IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.114 of 2017

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Savita Mandal wife of Nakshtra Kumar Mandal, daughter of Patal Sahni resident of Police Line, Katihar, P.S. and District Katihar.

... ... Appellant/Plaintiff

Versus

Nakshtra Kumar Mandal son of Dwarika Prasad Singh resident of village Vashupur, Majdiya, P.O. Devipur, P.S. Kursela, District Katihar.

... ... Respondent/Defendant

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Appearance :

For the Appellant/s : Mr. Mukesh Kumar Jha, Advocate
For the Respondent/s : Mr. Jibendra Mishra, Advocate

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE JITENDRA KUMAR)

Date : 25-08-2023

The present appeal has been filed impugning the judgment dated 12.01.2017, passed by learned Additional Principal Judge, Family Court, Katihar, in Matrimonial (Divorce) Case No. 413 of 2013. This petition was filed under Section 13 (1)(I-B) of the Hindu Marriage Act, 1955 praying for divorce and custody of two minor children born out of wedlock. However, the petition was dismissed on contest.

2. The case of the Appellant-Plaintiff, as per the pleadings is that the marriage between the Appellant-Plaintiff and the Respondent-Defendant was solemnized on 25.09.1998 as per the Hindu rites and customs. After marriage, the

Appellant-wife joined the matrimonial home of the Respondent-husband. It is further pleaded that at the time of marriage, lavish gifts besides cash of ₹1.5 lacs towards expenses of the marriage were given to the Respondent-husband. After the marriage, the conjugal life between the parties was cordial and two male children, namely, Priyansu Kumar and Saket Kumar were born out of the wedlock, who were 12 years and 10 years old respectively at the time filing of the divorce petition. It is further pleaded that after the birth of younger child, the Respondent-husband developed intimacy with another lady of the same village and he was living adulterous life with her. It is further pleaded that while she was living with her husband, there was complaint of insufficient payment of dowry and ornaments by the husband and his relatives, for which, she was subjected to physical and mental cruelty. Ultimately, she was driven out from the matrimonial home after keeping her belongings and ornaments. It is further pleaded that on account of ill treatment and adulterous life of the Respondent-husband, the Appellant-Plaintiff felt uncomfortable to live with Respondent-husband along with his family members and children. It is further pleaded that the Appellant-Plaintiff joined District Police on monthly salary and she scarcely spared time to meet the

Respondent-husband at his parental home on account of his posting at different places. It is further pleaded that at the end of every month, the Respondent-husband used to visit her place of posting to take her salary under threat and coercion, leaving the Appellant-wife hand to mouth. It is further pleaded that both the minor sons are living with the Respondent-husband on the pretext of better guardianship and academic career, but reliably it is learnt that they are subjected to ill treatment by the Respondent-husband. As the Appellant-Plaintiff has got government quarter for her residence, she is capable to maintain the academic career of her children. The Appellant-Plaintiff has strong apprehension of untoward incident at the instance of the Respondent-husband. Hence the Appellant-Plaintiff is no longer willing and ready to proceed further with her matrimonial relationship with the Respondent-husband. It is further pleaded that on account of ill treatment at the hands of the Respondent-husband and his family members, the Appellant-Plaintiff has lodged criminal case, bearing Complaint Case No. 203 of 2013 before the Ld. S.D.J.M., Katihar. It is further pleaded that in view of the above facts and circumstances, the matrimonial life of the Appellant-Plaintiff with the Respondent-husband was very tense and no reliance can be placed by the Respondent-

husband to continue the matrimonial relationship further and hence, she has filed the present petition with a prayer for divorce under Section 13(1)(1-B) of the Hindu Marriage Act, 1955.

3. On notice, the Respondent-Defendant-husband appeared and filed his written statement, wherein he has claimed that the matrimonial suit as framed was not maintainable. He further claimed that the Appellant-Plaintiff did not plead any lawful ground for decree of divorce. He has admitted the marriage with Appellant-Plaintiff, but he denied the allegation of demand of dowry. It is also claimed by the Respondent-husband that the matrimonial life was harmonious and two children were born out of the wedlock. It is further claimed that the Respondent-husband made the Appellant-wife well educated and also made her eligible to be selected in Bihar Police on the post of Lady Constable. He has denied all the allegations regarding cruelty and demand of dowry or living adulterous life. It is further claimed by the Respondent-husband that after being selected in Bihar Police, the Appellant-wife became financially independent and developed disregard for the Respondent-husband and his family members. He has further stated that by availing different kind of leave, she could have met the children

and her husband to maintain matrimonial and family life in proper way. He has denied that he ever snatched the salary of the Appellant-wife. It is also claimed by the Respondent-husband that the Appellant-wife is selfish and she has no regard and love for her children and she never takes care of her children and spends any money on them or on their education and well being. It is the Respondent-husband, who is taking care of the children and taking all efforts for their proper education. It is further claimed that on account of earning money independently, the Appellant-Plaintiff-wife wants to get rid of the Respondent-husband. It is also claimed that by filing false criminal case, she is collecting false evidence for decree of divorce.

