Madras High Court
C.R.Chenthilkumar vs K.Sutha on 11 February, 2008

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11/02/2008

CORAM
THE HONOURABLE MR.JUSTICE G.RAJASURIA

C.M.S.A.No.20 of 2006

C.R.Chenthilkumar ... Appellant/husband

Vs

K.Sutha ... Respondent/wife

Prayer

Appeal filed under Section 28 of the Hindu Marriage Act read with
Section 100 of the Civil Procedure Code, against the judgment and decree dated
18.01.2006, passed in A.S.No.9 of 2005 by the learned District Judge,
Kanyakumari at Nagercoil, in reversing the judgment and decree dated 02.12.2004
passed in H.M.O.P.No.14 of 2003 by the learned Principal Sub Judge, Nagercoil.

!For Appellant ... Mr.B.Kumar, Senior Counsel
for Mr.G.R.Swaminathan

^For Respondent ... Mr.S.Parthasarathy,
Senior Counsel for
Mr.R.Karthikeyan

:JUDGMENT

Challenging the judgment and decree dated 18.01.2006, passed in A.S.No.9 of 2005 by the learned District Judge, Kanyakumari at Nagercoil, in reversing the judgment and decree of divorce dated 02.12.2004 passed in H.M.O.P.No.14 of 2003 by the learned Principal Sub Judge, Nagercoil, this Civil Miscellaneous Second Appeal has been filed by the husband.

2. For convenience sake, the parties are referred to hereunder as husband and wife.

3. Both the Courts below detailed and delineated the averments as found set out in the petition as well as in the counter and reply. Even then, I am of the view that this being a matrimonial matter, it is just and necessary to set out the facts to some extent in detail.

4. Broadly but briefly, narratively but precisely the case of the husband as stood exposited from the records could be portrayed thus:

(i) The petitioner/husband and the respondent/wife got married as per the Hindu Rites and Customs on 25.06.1999 which is an arranged marriage. The husband is a Graduate Engineer. The wife is a graduate in Chemistry. The petitioner was 34 years and the wife was 31 years at the time of the marriage. Ever since the marriage, her behavior was abnormal. She was not co-operative with the husband for him to have sexual intercourse with her. After long persuasion, the husband had sexual intercourse with her. She deliberately avoided cooking food for the husband and his parents by stating that she had abnormal fear for knife from her childhood.

(ii) She was suffering from some sort of restlessness for which she was taking Buscalm tablet which fact she suppressed from the husband. He suspected his wife having psychiatric problems. His persuasions, for her to take proper medical treatment including the check up with psychiatrist, ended in a fiasco. The husband, one day saw the wife peeling the apple skin with knife and when he questioned about her phobia for knife, she confessed that to avoid cooking only she uttered out such a stooge. The wife had suicidal tendencies even on slight provocations.

(iii) On one Saturday mid-night, during the third week of July 2000, when the husband was fast asleep, the wife pulled him by catching hold of his night- wear shirt collar and torn the shirt into pieces, besides scratching his face with her finger nails. She was often in the habit of frequenting her parents' house and her father also often visited the matrimonial house of the couple and ill-advised her. She caused danger to the life and limb of the husband. She used vituperative language as against the husband during the month of October' 2000 for no good reason. While the wife was pregnant, she on one occasion, expressed that she was reluctant to carry the child in her womb and threatened that she would undergo abortion to show her antipathy towards the husband. The husband persuaded her not to resort such extreme steps. For delivery, she went to her parents house and she delivered a child on 04.06.2001. After such child birth, the husband frequented the house of his father-in-law so as to make arrangements for the treatment of the new born child with the help of his Doctor friend Saleem. It so happened, on 12.07.2001, so to say, on the 38th day after the birth of the child, the husband along with her Doctor friend, Saleem, went to the house of the wife's parents, where the wife was staying with her new born child. The wife abused the husband in filthy language by proving herself that she was foul mouthed and loud mouthed. The wife and her father virtually drove him out of the house. The wife, in fact, snatched the spectacles from her husband's face and threw it away and she also beat him on his chest and torn his shirt in the presence of the said Doctor Saleem and the neighbours. She used scurrilous words as against the husband. On 12.09.2001, the wife and her father entered the husband's house and took away her belongings and jewels and thereafter, she did not return back to the matrimonial home. The petitioner issued lawyer's notice which was replied with baseless, unfounded and defamatory statements. As such, the wife caused physical and mental cruelty to the husband who prays for divorce.

5. Per contra, denying and disputing, challenging and controverting the averments/ allegations in the petition, the wife filed the counter, the gist and kernel of which would run thus:

(i) The wife did not behave cruelly towards the husband and no physical or mental cruelty was perpetrated by her on the husband. The various instances as found set out in the petition as against the wife are all false. On 01.01.2002, the wife went to the husband's house along with the new born baby. The wife's mother also accompanied her. When they entered the portals of the house of the husband, the wife was ruffed up by the husband. She was dragged by him out of the house by shouting at her that without bringing dowry, she should not enter his house. Such an incident took place in the presence of the two passive spectators viz, the parents of the husband. The husband demanded dowry, but it was not complied with it. Hence, he refused to resume cohabitation with her. The wife has not given any police complaint as against the husband. In fact, she expressed her desire to resume cohabitation. Owing to ill-advice, the husband is attempting to remarry one other lady. The husband uttered out highly abusive and defamatory words as against the wife.

(ii) It was not the wife who deserted the husband, but it was the latter who treated the former cruelly and shunned her company. Even after the birth of the child, the parents of the husband and the husband have not chosen to see the child. In fact, the mother of the husband was unhappy about the pregnancy of the wife and she stated that the wife was unfit to bear the child of her son who belonged to reputed pioneer family. Accordingly, she prayed for the dismissal of the petition for divorce.

6. During enquiry, on the side of the husband, P.W.1 to P.W.3 were examined and Exs.A.1 to A.5 were marked and on the side of the wife, D.W.1 and D.W.2 were examined and Exs.B.1 to B.6 were marked.

