

Tripura High Court

Sri Bijit Kumar Banik vs Smti. Kaberi Banik (Debbarma) on 1 April, 2021

HIGH COURT OF TRIPURA  
AGARTALA

Mat. Appl. No. 12 of 2015

BEFORE

HON'BLE MR. JUSTICE S.TALAPATRA  
HON'BLE MR. JUSTICE S.G.CHATTOPADHYAY

Sri Bijit Kumar Banik, S/O Late Brajalal Banik, Resident of  
Palace Compound, P.S- East Agartala, District- West Tripura  
-----Appellant(s)

Versus

Smti. Kaberi Banik (Debbarma), W/O Sri Bijit Kumar Banik,  
D/O Late Rohini Debbarma, Now residing at Harish Thakur  
Lane near Bijoy Kumar Girls H.S. (2) School, B.K. Road,  
Krishnanagar, P.S. West Agartala, District- West Tripura

-----Respondent(s)

For Appellant(s) : Mr. S.Deb, Sr.Adv.  
Mr. Ranjit Dasgupta, Adv.

For Respondent(s) : Ms. P. Dhar, Adv.  
Mr. Jhon Debbarma, Adv.  
Mr. H. Debbarma, Adv.

Date of hearing : 12.02.2021

Date of pronouncement : 01.04.2021

Whether fit for reporting  
Yes No

#### JUDGMENT

[Per S.G.Chattopadhyay, J] [1] The present appeal is filed by the appellant husband being aggrieved by and dissatisfied with the judgment dated 09.09.2015 delivered by the Family Court, Agartala in Mat.App.12/2015 Case No. T.S. (Divorce) 104 of 2009 rejecting his petition for divorce.

[2] The factual background is as follows:

Appellant Bijit Kr.Banik and respondent Kaberi Banik (Debbarma) entered into matrimonial alliance as per hindu rites and rituals at Agartala on 22.07.1994. After marriage, respondent wife came to her matrimonial home. But her conduct to the appellant and his family members was very indignant and rude. She did not like to share a common mess with them. To avoid trouble, the appellant rented a house near her parental home and the spouses started living together in the rented house. She became more abusive in the rented house and spoiled the domestic peace.

Appellant tried to bring about changes in her by persuasion. But his efforts did not work. She once physically assaulted her appellant husband by fist and blows. However, the wife conceived in the rented house and a son was born to them. After the death of his father, the appellant returned to his ancestral house at palace compound, Agartala along with his wife and son where the second son was born to them on 15.10.2003. When she was living with her appellant husband after the death of her father in law, she raised quarrel Mat.App.12/2015 with her husband and lodged a complaint at the East Agartala woman police station on 08.02.2004 against her appellant husband on various allegations of cruelty. As a result of her complaint, police arrested her appellant husband. Thereafter, on 18.03.2004, she appeared at the police station and informed the officer-in-charge of East Agartala Woman Police Station that pursuant to an altercation with her husband on 07.02.2004, she returned to her parents and lodged a case against her husband at the spur of moment for which her husband suffered detention in police custody. She withdrew her case and resumed conjugal life with the appellant. On 30.10.2005, elder brother of the respondent visited the house of the appellant. His wife then left her matrimonial home with her elder brother along with her children. The appellant met her several times at her matrimonial home to bring her back. But she did not return. The appellant husband then filed a petition at East Agartala police station on 16.12.2005 seeking police help to rescue his wife and children from her parental home. 3 years thereafter, the appellant sent a letter to his wife by post registered with AD on 01.12.2008 seeking her consent for filing a petition for divorce on mutual consent. Having received no response from his wife, he filed Mat.App.12/2015 petition in the Family Court at Agartala under Section 13 of the Hindu Marriage Act seeking divorce.

[3] The respondent wife filed written objection denying the allegations of her husband. She admitted that her elder son was born in the rented house. She also stated that after the death of her father in law she returned to her in-law's house where the second son was born to them. According to the respondent, she never wanted separation from the family members of her husband. According to her, when her in-laws' house at Palace Compound was demolished for reconstruction, she shifted to a rented house along with all members of the family of her husband. It was stated by the respondent that she never misbehaved with her husband. Rather, she was always willing to live a happy conjugal life with her husband along with their children. The respondent, therefore, urged the court for dismissal of the divorce petition filed by her husband. [4] On the basis of the pleadings of the parties the following issue was framed by the Family Court:

"Whether the petitioner was subjected to cruelty by his wife and whether he was entitled to get the decree of divorce from his wife."