4. On the basis of pleadings of the parties, the learned Family Court framed the following issues:-

i. Whether the suit as framed is maintainable.
ii. Whether the petitioner has valid cause of action to file the suit.
iii. Whether there is reasonable excuse for the Petitioner to leave the society of her husband (Respondent).
iv. Whether the petitioner was subjected to ill treatment and cruelty due to non-fulfillment of dowry demand.
v. Whether the petitioner is entitled to custody

of two sons, who are presently living with Respondent-Defendant.

vi. Whether the Petitioner is entitled to the decree of divorce.

vii. Whether the Petitioner is also entitled to any other relief or reliefs.

5. During trial, the Appellant-Plaintiff has examined the following witnesses:-

i. P.W.-1, Savita Mandal, the Appellant.

ii. P.W.-2, Sheela Devi, mother of the Appellant.

iii. P.W.-3, Patel Sahani, father of the Appellant.

6. However, no document has been exhibited by the Appellant-Plaintiff.

7. (i) Savita Devi, the Appellant-Plaintiff has been examined as P.W.-1. In her examination-in-chief, she has reiterated the statement as made in her petition filed for divorce. In her cross-examination, she has deposed that she was taking care of her children along with her husband. She further deposed that her first child was born after two years of marriage and the second son was born after four years of marriage. She has further deposed that she did not want to live with her husband because he used to beat her. She has also lodged a

criminal case against her husband for the offence punishable under Section 498A of the IPC.

7(ii). Sheela Devi, who is the mother of Appellant-Plaintiff has been examined as P.W.-2. She, in her examination-in-chief, has reiterated the statement as made by the Appellant-Plaintiff in the petition filed for divorce. During her cross-examination, she has deposed that the Appellant-Plaintiff got selected in Bihar Police in the year 2007 and her first posting was at Supaul, where her children used to stay with her. She further deposed that at Supaul, the Appellant-Plaintiff and Respondent-Defendant used to quarrel, however, she cannot tell about the exact date of incident. She further deposed that both the children of the Appellant-Plaintiff are living with their father and now the the Appellant-Plaintiff has also applied for custody of the children. She has also deposed that she does not know with whom the Respondent-Defendant has illicit relationship.

7(iii). Patel Sahani, who is the father of the Appellant-Plaintiff has been examined as P.W.-3. He, in his examination-in-chief, has reiterated the statement as made by the Appellant-Plaintiff in her petition filed for divorce, though, nothing else significant has been deposed during cross-examination by this witness.

7(iv). Dharmendra Kumar, who is acquainted with both the parties, has been examined as P.W.-4. In his examination-in-chief, he has also reiterated the statement as made by the Appellant-Plaintiff in her petition filed for divorce, but nothing significant has been deposed by this witness during cross-examination.

8. The Respondent-Defendant has examined the following four witnesses:-

i. D.W.-1, Saket Kumar, son of the Respondent-Defendant.
ii. D.W.-2, Priyanshu Kumar, son of the Respondent-Defendant.
iii. D.W.-3, Pramod Kumar, villager of the Respondent-Defendant.
iv. D.W.-4, Nakshatra Kumar, the Respondent-Defendant.

9. However, no document has been exhibited on his behalf also.

10(i). Mr. Saket Kumar, who is the elder son of the Respondent-Defendant, has been examined as D.W.-1, who, in his examination-in-chief, has deposed that he was ousted by his mother and since then he has been living with his father. Her mother is in government service and since she is in government

service, her behaviour towards him and his brother and father got changed and she started looking down upon them. She used to torture them and after making false allegation, she got herself separated from them. Initially, after getting Appellant-Plaintiff employed in Bihar Police, he along with his brother and father used to live with his mother, but for one year thereafter, he along with his brother and father are living separately from the Appellant-Plaintiff. Prior to that, whenever his father used to visit his mother, he was abused by his mother with the assistance of other police constables. He further deposed that his father has no landed property and he maintains them by doing labour work and his mother is earning ₹30,000/- per month. He has also deposed that his mother does not want to live with him, whereas his father along with him and his brother wants to live with his mother. He has further deposed that when her mother will get divorce, they will become orphan and his future will be ruined. The statement of his mother is completely false. In his cross examination, he has further deposed that his father looks after him and his brother very well with love and affection and he caters to their all needs including educational fee. However, nothing else significant has been deposed by this witness.

10(ii). Priyanshu Kumar, who is the younger son of

Respondent-Defendant, has been examined as D.W.-2, who, in examination-in-chief, has reiterated the statement as made by his brother, Saket Kumar. In his cross-examination, he has deposed that his father is unemployed and he used to give tuition to some students and his mother is earning ₹30,000/- per months. He has further deposed that even if his mother gets ready to keep him, he will not go with her because her nature and behaviour is very bad. He has also deposed that her mother is living with someone else.

