

Madras High Court

S.Hymavathy vs S.Venkateswara Rao on 23 September, 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23/9/2011

CORAM:

The Honourable Mr.Justice K.MOHAN RAM
and
The Honourable Mr.Justice M.DURAIWAMY

CMA(NPD)NOS.3924 AND 3925 OF 2004
& MP.NOS.20874 & 20875 OF 2004 & CMP.NO.607 OF 2011

S.Hymavathy ...Appellant in both the CMAs

Vs

S.Venkateswara Rao ...Respondent in both the CMAs

Prayer:- Civil Miscellaneous Appeals filed under Section 19 of the Family Courts Act, against the fair and decretal orders dated 02.09.2003 made in (i) O.P.No.115 of 1999; and (ii) O.P.No.1213 of 1997 and I.A.No.1327 of 1999 respectively on the file of the Principal Family Court, Chennai.

For Appellant : Mr.S.Parthasarathy, SC for Mr.P.Elango For Respondent : Mr.P.C.Harikumar

COMMON JUDGMENT K.MOHAN RAM,J The appellant in both the above appeals is the wife of the respondent.

2. The appellant filed O.P.No.1213 of 1997 against the respondent herein before the Principal Family Court, Chennai under Section 13(1)(i-a) of the Hindu Marriage Act seeking a decree of divorce from the respondent on the ground of mental cruelty. Pending the aforesaid original petition, the respondent herein filed O.P.No.115 of 1999 before the same Court under Section 9 of the Hindu Marriage Act seeking restitution of conjugal rights on the ground that the wife appellant herein had left the matrimonial home without any reasonable cause.

3. Before the Family Court, the appellant herein was examined as PW1 and she was cross examined by the respondent. The respondent/husband did not enter into the witness box. Except the marriage

invitation card, which is marked as Exp1 by the appellant herein, no other documents have been marked on either side.

4. By an common order dated 2.9.2003, the Court below dismissed O.P.No.1213 of 1997 and allowed O.P.No.115 of 1999 and being aggrieved by that, the wife has filed the aforesaid two appeals. In O.P.No.1213 of 1997, the respondent filed I.A. No.1292 of 1999 seeking custody of the child and the wife/ appellant herein filed I.A.No.1327 of 1999 under Section 27 of the Hindu Marriage Act seeking a direction to the respondent herein to return the articles as per the list appended to the affidavit filed in support of the said application, namely, gold ornaments, silverware, furniture, kitchen utensils and seven items of original title deeds. By the said common order, the above said two interim applications also came to be dismissed.

5. During the pendency of the appeals, the appellant filed a petition in C.M.P.No.607 of 2011 under Order VIII Rule 22 of the Appellate Side Rules seeking to receive the additional documents enclosed in the compilation of papers.

6. In the affidavit filed in support of the above petition, it is stated that before their daughter became a major, the respondent fraudulently mortgaged the property at Tenali bought by the appellant's father in Sravanthi's name and usurped the mortgage money for his personal activities. The respondent even stooped to the level of using their minor daughter's photograph to fabricate a mortgage deed and had mortgaged the property to one Mr.Katta Vijayakumar on 23.9.2009. The consideration for such mortgage is seen to have been made by way of cheque. A complaint in this regard has been filed by the appellant herein and the same is pending. The above referred fraudulent acts of the respondent came to light only in October 2010. Therefore, the appellant preferred the above petition seeking leave of this Court to accept the petition to receive additional documents that are material and important in the above proceedings.

8. In the affidavit, the appellant has referred to the letter of the appellant dated 12.1.2011 to the respondent, the returned cover, the reply by the respondent, another letter by the appellant dated 20.1.2011 to the respondent and the returned cover. Since all the documents have come into existence after disposal of the original petitions and contending that the same have got some relevance to decide the question of mental cruelty, the appellant seeks to produce the same as additional evidence.

9. Though the respondent has not filed any counter affidavit to the said petition, learned counsel for the respondent seriously objected for the documents to be received as additional evidence. Learned counsel for the respondent submitted that the mortgage deed has absolutely no relevance to decide the issue of mental cruelty alleged by the appellant. As far as the letters said to have been written by the appellant and the reply said to have been written by the respondent and also the returned covers are concerned, as the same were not admitted by the respondent, oral evidence is necessary to test the veracity of the same and as to whether the letters were really written by the respective parties and therefore, learned counsel for the respondent submitted that in the absence of oral evidence, those documents could not be received as additional evidence. As far as the mortgage deed is concerned, learned counsel submitted that the circumstances under which the mortgage deed came

to be executed can be established only by oral evidence and in the absence of oral evidence, the mortgage deed cannot be received as additional document.

10. The brief facts, which are necessary for the disposal of the appeals are follows :

(i) The marriage between the petitioner and the respondent was solemnised as per Hindu rites and customs on 7.5.1987 at Tenali, Andhra Pradesh. At the time of marriage, the appellant was just 14 years old. After marriage, the couple came to Chennai. According to the appellant, after the initial excitement, she found to her shock that the respondent is very restless and short tempered. When enquired, the respondent told that he felt uneasy to stay in the appellant's parents' house, as he did not have privacy. The respondent used to go out early in the morning and come home very late in the night. If the respondent was questioned about the same, he used to shout at the appellant and abuse her. From June 1987, the respondent showed his true colours.

(ii) After one year, the appellant and the respondent set up their separate matrimonial home at No.19, Krishnarao Street, T.Nagar, Chennai-17 and were living together till 26.8.1996, when she left the matrimonial home.

(iii) It is the case of the appellant that even while living separately, she underwent torture and harassment at the hands of the respondent, as he used to abuse and torture even at the slightest pretext. Even for silly reasons, the respondent abused her and used to threaten that he will kill her and her family members. As the appellant was only 15 years old at that time, she was very much afraid of the conduct of the respondent. She used to shiver even on hearing the sound of the respondent's scooter.

(iv) While so, the appellant gave birth to a daughter by name Sravanthi on 23.10.1991 at Lady Wellington Hospital at Chennai. According to the appellant, at the time of delivery, the respondent never bothered to stay with her in the hospital. Only when she called up the respondent, he came to the hospital to see the child without any interest. The respondent did not show any affection even towards the child, but only showed hatred and abused the child in filthy language.