Mat.App.12/2015 [5] After the issue was framed, the parties were called to adduce their evidence. The plaintiff adduced the oral evidence of himself and his neighbour Kaushik Dey. His defendant wife on the other hand examined 03 witnesses including herself. She was examined as DW-1, her relative Smt. Maya Debbarma was examined as DW-2 and her sister Rakhi Debbarma was examined as DW-3.

[6] On appreciation of evidence, the Family Court by judgment and order dated 18.02.2013 in T.S (Divorce) 104 of 2009 declined to grant divorce in favour of the appellant husband and dismissed

the suit observing as follows:

"20) Considering the submission I find that this court is to consider the prayer for divorce as per Hindu marriage Act, 1955 on the ground as provided in Sec.13 of the Act and there is no such ground for granting divorce on the fact that the marriage between the parties irretrievably broken down and as such I find no merit in the submission made by the Ld. Counsel of the petitioner in this regard.

21) Besides considering the rest submission of the Ld. Counsel of the petitioner that there is no denial of the statement made on affidavit by the petitioner and her witnesses during their cross-examination, I find that this court directed both the parties to produce their witnesses before the court for cross-

examination during the trial in view of Sec.16 of the Family Courts Act, 1984 and in no circumstances, the examination-in-chief of Mat.App.12/2015 the petitioner and her witnesses submitted in this court was accepted by this court subject to cross-examination and as such I find no scope to consider such statements in evidence.

22) In the result I find that the petitioner is not entitled to any decree of divorce as prayed for against the respondent and accordingly all this issues No. 'I', 'II' and 'III' are decided in the negative and against the petitioner."

[7] Aggrieved by and dissatisfied with the said judgment of the Family Court, the appellant husband challenged the judgment in this court in Matt.App.10 of 2013. It was observed by this court in the said appeal that no effective opportunity was granted to the other side for cross-examination of the PWs during trial of the case. Therefore, vide order dated 18.02.2015 in Matt. App. 10 of 2013, this court remanded back the case to the Family Court for fresh consideration in terms of the directions issued by this court. Relevant extract of the judgment of this court is as under:

"7. On scrutiny of the records as well as on appreciating the submissions made by the learned counsel for the parties, this Court finds that no effective opportunity was granted for cross-examination of PW 1 and PW 3. It further appears from their cross-

examination that the Court has only noted after completion of the examination-in-chief that, "It is not a fact that I deposed false". It appears that the cross-examination was not carried out for exposing the truth, rather Mat.App.12/2015 having written that "It is not a fact that I deposed false" the examination of the witnesses was declared closed.

8. We are shocked to observe the way the family court has recorded the cross-

examination. At this juncture Ms Dhar, learned counsel has submitted that the defendant has been seriously prejudiced for denial of the opportunity to cross-examine. Therefore, it is apparent that without such opportunities granted to the defendant the impugned judgment and decree has been passed. There are several judgments, as stated, where this High Court has rendered in unequivocal

terms that the right to cross examine is a fundamental facet of the fair trial and component of natural justice. We are constrained to observe further that the way the cross-examination has been done and recorded by the court of the Judge, Family Court is wholly unacceptable in terms of the doctrine of natural justice. Apart that, the way the documentary evidence has been introduced in the records has not been introduced following the proper procedure as the respondent, defendant in the suit, did not have any opportunity of raising any objection against admissibility or relevance of the documentary evidence. These are material irregularities in the proceeding those have incapacitated the court to arrive at the correct finding on the fact. It is trite that fair procedure is a fundamental facet of the rule of law. Even though the Judge, Family court has the statutory right to devise its own procedure but he cannot devise such procedure, which is not in consonance with the principles of natural justice.