10(iii). Pramod Kumar Singh, who is a villager of Respondent-Defendant and also acquainted with both the parties, has been examined as D.W.-3, who, in his examination-in-chief has reiterated the statement as made by the Respondent-Defendant in his written statement. During his cross-examination, nothing significant has been deposed by this witness.

10(iv). Nakshatra Kumar, the Respondent-Defendant has been examined as D.W.-4, who, in his examination-in-chief, has reiterated the statement as made by him in his written statement. During his cross-examination, he has deposed that he has no landed property and he is unemployed. He further deposed that his marriage was solemnized with Appellant-

Plaintiff on 27.07.1996 and not on 25.08.1998. He further deposed that he wants to keep his wife, but his wife is not willing to live with him, but he has admitted that he has not filed any petition under Section 9 of the Hindu Marriage Act for restitution of conjugal life. He has further deposed that his wife has filed a criminal case against him with the allegation of demand of dowry. He has further deposed that for about 15-16 years, the relationship between them was very cordial and two sons were born out of the wedlock. He further deposed that when he was married with the Appellant-Plaintiff, she was 20-21 years old and was studying in 9th Class. It is the Respondent-Defendant, who helped the Appellant-Plaintiff to pass matriculation examination and also get her selected as constable in Bihar Police. He has also deposed that he is keeping the children with him and also bears all their expenses. He further deposed that if the children get ready to live with their mother, he will allow them to go with their mother. He has further deposed that the Appellant-wife got selected as a constable in Bihar Police on 10th March, 2007 and after the employment, he also used to live with her in the government quarter allotted to her for two years. However, nothing else significant has been deposed by this witness.

11. After considering the materials on record and submission advanced on behalf of both the parties, the Family Court had decided all the framed issues against the Plaintiff-Appellant and in favour of the Respondent-Defendant. In regard to issue nos. 1 and 2, related with maintainability of suit as framed and valid cause of action to file the suit, the Family Court has decided that in view of the finding in regard to the issue nos. 3 to 6, the petition as framed is not maintainable and the Appellant-Plaintiff had no valid cause of action to file the suit.

12. Ld. counsel for the Appellant-Plaintiff submits that Family Court has failed to properly appreciate the pleadings and evidence on record and erroneously found that the Appellant-Plaintiff had no cause of action to file the petition and the petition as framed was not maintainable. He further submits that the Appellant-Plaintiff has clearly proved the cruelty committed by the Respondent-Defendant against the Appellant-Plaintiff. He also submits that the appellant has also proved that Respondent-Defendant had deserted the Appellant-Plaintiff and hence she is entitled to get decree of divorce on the ground of cruelty and desertion. He also submits that as per evidence on record, the Appellant-Plaintiff is also entitled to get the custody

of both the minor sons, namely, Priyansu Kumar and Saket Kumar, who are presently in the custody of the Respondent-Defendant.

13. However, learned counsel for the Respondent-Defendant-husband defends the finding of the Ld. Court below and submits that the Appellant-Plaintiff had no cause of action to file petition, nor the petition as framed was maintainable. He also submits that the Appellant-Plaintiff has failed to prove the alleged ground of cruelty and desertion against him. She has also failed to prove her entitlement to get the custody of two minor sons born out of the wedlock.

14. In view of the aforesaid submission and the facts and circumstances of the case, following points arise for consideration of this Court:-

(i) Whether the appellant had valid cause of action to file the divorce petition.

(ii) Whether the divorce petition as framed is maintainable.

(iii) Whether the Appellant-Plaintiff had proved the ground of cruelty to get decree of divorce.

(iv) Whether the Appellant-Plaintiff had proved the ground of desertion to get decree of divorce.

(v) Whether the Appellant-Plaintiff is entitled

to custody of two minor children, namely, Saket Kumar and Priyanshu Kumar, who are aged about 12 years and 10 years respectively at the time of presentation of the petition before the Family Court.

15. Let us consider the points one by one.

Point No.1

16. Before we consider this point, it is imperative to know what is cause of action. It is relevant to point out that the word "cause of action" is nowhere defined by the Civil Procedure Code. However, it has been described by Hon'ble Supreme Court on various occasions as a bundle of essential facts which are required to be proved for obtaining relief as sought for. It is also settled position of law that to see whether the plaint discloses any cause of action, the Court is only required to look into the averment made in the plaint and the document, if any, filed in support of the plaint. It is also settled position of law that reading of the plaint should be meaningful and not formal. Clever drafting creating illusion of cause of action can not be permitted. A clear right to sue must be shown in the plaint. Reliance is placed on the following judgments of Hon'ble Supreme Court:

1. **Mayar (H.K.) Ltd. & Ors Vs. Owners &**

Parties, Vessel M.V. Fortune as reported in **(2006) 3 SCC 100**.

2. **I.T.C. Ltd, Vs. Debts Recovery Appellate Tribunal,** as reported in **(1998) 2 SCC 70.**

3. **T. Arivandanadam Vs. T.V. Satyapal and Anr.** As reported in **(1997) 4 SCC 467**.

