cordial may be on account of the mother-in-law. In paragraph 15 of the plaint it has been mentioned that on the 18th October, 1968 in the forenoon the petitioner went to her parents place. The respondent lodged a false information at Doranda Police Station against the petitioner's mother accusing her of kidnapping her younger child. In paragraph 16 it has been stated that in the evening of the same day i.e. 18.10.1968 the respondent came with police officers to the residence of the petitioner and asked the officers to take the children away from the petitioners custody and hand them over to her. In order to appreciate the stand of the petitioner paragraphs 14, 15 and 16 of the plaint must be quoted in extenso which read as follows:

14. That in pursuance of the said conspiracy the parents of the respondent came to Ranchi on 15.10.1968 and from the very next day she began to spend almost the entire day with her parents in confabulation and planning.

15. That in pursuance of the ultimate conspiracy, the respondent tried to remove the younger child from the custody of the petitioner in the forenoon of 18.10.1968 while the petitioner was away and when she failed to do so, the respondent lodged a false information at Doranda police station against the petitioner's mother accusing her of kidnapping her younger child.

16. That in the evening of the same day the respondent came with police officials to the petitioner's residence and asked the officials to take the children away from the petitioners custody and hand them over to her. While this drama was being enacted within the house the father of the respondent was all along just outside the gate in a car. Both the petitioner and his mother requested the respondent to stay in the house and not to break up the marriage, but the respondent refused to do so. When the police officers did not comply with the request of the respondent, she left the petitioner residence in anger.

22. From the above it will be seen that the plaint is conspicuously silent about anything having happened in the morning on 18.10.1966. The petitioner has not

disclosed, in the plaint, at what hour the respondent went from "Bapsi" to her parents. The plaint does not disclose whether on the 16th and 17th October, 1968 the respondent was going to see her parents with the children or without them. In evidence, however, the respondent stated in paragraph 58 that she had gone without the children. Was it unreasonable on her part to take one of the children. The Nana may be visiting to see the latest child. I have some difficulty in holding that the respondent should have gone out to her parents without Hemendra, the second son on 18.10.1968 in the forenoon. The fact that the respondent did not endeavour to take the first child militates against the suggestion that she was forsaking the Home in the forenoon. Paragraph 15 quoted above, shows that the endeavour of the respondent to take the younger child out of the custody of the petitioner took place in his absence. His knowledge, therefore, was derived from other sources. The source has not been disclosed in the plaint. Even so, let me assume that it was reported to the petitioner by his mother. Unless the petitioners mother reported things to his son with paper and salt, it is difficult to appreciate how the mother-in-law thought that the respondent was walking out of the house for good with Hemendra. The mother was going out. She wanted to take 13 months old child with her leaving Gajendra in the house. It would be a normal course of conduct. There was no ostensible reason for the mother-in-law to have stood in the way of the respondent taking her 13 months old son with herself, I am inclined to believe that the mother-in-law snatched Hemendra from lap of her respondent and turned her out abusing her as "Chandalin, prostitute, etc. In the pleadings nothing has been said about any fact or incident showing that the respondent would be breaking up the matrimonial Home. The conduct of the petitioner's mother in stopping the respondent from taking her son was rather regrettable. The petitioners mother appears to have come out in the portrait of a proverbial mother-in law. I am inclined to accept the version of the respondent that the atmosphere was not congenial at "Bapsi". The respondent has stated in paragraph 13 of the written statement that on 18.10.1968 the mother-in-law forcibly snatched the second child away from the respondents lap and on the respondent's protest, assaulted and abused her in filthy language calling her "Chandalin and Prostitute" and thereafter not only drove her out of the house but denied her re-entry in house. The version of the respondent appears more plausible to me. The mother-in-law died a few months before the hearing of the suit commenced. In terms of the plaint, after the respondent failed to remove the younger child in the forenoon of 18.10.1968, the respondent lodged a false information at Doranda Police Station making out a case of kidnapping against the mother-in-law. The institution of the kidnapping case is a separate matter and I shall deal with it later. In pursuance of the institution of the case, the police arrived at "Bapsi" in the evening of 18.10.1968. The petitioners version is to be found in paragraph 16 of the plaint quoted above. There is no getting away from the fact that in huff the respondent did institute a case of kidnapping. What were her allegations is not known, as the first information report of that case has not been filed by the petitioner in this case. No documentary evidence in that behalf