(v) After delivery, the respondent's behaviour became worse and he started ill-treating and abusing the appellant even in front of the servant maid and used to beat her. As the appellant was just 18 years at that time, she was not in a position to understand the reasons for his unnatural behaviour. At that time, the respondent was said to have told her that his grandfather told him that the petitioner's family and the respondent's family members had some family disputes and in order to take vengeance, the marriage was arranged.

(vi) It is the further case of the appellant that she was not allowed to go out anywhere or even to her parents' house. Even if she goes to the parents' place, she was never allowed to stay with them, but was asked to rush back from her parents' house. For ten years, the appellant had not seen the outside world at all. It is averred in the petition that some times, the respondent used to lock the doors and windows and go to work and when he comes back, he used to check whether everything was the same as he left in the morning.

(vii) The respondent was working under the petitioner's uncle Mr.Ramachandra Rao, who was a producer-cum-financier, as a Production manager and in that also, he made heavy loss. The respondent used to get hand loans from the petitioner's relatives and thereby he was indebted to a tune of Rs.14 to 15 lakhs. As the appellant was never allowed to go out of the house, the respondent only used to get groceries and vegetables. Whenever he did not have money, he used to pledge or sell the jewels of the appellant.

(viii) At the time of marriage, she was presented 70 sovereigns of gold by her parents and Rs.75,000/- was given to the respondent as cash. The respondent had sold almost all the jewels and some of the jewels had been pledged with MCC Bank, Ashok Nagar Branch.

(ix) It is further alleged in the petition that the respondent expected the appellant to open the door immediately when he returns and if there is a few minutes delay to open the door, the respondent would ask the appellant with whom she was sleeping and he would start beating and abusing her in filthy language. The conduct of the respondent psychologically affected the child and she was afraid to go to her father. In front of her relatives, the appellant was ill-treated by the respondent and he used to shout for silly reasons. After leaving the job with the appellant's uncle, he was roaming around as a vagabond, pledged all her jewels and took loan everywhere. He became restless and his conduct became intolerable. Because of the aforesaid conduct of the respondent, the appellant was put to a lot of mental agony and hardship.

(x) It is the further case of the appellant that in the month of August 1996, when the respondent came home and knocked the door and as it was a little late for the appellant to open the door, the respondent caught hold of the appellant's hair and threw her in the staircase, as they were living in the first floor. The appellant rolled down in the staircase and sustained injuries. The said incident occurred in the presence of the child. The child started crying, for which, the respondent shouted and abused the appellant in filthy language. He attempted to kill the appellant by strangulating her. As the life of the appellant and their child was unsecured at the hands of the respondent, the appellant had no other alternative except to leave the matrimonial house leaving behind all her belongings in the house itself, including the title deeds relating to the immovable properties bought and given by her father subsequent to marriage.

(xi) The conduct of the respondent caused unbearable cruelty and mental agony and the respondent created a situation whereby the appellant found it impossible to live with him. The respondent failed to create a conducive situation for the growth and upbringing of the child. After she left the matrimonial house, she called up the respondent over phone to know the intention of the respondent regarding taking her back to the matrimonial home several times. But, on those occasions, the respondent abused the appellant in filthy language and disconnected the call.

(xii) The respondent had not still mended himself. The child is with her and is studying. The respondent never came to see the child nor cared to pay any amount towards maintenance of the child or the appellant. The respondent treated the appellant cruelly even for small differences for no reason at all. However, the appellant, who is a chaste Hindu wife, tolerated all his tortures patiently for a long time. The respondent's torture had gone to an extreme extent that the appellant was

frightened to live with the respondent. Therefore, the appellant is staying in her parents' house. The respondent went to the place where the appellant's parents are residing and created ugly scenes thereby tarnishing their reputation. With no other alternative except seeking divorce, O.P.No.1213 of 1997 has been filed.

11. The respondent filed a counter statement inter alia contending as follows :

(a) The averments in paragraph 3 of the petition are substantially true and correct. The respondent had denied that he was restless and short tempered and that he shouted at the appellant and abused her, when he was questioned by the appellant for his late coming to home as stated in paragraph 4. The respondent generally denied the averments in paragraphs 5 and 6. The respondent stated that there was no respect in the appellant's parents house and hence, they moved to T.Nagar. He denied the averment that he abused the appellant mentally and psychologically. The respondent saw the appellant when she gave birth to the child in the hospital on 23.10.1991. But, he was not permitted to stay with the appellant in the hospital. He also visited the hospital quite often.

(b) The respondent denied the averment that he did not allow the appellant to go to the appellant's parents house. It is not correct to state that the appellant's parents gave 70 sovereigns of gold and a cash of Rs.75,000/- to him. He denied the pledging of the jewels with MCC Bank. However, he admitted that the appellant's parents gave only 25 sovereigns of gold.

(c) The respondent had generally stated that the averments contained in paragraphs 13 and 14 are denied. The respondent did not ill-treat the appellant and had generally denied the averments in paragraph 17. He had simply stated that the incident that took place on 26.8.1996 as mentioned in paragraph 17 has been denied. The respondent denied that he attempted to kill the appellant. He also denied the averment that the properties were bought and given to the appellant by her parents. According to the respondent, the documents left in the home are the properties situated at Madhavaram and in the village and the same were purchased by the respondent.

(d) There is a general denial of the averments in paragraph 18 and 19 of the original petition filed by the appellant. It is the case of the respondent that he had called up the appellant many times, but the appellant had refused to come nor attended the phone calls. There is a general denial of the averments contained in paragraph 19 of the petition. The respondent also stated in the counter that if the appellant is ready to adjust and live with the respondent, he is willing to take her back.

12. In the original petition in O.P.NO.115 of 1999, the respondent, after referring to the marriage and living at Madhavaram at the appellant's parents house, had stated that since the appellant insisted the respondent to change the matrimonial house, the matrimonial house was set up at No.19, Krishna Rao Street, T.Nagar, Chennai-17. According to the respondent, they led their life without any hindrance. On 26.8.1996, the appellant, without any reasonable excuse and with a view to break the matrimonial home, withdrew the society from the respondent. As soon as the appellant left the matrimonial home, all the efforts and attempts were made by mutual friends and relatives to effect a reconciliation for resumption of matrimonial relationship. But, in spite of the efforts taken for three years, there was no improvement. Whenever attempts were made by the respondent to take back the

appellant to the matrimonial home, she evaded for some reason or the other. In 1997, the respondent shifted his residence from T.Nagar to Saidapet. According to the respondent, after receipt of summons in the divorce petition filed by the appellant, he made every possible efforts for reunion. But, the appellant refused to come back to the matrimonial home. The respondent is always ready and willing to lead matrimonial life with the appellant.