17. Hon'ble Supreme Court, in para 11 of **Mayar (H.K.) Ltd. case** (supra) has observed- "Under Order VII Rule 11 of the Code, the court has jurisdiction to reject the plaint where it does not disclose a cause of action…………" In para 12 of **Mayar (H.K.) Ltd. case** (supra)**, Hon'ble Apex Court** has further observed that plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order VII Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for

the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint.

18. In para 16 of **I.T.C. Limited Vs. Debts Recovery Appellate Tribunal** as reported in **(1998) 2 SCC 70, Hon'ble Supreme Court**, after referring to **T. Arvindandam case** (supra), has observed that the question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 Civil Procedure Code. clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint.

19. In para 5 of **T. Arvindandam case** (supra)**, Hon'ble Supreme Court** has observed that the Ld. Munsif must remember that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise

his power under Order VII, Rule 11 Civil Procedure Code taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, Civil Procedure Code.

20. Now the question is what are the essential facts which constitute cause of action for the petitioner to file divorce petition under Section 13 of the Hindu Marriage Act for dissolution of his marriage with Respondent-Defendant and seek custody of minor children born out of the wedlock. To know the essential facts constituting cause of action to file petition for divorce and custody of minor children, it is imperative to examine the relevant statutory provisions. Now let us see what are statutory provisions regarding the subject.

21. Section 13 of the Hindu Marriage Act provides for dissolution of marriage on a petition presented by either of husband or the wife by a decree of divorce on the ground as enumerated thereunder. The grounds as provided in Section 13 of the Hindu Marriage Act are exhaustive in nature. Cruelty and desertion are also provided as grounds for dissolution of marriage under Sections 13(I)(ia) and (ib) respectively of the Hindu Marriage Act. For ready reference Section 13 of the

Hindu Marriage Act reads as follows:-

> "13. **Divorce.** - (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-
>
> (i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
>
> (ia) has, after the solemnisation 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; or
>
> (ii) has ceased to be a Hindu by conversion to another religion; or
>
> (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
>
> Explanation.- In this clause, -
>
> (a) the expression mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes

schizophrenia;

(b) the expression psychopathic disorder means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or

(iv) 3 Omitted

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation. In this sub-section, the expression desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may

also present a petition for the dissolution of the marriage by a decree of divorce on the ground-

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,-

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner:

Provided that in either case the other

wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or 23 [bestiality; or]

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

> Explanation. This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976)"

22. Regarding custody of child, the relevant statutory provisions may be found in Section 7(1)(a) of **the Guardians and Wards Act, 1890,** as per which, the court is empowered to make order as to guardianship. It provides that if the court is satisfied that for the welfare of a minor, an order should be made appointing a guardian of his person, the court may make order accordingly.

23. Again Section 13 of **the Hindu Minority and Guardianship Act, 1956**, provides that in the appointment or declaration of any person as guardian of a Hindu minor boy by a Court, the welfare of the minor shall be the paramount consideration. It is also provided that no persons shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

24. Section 26 of the **Hindu Marriage Act, 1955** provides that the court may, from time to time, pass such interim

orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

25. Now let us examine whether the Plaintiff-Appellant has pleaded essential facts disclosing cause of action for divorce and custody of minor children.

26. After perusal of the petition filed by the Appellant-Plaintiff before the Ld. Court below under the Hindu Marriage Act, it appears that there is averment in regard to alleged cruelty committed by the Respondent-Defendant against the Appellant-Plaintiff and desertion of the Appellant-Plaintiff by the Respondent-Defendant. Averment has been also made in regard to entitlement to the custody of two minor children. Hence, the Family Court has wrongly found that the Appellant-Plaintiff had failed to plead the cause of action to file the petition seeking divorce and custody of the minor children. Perhaps such erroneous finding has been given by the Ld. Court below under wrong impression that cause of action and proof to get the relief as prayed for is the same. Having cause of action by the petitioner to file the petition does not mean that the petitioner is bound to succeed to get the relief as prayed for. For succeeding

and getting relief, the petitioner is required to prove his or her case as claimed and only having cause of action bereft of any evidence to prove the grounds does not entitle the petitioner to get the relief. Hence it is wrong to say that once there is finding against the petitioner in regard to relief as prayed for, she has no cause of action to file the divorce petition. Hence, this point is decided in favour of the Appellant.

Point no.2

27. Here again, it appears that Ld. Court below is under impression that maintainability of a petition and grant of relief as prayed for are same, whereas the fact is that both are different concepts. The maintainability of a petition is decided with reference to Order VII Rule 10 and 11 of the Civil Procedure Code. If the petition filed is not liable for return or rejection under any provisions of Order VII Rule 10 and 11 of the Civil Procedure Code, the petition is maintainable. Whether the petitioner is entitled to get relief as prayed for is altogether different thing. A petition may be maintainable, but the petitioner ultimately may not get relief after trial. Grant of relief depends upon whether the petitioner has proved his case or required facts for entitlement to relief. But in the case at hand, the Court has nowhere pointed out under which provisions of

law, the suit is not maintainable. Order VII, Rule 10 of the Civil Procedure Code, provides for return of the plaint if the court has no jurisdiction. Rule 10 of Order VII of the Civil Procedure Code reads as follows:-

> "**10. Return of plaint.-** (1) Subject to the provisions of rule 10A, the plaint shall at any stage of the suit be returned to be presented t**o the Court in which the suit should have been instituted.**
>
> Explanation: For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint, under this sub-rule.
>
> (2) **Procedure on returning plaint**—On returning a plaint, the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it."