has been produced by the petitioner, but the respondent accepts that she instituted the case. We do not know at what hours the case was instituted. In the evening the respondent came to the house. The police and Mr. A.K. Banerjee counsel for the respondent were also present there. The respondent with the courage of her conviction has stated in paragraph 16 of the written statement that on that occasion Shri Banerjee suggested that the parties should make up and the respondent should be permitted to reside in the house. Her version is that despite the persuasion of Mr. Banerjee, the petitioner and his mother totally refused to admit the respondent. In such circumstances humiliated and frustrated the respondent had no option but to depart." It is admitted on all hands that Mr. A.K. Banerjee was present at "Bapsi" when the respondent and police had gone there. He was thus a witness to everything that happened there. It is regrettable that Mr. Banerjee chose to be the lawyer of the petitioner. His appropriate place was in the dock as a witness. The Court is deprived of the benefit of his evidence in unravelling the picture. Mr. Banerjee's evidence would have been very valuable in arriving at the truth. It was professional misconduct. It is against rules of professional ethics presented by State Bar Council. It was certainly highly improper on the part of Mr. Banerjee to have appeared as counsel in the case, but that is a matter for the Bar Council and not for me. The records show that Mr. Banerjee has been the mentor of the petitioner's family. His absence from the witness box shows that the petitioner has not produced the most valuable evidence to corroborate the petitioners evidence in Court. Inference adverse to the petitioner must be drawn from non-examination of Mr. Banerjee. It must follow that the respondent did not walk out but she was pushed out on the morning of 18.10.1968. That is the inference flowing from the pleadings.

23. Let us now appreciate the oral evidence of the parties in regard to the incident on 18.10.1968. In paragraph 8 the petitioner deposed that on that day in the morning which might mean any time from 6 A.M. to 10 A.M. a car came to the house of the petitioner. The respondent's father and two employees of Atmaram Budhia an elite of the town of Ranchi were also in the car. The evidence is that the respondent said that she was going out with the younger child Hemendra, The mother-in-law said that it was time for meal and for bed time for the child and, therefore, she should not take him along with herself. The respondent then left the child and went away in the car. Let us take this evidence at its face value. That is what was reported to the petitioner for he was not present when she was going out. This version of the incident in the morning shows that the respondent was a dutiful and obedient daughter-in-law. A child of 13 months does not sleep in the morning and of course every time is meal time for a child. The evidence is not that the child was sleeping when she wanted to go out but that it was the time for the child to sleep. A child does not sleep until he is tired. He will be playing round all the time until he is tired. The evidence in paragraph 8 shows that the mother of the petitioner did not disclose to him all that had happened and the part played by her. The suggestion of the respondent

that the mother-in-law enacted the child from the lap of the respondent appears to be more probable. The mother-in-law could not have told the petitioner that she had abused or slapped the petitioner's wife, as that would have shown her in adverse light. The paper and salt thus becomes obvious.

24. The evidence of the petitioner that the respondents father was also waiting outside in the car does not seem to be true. The petitioner had not seen him as tie was not present. I am inclined, therefore, to accept the testimony of the respondent that the father or any body else was not in the car (see her evidence at paragraph 30).

25. In the evening the police came to the house of the petitioner followed by the respondent. She tried to get her child with the help of the police but the police did not try to take away the child. The evidence of the petitioner is that the petitioner and his mother asked the respondent to stay in the house, but she refused and went away. Let us analyses it. The evidence is that on the first occasion the respondent went out of the house in the morning. She came back in the evening and then again went away. When did the desertion take place or when did she walk out of the house? Did the desertion commence in the morning when she went out without the child or did it commence in the evening. There is no evidence that when the respondent went out in the morning she had gone away bag and baggage. According to the petitioner's evidence at paragraph 8 there was no fight or quarrel in the morning either between the petitioner and the respondent or his mother. The walking out of the house, therefore upon the own statement of the petitioner, did not take place in the morning. If the desertion did not commence in the morning it commenced in the evening, but does that indicate Animus Deserendi. She did go out of the house in the morning but she did not desert at that hour. She had a tiff with her mother-in-law. She had not been allowed to take her thirteen months old child with herself. The institution of the criminal case was unfortunate. It is, however, not surprising that the respondent lost her balance because of the treatment given to her by the mother-in-law in regard to her newly born child. The going away would not amount to desertion. The respondent has boldly asserted in her written statement that Mr. A.K. Banerjee requested the petitioner and his mother in the evening to let her reside in the house. The petitioner did not have the courage to put Mr. Banerjee in the witness box. The respondent knew that Mr. A.K. Banerjee, Advocate was closely associated with the petitioner and probably may have supported the petitioner. Let with the courage of conviction she stated in her pleading that the entreaty of Mr. Banerjee to let the respondent reside in the house was ignored. I have, therefore, some difficulty in accepting the evidence of the petitioner that he and his mother asked the respondent (see paragraph 11) to stay in the house. It also shows that in the evening the respondent was willing to be in the house. The petitioner withheld the most valuable evidence in the testimony of Mr. A.K. Banerjee. If he had deposed in Court the version of the petitioner would have been corroborated. The inference which I am inclined to draw is that Mr. Banerjee was not inclined to deny the respondents version that