9. Hence, this Court has no hesitation to hold that the impugned judgment is liable to be set aside and accordingly the judgment and decree dated 18.02.2013 are set aside for the limited purpose of remanding the matter Mat.App.12/2015 back for re-commencing the inquiry after affording opportunity of cross-examination to the respondent, defendant in the suit, and in the suit, to raise any objection in regard to the admissibility or relevance of documentary evidence. Hence, this matter is remitted for fresh consideration in the manner as directed above.

10. In the result, this appeal stands partly allowed, to the extent as indicated above. Draw the decree accordingly. Send down the LCRs forthwith with a copy of this order.

11. Before parting with the records, the Judge, Family Court, Agartala, West Tripura is directed to complete the entire proceedings within six months from the date of receipt of the case records along with a copy of this order. "

[8] Pursuant to the direction of this court in the aforementioned appeal, the Family Court framed the following issues:

"i) Whether the husband petitioner was subjected to cruelty by the wife respondent and if so, to what extent.

ii) Has the petitioner been deserted by the respondent.

iii) Is the petitioner entitled to decree as prayed for."

[9] Each of the parties was given opportunity to cross examine the witnesses of the other side. Accordingly, PW-1 that Mat.App.12/2015 is the appellant husband and his neighbour Kaushik Dey [PW-2] were cross examined at length on behalf of the defendant. Similarly, DW-1 i.e. the defendant wife, her relative Smt. Maya Debbarma, DW-2 and her sister Smt. Rakhi Debbarma, DW-3 were also cross examined at length on behalf of the appellant husband.

[10] On appreciation of evidence, the Family Court vide fresh judgment dated 09.09.2015 in T.S (Div.)104 of 2009 further rejected the petition of the appellant husband for divorce which has been

challenged by the appellant husband in the present appeal.

[11] Heard Mr. Sankar Deb, learned Sr. Advocate assisted by Mr. Ranjit Das Gupta learned Advocate for the petitioner.

Heard Ms. P. Dhar, learned Advocate for the respondent.

[12] Appearing for the petitioner, Mr. Deb, learned Sr. Counsel has argued that despite adequate proof of cruelty and desertion against the respondent wife, the Family Court delivered an erroneous judgment rejecting his petition for divorce. It is contended by learned counsel that right from the Mat.App.12/2015 beginning of marriage, respondent wife was cruel and indignant to her husband and his family members. She even prosecuted them under Section 498A IPC on various allegations and her appellant husband was put to jail on the basis of her allegations and the said conduct of her tantamount to serious cruelty against her husband. Further submission of learned counsel of the petitioner is that on 30.10.2005, respondent wife had permanently abandoned her husband along with the two children. Thereafter, she never allowed her husband even to meet his children. According to learned counsel, the appellant husband had taken all efforts to bring back his wife and children. He also approached the police station by filing a written ejahar on 16.12.2015 seeking police assistance to bring back his wife and children which did not work. Ultimately, he approached the Family Court seeking divorce. According to Mr. Deb, learned Sr. Advocate, the said facts have been proved by the appellant husband before the trial court which demonstrates that the wife is guilty of desertion and cruelty. It is submitted by learned counsel that without taking these facts into consideration, the Family Court by the impugned judgment dismissed the suit of the husband. Finally, it is submitted by Mr. Deb, learned counsel of the petitioner that the parties have Mat.App.12/2015 been living apart since 2005. During this period they never met each other which indicates that their marriage has broken down irretrievably. Learned counsel, therefore, urges the court to put their relationship to end by granting divorce. Learned counsel has relied on the following decisions of the Apex Court in support of his contention:

i) DR.N.G.DASTANE Versus MRS. S.DASTANE reported in (1975) 2 SCC 326, ii) V.BHAGAT Versus D.BHAGAT (MRS) reported in (1994) 1 SCC 337,