28. The suit is also liable to be rejected if any of the grounds as provided in Rule 11 of Order VII of the Civil Procedure Code is available.

29. Order VII, Rule 11 of the Civil Procedure Code reads as follows :

> " **11. Rejection of plaint.-** The plaint shall be rejected in the following cases:—
>
> (a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;ly stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails comply with the provision of Rule 9, provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff."

30. Non-disclosure of cause of action is one of grounds for rejection of plaint as provided under Order VII, Rule 11 of the Civil Procedure Code . We have already found that the plaint has disclosed cause of action. No other ground for rejection of the plaint has been found in the judgment. Without such finding the Court cannot say that the petition is not maintainable. Hence, such finding of the Court below cannot be sustained. The petition is very much maintainable for absence of

any ground as provided under Order VII Rule 10 and 11 of the Civil Procedure Code.

31. Before we proceed to discuss the next points arising for consideration, it is imperative to see case laws or authoritative Judicial Pronouncements regarding Burden of Proof and Standard of Proof in matrimonial cases.

32. Hon'ble Supreme Court has elaborately discussed the nature of **burden of proof** in matrimonial cases in **Dr. Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane** as reported in **1975 (2) SCC 326** and law laid down herein is still holding the field. In para 23 of the case, **the Hon'ble Apex Court** has observed that, doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with commonsense as it is so much easier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty.

33. Coming to the **Standard of Proof**, we find that some misconception had arisen on account of the use of the words "Matrimonial Offences" to describe the misconducts of Defendants under the Hindu Marriage Act. That is why before

authoritative decision of **Hon'ble Full Bench of the Supreme Court** in **Dr. Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane** as reported in **1975 (2) SCC 326,** there were conflicting views. As per one view, matrimonial cases are of civil nature and hence standard of proof in such cases would be preponderance of probabilities whereas, as per the another view, proof beyond reasonable doubt should be standard of proof in matrimonial cases in view of the use of word “matrimonial offences” in Hindu Marriage Act. However, in **Dr. Narayan Ganesh Dastane case** (supra), **Hon'ble Full Bench of the Supreme Court** clearly held that matrimonial cases are civil in nature and preponderance of probabilities will be standard of proof in trial of Matrimonial cases under the Hindu Marriage Act, and not proof beyond reasonable doubt which is applicable in criminal trials. **Hon’ble Supreme Court**, in para 24 of **Dr. Narayan Ganesh Dastane case** (supra) observed that the normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular

case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

34. Ruling out application of "proof beyond reasonable doubt" in matrimonial cases, **Hon'ble Supreme Court**, in para 25 of **Dr. Narayan Ganesh Dastane case**

(supra) has observed that the proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so nicely balanced that a reasonable, not a vascillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature. In para 26 of **Dr. Narayan Ganesh Dastane case** (supra)**, Hon'ble Apex Court** has further observed that under the Hindu Marriage Act, nowhere it is required that the petitioner must prove his case beyond reasonable doubt. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (*a*) to (*e*) of its sub-section of (1). Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

35. Hon'ble Supreme Court, in para 27 of **Dr.**

Narayan Ganesh Dastane case (supra) has further observed that the misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a “matrimonial offence”. Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance. To marry or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

36. Hon’ble Apex Court in para 10 of **Shobha Rani Vs. Madhukar Reddi** as reported in **AIR 1988 SC 121** has also observed that considering that proceedings under the Hindu Marriage Act is essentially of a civil nature, the word ‘satisfied’ must mean ‘satisfied on a preponderance of probabilities’ and not ‘satisfied beyond a reasonable doubt’. Section 23 of the Act does not alter the standard of proof in civil cases.

37. Hon'ble Supreme Court in para 10 of **A. Jayachandra Vs. Aneel Kaur** as reported in **2005(2) SCC 22** has observed that in a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

38. Hon'ble Kerala High Court, after referring to **A. Jayachandra case** (supra)**,** in para 19 of **Mohandas Panicker Vs. Dakshayani** as reported in **2013 SCC Online Ker 24493**

has observed that the principles laid down in the above decisions reiterate that in civil cases, preponderance of probabilities is the standard to be adopted to prove the case. No doubt, matrimonial cases are civil proceedings and the Court can act upon preponderance of probabilities, especially in adultery cases, since it is difficult to get direct evidence.

39. Now let us consider the next point.

Point No.3.

40. Before considering whether the Respondent/Wife has committed cruelty against the Appellant or not, it would be imperative to see what is the statutory provisions and case laws regarding cruelty.