he had requested the petitioner and his mother to let the respondent reside in the house. Thus although the respondent acted in a huff in going to the police in the morning the position changed in the evening. Mr. A.K. Banerjee requested the petitioner to let the respondent reside in the matrimonial Home but the mother and son did not condescend. The respondent would then certainly look for some place of shelter. We have the admission of the petitioner that after 18.10.1968 he never asked the respondent to come back. Then it was not a case of desertion by the wife rather a case of constructive desertion by the petitioner, the husband.

26. The trial Court in paragraph 27 of its judgment has observed that on the morning of 18.10.1968 a car had come to the house of the petitioner to take away the respondent to her father and that showed that the car had been arranged in advance for the respondent to desert the Home. I regret, I am unable to agree with the conclusion of the learned Judge. The respondent had been going to her father at Atmaram Budhias residence on the 16th as well as 17th October, 1968 as well. Her going to them was not taken as desertion and in fact it was not. The car must have been coming on those two dates also. Nothing more than that had happened on the 18th. The fact that the car had come on the 18th to take the respondent does not in any manner indicate a preconceived design to desert. Thus in disagreement with the views of the trial court, I hold that the desertion did not take place in the morning of 18.10.1968. I have already shown earlier that in the evening of that day despite the institution of the case against the mother-in-law she was prepared to reside in the house, but the petitioner and his mother did not condescend to the advice of Mr. A.K. Banerjee to let her stay at "Bapsi" the matrimonial Home.

27. Let us now evaluate the contention urged on behalf of the petitioner that the parents of the respondent planned and fanned desertion. In support of his stand the petitioner has relied upon some letters written by the respondents father and brother. Ext. 2(b) is a letter from Mahendra B. Shah, the father of the respondent dated 9.10.1968. In this letter it has been written as follows:

I am thinking of addressing letter individually to Rani Sahiba and Yubraj (i.e. the petitioner and his mother) for the proposed amicable settlement of your affairs well and good if it moves on smoothly. If not other ways are open.

28. Learned Counsel for the petitioner laid emphasis upon the last sentence quoted above which I have underlined. On the basis of that sentence it has been submitted that the father of the respondent had held out threat if matter were not settled other methods would be resorted to the implication being that desertion had been planned in advance and that the father of the respondent had fanned it. I regret, I am unable to read the letter as read by learned Counsel for the petitioner. The document must be read as a whole and then we can appreciate the true import of the letter. For that purpose it is necessary to quote another paragraph of the same letter which reads as follows:

I am sorry that you have suffered tea long. You know things to change. Let me hope for the better. I had taken a trip to Varanasi on the 4th October and then returned yesterday after a dip in the Ganges.

29. The paragraph quoted above shows that matters were not cordial. Since some time past the respondents father was holding against hope that the treatment meted out by the petitioners family to respondent would change for the better. Paragraph upon which learned Counsel for the petitioner has placed emphasis only shows anxiety of the father for amicable settlement of matters. If amicable settlement was not possible it would certainly be better, rather than experience, assault or murder which is getting quite frequent these days. In this letter the father wrote that he intended to send Rs. 500 for medical expenses. That shows that the respondent's health was not normal as also that the respondent was not being looked after properly. If the petitioner were looking after the respondent's health there would be no question for the father intending to send Rs. 500 for medical expenses. This letter not only shows neglect of the respondent's health by the petitioner but also that the respondent's health not being normal, she may have just cause for withdrawal from sex. In my view, Ext. 2(b) does not show any planning or incitement by the letter to the daughter to support. It is quite a conciliatory but realistic letter Ext. 2(a) dated 9.10.1968 is another letter written by father of the respondent to mother of the petitioner. This letter shows that the husband and wife were not putting on well. On an earlier occasion the father had tried to patch up matters and bring about amicable settlement. Probably it did not succeed. In that state of affairs, anybody would be of the view that it would be much better to part as friends father than suffer wrangling every day. I fail to see any threat in it. Ext. 2 is another letter written by Mahendra B. Shah father of the respondent to the petitioner. This also is dated October 9, 1968. This letter makes a frontal charge at the petitioner. This letter does show that he would not further insist upon the respondent not to take recourse to the parting of the ways. This implies that the respondent's father had impressed upon her in the past against parting of ways. Learned Counsel for the petitioner submitted that this shows animus to desert and the father farming the animus. In appreciating this letter we cannot lose sight of some other matter which I must quote below:

My daughter refuses any longer to be subjected to manhandling, threats of physical violence, insults and abuses that have been heaped upon her during these long years. Further she has requested all of us to help her get out of this rot, which she thinks is beyond the rational capacity of endurance of any self-respecting human being.

The portion of the letter quoted above shows that the respondent was passing through unmitigated suffering at the hands of the petitioner and his mother. The accusing finger must be pointed towards the petitioner. The father wrote in the penultimate paragraph that he will do his utmost to help matters straighten and smooth so far as it lies within his powers. The letter far from being a threat was

same counsel to the petitioner. I cannot regard it as any threat to the petitioner or insinuation to the respondent to desert.

30. There is another letter dated 2.11.1967 from Sanu, a brother of the respondent. I am unable to read any incitement or provocation to the respondent to desert the petitioner. Learned Counsel for the petitioner submitted that this letter shows that the petitioner was a party to so ire shady deals in foreign goods which the petitioner did not like. I regret this submission is absolutely unwarranted. There is nothing to show of any clandestine deal in the letter except that the brother had asked the respondent to sign the specimen signature card and send it back to him. Probably the respondent had bank account in America. But merely from that, I am unable to infer that it was an under hand affair. She may be having a Bank account in America legitimately. Her father was Ambassador for Nepal in India (See P.W. 1 at Paragraph 79). The Reserve Bank may, therefore, well have granted some sort of permission to her to have an account in the States. I am not for a moment suggesting that she had the necessary permission of the Reserve Hank, but it was for the petitioner to show or at least allege that without permission of the foreign Exchange Authorities she was maintaining a Bank account in States. Further, according to the petitioner, the respondent is still a Nepali citizen. In that case the respondent would be free to have account in America. The Indian Foreign Exchange Regulation may not affect her. Let me assume that there was no foreign exchange authorisation. Even so, she may be doing something against the law, but it does not show that the respondent was leading an amorous life. I am unable to find how this letter supports the petitioner's stand. I must, however, take note of the Post script where it is mentioned. P.S. Sending your abdomen support belt this week". This shows that the respondent was not normal after her second child birth even in the month of November, 1967.

31. There is yet another letter from the brother to the sister dated April 16, 1968. There are several matters about which the brother had written to his sister. I am unable to find anything of incitement in it.

32. Thus none of the documents relied upon by the petitioner show that the parents of the respondent ever tried to draw a wedge between the respondent and the petitioner. On the other hand, Ext. 2 shows that the respondent was going through untold suffering in the house of the petitioner. This document has been brought on the record by the petitioner himself. He therefore, cannot run away from the adverse circumstances brought out in that letter. It shows the difficult situation which the respondent was facing. That would again amount to constructive desertion by the petitioner himself rather than the respondent. At the lowest, I have no difficulty in holding that the respondent was passed to the position that she would be left with no option but to keep out of the house. That would not be desertion.

33. The trial court has accepted the petitioner's case that the respondent had refused to have sexual intercourse with the petitioner. I regret, I am unable to

see eye to eye with this finding of the learned Judge. He has based this conclusion upon the basis of paragraph 5 of the written statement which reads as follows:

The respondent never withdrew himself from the society ;of applicant nor the respondent refused to cohabit with him without just cause and reason and against the express wishes of applicant. Rather due to two quickend successive conceptions and both deliveries being by ceaserian operation, the respondent's health did not permit cohabitation immediately, after the birth of second child. Elective ceaserian during second pregnancy was hurried up as there was danger to the life and person of the respondent and one month premature delivery was obtained. Cohabitation could never have been resumed immediately after birth of second child; the external and internal wounds took over two months to heal.

During the pregnancy and conception of second child, the relevant period the respondent was not keeping well and was under medical advice to take complete rest.