13. The appellant herein filed a counter in O.P.NO.115 of 1999 reiterating the averments and allegations contained in her divorce petition and denying the averments made in the petition seeking restitution of conjugal rights.

14. Since the issues involved in both the said original petitions are one and the same, both were tried together, in which, the appellant was examined as PW1 and the marriage invitation card was marked as ExP1. But, the respondent, for the reasons best known to him, did not enter into the witness box. On a consideration of the materials available on record, the Principal Family Court, Chennai came to the conclusion that the allegations of mental cruelty alleged by the appellant have not been proved by acceptable evidence and that there was no reasonable cause for the appellant to leave the matrimonial home. The Principal Family Court, Chennai ultimately dismissed the divorce petition and ordered the petition for restitution of conjugal rights prayed for by the respondent. As aforesaid, aggrieved by the order passed by the Court below, the wife has filed the above appeals.

15. Heard both.

16. Mr.S.Parthasarathy, learned Senior Counsel appearing on behalf of Mr.P.Elango, learned counsel for the appellant made the following submissions :

(a) Mr. S.Parthasarathy, learned senior counsel submitted that CMP No.607 of 2011 has been filed to receive the documents mentioned therein as additional evidence. He submitted that the respondent herein had mortgaged the property at Tenali standing in the name of the minor daughter-Sravanthi, which was purchased by the appellant's father in her name, under a registered mortgage deed, dated 23.09.2009, and the mortgage money had been usurped and used for his personal use; the execution of the said mortgage came to the knowledge of the appellant only in October 2010; as the respondent had encumbered the minor's property, the same has caused great mental agony and anguish to the appellant; the execution of the mortgage deed by the respondent will show the conduct of the respondent which is relevant for deciding the issue of mental cruelty, therefore, the learned senior counsel submitted that the same may be received as additional evidence. He further submitted that the letters, reply and returned covers, which have come into existence in January 2011, are relevant for deciding the issue of mental cruelty, as the said documents have come into existence only during the pendency of the above appeals, there is no delay in producing the same before this Court and he further submitted that no prejudice whatsoever will be caused to the respondent if the same are received as additional evidence.

(b) The contention of the learned counsel for the respondent has already been referred to in paragraph 9 supra and therefore the same is not being repeated here.

(c) We have considered the aforesaid submissions made by the learned counsel on either side, perused the affidavit filed in support of CMP No.607 of 2011 and the documents which are sought to be produced as additional evidence.

(d) It is pertinent to point out that it is the contention of the learned counsel for the respondent that the mortgage deed has absolutely no relevant to decide the issue of mental cruelty alleged by the appellant and the circumstances under which the mortgage deed came to be executed can be considered only on the basis of the oral evidence of the parties and in the absence of oral evidence the mortgage deed cannot be received as additional evidence. It is further submitted by the learned counsel that the other documents, namely, the letters, reply returned covers, etc., are concerned, the very same contention is raised, namely, in the absence of oral evidence, the aforesaid documents cannot be received as additional evidence.

(e) In our considered view, there is force in the contention of the learned counsel for the respondent. As rightly contended by him, in the absence of oral evidence, it cannot be decided as to under what circumstances, the said mortgage deed came to be executed by the respondent and whether money received under the mortgage deed was used by the respondent or for the benefit of the appellant and the minor. Similarly, the relevance and the circumstances under which the documents came into existence cannot be considered in the absence of oral evidence of the parties. Further, we are of the considered view that the said documents cannot be considered to be relevant for deciding the issue of mental cruelty and therefore we do not find any valid reason for receiving the said documents as additional evidence. Accordingly, CMP No.607 of 2011 fails and the same is dismissed.

16. (i) It is not in dispute that the marriage between the appellant and the respondent took place on 7.5.1987 when the appellant was only 14 years old. The marriage was performed at the early age of the appellant, as the appellant's father suffered a stroke. It is admitted that in 1991, a child by name Sravanthi was born to the couple. As the appellant was abused, ill-treated and subjected to mental cruelty by the various acts of the respondent, ultimately, the appellant, unable to bear such mental cruelty, left the matrimonial home in August 1996 and no efforts whatsoever were taken by the respondent to take her back to the matrimonial home and he had not even cared to come and see their daughter. According to the learned Senior Counsel, the respondent has so far not cared to maintain either the the appellant or their daughter nor had given any monetary assistance to them.

(ii) Learned Senior Counsel further submitted that the various acts of cruelty have been elaborately set out in the petition. But, except a general denial in the counter statement filed by the respondent, there are no specific denials of the allegations. Learned Senior Counsel also submitted that in paragraph 6 of the petition, it has been specifically stated that even after the appellant and the respondent were living separately, the appellant underwent torture and harassment at the hands of the respondent and the respondent used to abuse and harass the appellant. Every day, as soon as the respondent came home from the working place, he used to shout and abuse the appellant for silly reasons and threaten the respondent that he will kill her and her family members and she used to shiver even on hearing the sound of the respondent's scooter.

(iii) Learned Senior Counsel submitted that in paragraph 3 of the counter statement, though the respondent had simply stated that he denied the averments contained in paragraphs 5 and 6 and stated the reason for their moving to a separate residence, he had not specifically denied the aforesaid allegations. Even though in paragraph 8 of the original petition filed by the appellant it has been alleged that the respondent was not affectionate even towards the child, but had shown only hatred, that he abused the child in filthy language, that his behaviour became worse after the delivery, that he used to abuse her for no reason at all, that too in front of the servant maid and that he used to beat the appellant, those allegations have not at all been specifically denied.

(iv) Learned Senior Counsel further submitted that the allegations contained in paragraph 9 have not been specifically denied. In paragraph 9, it has been specifically stated that the respondent had told the appellant that his grandfather told him that the appellant's family and the respondent's family members have some family disputes and in order to take vengeance, he married the appellant and the said allegation has not been specifically denied. Similarly, the specific averment in paragraph 10 of the petition that the respondent had not allowed the appellant leaving the house even to visit her parents and that she had not seen the outside world for ten years had not been denied specifically in the counter statement. Further, in paragraph 10 of the petition, it has been stated by the appellant that some times, the respondent used to lock the doors and windows and go to work and when he came back home, he used to check whether everything is kept as he left. Even this serious allegation was not at all denied specifically by the respondent.