41. Cruelty has been provided as one of the grounds for divorce under Section 13(1)(ia) of Hindu Marriage Act. As per the provisions, the marriage can be dissolved by decree of divorce on a petition presented by either of the parties, if the other party has treated the petitioner with cruelty.

42. However, the word ‘cruelty’ used in Section 13(1)(ia) of Hindu Marriage Act has not been defined under the Hindu Marriage Act. But the word has been interpreted by **Hon’ble Supreme Court** on several occasions.

43. The **Hon’ble Supreme Court**, in para 4 of **Sobha**

Rani Vs. Madhukar Reddi as reported in AIR 1988 SC 121, has observed that the word 'cruelty' has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

44. The **Hon'ble Apex Court** in para 5 of **Shobha**

Rani case (supra) has further observed that it will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. The Judges and lawyers, therefore, should not import their own notions of life. They may not go in parallel with them. There may be a generation gap between them and the parties. It would be better if they keep aside their customs and manners. It would be also better if they less depend upon precedents. Each case may be different. They deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the

conduct complained of. Such is the wonderful realm of cruelty.

45. The **Hon'ble Supreme Court**, in para 17 of the **Shobha Rani case** (supra) has also observed that the context and the set up in which the word 'cruelty' has been used in the section, it appears that intention is not a necessary element in cruelty. That word has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case, if by ordinary sense in human affairs, that act complained of could otherwise be regarded as cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment.

46. The **Hon'ble Apex Court** in **Gananath Pattnaik Vs. State of Orissa** as reported in **2002(2) SCC 619** has observed that the concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given

case.

47. The **Hon’ble Supreme Court** in para 10 of **A. Jayachandra Vs. Aneel Kaur** as reported in **2005(2) SCC 22** has observed that cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty.

48. The **Supreme Court** in para 12 of **A. Jayachandra case** (supra) has further observed that to constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other

spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background, has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

49. The Supreme Court in para 13 of **A. Jayachandra case** (supra) has further observed that the court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon a endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

50. In **Harbhajan Singh Monga Vs. Amarjeet Kaur** as reported in **1985 SCC OnLine MP 83, Hon'ble Madhya**

Pradesh High Court has held that even threat to commit suicide to falsely implicate the other spouse and his/her family members in criminal case also amounts to cruelty.

51. In **Smt. Uma Wanti v. Arjan Dev** as reported in **1995 SCC OnLine P & H 56, Hon'ble Punjab and Haryan High Court** has held that even peculiar behaviour of spouse on account of unsoundness of of mind or otherwise also amounts to cruelty. **Hon'ble Court** had held that day to day behaviour of the appellant was such as to disturb the mental peace and harmony of the respondent which definitely amounted to legal cruelty. She may not be of the unsound mind, but her peculiar ways of behaviour proved by the respondent are sufficient to constitute that legal cruelty. The husband could not live with peace in the company of the appellant. Peace was always disturbed due to her peculiar ways of behaviour, and thus he cannot be disbelieved that her behaviour was cruel to him.

52. In **Mrs. Rita Nijhawan Vs. Mr. Bal Krishna Nijhawan** as reported in **ILR (1973) I Delhi 944** , **Hon'ble Delhi High Court** has held that denial of sexual intercourse either on account of impotence or otherwise amounts to cruelty to the aggrieved spouse. **Hon'ble Court** also observed that sex is the foundation of marriage and without a vigorous and

harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favourable influence on a woman's mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse.

53. Hon'ble Court in **Mrs. Rita Nijhawan case** (supra) further observed that the law is well settled that if either of the party to a marriage being of healthy physical capacity refuse to have sexual intercourse, the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual intercourse is the result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any wilful refusal by the respondent; this is because in either case the result is the same namely frustration and misery to the appellant due to denial of normal sexual life and hence cruelty.

54. The **Hon’ble Supreme Court**, in para 99 of the **Samar Ghosh Vs. Jaya Ghosh** as reported in **(2007) 4 SCC 511,** has observed, after referring to and discussing several judgments on the point of cruelty, that human mind is extremely complex and human behaviour is equally complicated. Similarly, human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

55. The Hon'ble Supreme Court has further observed in **Samar Ghosh case** (supra) that there cannot be any comprehensive definition of the concept of mental cruelty within which all kinds of cases of mental cruelty can be covered. **The Hon'ble Court** in para 100 has further observed that the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a

mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

56. It has been further observed by **Hon'ble Supreme Court** in para 101 of the **Samar Ghosh case** (supra) that no uniform standard can ever be laid down for guidance. However, Hon'ble Court thought it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty" with caution that such instances are only illustrative and not exhaustive. The instances enumerated by **Hon'ble Apex Court** are as follows :

> " (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.
>
> iii) Mere coldness or lack of affection cannot amount to cruelty,

frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

57. The **Hon'ble Supreme Court**, in para 18 of **Ravi Kumar Vs. Jumla Devi** as reported in **2010 SCCR 265**, observed that in matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty. Therefore, cruelty in matrimonial behaviour defies any definition and its category can never be closed. Whether husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any pre-determined rigid formula. Cruelty in matrimonial cases can be of infinite variety. It may be subtle or even brutal and may be by gestures and words.