7. Ultimately, the trial Court granted divorce on the ground of cruelty and desertion.

8. Challenging the judgment and decree of the trial Court, the wife preferred the appeal in A.S.No.9 of 2005 before the District Court, Kanyakumari at Nagercoil, which Court reversed the judgment and decree of the trial Court and ultimately, dismissed the H.M.O.P for divorce.

9. Being aggrieved by and dissatisfied with, the judgment and decree of the first appellate Court, this Civil Miscellaneous Second Appeal has been filed on the grounds inter alia thus:

(i) The first appellate Court erroneously reversed the well-reasoned judgment and decree of the trial Court. The evidence has not been properly analysed and understood by the first appellate Court. The cumulative effect of the cruel acts committed by the wife was not considered by the first appellate Court. Despite the husband proved by clinching evidence, the cruelty perpetrated by the wife, the trial Court's judgment was reversed erroneously by the first appellate Court. The lower appellate Court expected the corroboration for the deposition of P.W.1, unmindful of the fact that in matrimonial matters, such corroboration cannot be expected by Courts. The evidence of P.W.2 and P.W.3 was not considered by the first appellate Court as the ones supporting the husband's case. The wife had not taken any steps for resuming cohabitation.

(ii) The trial Court correctly held that the wife falsely alleged as though the husband demanded dowry. But, the first appellate Court reversed the finding for no good reason. The first appellate Court did not apply the correct principles of law relating to burden of proof in matrimonial matters. The judgment and decree of the first appellate Court were perverse. Accordingly, he prayed for setting aside the judgment and decree of the first appellate Court and for restoring the judgment and decree of the trial Court.

10. At the time of admitting the second appeal, my learned Predecessor framed the following substantial questions of law:

"(i) Whether the judgment of the lower appellate Court is vitiated for having failed to set out the reasons on which the findings of the trial Court were held to be erroneous before reversing the same?

(ii) Whether the lower appellate Court applied the correct principles of law relating to burden of proof in matrimonial proceedings?

(iii) Whether the findings of the lower appellate Court are vitiated for having failed to apply the correct principles of law by not holding that the very act or levelling unsubstantiated allegations of dowry demand by the respondent/wife in reply notice and counter would by itself constitute cruelty?"

11. All the points are taken together for discussion as they are interlinked and interwoven with one another.

The Points:

12. A re'sume' of facts absolutely necessary and germane for the disposal of this appeal would run thus:

According to the husband, he suspected that the wife was suffering from some mental problem for which he advised her to take treatment; but it was not taken in the right spirit by the wife; she was even reluctant to have sexual intercourse with him; she avoided cooking under false pretexts and she was harsh towards him on various occasions and deserted him; when he attempted to make arrangements, with the help of Doctor friend Saleem to give medical treatment to the new born child which was in the custody of the wife, she behaved rudely with the husband and caused both mental and physical cruelty to him and in her reply notice as well as in the counter, she set out false pleas.

13. Per contra, the wife would contend that the husband demanded dowry; he is intending to marry some other lady under ill-advice of her friends; he shunned the company of the wife and despite that she wanted to resume cohabitation with him for which he refused.

14. It is the specific plea of the wife that despite such harassment meted out to her, she never lodged any complaint with the police as against the husband or his parents in any manner.

15. On the side of the husband, the arguments have been restricted to the grounds relating to the plea of cruelty only.

16. Obvious and apparent, it is, that there is no definition of cruelty as found set out in the Statute book concisely and precisely. Whereupon, the Honourable Apex Court in the catena of decisions, for the guidance of the Courts below, set out as to what would constitute cruelty in matrimonial relationship. The following decisions of the Honourable Apex Court could fruitfully be cited:

(i) Savitri Pandey v. Prem Chandra Pandey reported in (2002) 2 Supreme Court Cases 73. An excerpt from it, would run thus:

"6. Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(i-a) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent. Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly show that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life."

(ii) Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate reported in (2003) 6 Supeme Court Cases 334. An excerpt from it, would run thus: "6. In V. Bhagat v. D. Bhagat 2 it was observed that mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other and the parties cannot reasonably also be expected to live together or that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It was also considered to be not necessary to prove that the mental cruelty is such as to cause injury to the health of the wronged party. That was a case wherein the husband filed a petition against the wife for divorce on the ground of adultery. In the written statement filed by the wife in the said proceedings, she alleged that the husband was "suffering from mental hallucination", that his was a "morbid mind ... for which he needs expert psychiatric treatment", and that he was "suffering from paranoid disorder" etc. and that during cross-examination several questions were

put to him suggesting that the petitioner and several members of his family including his grandfather were lunatics and that the streak of insanity was running in the entire family. It is in the said context this Court though held the allegations levelled against the wife were not proved, the counter-allegations made by the wife against the husband certainly constituted mental cruelty of such a nature that the husband cannot reasonably be asked to live with the wife thereafter. The husband, it was also held, would be justified to say that it is not possible for him to live with the wife. In rejecting the stand of the wife that she wants to live with her husband, this Court observed that she was deliberately feigning a posture, wholly unnatural and beyond comprehension of a reasonable person and held that in such circumstances the obvious conclusion has to be that she has resolved to live in agony only to make life a miserable hell for the husband, as well. ...

11. ... To satisfy the requirement of clause (i-a) of sub-section (1) of Section 13 of the Act, it is not as though the cruel treatment for any particular duration or period has been statutorily stipulated to be necessary. As to what constitutes the required mental cruelty for purposes of the said provision, in our view, 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. If the taunts, complaints and reproaches are of ordinary nature only, the courts 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. ..."