(v) Similarly, learned Senior Counsel for the appellant submitted that in paragraph 12 of the petition, it has been specifically alleged that the respondent never allowed the appellant to go out of the house and he only used to get groceries and vegetables. Except denying the averments relating to the parents of the appellant giving 70 sovereigns of gold and Rs.75,000/- as cash at the time of marriage, the other allegations have not been specifically denied.

(vi) Learned Senior Counsel further submitted that in paragraph 13 of the petition, there is a very serious allegation, namely, that the respondent expected the appellant to open the door immediately when he knocked at the door and that even if it became a few minutes late, he used to ask the appellant with whom she was sleeping and was beating and abusing her in filthy language. But, in the counter, this serious allegation was not denied. In paragraph 14 of the petition, it has been stated that the child was psychologically affected by the conduct of the respondent and used to get nightmare dreams about her father and at the very sight of the respondent, the child used to shiver but this has not been specifically denied by the respondent. Similarly, the allegations in paragraphs 15 and 16 have not been specifically denied.

(vii) Learned Senior Counsel further submitted that paragraph 17 refers to the incident that took place in the month of August 1996 and the reasons for the appellant to leave the matrimonial home and about the assault of the appellant by the respondent. But, in paragraph 6 of the counter statement, he simply denied the averment in paragraph 17 that such incident took place in August 1996. The respondent had not stated as to what happened on 26.8.1996 and the reason for the appellant to leave the matrimonial house. There is no specific denial in paragraph 7 of the counter statement. There is a general denial of the allegations contained in paragraphs 18 and 19 of the

petition wherein the appellant had stated that she tried to call the respondent over phone to know the intention of the respondent regarding taking her back to the matrimonial home several times and that on those occasions, she was abused and the telephone was disconnected by the respondent. In paragraph 19 of the petition, the appellant had specifically stated that the respondent never came to see either the appellant or the child nor cared to maintain them. But, this allegation was not denied specifically. The averment in paragraph 20 of the petition that the appellant, who is a chaste Hindu wife, tolerated all his tortures has not been specifically denied. The averment that the respondent's torture had gone to such an extent that the appellant is frightened to live with the respondent has not been specifically denied in the counter statement.

(viii) Learned Senior Counsel submitted that the respondent in the counter statement has not stated his specific defence, but he only stated the reason for the appellant to leave the matrimonial home and he has not made any allegations whatsoever against the appellant.

(ix) Learned Senior Counsel submitted that if the allegations in the petition are not specifically denied in the counter statement of the respondent, it will amount to admitting the same. Learned Senior Counsel further submitted that the respondent had not cared to enter into the witness box to rebut the evidence adduced by the appellant.

17. In support of his contentions, learned Senior Counsel placed reliance on the decision of the Apex Court in the case of Seth Ramdayal Jat Vs. Laxmi Prasad {reported in 2009 (11) SCC 545} wherein in paragraph 26 of the said decision, it has been laid down as follows :

"Having regard to the fact that the averments contained in the para 3 of the plaint were not traversed, the same would be deemed to have been admitted by him in terms of Order 8 Rule 5 of the Code of Civil Procedure. In Gautam Sarup V. Leela Jetly (2008 (7) SCC 85), this Court held : (SCC p.89, para 14) '14. An admission made in a pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore.' "

18. The learned Senior Counsel for the appellant secondly relied upon the decision in the case of Smt.Asha Handa Vs. Baldev Raj Handa (reported in AIR 1985 Delhi 76) wherein in paragraph 11, it has been laid down as follows :

"The first ground for divorce is persistent cruelty on the part of the respondent. I have briefly adverted to the allegation made by the appellant in this behalf. Significantly, the respondent in his written statement did not make specific denial of each and every averment of fact contained in the petition. For Instance, the appellant had specifically contended that she was forced by the respondent to hand over her entire salary to him and only a small amount out of the same was given to her for her day to day expenses but I have looked in vain for specific denial of this allegation in the corresponding para of the written statement. He has simply dubbed this allegation as wrong and baseless. Order VIII Rule 4, Civil P.C., lays down that where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. The principle underlying this rule is that pleadings should be specific. Rule 5 of the same order further lays down

that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be deemed to be admitted. In such an event the admission itself being proved, no other proof is necessary. See *Badat and Co. Vs. East India Trading Co.* AIR 1964 SC 538, in which it was held that :

'If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. But under the proviso to R.5 the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission.' "

19. In the decision in the case of *Badat and Co., Bombay Vs. East India Trading Co.* (reported in AIR 1964 SC 538), which is a decision of Three Judges' Bench of the Apex Court, in paragraph 11, it has been laid down as follows :

"Order 7 of the Code of Civil Procedure prescribes, among others, that the plaintiff shall give in the plaint the facts constituting the cause of action and when it arose, and the facts showing that the court has jurisdiction. The object is to enable the defendant to ascertain from the plaint the necessary facts so that he may admit or deny them. Order 8 provides for the filling of a written statement, the particulars to be contained therein and the manner of doing so; Rules 3, 4 and 5 thereof are relevant to the present enquiry and they reads:

Order 8 Rule 3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

Rule 4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Rule 5. Every allegation of fact in the plaint, if not denied specifically, or by necessary implication or stated to be not admitted the pleading of the defendant, shall be taken to be admitted except as against a person under disability.

Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission. These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first para of Rule 5 is a reproduction of Order 19, Rule 13 of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in

practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do justice between those parties, for which Courts are intended, the rigor of Rule 5 has been modified by the introduction of the proviso thereto. Under that proviso the court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably replying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice. But on the original side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non-suiting the plaintiff. The discretion under the proviso must be exercised by a court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and conventions of a court wherein such pleadings are filed."

(Emphasis supplied)

20. Learned Senior Counsel submitted that when, as pointed out above, several serious allegations made in the petition have not been specifically denied by the respondent in his counter statement, it will amount to admission on the part of the respondent as has been laid down in the aforesaid decisions and this aspect has not at all been considered by the Court below, which has resulted in miscarriage of justice and rendering erroneous findings. Learned Senior Counsel submitted that the Court below not only did not consider the aforesaid aspects, but also did not properly consider the effect of non examination of the respondent as a witness in this case.