58. In para 10 of **Ramchander Vs. Ananta** as reported in **2015(11)SCC 539, Hon'ble Supreme Court** has observed that cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes a reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Cruelty can be physical or mental.

59. It has further been observed by **Hon'ble Apex Court** in **Ramchander case** (Supra) that instances of cruelty are not to be taken in isolation. It is the cumulative effect of the facts and circumstances emerging from the evidence on record which should be taken into consideration to draw a fair inference whether the plaintiff has been subjected to mental cruelty due to conduct of the other spouse.

60. In **Vinita Saxena v. Pankaj Pandit**, as reported in **(2006) 3 SCC 778 Hon'ble Supreme Court** has observed in para 31 that it is settled by a catena of decisions

that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on the whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

61. Hon'ble Supreme Court has further observed in Para-32 of **Vinita Saxena case** (supra) that the word "cruelty" has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct

complained of itself is bad enough and *per se* unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

62. Hon'ble Supreme Court has further observed in Para-36 of the **Vinita Saxena case** (supra) that the legal concept of cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relation must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints. accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for the wife, or physical, like acts of violence and abstinence from sexual

intercourse without reasonable cause. It must be proved that one partner in the marriage, however mindless of the consequences, has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

63. Hon’ble Supreme Court has further observed in Para-37 of the **Vinita Saxena case** (supra) what

constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

64. Hon'ble Supreme Court has further observed in Para-38 of the **Vinita Saxena case** (supra) that if the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

65. Now, let us examine point no. 3, whether the Appellant-Plaintiff has proved the ground of cruelty to get

decree of divorce.

Point No.3

66. In the case on hand we find that in regard to cruelty, the Plaintiff-Appellant/Wife has pleaded in her plaint that she was subjected to physical and mental cruelty on account of insufficient dowry and ornaments at the hands of the Respondent-Husband and his relatives and she was ultimately driven out from her matrimonial home after keeping her belongings and ornaments and she has also lodged a criminal case bearing complaint case no. 203 of 2013, pending consideration in the Court of Ld. S.D.J.M. Katihar. It is also pleaded that the salary was taken by the Husband/Respondent under threat and coercion leaving her hand to mouth. However, in his written statement, the Respondent/Husband has denied all the allegations of cruelty and he has claimed that after getting employed as a police constable, her behaviour changed towards him and the children born out of the wdlock and she developed disregard for him and his family

mmbers and she never took care of the children, nor spent any money on them. He has further claimed that she has filed false case only with the intent to make out grounds to get decree of divorce. After perusal of the evidence on record, we find that allegation of cruelty against the Respondent/Husband is omnibus and general in nature and no date or place has been given in his evidence in regard to the alleged instances of cruelty. We further find that the marriage was solemnized in the year 1998 and the Appellant-Wife got employed as police constable on the 10th March, 2007 and divorce has been filed on 19.08.2013 and out of the wedlock two sons are born and both are examined as D.W.-1 and D.W.-2. The criminal case lodged by the Appellant-Wife is still under consideration of the Court. On the other hand, the Respondent/Husband has deposed that false allegation of cruelty has been levelled only with the intent to get rid of him by decree of divorce. D.W.-1 and 2, Saket Kumar and Priyanshu Kumar who are sons of the parties to the marriage have deposed that the allegation made by his mother against his father is false and she does not want

to live with them. The evidence of the Respondent-Husband and the sons of the parties to the marriage gets credence in view of the fact that before her joining as a police constable, there was no allegation of any sort against the husband and it is further found that after joining as police constable in the year 2007, she was living at her place of posting and her husband and children have lived with her only for about two years at her government quarter i.e up to the year of 2009 and thereafter, there is no occasion for the Respondent/Husband to commit cruelty against her because thereafter, she did not allow them to live with her and during this period of two years when both the parties lived together, there is no allegation of any specific instance of cruelty either in the pleadings or in the evidence.

67. As such, in totality of the evidence on record, we find that no instance has been proved by the Plaintiff/Appellant-Wife, which may be construed as cruelty in the strict sense of the term as provided under Section 13 of the

Hindu Marriage Act, as we have already seen what the cruelty under the Act means. The wife/Plaintiff, who is Appellant herein, has failed to prove any misconduct on the part of Respondent/Husband which could be considered grave and weighty giving reasonable apprehension to him of such a danger which could make it unsafe for her to continue the matrimonial life with the Respondent/Husband. There may have been ordinary wear and tear in the matrimonial life of the parties, but certainly no cruelty is found to have been committed by the Respondent/Husband towards the Appellant/Wife. Hence, this point is decided against the Respondent-Plaintiff and in favour of the Appellant-Defendant.

Point No.4

68. Now, let us examine the point. Before considering this point related with Desertion, it would be again imperative to see what is the statutory provisions and case laws on the subject.