The respondent further states that the condition of her health in early 1967 forbade cohabitation with her husband. The respondent humbly remonstrated to her husband that the married life does not mean merely sex. She was in every way consistent with her health ready to serve. Unfortunately this only annoyed the petitioner too much and she even received physical assault, necessitating medical assistance.

Paragraph 5 quoted above relates specifically to the period after the second child birth. The learned Judge fell into a grievous error in holding that the respondent had admitted in that paragraph that there was no intercourse after second child birth. I find no admission of the sort. The respondent emphasized in that paragraph that the health did not permit cohabitation immediately. The learned Judge failed to appreciate the significance of the word "immediately". The petitioner himself admitted in paragraph 53 of his evidence that the doctor had advised against sexual intercourse six weeks after the second child birth. The learned Judge thus misread the contents of paragraph 5 of the written statement. If the court below had tried to appreciate the contents of paragraph 5 along with the statement in paragraph 6 together, it would have appreciated that the respondent had not conceded in her written statement that there had been no sexual intercourse after the second child birth. The learned Judge observed in paragraph 23 that in the written statement the statement of the respondent was that her health and condition did not permit cohabitation but she did not specifically plead that there was no cohabitation or intercourse in the period of conception. His finding rejecting the respondent's stand that cohabitation had continued during conception did not appear to be consistent. I have already shown the fallacy in the reasoning of the trial court in regard to the question of intercourse after the second child birth.

34. As regards intercourse during the second conception it will not go merely by

word and mouth of the petitioner, but we have to appreciate the oral evidence or the pleadings in the light of probability. The respondent had given birth to her first child in July, 1966. There was no denial of sex till then. She conceived again in February, 1967. It is apparent that there was no denial of sex till that period. The petitioner says and would want as to accept that on and from the second conception the respondent refused to have sexual intercourse. But what happened abruptly which led the respondent to withdraw from sex. No evidence or circumstance worth the name has been brought on the record or suggested why she all of a sudden withdraw from sexual intercourse. She was normal healthy woman. She had sex after the first child birth. It does not sound very convincing that abruptly she gave up sexual intercourse. The petitioner stated in paragraph 51 of his evidence that he had no complaint against his wife till August, 1968 except that she used to neglect the children. This statement of the petitioner shows substance of grievance on the score of sexual intercourse. Either there was no denial of sexual intercourse or the petitioner had condoned it. Again a paragraph 55 the petitioner deposed that despite refusal of sexual intercourse, the relationship with his wife was cordial. The trial court failed to appreciate the evidence of the petitioner at paragraph 51 and 55 in their proper perspective. Two inferences follows. The first inference is that there was no withdrawal from sexual intercourse. The second inference may be that even if there was withdrawal therefrom, it was not a serious matter and relationship continued to be cordial. We should not forget that mere withdrawal from sexual intercourse is no desertion. Further the petitioner deposed, paragraph 3 of his evidence that in February, 1968 the respondent had said that she did not want a third child. There was nothing wrong about it. That was in accordance with the family planning policy of our country. The petitioner may be of the view that contraceptives are guarantee against conception, but every body knows contraceptives are not full proof against conception. The evidence that in 1968 the respondent had given out that she did not want third child is significant. It shows that she was not averse to the second. In paragraph 59 of his evidence the petitioner (P.W. 1) deposed that the respondent stated in February, 1968 that she would not permit intercourse without contraceptives She could not have, therefore, denied sex during conception and before birth of the second child. I am! therefore, unable to agree with the conclusion of the trial court that there was denial of sex by the respondent to the petitioner.

35. The learned Judge held upon the assumption of denial of sex by the respondent that there was desertion by her. The conclusion does not follow. I have referred to the law on the subject earlier and Mr. A.K. Banerjee for the petitioner also conceded that mere denial of sexual relationship does not amount to desertion. The learned Judge did not find anything more than mere withdrawal from sexual cohabitation. In my view, the inference of legal desertion does not follow.