21. Learned Senior Counsel for the appellant further submitted that the Court below has failed to see that there is absolutely no rebuttal evidence adduced by the respondent and in the absence of such rebuttal evidence, the Court below ought to have held that the allegations contained in the petition have been proved. But, the Court below, by relying upon certain contradictions in the averments in the petition and the evidence of PW1, has disbelieved her evidence and wrongly came to the conclusion that the allegations of cruelty made by the appellant have not been proved.

22. Learned Senior Counsel for the appellant also submitted that the Court below failed to see that if the totality of the circumstances are considered, then the acts of the respondent as alleged in the petition and as spoken to by PW1 will amount to mental cruelty. Learned Senior Counsel further submitted that nowhere the respondent had stated that he has love and affection towards either the appellant or the child and the fact that the respondent has absolutely no love and affection towards the child itself established that he never cared to visit either the appellant or the child and the welfare, health and education of the child. He had not contributed a single pie to the maintenance of the appellant and the child. There is absolutely no evidence whatsoever that he ever visited the appellant or the child or enquired about their welfare or made any attempt to reconcile the differences between them and took her back to the matrimonial home.

23. Learned Senior Counsel further contended that admittedly, the respondent did not issue any legal notice to the appellant calling upon her to come back to the matrimonial home. According to him, in the counter statement filed in the divorce petition, it has not been stated by the respondent that efforts were taken by him either in person or through his friends or relatives to persuade the appellant to come back to the matrimonial home. But, as an after thought, in the petition for restitution of conjugal rights, which was filed in the year 1999, such averments have been made and that therefore, the same cannot be believed.

24. Learned Senior Counsel for the appellant also relied upon the decision in the case of Suman Kapur Vs. Sudhir Kapur (reported in 2009 (1) SCC 422) wherein in paragraph 34, it has been laid down as follows :

"In Sirajmohmedkhan Janmohamadkhan Vs. Hafizunnisa Yasinkhan (1981 (4) SCC 250 : 1981 SCC (Cr1) 829), this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. It was further stated that to establish legal cruelty, it is not necessary that physical violence should be used. Continuous cessation of marital intercourse or total indifference on the part of the husband towards marital obligations would lead to legal cruelty."

25. Placing reliance on the aforesaid decision, learned Senior Counsel for the appellant submitted that it is not necessary that physical violence should be used and even the total indifference on the part of the husband to perform marital obligations would lead to legal cruelty. According to the learned Senior Counsel, the appellant has clearly established by the allegations in the petition for divorce and by her evidence that the respondent/husband had been totally indifferent towards the appellant and their child and he had not performed the marital obligations and this conduct of the respondent would amount to legal cruelty. As per the said decision, the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. If so, in the modern days, it is quite common for a married woman expect her to be treated by her husband affectionately and to meet her needs and every woman would expect her husband to take her out to malls, cinemas, beach, etc. But, in this case, the respondent did not even allow the appellant to leave the house without his permission and even if she goes to her parents house, she had to return within a short time. At times, the respondent locked her inside the house while he was going out. This allegation of the appellant has not been specifically denied by the respondent in the counter. This singular act of the respondent itself would amount to legal and mental cruelty.

26. Learned Senior Counsel for the appellant further submitted that in the divorce petition in paragraph 13, though the appellant specifically alleged that even if it became a few minutes late to open the door, the respondent used to ask with whom she was sleeping and used to beat and abuse her in filthy language and the respondent had not chosen to deny the said allegation in his counter and as such, the said allegations and averments are deemed to have been admitted by the respondent, especially when the respondent had not entered into the witness box and denied the allegations.

27. Learned Senior Counsel further submitted that it has not been suggested to PW1 in the cross examination that the said averments are false. He further submitted that though PW1 has spoken to about the various acts of the respondent, which amounted to cruelty, PW1 has not been cross examined on many of those aspects, which will amount to accepting the evidence of PW1 by the respondent. The necessity of cross examination and the effect of cross examination have been laid down by a Division Bench of this Court in the case of M.Vaithilingam Pillai (died) and another Vs. Minor Maruganandham {reported in Vol.2 (1994) DMC 226}. In the above decision in paragraph 11, a Division Bench of the Calcutta High Court has been referred to, wherein it has been laid down as follows :

"(10). The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believes that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that was going to be made when the turn of the party on whose behalf the cross examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks to question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice first by springing surprises upon the party then he has finished the evidence of his witnesses and when he has further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated."

In paragraph 12, it has been further laid down as follows :

"The learned counsel for the respondent drew our attention to another decision reported in Cuni Lal Vs. Hartford Fire Insurance (AIR 1958 in Browne Punjab 440 at page 444). Where also the earlier quoted English decision in Browne Vs. Dunn was quoted and it was held :

'It is well established rule of evidence that a party should put to each of his opponent witnesses so much of his case as concerns that particular witness. If no such questions are put, the Court presume that the witness account has been accepted. If it is intended to suggest that a witness was not speaking the truth upon a particular point, his attention must first be directed to the fact by cross examination so that he may have an opportunity of giving an explanation.' "

In the very same decision, in paragraph 14, the Division Bench observed as follows :

"Having not disputed the evidence of P.Ws.1 and 2 before the Court below, it is not open to the appellant to contend before this Court that the plaintiff has not established the adoption by examining the other witnesses who were present at the time of the ceremony and also examining the poojari who has performed the homam and in view of the non examination, it cannot be said that the adoption has been established. On a careful reading of the evidence of P.Ws.1 and 3, and Ex.A4,

we have no hesitation in holding that the plaintiff has established the adoption by means of a registered deed as well as by means of oral evidence regarding the ceremonies."

28. Learned Senior Counsel for the appellant also placed reliance on the decision of a Division Bench of Delhi High Court in the case of Ashok Kumar Bhatnagar Vs. Smt.Shabnam Bhagnagar {reported in AIR 1989 Delhi 121 (1)}, wherein in paragraph 80, it has been laid down as follows :

"It is now well settled that matrimonial court has not to just superficially to look at as to which of the party was ostensibly living about. The entire conspectus of the family life has to be kept in view, and if one side by his words and conduct compels the other side to leave the matrimonial home or stay away therefrom, the former would be guilty of desertion though it is latter who is seemingly separated from the other."