(iii) Parveen Mehta v. Inderjit Mehta reported in (2002) 5 Supreme Court Cases 706. An excerpt from it, would run thus:

"17. This Court, construing the question of mental cruelty under Section 13(1)(i-a) of the Act, in the case of G.V.N. Kameswara Rao v. G. Jabilli [(2002) 2 SCC 296] observed: (SCC pp. 303-04, para 12) "12. The court has to come to a conclusion whether the acts committed by the counter-petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs, traditions and other similar circumstances. Having regard to the sanctity and importance of marriages in a community life, the court should consider whether the conduct of the counter-petitioner is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible, and then only the court can find that there is cruelty on the part of the counter-petitioner. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances."

21. 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 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. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be

appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

(iv) A.Jayachandra v. Aneel Kaur reported in 2005-2-L.W.149. An excerpt from it, would run thus:

"10. The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb, or health, bodily or mental, or as to given 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, as noted above, 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. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a 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."

(v) Samar Ghosh v. Jaya Ghosh reported in 2007 (3) CTC 464. An excerpt from it, would run thus:

"102. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(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."

17. The perusal of the aforesaid decisions would unambiguously reveal that there is no specific set of facts which could be taken as the ones which would constitute cruelty. It all depends upon the facts and circumstances involved in a given case. The Judges are not expected to bring in their own standard while assessing the conduct of the parties involved in the matrimonial proceedings.

18. The gravity, intensity and seriousness of the acts of the parties should necessarily be considered. The ordinary wear and tear of the matrimonial life should not be taken as sufficient grounds constituting cruelty for granting divorce.

19. No doubt, in the aforesaid precedents, various sets of facts are found dealt with and the Honourable Apex Court also highlighted as to what type of acts perpetrated by one spouse as against the other spouse would amount to cruelty. With the aforesaid factual as well as legal background, let me proceed to decide the lis at hand.

20. The learned Senior Counsel for the husband, drawing the attention of this Court to the pleadings as well as the evidence and more specifically, the reply notice and the counter filed by the wife, would advance his arguments that the first appellate Court was wrong in reversing the judgment and decree of the trial Court in granting divorce. Whereas the learned Senior Counsel for the wife drawing the attention of this Court to each and every reasoning paragraph of the judgment of the first appellate Court, would argue that absolutely there is no scope for second appeal and there is no question of law, much less substantial question of law involved in the second appeal warranting interference by the High Court.

21. At this juncture, I would like to stress upon the fact that so far this case is concerned, this Court is dealing with the matter as the second appellate Court, under Section 100 of the Code of Civil Procedure. The first appellate Court is the last Court of facts and unless, there is perversity or glaring illegality committed by the first appellate Court in applying the principles of law in analysing the evidence and in arriving at its conclusion, no interference by this Court is warranted.

22. The first appellate Court in paragraph No.6 onwards started discussing the points after formulating the same for adjudication and held that the trial Court was wrong in granting divorce. The first appellate Court referred to the pleadings of the parties and held that the husband as P.W.1 without adequate averments in the petition, travelled beyond while deposing before the trial Court. In paragraph No.6 of the judgment of the first appellate Court, the Court commented that without the backingof the pleadings, P.W.1 in his deposition, deposed as though the wife on 25.06.1999, the

date of marriage itself after accompanying her husband simply left the matrimonial home quite against the entreaties and dissuasions of the husband and thereby put the husband and his relatives in quandary.

23. The first appellate Court correctly held that such events were not set out in the petition and accordingly, disregarded such evidence correctly. It is a trite proposition of law that any of amount of evidence without pleadings should not be given weightage by the Court. The husband in this case filed a detailed petition for divorce on the grounds of cruelty and desertion, nonetheless there is no such averment found therein, which demonstrates that during enquiry, the husband wanted to embellish his case by uttering out various facts which are not found set out in his petition.

24. Furthermore, the way in which he gave his deposition before the Court imputing motive on the part of the wife in leaving the house after marriage etc., evinces as to how he started looking askance at the conduct of the wife with suspicious eye as though she is a mental patient. Absolutely, there is no iota or shred of evidence to prove that she has been suffering from any mental abnormality. Even though in the pre-suit notice, Ex.A.2, as well as in his petition, he virtually tried to project his wife as a psychiatric patient, nonetheless, there is no evidence. The husband elaborately described about the unwillingness of the wife to cook food. In paragraph No.3 as well as in paragraph No.6, he speaks about the wife's fear for knife and her unwillingness to cook food.

25. A mere perusal of the averments concerning the alleged acts of the wife would create an impression in the mind of any one that the husband's attitude towards the wife was not healthy. He as a dutiful husband should have kind and considerate attitude towards the bride. But, his very narration of facts in paragraph Nos.3 and 6 of the petition as well as in his deposition relating to the wife's reluctance to cook food, would speak volumes about the husband's attitude towards the wife. On the side of the husband, it has been pointed out that even though the wife at the time of marriage, was 31 years old, he instead of going for a young bride had chosen to marry her on the expectation that she would cook food for himself and for his septuagenarian father and his sexagenarian mother. No doubt, there is no harm on the part of a husband in expecting his wife to cook food for himself and his parents. However even assuming that there was some reluctance on the part of the wife to cook, the question arises as to whether that might be a ground for divorce whether the husband is justified in making it a million dollar questions. I am of the considered opinion that the husband could have very well refrained from setting out it as one of the grounds of cruelty in seeking divorce. The husband projects his case as though he investigated on the wife's plea and caught her unawares when she was peeling apple with knife even though earlier she refrained from cooking food on the pretext of her fear for knife.

26. It is therefore crystal clear to the judicial mind, that the temperament of the husband towards the wife ever since the inception of the marriage was not proper. He started looking at the wife as though she was having psychiatric problem and that she deliberately, avoided cooking. His attitude towards her actually paved the root cause for the matrimonial rift between them. Judicial experience in matrimonial matters helps to understand, that if a husband behaves with suspicious mind relating to the wife's behaviour and conduct from the time of marriage, the wife would get dissolutioned about her future. To say the least, the ground as found set out by the husband relating

to the wife's reluctance to cook as the one constituting cruelty towards him and his parents, by no stretch of imagination could be countenanced as one of the grounds for granting divorce.