69. Desertion has been provided as a ground for divorce under Section 13(1)(ib) of Hindu Marriage Act. As per the provisions, marriage may be dissolved by decree of divorce on a petition presented by either the husband or the wife if the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. As per the Explanation, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

70. In **Bipinchandra Jaisinghbai Shah v. Prabhavati** as reported in **AIR 1957 SC 176, Hon'ble Supreme Court** has observed that the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be

there, namely, (*1*) the factum of separation, and (*2*) the intention to bring cohabitation permanently 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 of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. In the same paragrpah **Hon'ble Supreme Court** has further observed that 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 an *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. The *de facto* separation may have commenced without the necessary animus or it may be that

the separation and the *animus deserendi* coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close.

71. Following **Bipinchandra Jaisinghbai Shah case** (supra), **Hon'ble Supreme Court** in **Lachman Utamchand Kirpalani Vs. Meena** as reported in **AIR 1964 SC 40** held that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (*1*) the factum of separation, and (*2*) the intention to bring cohabitation permanently 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 of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved 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.

72. Hon’ble Apex Court in para 8 of **Savitri Pandey Vs. Prem Chandra Pandey** as reported in **2002(2) SCC 73**, has observed that “desertion”, for the purpose of seeking divorce under the Act, means intentional permanent forsaking and abandonment of one spouse by the other without other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case.

73. Hon’ble Supreme Court, in para 7 of **Debananda Tamuli Vs. Kakumoni Kataky** as reported in **(2022) 5 SCC**

459 has observed that the law consistently laid down by this Court is that desertion means the intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. The deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. In other words, there should be *animus deserendi* on the part of the deserting spouse. There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home. The view taken by this Court has been incorporated in the Explanation added to sub-section (1) of Section 13 by Act 68 of 1976.

74. **Now, coming to the case on hand,** we find that in regard to desertion, the Appellant-Wife has pleaded in her plaint that she was subjected to cruelty on account of insufficient dowry and ultimately, she was ousted from the matrimonial home. It is also pleaded that she has strong apprehension of untoward instance at the instance of the Respondent/Husband and she is no longer willing to proceed with her matrimonial relationship with the Respondent/Husband. The allegation has been strongly denied by the Respondent/Husband in his written

statement.

75. Coming to the evidence of the parties we find that in her examination-in-chief she has reiterated her statement as made in her plaint and even during the cross examination nothing significant has been deposed by her regarding desertion.

76. After perusal of the evidence of both the parties, we find that the divorce petition has been filed on 19.08.2013. Prior to divorce petition, she had got appointed as police constable in the year 2007 and since then she has been living in her government quarter and as per the evidence on record we find that she did not allow the husband and children after two years of her service in the government quarter.

77. On the other hand, the Respondent/Husband has all along maintained that he wants to live with her but on account of financial independence after getting government job, she has changed and she wants to get rid of him. Hence, she has made false allegation to get divorce. The Appellant/Wife has also not filed any matrimonial petition under section 9 of the Hindu Marriage Act for restitution of conjugal rights. This instance also goes against her and gives credence to the case of the Respondent/Husband that she does not want to continue with the marriage and she has made false allegation for the sake of

getting decree of divorce against him. We also find that there is no specific statement either in the pleading or in the evidence on the part of the Appellant/Wife regarding when the Respondent-Husband abandoned her without her consent and without any reasonable cause with intent to bring cohabitation to a permanent end. As such, the Plaintiff/Appellant has failed to prove the ground of desertion to get decree of divorce.

78. Hence, this point is also decided against the Appellant/Wife and in favour of the Respondent/Husband.

Point No.5

79. Now, let us examine the point no. 5 regarding entitlement of the Appellant-Plaintiff to the custody of two minor children born out of the wedlock between the parties.

80. Here it is relevant to point out that the suit was filed by the Appellant-Plaintiff before the Family Court on 19.08.2013 as transpires from the Family Court records and at that time, the minor children, namely Saket Kumar and Priyanshu Kumar were aged about 12 years and 10 years respectively. However, at present, both the children have grown up as major. Saket Kumar is about 22 years and Priyanshu Kumar is about 20 years of age. Hence, neither of the parties is entitled to custody of the children because question of custody

of children arises only when the children are minor, but they have already become major. Hence, the question regarding custody of children becomes infructuous. Major children are at liberty to decide where and with whom to live.

81. As such, we find that there is no merit in the present appeal warranting any interference in the impugned judgment. The Family Court has rightly dismissed the matrimonial case of the appellant. The present appeal is dismissed, accordingly, upholding the impugned judgment. Both the parties shall bear their own costs. Let the decree be drawn accordingly.

82. The Registrar General is directed to circulate a copy of this judgment amongst all the Presiding Officers of the Family Courts and send a copy to the Director of Bihar Judicial Academy for needful.

(Jitendra Kumar, J)

(P. B. Bajanthri, J)

Amrendra/Chandan/-

AFR/NAFR	AFR
CAV DATE	11.07.2023
Uploading Date	25.08.2023
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