29. According to the learned Senior counsel, the aforesaid conduct of the respondent itself is sufficient to hold that the respondent had caused mental cruelty to the appellant. In the very same decision in 2009 (1) SCC 422 (cited supra), in paragraph 43, the Apex Court referred to the decision reported in the case of Samar Ghosh Vs. Jaya Ghosh (reported in 2007 (4) SCC 511), wherein the Apex Court has enumerated some instances of human behaviour, which may be relevant in dealing with the cases of mental cruelty. In that decision, it has been further held that a sustained course of abusive and humiliating treatment calculated to torture, discommodore or render miserable life of the spouse; sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse; and sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health will amount to mental cruelty. Learned Senior Counsel for the appellant submitted that all the aforesaid tests have been fully satisfied in this case.

30. According to the Senior Counsel for the appellant, the Family Court has erred in rejecting the divorce petition and ordering the petition for restitution of conjugal rights. In the decision reported in 2009 (1) SCC 422 (cited supra), it has been further laid down as follows :

"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."

31. Placing reliance on the aforesaid passage, learned Senior Counsel for the appellant submitted that from 1996 to till date, the appellant and the respondent are living separately and from that, it may be fairly concluded that the matrimonial bond is beyond repair and the refusal to sever the matrimonial tie will amount to showing scant regard for the feelings and emotions of the parties and in such like circumstances, it may lead to mental cruelty. Learned Senior Counsel submitted that taking into consideration of the aforesaid decision and the factual matrix of the case, it is a fit case where divorce should have been granted.

32. Countering the aforesaid submissions, learned counsel for the respondent made the following submissions :

The burden of proving the allegations levelled against the respondent by the appellant lies only on the appellant and the appellant had not discharged such burden. Except PW1, none else has been examined to corroborate the interested testimony of PW1. Though, according to the appellant, she was abused and ill-treated in the presence of the servant maid and relatives, neither the servant maid nor the relatives have been examined. According to the learned counsel, PW1's evidence shows that upto 1990, there was no cruelty. Learned counsel submitted that in paragraph 17 of the divorce petition, it is alleged that the appellant was beaten. Further, other allegations were also made. But, PW1 has not spoken about the same in her oral evidence. Similarly, the allegations in paragraph 19 of the divorce petition have not been spoken to in the oral evidence.

33. According to the learned counsel for the respondent, the non examination of the husband is not fatal and it is for the appellant to prove her case. It is not correct to state that the allegations in the divorce petition have not been specifically denied. Learned counsel submitted that even in a case where the defendant/respondent is set ex parte, still, it is the duty of the Court to find out as to whether the plaintiff/petitioner has substantiated her case by acceptable materials. When that being the legal position, the Court below has, even in the absence of the oral evidence of the respondent, analysed the pleadings and the oral evidence of PW1 and rightly has come to the conclusion that the appellant had not proved the case of cruelty against the respondent. The Court below has rightly come to the conclusion that there was absolutely no reasonable cause for the appellant to leave the matrimonial home, dismissed the divorce petition and allowed the petition for restitution of conjugal rights. According to the learned counsel for the respondent, there is no reason whatsoever for interfering with the order passed by the Court below.

34. Learned counsel for the respondent basing reliance on the decision of the Apex Court reported in 2003 AIR SCW 2590 (Ramesh Chand Ardawatiya v. Anil Panjwani) submitted that even if the suit proceeds for hearing ex parte, the Court is not absolved of its duty of deciding the case in accordance with law; rather an additional obligation is cast on the Court to act with caution and be watchful to see that in the absence of any opponent, the plaintiff does not succeed in achieving what he is not entitled to or which he does not deserve, and that in no case he succeeds in over-reaching the Court. He further submitted that though the respondent has not entered into the witness box to rebut the evidence of the appellant, the Court below has rightly gone into the available materials on record in accordance with the aforesaid principles laid down by the Apex Court and has correctly found that the petitioner has not proved her allegations of cruelty.

35. Learned counsel for the respondent basing reliance on the decision of the Apex Court reported in (1975) 2 Supreme Court Cases 326 (DASTANE v. DASTANE) submitted that the petitioner must prove that the respondent has treated her with cruelty within the meaning of Section 10(1)(b) of the Hindu Marriage Act, 1955 and when the petitioner has not discharged her burden of proving the allegations, the Court below is right in dismissing her petition. Basing reliance on the decision of the Punjab and Haryana High Court, in the decision reported in II (1984) DMC 467 (Santro Devi v. Phool Singh) the learned counsel for the respondent submitted that in the absence of corroborative

evidence, the petitioner's evidence alone is not sufficient to prove her allegations of cruelty. Basing reliance on the decision of the Punjab and Haryana High Court reported in I (1988) DMC 385 (Sandeep alias Badri Nath v. Mangla), the learned counsel for the respondent submitted that there must be cogent evidence on record to prove that the allegations of cruelty and the totality of the circumstances must also be kept in view. According to the learned counsel, in these cases, there is no cogent evidence on record to prove the allegations of cruelty. In the decision reported in I (1991) DMC 296 (Tamizh Selvi v. Arumugam) it is laid down that before divorce is sought for on the ground of cruelty, the factors to be taken into account have been stated. It is stated that status of the parties, customs and traditions and public opinion prevalent in the locality should be taken into consideration. It is further stated that the concept of cruelty is not static; onus is on the person who alleges cruelty and that false allegation of un-chastity to a women is cruelty.

36. We have heard the learned counsel on either side, perused the materials available on record and the orders of the Court below.

37. It is the contention of the learned senior counsel for the appellant that though serious allegations have been made in the Original Petition, in the counter statement filed by the respondent, except a general denial, there are no specific denials of the allegations. In paragraph 6 of the petition, it is specifically stated that even after the appellant and the respondent were living separately, the appellant underwent torture and harassment at the hands of the respondent and even for silly reasons, the respondent used to abuse and harass the appellant and everyday as soon as the respondent comes home from working place, he used to shout and abuse the appellant for silly reasons and threaten the petitioner that he will kill her and her family members. Except a general denial in paragraph 3 of the counter affidavit, the aforesaid allegations have not been specifically denied. Similarly in paragraph 8 of the original petition, it has been stated that the respondent was not affectionate even towards the child, but has shown only hatred and that he abused the child in filthy language and he used to abuse the appellant for no reason at all that too in front of the servant maid, but the same have not been specifically denied in the counter statement. In paragraph 9 of the Original Petition, it has been specifically stated that the respondent had told the appellant that his grandfather told him that the appellant's family and the respondent's family members had some family disputes and in order to take vengeance he married the appellant, but the said allegation has not been specifically denied in the counter statement. The specific allegation in paragraph 10 of the Original Petition that the respondent had not allowed the appellant to go out anywhere or even to her parents' house and that she has not seen the outside world for the last ten years have not been specifically denied in the counter statement. In the very same paragraph, it has been further stated that sometimes, the respondent used to lock the doors and windows and then go to work and when he used to come back home, he used to check that whether everything was same as he left, but the same has not been specifically denied by the respondent in his counter statement. In paragraph 12 of the petition also, it is stated that the respondent never allowed the appellant to go out of the house and he only used to get groceries and vegetables, but the said allegation has also not been denied in the counter statement filed by the respondent.