27. In paragraph No.2 of the petition, the husband would simply state that she was not co-operative in having sexual intercourse with him. The indubitable and incontrovertible fact is that the marriage took place on 25.06.1999, whereas the wife gave birth to a child on 04.06.2001. It is not known as to how the petitioner had chosen to set out such a ground in paragraph No.2 as though the wife was not co-operative in having sexual intercourse.

28. Once again, the husband for getting divorce as against the wife had chosen to put forth such a ground. It is therefore crystal clear that the plea of the husband that the wife was non co-operative to have sexual intercourse is found out to be a baseless one, which demonstrates the attitude of the husband towards the wife in seeking divorce.

29. In paragraph No.4 of the petition, the husband would state as though for the first time, he came to know that she was taking Buscalm tablets so as to control her restlessness and that he persuaded her to take psychiatric treatment. Had really the husband been sincere in his plea, he could have very well filed a petition before the trial Court seeking direction from the Court to subject his wife for psychiatric treatment. The wife is a Graduate in Chemistry and she gave birth to a child in time. If a husband suspects a normal wife that she is having psychiatric problem and that she should consult a psychiatrist, certainly the newly married lady would get depressed and defected in life. In paragraph No.7 of the petition, the husband used the following words:

"the Respondent's mercurial, repulsive, abnoxious and eccentric behaviour have jeopardised the peaceful and calm atmosphere which hitherto existed in the petitioner's home."

(emphasis supplied.)

30. As such, the husband has chosen to use such harsh terms as against the wife. But, according to him, all such cruel acts allegedly occurred before she became pregnant. If that be so, it is not known as to how she became pregnant.

31. The husband would attribute that the wife was expressing suicidal tendencies, but there is no evidence to buttress such plea. The first appellate Court correctly observed that there was no evidence except the ipsi dixit of the husband. The learned Senior Counsel for the husband would contend that admittedly even as per the version of the wife, in her counter filed as against the petition for custody of the child, the parents of the husband were aged persons and in such a case, there were no likelihood of examining them in Court on the side of the husband in corroboration of P.W.1's evidence.

32. I would like to disagree with such an explanation and it fails to carry conviction with the Court for the reason that simply because the father and the mother of the husband happened to be Septuagenarian and Sexagenarian respectively, it cannot be presumed that they could not be examined as witnesses. It is common knowledge that as per Order 26 of the Code of Civil Procedure,

the husband could have taken the assistance of a Court-appointed Advocate Commissioner. As such, the first appellate Court cannot be found fault with in expecting the best evidence on the side of the husband. There is no hard and fast rule that in matrimonial matters, the Court should not expect corroboration before relying on a party's deposition; and that too where corroborative evidence could be adduced. Barely based on the sworn statement of the husband who is seeking divorce, if the guarded discretion of the matrimonial Court should be exercised, then no matrimonial relationship could be preserved or guarded.

33. The husband in paragraph No.8 of his petition, would state that during July 2000, at Bangalore, during night, the wife attempted to strangulate him and for which also there is no reliable evidence. As has been already pointed out, the husband by his own conduct clearly exposed himself that he attempted to make a mountain out of mole hills for the purpose of getting divorce and naturally, the Court has to look askance at the allegations in paragraph No.8 relating to the alleged wife's act in strangulating the husband etc and in the absence of proof, the husband cannot expect the first appellate Court to simply believe his version and confirm such erroneous view of the trial Court.

34. The husband also in paragraph Nos.9 and 10 would make bald allegations as though the wife had erratic and impulsive behaviour towards him. The points to be noted here is that the marriage took place on 25.06.1999 and as per his versions in the petition, the wife went to her mother's house for delivery of the child. In paragraph No.15, it is found stated that the couple lived for two years and according to his own version, the wife became pregnant even by October 2000 and she delivered the child on 24.06.2001. It therefore shows that well before the expiry of two years from the date of marriage, she went to her mother's house for delivery. Within such short span of time, the husband heaps voluminous allegations as against the wife which are antithetical to the happy occurrences which took place in their matrimonial life. The first appellate Court failed to consider all these facts and simply believed the version of P.W.1. However, the first appellate Court correctly refrained from believing the version of P.W.1 for gospel truth and correctly reversed the judgment and decree of divorce of the trial Court.

35. It is therefore crystal clear from the above narration that what are all the husband narrated till the delivery of the child by the wife are not at all weighty enough and for that matter, those allegations have also not been proved as correctly upheld by the first appellate Court. However, the husband would very much try to place reliance on the conduct of the wife and the wife's father in humiliating him in the presence of his Doctor friend Saleem on 12.07.2001, when he and the said Doctor went to the house of the wife's parents to give treatment to the child.

36. The learned Senior Counsel for the husband would find fault with the judgment and decree of the first appellate Court by pointing out that the first appellate Court had thrown to winds the preponderance of probabilities and the methodology to be adopted in analysing the evidence in matrimonial matters. No doubt, the first appellate Court expected as though there should have been evidence as to how his broken glass was repaired etc., so as to prove the occurrence, because there was no clinching evidence before it to prove the real facts constituting the occurrence.

37. The wife, D.W.1, as well as the father of the wife, would deny such occurrence. Even though the husband P.W.1 and his Doctor friend P.W.2, would depose about the incident which took place on 12.07.2001, yet what one could understand from their depositions is that some incident had taken place. But, there is nothing to show that the incident took place in the manner that they described. In fact, the very admission of the husband that he along with his Doctor friend frequently visited the house of the wife's parents, would clearly demonstrate that the husband was not treated cruelly. Had he been treated cruelly, he might not have ventured to visit the house of the wife's parents with his Doctor friend at all.