36. In paragraph 25 of the judgment the trial court has referred to letters (Exts. 2 series) and held that there was serious difference between the husband and

wife and amicable parting of ways saw suggested, in that atmosphere of better relationship there could not have been cohabitation and sexual intercourse between the parties. I regret, the inference is unwarranted, we know of any number of cases of dowry deaths taking place a few months or a few years after marriage. Despite differences intercourse does take place. It needs two for an intercourse, but one may force it on the other, when his or her hunger for it is great. Thus the fact there were differences between the petitioner and the respondent 1 does not preclude the probability of sexual intercourse. The letters are all of October, 1968, only ten days before the respondent was pushed out of the house. They cannot show the state of affairs prevailing in 1967 or early 1968. The petitioner has failed to show that the desertion was on account of the respondent and not on account of his and his mother's behaviour. I regret, I am unable to agree with the conclusions of the learned Judge in paragraphs 23 to 26 of the judgment.

37. Learned Counsel for the petitioner submitted that the oral evidence of the respondent was not fit to be accepted and that the evidence of the petitioner and, therefore, the case of the petitioner is in regard to desertion was worthy of acceptance. The evidence of the respondent was assailed on the following grounds:

(i) She falsely denied that she had ever filed account books in the proceeding relating to the custody of the minor children.

(ii) She denied having filed Income Tax return which has been conclusively proved by her lawyer Sheonath Sahay.

(iii) She denied having an account in a Bank in America. This denial is belied by letter (Ext. 2/c).

(iv) She denied that she used to go late night shows which she had accepted earlier.

In my view, all those comments are irrelevant for the purpose of holding whether there was desertion on the part of the respondent or not. Those comments have relation with the capacity of the respondent to maintain and bring up the minor children. It could be validly said that her stand in regard to her economic condition was not tenable, but if we test the evidence of the petitioner also, it will be obvious that the petitioner also tried to conceal his assets and income. In the custody of the minor children both the parties were endeavoring to show that they possessed of sufficient means and were capable of maintaining the children. In this proceeding, however, when the question of maintenance of the respondent would have arisen, both parties have tried to show that they are possessed of inadequate means. In paragraph 63 of his evidence the petitioner deposed that he could not say whether his monthly expenditure was more or less than Rs. 3-4 thousand per month. In paragraph 64 he deposed that he could not say how much income he was deriving from his deposits (which must mean Bank deposits), in paragraph 81 he had to concede that the petitioner's mother was

an Income Tax assessee and that she had paid Income Tax earlier on an annual income of Rs. 30/35 thousand. The petitioner is the only heir of his mother. The petitioner denied in his evidence during the custody proceeding that his mother did not put on European dress. But before the trial court he had to concede that his mother used to put on trousers, shirt and coat even at the residence. He also stated that she was the member of the Ranchi Club since 1939 in her own right when most of the members of the Club were Europeans or I.C.S. and I.P.S. officers. The petitioner has shown himself to have no respect for truth by deposing that the respondent was living a loose life in America when he has no material to say so. No material or circumstance has been brought on I he record to show that the respondent was leading a loose life there. Even in regard to her life in Ranchi the petitioner made a reckless statement that the respondent was leading a reckless life. The petitioner holds share stocks of companies, but he deposed that he would not disclose the names of the companies. He refused to disclose how much he had invested in shares and how much in debentures. Thus in regard to financial matters both have tried to conceal their real state of affairs. The petitioner also suffers from the same infirmity as the respondent in that regard. In regard to the question of desertion, however, there is nothing to choose between the petitioner and the respondent but upon the probabilities revealed from the evidence of the petitioner himself, the evidence of the respondent appears to be more convincing. I would, therefore, prefer her evidence over that of the petitioner.

38. Much was attempted to be made on behalf of the petitioner that he had filed a suit for restitution of conjugal rights. In my view, the circumstance leading to the filing and withdrawal of the petition is contraindicated of the desertion by the petitioner. To recapitulate the stand of the petitioner is that he and his mother entreated the respondent on several occasions to come back home, but she did not condescend. The stand of the respondent, on the other hand, is that she was always willing to be part of the Home, but she was not allowed. In that background if the petitioner really wanted her to come back having filed the suit for restitution of conjugal rights why did he allow it to be withdrawn. The respondent had not opposed it. No written statement was filed on her behalf. That being the position, if the petitioner really wanted the wife to come back, he should have gone for ex pane decree, but that would not have fulfilled the objective of the petitioner. Therefore, when no written statement was had opposing the claim, the petitioner withdrew it. This stand of the petitioner, therefore, does not help him in any manner. Rather, it goes against him.