38. In paragraph 13 of the Original Petition, the appellant has alleged that the whenever the respondent enters home he used to call her and ask where she was in the house and the respondent

always wanted the appellant to stay near the door and even if she was few minutes late to open the door, the respondent would ask the appellant with whom she was sleeping and used to beat and abuse her in filthy language, but this serious allegations have also not been specifically denied in the counter statement. Similarly, the averments contained in paragraphs 15 and 16 of the petition have also not been specifically denied. In paragraph 17 of the Original Petition, the incident that took place in the month of August 1996 and the reason for the appellant to leave the matrimonial home have been stated, except generally denying the said allegation, the respondent has not specifically denied the same and he had not stated as to what happened on 26.08.1996 and the reason for the appellant to leave the matrimonial house. Similarly there is only general denial of paragraphs 18 and 19 of the Original Petition by the respondent. In the counter statement, the respondent has not stated his specific defence. When the respondent had not specifically denied the allegations made in the Original Petition in his counter statement, it will amount to admitting the same, in the light of the decisions reported in 2009 (11) SCC 545 (referred to supra), AIR 1985 Delhi 76 (referred to supra) and AIR 1964 SC 538 (referred to supra).

39. In the decision reported in 2009 (11) SCC 545 (referred to supra) the Apex Court has laid down that when the averments contained in the plaint were not traversed, the same would be deemed to have been admitted by the defendant, in terms of Order 8 Rule 5 of the CPC. It has been further laid down that an admission made in a pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore. Order 8 Rule 4 of the CPC lays down that where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. The principle underlying the rule is that the pleading should be specific. When there is no specific denial, the allegations in the petition shall be deemed to be admitted. In such an event, the admission itself being proof, no other proof is necessary.

40. In the decision reported in AIR 1964 SC 538 (referred to supra) it has been laid down that if the denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. In the very same decision, the Apex Court has considered the proviso to Order 8 Rule 5 CPC, which provides that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission. The Apex Court held that in construing such pleadings, the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non-suiting the plaintiff.

41. As rightly contended by the learned senior counsel for the petitioner when several serious allegations have been made in the petition and the same have not been specifically denied by the respondent in his counter statement, it will amount to admission on the part of the respondent, but this aspect has not at all been considered by the Court below, which has resulted in miscarriage of justice and rendering erroneous findings. The Court below, though has not invoked the proviso to Order 8 Rule 5 CPC, has failed to see that the non-denial of the allegations contained in the petition specifically in the counter statement by the respondent, will amount to admission and that admission itself being proof, no other proof is necessary. This aspect has not at all been considered

by the Court below. Similarly the Court below has not at all considered the effect of non-examination of the respondent as a witness in the case. In the light of the fact that the respondent has not specifically denied in his counter statement the various allegations contained in the petition, which will amount to admission and such admission itself being proof and no other proof is necessary, the Court below ought to have held that in such circumstances, the non-examination of the respondent himself as a witness will further strengthen the case of the appellant / wife, but the Court below has lightly brushed aside the effect of non-examination of the respondent as a witness in these cases.

42. Though the learned counsel for the respondent submitted that all the allegations have been specifically denied, a reading of the allegations contained in the petition and the averments in the counter statement filed by the respondent shows that various allegations in the petition, as pointed out by the learned senior counsel for the appellant have not been specifically denied by the respondent in his counter statement.

43. It has to be further pointed out that a reading of the cross-examination of P.W.1 shows that no specific suggestions have been put to her denying the various allegations made by her in her petition and spoken to by her in her evidence. In paragraph 13 of the petition, it has been alleged by the appellant that the respondent expected the appellant to open the door immediately when he knocked the door and even if it become few minutes late to open the door, he used to ask her with whom she was sleeping and used to beat and abuse her in filthy language, but in the counter statement, this serious allegation has not at all been denied specifically. The aforesaid allegation, in effect, amounts to suspecting the chastity of the wife by her husband. In the cross-examination of P.W.1 also, there is no suggestion that the respondent did not ask the appellant as alleged by her in paragraph 13, which will amount to admission on the part of the respondent. This aspect has not at all been considered by the Court below.

44. In paragraph 9 of the petition it has been specifically stated that the respondent had told the appellant that his grandfather told him that the appellant's family and the respondent's family members have some family disputes and in order to take vengeance he married the appellant, but the said allegation has not been specifically denied in the counter statement. In her cross-examination also, no suggestion has been put to her denying the same, but overlooking this aspect, the Court below has observed that there is no proof for the same. In paragraph 10 it has been stated by the appellant that sometimes, the respondent used to lock the doors and windows and then go to work leaving the wife inside and when he come back to house, he used to see that whether everything is kept as he left, but this serious allegation has not at all been denied specifically in the counter statement. This has also not been considered by the Court below and no suggestion also has been put to P.W.1 in her cross-examination denying this. This conduct of the respondent shows his suspicious nature. Even with respect to the assault of the appellant by the respondent on 26.08.1996, which is elaborately stated in paragraph 17 of the petition, in paragraph 6 of the counter statement the respondent has simply denied the averments in paragraph 17, but the respondent has not specifically referred to the incident that took place on 26.08.1996 and has not stated that as to what had really happened on 26.08.1996 which forced the appellant to leave the matrimonial home and it is pertinent to point out that no specific suggestion has also been put to P.W.1 in her

cross-examination denying the said incident. When the aforesaid allegations, as pointed out above, have not been specifically denied in the counter statement that will amount to admission on the part of the respondent and in that event, no further proof is necessary, the Court below, by simply pointing out certain immaterial contradictions in the evidence of P.W.1 and the pleadings, has disbelieved her entire case. The very approach of the Court below is erroneous.