38. Put simply, the wife and the wife's father denied the incident, it cannot be assumed or presumed that they denied in toto the incident so as to conceal and camouflage their fault. No doubt, the first appellate Court, instead of holding that the husband, had not proved the incident in the way he and his Doctor friend described without examining the neighbours who allegedly witnessed the occurrence, went to the extent of discussing as though there are discrepancies and contradictions in the depositions of P.W.1 and P.W.2 regarding time of occurrence and the time of departure of the Doctor friend from his clinic so as to accompany P.W.1 to the house of D.W.1 and D.W.2 etc. The correct approach is to raise the question as to why the wife all of a sudden on seeing the husband with his Doctor friend should allegedly attack him and brake P.W.1's spectacles. The husband himself in his petition would narrate that when he went to the house of his wife's parents, the father of the wife passed remarks as though one Doctor Manohar was the best Doctor and no other Doctor was good enough to give treatment to the child. According to the husband, the incident got snowballed and culminated in the wife uttering out egregious abusive words and snatching away the spectacles and throwing it away in addition to she having attacked him.

39. It is therefore clear that even as per the version of the husband, some provocative acts occurred there and thereupon, it is not clear as to what was done by the wife. The whys and wherefores for such alleged violent conduct on the part of the wife remained unestablished and the scanty interested testimony on the husband's side was correctly looked with suspicion by the first appellate Court. However, the first appellate Court even though might not be right in discussing minutely about the timings and other details, but it was right in doubting the way and the manner in which the incident was alleged to have occurred had taken place. Instead of putting it in such a manner, the first appellate Court in its own way discussed the point.

40. In paragraph No.11 in the petition, the husband would state as under:

"... During the Respondent's stay in her parents' house, the petitioner visited his in-laws' house once in a week along with a Paediatrician to give due medical care to the Respondent and the child. During the last visit of such visits he made along with the Paediatrician on the 38th day after the birth of the child, i.e, on 12.07.2001, the Respondent purposely and with the intention to wreck the matrimonial bond picked up an unprovoked quarrel with him and hurled vulgar terms at the petitioner and created an ugly scene drawing people from the neighbourhood to witness the scene."

(emphasis supplied.)

41. The above excerpt from the petition would clearly show that the husband was in the habit of visiting the house of his wife's parents once in a week along with the Doctor to give medical treatment to the child as well as to the wife. Only during his last visit on 12.07.2001, the alleged incident occurred. Had the wife and her father was cruel, it is not known as to how the husband was able to visit with his Doctor friend periodically once in a week and give medical treatment to the wife and the child. It is not only the child but also the wife, was under his utmost care as per his case even when the wife was in her parents' house after child's birth.

42. As per the version of the husband, after the birth of the child, once in a week he was visiting the house of the wife's parents and with the help of his Doctor friend, he was giving medical treatment to the child and the wife and that was allowed by the wife as well as the father of the wife and in such a case, the burden of proof is on him to show as to what happened on 12.07.2001 for the wife's father allegedly to talk ill of his Doctor friend Saleem and talk well of Doctor Manohar and also for the wife allegedly to attack the husband. By way of clarifying this factual position, absolutely there is no evidence. In fact, his narration shows that his theory of cruelty having been perpetrated as against him by the wife is turned out to be untrue. According to the husband, before the others, the wife was cruel towards him and in fact, she deserted him etc, often. If that be so, it is not known as to how after the birth of the child, such cordial relationship of visiting the house of the wife's parents once in a week would have taken place for giving treatment to the wife and the child. It is therefore crystal clear that the husband for the purpose of getting divorce, has come forward with such allegations as against the wife and the wife's father.

43. Be that as it may, this Court is of the firm opinion that the best evidence should have been adduced. In the petition as well as in the deposition, the husband would admit that some neighbours had witnessed the occurrence, nevertheless no even one of such neighbours was summoned by him to give evidence before the Court.

44. The learned Senior Counsel for the husband would submit that in matrimonial matters, no neighbour would venture to come forward and depose. I would like to disagree with such a submission for the reason that here, the neighbours are not going to speak about the actual matrimonial relationship and if at all, such an incident occurred and the neighbours witnessed it, they must be in a position to speak about the alleged incident only. As such, despite the best evidence available, the husband had not chosen to produce the same. As such, relating to non-examination of the husband's parents and for non- examination of the neighbours, some explanations were expounded which are not convincing and despite the availability of best evidence, the husband failed to produce such evidence and accordingly, it cannot be held that he discharged his burden of proof.

45. It is not as though the nature of the case as alleged by him was only between the husband and the wife and in such cases alone, the husband would be heard to plead that there were no possibilities of producing clinching evidence, other than his own evidence. But, in this case, his parents as well as the neighbours should have been examined to prove the various occurrences alleged to have taken place in different times and in different places. But, they have not been examined and that clearly demonstrates that the husband has not discharged the burden of proof

cast upon him and the first appellate Court cannot be found fault with it in reversing the judgment and decree of the trial Court.

46. The husband would try to point out that the wife in the reply notice as well as in the counter alleged falsely as though the husband demanded dowry and that he and his parents were money minded etc. D.W.1, the wife spoke about dowry demand by the husband at the instigation of his friends. There is nothing to show that her version is utterly false. On the husband's side various decisions of the Honourable Apex Court and the decisions of this Court have been cited to point out that if the false allegations are made in the reply notice or in the counter, it would amount to cruelty. The Court cannot assume and presume that what are all stated by the wife, are all false and frivolous.

47. No doubt, according to the husband, he is richer than the wife and that it does not mean that such fact would lead to the conclusion that the wife's allegation that he demanded dowry should be rejected as false in toto. It is one thing, to say that the wife had failed to prove convincingly that the husband or his mother demanded dowry, yet it is another to say that those allegations are false. Here, the wife has not approached the Court with any relief. I am fully aware of the fact that the same standard of proof relating to the averments made by the husband, should also be applied to wife's evidence. To the risk of repetition, without being tautologous, I would observe that here the husband approached this Court with certain averments seeking divorce and this Court holds that the husband failed to prove convincingly the act of cruelty and furthermore, the preponderance of probabilities as highlighted are against the plea of the husband. Similarly the wife could not produce clinching evidence that the husband demanded dowry and perpetrated cruelty as against her, but it cannot be held that all her versions are false intended to malign the husband.