39. For all the reasons, stated above my concluded findings are (i) that there was no denial of sexual intercourse by the respondent to the petitioner between February 1967 and October, 1978 ; (ii) even if there was denial, it was from February, 1968; (iii) the plaint and the evidence of the petitioner show mere denial of sexual intercourse. This is upon assumption that every allegation of petitioner is true. The assumption has not been proved. Therefore, it does constitute desertion in the eye of law, and (iv) on 18.10.1968 there was

constructive desertion by the petitioner himself. He and his mother hounded out the respondent from the Home. Upon these findings, I am of the view that the petitioner has failed to establish desertion in the legal sense by the respondent.

Cruelty:

40. The only allegation of cruelty is to be found in paragraph 21 of the plaint. It has been stated therein that on one of the occasions of access on 5.12.1968 the respondent abused and assaulted the plaintiff and bit him on the hand. The second instance of cruelty took place on 14.1.1969 when the respondent abused and assaulted the petitioner even in the presence of the family doctor. Paragraph 26 makes it absolutely clear that cruelty consists in incidents that took place on 5.12.1968 and 14.1.1969. The plaint was, however, amended eleven years after the initiation of the proceeding and therein it was stated that the respondent was guilty of cruelty to the petitioner, inasmuch as, she filed false criminal case in the court of Sub-divisional Magistrate on 14.1.1969 being Case No. C-25 of 1969 which had been subsequently dismissed. This assertion to be found in paragraph 22-C of the plaint as amended. I regret the amendment of the plaint by addition of paragraph 22-C. The learned Judge allowed the amendment and insertion of these facts by order dated 19.5.1980 on the footing that the contents thereof were elaboration of assertion already made in the plaint. I regret there was no such assertion in the plaint that the respondent had lodged any false case on 14.1.1969. All that was said in the original Plaint was that the respondent had abused and assaulted the plaintiff on 14.1.1969, even in the presence of Dr. Sanyal, the family physician of the petitioner. In my view, the charge of cruelty is absolutely ill founded. While deposing before the trial court, the petitioner did not say even one word about the incident alleged to have taken place on 5.12.1968 and 14.1.1969. It is well known that pleadings are not evidence. The charge of abuse and assault by the respondent on 5.12.1968, and on 14.1.1969 must, therefore, be rejected outright. In regard to incident of 14.1.1969 Dr. Sanyal, the family physician of the petitioner was examined in the custody matter. He did not say a word supporting the petitioners assertion in paragraph 21. I have not the slightest hesitation in holding that no such incident as alleged in paragraph 21 took place on 5.12.1968 or on 14.1.1969.

41. I have already stated above that the amendment of the plaint by adding paragraph 22-C was a material irregularity. In the interest of justice it was wrong to have allowed it. Paragraph 22C contains a fresh brand of cruelty. It has been argued on behalf of the petitioner that cruelty by the respondent consists in instituting a false case. Some cases have certainly taken the view that instituting false case would mean cruelty by spouse instituting such cases. It has, therefore, to be seen whether the fact stated in paragraph 22C has been established or not.

42. In paragraph 21 of the plaint it has been stated that the respondent abused and assaulted the plaintiff. No other incident took place for which the respondent could have instituted any case. This incident, if any, took place three months after the respondent had ceased to reside in the family house. The complaint has

not been brought on the record. In the absence of the complaint, it is difficult to say what were the assertions of the respondent in the complaint and whether they were false or not. We do not know what was the case about. The mere fact that she did not peruse it would show that it was false. In paragraph 19 the petitioner deposed that his wife assaulted him and bit him. Thereafter she instituted a case against petitioner which was dismissed. The case was false, according to the petitioner. The petitioner has not stated in Court the day on which the assault and biting took place or the place where it came to pass. In paragraph 66 the respondent was cross-examined with reference to a case u/s 107 of the Code of Criminal Procedure, but not in regard to any substantive case. In the absence of the complaint, it is difficult to appreciate the nature of the case and whether it was false or not. The petitioner has stated that the case was dismissed. The respondent has stated in paragraph 66 that she did not pursue the case. That too about a proceeding u/s 107 of the Code of Criminal Procedure and not about any substantive case. In the absence of requisite materials, it is difficult to hold that the respondent instituted any case on 14.1.1969 or that case instituted on 14.1.1969 was false. Assuming that she did institute a case which was false, that took place after the respondent was away from the house. In that view of the matter, I am definitely of the view that the facts on which the charge of cruelty is founded have not been established. They were propped up merely to support a plea of cruelty.