45. It is pertinent to point out that there is absolutely no evidence on record and it has also not been pleaded in the counter statement by the respondent that the respondent had been caring and affectionate towards the appellant and the child and he had performed the marital obligations and whereas he had been totally indifferent towards them and this conduct of the respondent would amount to legal cruelty.

46. In the decision reported in 2009 (1) SCC 422 (referred to supra) the Apex Court has laid down that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living and it has been further laid down that the indifference on the part of the respondent towards marital obligations would lead to legal cruelty. In the modern days, it is quite common for a married women to expect her to be treated by her husband affectionately and to meet her needs. Every women would expect her husband to take her out to malls, cinemas, beach, restaurants, etc., In this case, it is not even the case of the respondent that he was discharging his aforesaid marital obligations, but the respondent did not even allow the appellant to leave the house without his permission and even if she goes to her parents' house she has to return within a short time and the respondent, as alleged by the petitioner, has locked her inside the house, while he was going out. These aspects have also not been considered by the Court below.

47. The appellant had stated that it is the case of the appellant that she was never allowed to go out of the house and she did not know the outside world for nearly ten years, but the Court below has disbelieved the same by pointing out that if these allegations are true then how the appellant could have studied BBA degree. It is in evidence that the appellant was doing BBA degree in the Open University and not by attending in any regular college or in any Institution and for that she need not to go out regularly.

48. It is well established rule of evidence that a party should put to each of his opponent witnesses so much of his case as concerns that particular witness and if no such questions are put, the Court presume that the witness account has been accepted. If it is intended to suggest that a witness was not speaking the truth upon a particular point, his attention must first be directed to the fact by cross examination so that he may have an opportunity of giving an explanation. But, as pointed out above, on several aspects P.W.1 has not only not been cross-examined, but the respondent has not put to P.W.1 his case. When no such questions are put, the Court below ought to have presumed that what P.W.1 has spoken to is to be accepted. Having not disputed the evidence of P.W.1 before the Court below, it is not open to the respondent to contend before this Court that the appellant has not established the allegations of cruelty by examining the other witnesses in whose presence the acts of cruelty were committed. Therefore, the adverse comment made by the Court below on the non-examination of P.W.1's father, the servant maid and her relatives is unwarranted and erroneous.

49. It is now well settled that the matrimonial court has not to just superficially to look out as to which of the party was ostensibly living about. The entire conspectus of the family life has to be kept in view, and if one side by his words and conduct compels the other side to leave the matrimonial home or stay away therefrom, the former would be guilty of desertion though it is latter who is seemingly separated from the other.

50. In the decision reported in 2007 (4) SCC 511 (referred to supra), it has been laid down that a sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse; sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse; and sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health will amount to mental cruelty.

51. We are of the considered view that in the light of the aforesaid facts, which have been discussed by us, all the aforesaid tests have been fully satisfied in this case.

52. Further, in the decision reported in 2009 (1) SCC 422 (referred to supra) it is laid down as follows:-

"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."

In this case, from 1996 to till date, the appellant and the respondent are living separately and it appears no meaningful effort have been taken by the respondent to take the appellant back to the matrimonial home and from that it may fairly be concluded that the matrimonial bond is beyond repair and the refusal 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 appellant and in such circumstances, it will definitely lead to mental cruelty and therefore on this ground also the appellant is entitled to get divorce.

53. As far as the contention of the learned counsel for the respondent, basing reliance on the decision reported in (1975) 2 Supreme Court Cases 326 (referred to supra), that the burden is on the wife to prove the allegations is concerned, it is to be pointed out that the appellant had discharged the burden of proving the allegations. 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 and therefore it is not necessary that the allegations made by the appellant should be proved beyond reasonable doubt. If the aforesaid test is applied to the facts of this case, the appellant has established and proved her case by preponderance of probabilities. As far as the contention of the learned counsel for the respondent that there is no other corroborative evidence is concerned, it has to be pointed out that it has been already discussed and held in the preceding paragraphs that in the light of the fact that the allegations in the petition have not been specifically denied by the respondent in the counter

statement that would amount to admission on the part of the respondent and in such circumstances, no other proof is necessary and therefore there is no need for any other corroboration and therefore the said contention is liable to be rejected and accordingly rejected.

54. It is pertinent to point out that in the decision reported in I (1988) DMC 385 (referred to supra), which was relied upon by the learned counsel for the respondent, it is laid down that there must be cogent evidence on record to prove that the allegations of cruelty and the totality of the circumstances must also be kept in view. As discussed by us above, in this case, there is cogent evidence on record to prove the allegations of cruelty, but the Court below has failed to keep in view the totality of the circumstances while considering the mental cruelty alleged.

55. The contention of the learned counsel for the respondent that the non examination of the husband / respondent herein is not fatal cannot be countenanced. When serious allegations have been made in the petition and when the same have not been specifically denied by the respondent / husband and P.W.1 has deposed about the acts of cruelty, the burden is cast on the respondent to enter the witness box and deny the same and put forth his defence. It is true that even if the respondent is set exparte still it is the duty of the Court to find out as to whether the plaintiff / petitioner / appellant has substantiated her case by accepted materials. As pointed out above, the appellant herein, as the petitioner in the Original Petition, has substantiated her case by acceptable materials.

56. When this Court has found that the acts on the part of the husband / respondent herein, as alleged by the appellant, have been proved and the same will amount to mental cruelty and only because of the said acts of cruelty, the wife / the appellant herein had to leave the matrimonial home and the husband is guilty of committing such acts of mental cruelty and the appellant / wife had sufficient cause for leaving the matrimonial home, the Court below is not right in granting the decree for Restitution of Conjugal Rights. The husband, being the wrong doer, in this case, cannot take advantage of his own wrong and claim the relief of Restitution of Conjugal Rights. Therefore, the Court below has erred in dismissing the Divorce Petition filed by the wife and in ordering Restitution of Conjugal Rights in favour of the respondent.

57. We are of the considered view that if the totality of the circumstances, in this case, are kept in view there is no doubt in our mind that when the acts of cruelty alleged against the respondent have been proved, the same will amount to causing mental cruelty to the appellant.

58. For the aforesaid reasons, CMP No.607 of 2011 dismissed and orders dated 02.09.2003 made in O.P.No.115 of 1999; and in O.P.No.1213 of 1997 on the file of the Principal Family Court, Chennai, are hereby set-aside and the above Civil Miscellaneous Appeals are allowed. However, there will be no order as to costs. Consequently, all the connected MPs are closed.

RS / srk To Principal Family Court, Chennai