48. It is a trite proposition of law that the respondent as per law is permitted to take defence in support of her plea. It has to be seen whether such pleas are taken with malafide intention to defame or humiliate etc, the husband. In this case, there is no such malafide intention that could be seen on the wife's side.

49. The following decisions of the Honourable Apex Court could be referred to as set out by the learned Counsel for the husband thus:

(i) V.Bhagat v. D.Bhagat reported in AIR 1994 SUPREME COURT 710.

(ii) Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate reported in (2003) 6 Supeme Court Cases 334.

(iii) A.Jayachandra v. Aneel Kaur reported in 2005-2-L.W.149. The perusal of the aforesaid decisions would clearly show that the facts involved in those cases are entirely different.

50. It is quite obvious from the perusal of V.Bhagat's case, that the facts in that case are to the effect that the wife went to the extent of lodging complaint as against the husband and also alleging as against the husband and his family members as lunatics and streak of insantiy run through his

entire family. In fact, in this case, it is the husband who admittedly suspected the wife as a psychiatric patient and even persuaded her to take psychiatric treatment and the wife also in turn simply suspected psychiatric problem on the part of the husband. In such a case, it is not known as to how the husband would be able to press the dictum as found set out in V.Bhagat's case.

51. In Vijaykumar Ramchandra Bhate's case, the facts involved are to the effect that the wife in that case filed an application for withdrawing her outrageous statements and that obviously admitted that she made false allegations in her counter. But, here, it is not the case.

52. In A.Jayachandra's case, the wife went to the extent of prescribing standards for the husband and an excerpt from it, would run thus:

"15. ... Though respondent tried to show that they were simple and harmless advice, yet on a bare reading thereof, it is clear that there were clear manifestations of her suspecting the husband's fidelity, character and reputation. By way of illustration, it may be indicated that the first so called advice was not to ask certain female staff members to come and work on off-duty hours when nobody else was available in the hospital. Second was not to work behind the closed doors with certain members of the staff. Contrary to what she had stated about having full faith in her husband, the so called advices were nothing but casting doubt on the reputation, character and fidelity of her husband. Constant nagging on those aspects, certainly amounted to causing indelible mental agony and amounts to cruelty."

(emphasis added.) It is at once clear that the facts involved in A.Jayachandra's case, can never be applied to the case on hand.

53. The learned Senior Counsel for the husband would place reliance on the decision of this Court in Natarajan, P. v. Thamizhmani reported in 2002-2- L.W.250. An excerpt from it, would run thus:

"17. ... It may be that the Appellate Court was interested in keeping the matrimonial tie intact. But in matrimonial proceedings, it is also important to see that parties come to court only when the continued relationship becomes unworkable. Blind refusal to recognise the same, by giving over importance to sentimental views would ultimately render the provisions entitling divorce ineffective and meaningless. In this case, a reading of the pleadings and evidence disclose the conduct on the part of the wife which appears to be very inflexible and with an attitude of financial superiority of her own family refusal to adjust with the conditions of life in the husband's place heaping insults on the husband and last but not the least, allegations of theft and frequent accusations of adultery against the husband. If these features do not justify the husband seeking divorce on the ground of mental cruelty, there will no justification for retaining the ground of mental cruelty as one of the grounds for divorce.

... If these facts are to be stated even in the pleadings which are generally drafted with sufficient care to avoid any blame on herself resulting in adverse impression, considering that she was opposing the petition for divorce, one could very well imagine, how she would have been behaving with her husband with the air of superiority that her own family is richer and well placed than that of her

husband's family.

18. In her evidence, she very frankly admits that she found it impossible to eat the equality of the rice which was used in her husband's place and therefore, she used to get food from her parents house in Tiruvannamalai. She also says that even now (after the filing of the petition for divorce), she was not prepared to live at Vettavalam husband's place). Even these admitted pleadings and evidence on the side of the wife herself have been ignored by the Appellate Court. There cannot be any better material than her own admissions as above, to prove that by her conduct, she had been deliberately insulting and hurting her husband and his family with a show of financial superiority of her own family. Leave alone the traditional obligations of woman/wife in a Hindu society, even in a western family, such a behaviour is bound to be treated as clear instance of a wife torturing her husband."

54. A mere perusal of the aforesaid excerpts would show in that case, as to how the wife behaved so cruelly towards the husband by accusing the husband as a thief; he and his family members were below her status etc and thereby humiliated and treated cruelly the husband and thereupon the Court discussed threadbare the wife's arrogance towards the husband and had correctly held that it was a fit case for divorce. But, here the factual position is entirely different and it is quite obvious and no more elaboration is required in this regard in view of the discussion as found set out supra.

55. The ratio decidendi of a case alone has to be applied. Oblivious of the facts involved in this case, certain abstract propositions cannot be culled out from the precedents and applied in this case. If at all, there are factual similarities between the precedents cited and the case on hand, then only such precedents could be applied. Here, as has been already highlighted supra, there cannot be any second opinion over the well settled propositions as found set out in the precedents cited supra. But, those precedents, in fact, are not in support of the husband's case here, in the facts and circumstances as discussed above.

56. The learned Counsel for the husband placing reliance on the concept 'irretrievable breakdown of marriage', would develop his argument to invoke the said theory in this case. In connection with that, he would cite the decision in Samar Ghosh v. Jaya Ghosh reported in 2007 (3) CTC 464. An excerpt from it, would run thus:

"98. This Court in Naveen Kohli v. Neelu Kohli dealt with the similar issues in detail. Those observations incorporated in SCC paras 74 to 79 are reiterated in the succeeding paragraphs:

"74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised 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.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

77. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems than are sought to be solved.

78. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

79. When we carefully evaluate the judgment of the High Court and scrutinise its findings in the background of the facts and circumstances of this case, then it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory."