43. Learned Counsel for the petitioner also submitted that since the parties have not come together for last 14 years, it should be presumed that the desertion continues upto this date and therefore, the decree for judicial separation be sustained. Similar facts were introduced in the plaint by addition of paragraph 22-A. It has been stated therein that the wife is continuing her desertion wilfully. I regret, I am unable to see any force in this submission. I have held earlier that she did not go out of her own free will. In the written statement the respondent has stated in paragraph 16 that the applicant, i.e. the husband and his mother totally refused to admit the respondent. In such circumstance, humiliated and frustrated the respondent had no option but to depart, hi paragraph 21 of the written statement it has been stated that the respondent never deserted the petitioner nor did she refuse to live with the petitioner as husband and wife. In paragraph 23-A it has been stated that "she is not voluntarily staying away from her husband. The atmosphere prevailing in the applicant's house to which the applicant has largely contributed is unsafe for the health and peace of mind of the respondent.... As soon as the applicant were able to provide the respondent a safe and peaceful Home and mend his own ways and is in a position to keep her within reasonable limits of parental supremacy the respondent would be willing to return to him" In evidence also the respondent repeated times without number that she did not want to stay away from the Home, but she was never allowed to go back. Lastly, in the course of hearing of the appeal the respondent stated before us that she was willing to go back and live as husband and wife. The petitioner (husband), on the other hand, categorically stated that he was not

prepared to receive back the wife. All these lead me to hold that for all these 14 years the respondent has not continued her desertion wilfully. Circumstances forced her to do so. Even now she feels proud of being the wife of Yubraj B.K. Singh. The prayer for judicial separation, therefore, cannot be granted on the mere asking of the petitioner.

44. The petitioner's stand in regard to desertion and cruelty by the respondent having been found unsubstantiated and untenable, I am unable to uphold the judgment and decree passed by Third Additional Judicial commissioner, Ranchi.

45. The appellant has prayed for a direction that the children be directed to reside with her. The question of access to the children has been considered in the past on several occasions. Once the matter was considered by the Supreme Court as well, but orders favourable to the appellant was never passed. The elder son Gajendra Chandra Singh is now 17 years 2 months. Thus after ten months he will attain majority. The younger son Hemendra Chandra Singh having been born on 29.9.1967 is now 16 years of age. Both of them are considerably grown up. The records show that they were asked in the past whether they would like to reside with the mother, and expressed their disinclination. I am, therefore, not inclined to grant access of the appellant to the children now when they have become matured enough to their rights and propriety involved.

46. The appellant has also prayed for maintenance. The only source of income of the appellant is running of a children School. It is difficult to say what it means in money terms, but the husband, however, appears to be substantially rich. He himself deposed that he had filed Income Tax return on an annual income of Rs. 20,000/- He also stated that his mother, who died in March, 1980 had filed Income Tax returns on annual income of Rs. 30,000. He also stated that he had interest in the assets of his father. It was stated at the Bar that his father died only a few days prior to the commencement of the hearing of this appeal. The father of the respondent was Raja of Nayagarh (Orissa). From all these circumstances and evidence, I am of the view that the husband is possessed of considerable assets and properties. On the other hand, G. and H. Junior School is run by the wife. She is left with hardly Rs. 200/- and this was stated in the proceeding in regard to custody of the minor children. Taking all aspects of the matter, it is hereby directed that the petitioner shall pay Rs. 500/- per month as maintenance to the wife, the appellant in the appeal.

47. In the result, the appeal is allowed with costs. The respondent of this appeal shall pay Rs. 500/- per month as maintenance to the appellant effective from 1.9.1983. The prayer of the appellant for access to the children is rejected. The appeal was heard on eleven days much too to our chagrin. The cost of the proceeding in the appeal is, therefore, assessed at Rs. 5,000/- which the petitioner must pay to the respondent (the wife).

48. Civil Revision No. 162 of 1983 (R).--This application is directed against order of 5th Additional Judicial Commissioner, Ranchi, dated 22.4.1983. The facts

leading to the filing of this application are that after the decree for judicial separation passed in favour of the husband, the latter filed an application for divorce. That has been numbered as Title Suit 28 of 1981. Since the appeal against the decree for judicial separation was pending before this Court, prayer for adjournment of hearing of the suit for divorce was made. On 22.4.1983, the prayer for adjournment was rejected. The wife has, therefore, moved this Court by the present application for stay of the divorce suit. Since the miscellaneous appeal is being disposed of now, the civil revision application has now become infructuous. It is dismissed accordingly but without costs.

ABHIRAM SINGH, J. I agree.