"104. The High Court in the impugned judgment seriously erred in reversing the judgment of the learned Additional Sessions Judge. The High Court in the impugned judgment ought to have considered the most important and vital circumstance of the case in proper perspective that the parties have been living separately since 27-8-1990 and thereafter, the parties did not have any interaction with each other. When the appellant was seriously ill and the surgical intervention of bypass surgery had to be resorted to, even on that occasion, neither the respondent nor her father or any member of her family bothered to enquire about the health of the appellant even on telephone. This instance is clearly illustrative of the fact that now the parties have no emotions, sentiments or feelings for each other, at least since 27-8-1990. This is a clear case of irretrievable breakdown of marriage. In our considered view, it is impossible to preserve or save the marriage. Any further effort to keep it alive would prove to be totally counter-productive."

57. The learned Senior Counsel for the husband also cited the following two other decisions of this Court thus:

(i) R.Mallika v. R.Rajagopal reported in (2007) 6 MLJ 1337. An excerpt from it, would run thus:

"14. Taking note of all these circumstances and the fact that the parties were admittedly living separately for more than 16 1/2 years, the Apex Court felt that the irresistible conclusion would be that the matrimonial tie had been ruptured beyond repair and hence, confirmed the order of the Family Court and granted divorce. Applying the said decision to the facts of the case herein on the admitted fact that the parties have been living separate eversince 1996 and attempts made by the

Court had further failed, we do agree with the view of the Family Court that the marriage had irretrievably broken beyond repair and that there is no possibility of bringing the couple together. In these circumstances, we dismiss the appeal, thereby confirm the order of the Family Court, passing a decree of divorce and dissolution of the marriage held on 27.5.1994. As regards the maintenance, the order passed by the Family Court shall continue. It is open to the respondent to seek modification as and when required."

(ii) J.Balasubramaniam v. S.Pitchammal reported in CDJ 2007 MHC 2038. An excerpt from it, would run thus:

"So, these factors would certainly show that the appellant and the respondent can never ever stay as husband and the wife. It leaves no doubt in our mind to take a view that the relationship was broken down beyond the repair. As it has been held by the Supreme Court cited above, cohabitation is essential for a valid marriage. The marriage took place on 29.08.1993. They lived together only for a period of four months. Thereafter, the parties are not living together from 1996. There is no hope for the parties living together peacefully. We are very careful and cautious to embrace the new "irretrievable break down" concept. We know that new irretrievable break down concept would be to open "too wide a door to divorce". It is an easy path to tread out the same is not correct method of approach. A true balance must be kept. It is also most important that the Court should emphasis the sanctity of marriage. We have to take a fairly realistic approach to it. So, the Court attitude should be essentially pragmatic. We have to give relief from a marriage that had broken down. In this case, both the parties have contributed to the break down. The marriage has lasted only for a short time. There are no children. We are of the view that the marriage is irretrievable broken down and hence, we set aside the order of the lower authority and allow the appeals filed by the appellant and on the aforesaid legal and factual ground, the appellant is entitled to decree of divorce accordingly. No costs."

58. The learned Senior Counsel for the husband would submit that ever since the birth of the child in the year 2001, the husband and wife have been living separately; even three years separation could be taken as sufficient for presuming that irretrievable breakdown of marriage.

59. The aforesaid decision of the Honourable Apex Court in Samar Ghosh's case, cited by the learned Counsel for the husband, would evince that the Honourable Apex Court by virtue of its power under Article 142 of the Constitution of India, passed such order. The two Division Bench of this Court taking into account the peculiar facts and circumstances of the case before them, applied the theory of irretrievable breakdown of marriage and granted divorce and no more elaboration is required in this regard. However, in the facts and circumstances of this case, I am of the considered opinion that there is no possibility of invoking the theory of irretrievable breakdown of marriage and in such a case, I need not go into the question whether the theory of irretrievable breakdown of marriage could be applied by the High Court or not. Here, the facts and circumstances do not show that there was any irretrievable breakdown of marriage between the parties.

60. The learned Senior Counsel for the husband also cited the report of the Law Commission of India relating to the irretrievable breakdown of marriage as a ground of divorce and argued that

three years separation led to the inference of break down of marriage irretrievably. The husband and the wife in this case admittedly lived for two years and within that period, the wife got conceived and delivered the child subsequently. The improved instances cited were not at all serious enough by any standard to grant divorce and over and above all, there is no proof as correctly pointed out by the first appellate Court that the wife behaved cruelly towards the husband. Hence, absolutely there is no reason for interfering with the judgment and decree of the first appellate Court in setting aside the judgment and decree of the trial Court and dismissing the petition for divorce filed by the husband.

61. The first appellate Court also observed that the wife has not preferred any complaint as against the husband relating to the dowry harassment and that she was not cruel towards the husband. The learned Counsel for the wife would also argue in support of the stand taken by the first appellate Court. Whereas the learned Senior Counsel for the husband would contend that there is no hard and fast rule that unless criminal complaint is lodged, the mere allegation would not constitute cruelty. Placing reliance on the aforesaid decisions of the Honourable Apex Court, he would state that there is no necessity that there should be mens rea on the part of the wife in passing allegations. It is sufficient if the allegations are capable of causing mental cruelty to the husband. However, in this case, my discussion supra would show that there is nothing to show that the wife made false allegations in the counter and in the reply notice. No doubt, in the deposition, in one place as pointed out by the learned Counsel for the husband, she would state that the husband was not having bad qualities at the time of marriage and subsequently also and that it does not mean that the wife admitted that the husband did not make any demand for dowry.

62. The wife has been consistent in her stand that she wants to resume cohabitation. Whereas on the husband's side, it was alleged as though he took steps to resume cohabitation. It is obvious that in view of the discussion supra, the wife never had animus deserendi and there is no iota or shred of evidence to show that the husband at any point of time had taken steps to resume cohabitation with the wife, even though the wife was ready and willing to live with the husband.

63. The non-filing of criminal complaint as against the husband, certainly in the facts and circumstances of the case, would speak in support of the wife that she wanted to resume cohabitation with him. The matrimonial Courts now-a- days come across in majority of the cases, the wife sets the criminal law in motion, but in this case, she has not done so. In fact, that itself speaks about her genuine intention to resume cohabitation and such a fact cannot be lost sight of.

64. The trial Court's reasoning that since the wife has not filed the petition for restitution of conjugal rights, would speak volumes about her unwillingness to resume cohabitation. To say the least, it is a wrong approach of the trial Court relating to the non-filing of the application for restitution of conjugal rights under Section 9 of the Hindu Marriage Act [the trial Court erroneously understood as though Section 11 of the Act is for restitution conjugal rights].

65. There is no hard and fast rule that to express a spouse's intention to resume cohabitation, there should be an application for restitution conjugal rights. In the counter itself, she has categorically set out that she intended to resume cohabitation with the husband.

66. In fact, Section 23(A) of the Hindu Marriage act also would contemplate that no separate petition is required and the prayer of the respondent/wife could be set out in the counter. No doubt, the wife has not set it out as counter claim, but she clearly spelt out her mind in the counter as well as in the earlier reply notice that she wants to resume cohabitation with the husband.

67. The trial Court has failed to take into consideration the fact that the wife has not at all resorted to any legal action and in such a case, it was wrong on the part of the trial Court to expect that she should have filed an application for restitution of conjugal rights. The trial Court failed to pose the question as to why the husband has not chosen to initially file an application for restitution of conjugal rights. Even though, the husband stated that he tried his level best to resume cohabitation with the wife in the pre- suit notice, Ex.A.2 at paragraph No.13, nonetheless he has not filed any such petition. The said paragraph No.13 is extracted hereunder for ready reference: "13. Strangely enough your father instead of correcting you had been encouraging you to indulge in such acts of cruelty. You would appear to be a pampered child of your father that you had been exhibiting crocked propensities fuelled by your father who was bent upon separating you from my client all the while attempting to ensure that the marital bond remained intact. Further well meaning friends well wishers and relatives of the family made every conceivable endeavour for happy reunion between my client and you, burying the hatchet. Now that mediators have failed in their efforts on account of your recalcitrant and intransigent attitude. My client is constrained to seek divorce on the ground of mental cruelty and desertion."

In paragraph No.15, the husband also would state thus:

"15. Further my client says that you being a person of unsteady abnormal, instable character he apprehends that his child will not be safe if he remains with you. So, for proper upbringing of the child in a most conjenial atmosphere the child should be under the custody of my client and as the natural guardian of the child he would take necessary steps for getting custody of the child."

68. A reading of the aforesaid extracts in conjunction with the allegations raised in the pre-suit notice, Ex.A.2, would clearly demonstrate that the husband's case was to the effect that despite all alleged previous cruel acts perpetrated by the wife and the wife's father on the husband, including the incident which took place in the presence of Doctor friend Saleem at the residence of the wife's father, the husband wanted to resume cohabitation/reunion with the wife, and that it did not allegedly fructify due to the attitude of the wife.

69. If that be so, it is not known as to how the husband has not chosen to file the application under Section 9 of the Act at the first instance. Furthermore, the husband's stand in paragraph No.13 of Ex.A.2, would further evidence that he condoned the alleged past cruel conducts of the wife and that he was allegedly ready and willing to take her back. The wife also in her reply notice stated that she was ready and willing to resume cohabitation with the husband and even in the counter, she stated so.

70. In such a case, it is not known as to why the husband despite conciliation proceedings undertaken during the pendency of the proceedings, has not come forward to resume cohabitation

with the wife. The husband thinks that it would be a good ridden if he could get divorce but on the contrary, a fortiori, the circumstances would clearly prove that the husband is bent upon to get divorce on unsubstantiated ground of alleged cruelty.

71. Paragraph No.30 in the reply notice, Ex.A.3, is extracted thus:

"30. My client is always ready and willing to live with your client, inspite of the highly abusive, defamatory and false allegations made against her by your client."

72. The Honourable Apex Court in Dastane v. Dastane reported in AIR 1975 SUPREME COURT 1534 wherein the concept of condonation is found set out. An excerpt from it, would run thus:

"54. Before us, the question of condonation was argued by both the sides. It is urged on behalf of the appellant that there is no evidence of condonation while the argument of the respondent is that condonation is implicit in the act of cohabitation and is proved by the fact that on February 27, 1961 when the spouses parted, the respondent was about 3 months pregnant. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of Section 23(1)(b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.

55. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things: forgiveness and restoration. The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued cohabitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws."

73. The learned Senior Counsel for the wife would convincingly argue that even if there was any such drawbacks as alleged by the husband, all those acts could be taken to have been condoned and the husband cannot veer round and take pleas quite antithetical to the concept 'condonation'. Whereas the learned Senior Counsel for the husband would submit that condonation of certain acts is always subject to future good conduct. No doubt, in this case, there is nothing to prove that the wife subsequently indulged in any cruel act warranting divorce.

74. Pithily saying, the case of the husband is that he has been made to suffer from battered spouse syndrome which plea has not been proved by him.

75. Accordingly, the substantial questions of law No.(i) is answered to the effect that the judgment of the first appellate Court is not vitiated due to the failure to set out the reasons in its finding. In fact, the first appellate Court furnished convincing reasons as set out supra. The substantial question of law No.(ii) is answered to the effect that the first appellate Court applied correct principles of law relating to burden of proof in matrimonial proceedings. The substantial question of law No.(iii) is answered to the effect that the first appellate Court applied the correct principles of law in analysing the plea of the husband that the wife made allegations as against him in the reply notice as well as in the counter and in rejecting such plea of the husband.

76. In the result, there is no merit in this Civil Miscellaneous Second Appeal and accordingly, the same is dismissed. No costs. However, I could see from the facts and circumstances available that there is every likelihood of the husband and the wife resuming cohabitation and they are advised to resume cohabitation in the near future in the best interest of their child.

rsb To

1.The District Judge, Kanyakumari at Nagercoil.

2. The Principal Sub Judge, Nagercoil.