iii) SAVITRI PANDEY Versus PREM CHANDRA PANDEY reported in (2002) 2 SCC 73, iv) NAVEEN KOHLI Versus NEELU KOHLI reported in (2006) 4 SCC 558, v) SAMAR GHOSH Versus. JAYA GHOSH reported in (2007) 4 SCC 511, vi) GURBUX SINGH Versus HARMINDER KAUR reported in (2010) 14 SCC 301 vii) U.SREE Versus U.SRINIVAS reported in (2013) 2 SCC 114 [13] Ms. P.Dhar, learned Advocate appearing for the respondent wife on the other hand argued that the respondent wife by adducing consistent and coherent evidence proved that she was treated with cruelty by her appellant husband. According to Ms. Dhar, learned Advocate, the husband compelled his respondent wife to leave her matrimonial home who is now trying to take the advantage of his own wrong. It is submitted by Ms. Dhar, learned Advocate that even though her complaint was genuine, day after filing the complaint against her husband at the police station, the wife had withdrawn her complaint at the instance of her husband and in laws to save their relationship. If she really intended to terminate the Mat.App.12/2015 relationship, she would not have withdrawn the

complaint against her husband. It is submitted by learned counsel that the respondent wife has 02 children and she is still willing to live with her husband.

[14] Relying on the decision of the Apex Court in the case of Savitri Pandey (supra) learned counsel submits that neither cruelty nor desertion has been proved against the respondent wife. Moreover, the theory of irretrievable break down of marriage does not apply to this case because given facts and circumstances of the case do not establish that their marriage has become dead. Learned counsel, therefore, urges the court for dismissal of the appeal.

[15] We may recall that the appellant, in support of his case has examined himself as PW-1 and his neighbour Koushik Dey as PW-2. Bijit Kumar Banik, the appellant PW-1 stated at the trial that inspite of having his ancestral house at palace compound, he had to stay in a rented house for about 8 years from 1994 to 2002 at the insistence of his wife where their first son was born. After the birth of their son they returned to the ancestral house of the appellant and stayed there for about 1 year where their second son was born. Again his wife demanded for moving to a rented house. The appellant could not accede to Mat.App.12/2015 her proposal because he did not want to leave his old mother alone in the ancestral house. Finally, in the month of October, 2005, his wife left his company bag and baggage along with their sons. He sought police help to bring her back but his efforts did not work. Since then, his wife is living along with the sons away from him. According to the appellant, as an agent of 'Rose Valley' his wife earns 10,000/- per month. [16] The appellant PW-1 was cross-examined at length on behalf of his respondent wife. In his cross examination he stated that after separation, he did not write any letter to his wife to get her back home. Several suggestions were put to him on behalf of his wife during the cross examination. It was suggested to him that his wife was treated with cruelty at her matrimonial home. The appellant denied the suggestion. Among the other suggestions, it was also suggested to him that he made false statement before the court that his wife deserted him. It was also denied by the PW.

[17] As stated above, the appellant also examined his neighbour Koushik Dey as PW-2 who stated that the appellant and his wife lived a peaceful conjugal life in the rented house for many years. Thereafter, the appellant came back to his Mat.App.12/2015 ancestral house along with his wife and son. Then the wife of the appellant left her matrimonial home at a night at about 12 O'clock. The PW was not aware about the actual reason of their matrimonial dispute. In his cross examination he denied that he gave false statement before the court.

[18] The respondent on the other hand examined herself as DW-1. She stated that after marriage, she stayed with her husband in a rented house for about 8 years. After the death of her father in law, she was taken by her appellant husband to his ancestral house at palace compound where their second son was born. The respondent wife stated that problems started after the birth of their second son. Her husband started quarrelling with her on trivial issues. Every time after her return from her parental home, her husband used to encounter her with queries like why she delayed in returning home etc. She felt humiliated for such conduct of her husband. In her statement she referred to an incidence of such humiliation which is as under:

".....After birth of my 2nd son in one occasion there was a program at Astabal market in front of our house. My maternal sister-in-law also came to our house to attend that program where some artists had come from outside Tripura. My husband was absent at that time in the house. One of my sister who is my distant relative used to stay in my marital home as a tenant. On that day I took permission from mother-in-law and attended the program and Mat.App.12/2015 accordingly, I along with my maternal sister-in-law and the sister (distant relative), went to attend the program. At about 9.30 pm, I along with my maternal sister-in-law came back to our house where I found my husband sleeping in the house. My maternal sister- in-law left the house. After that my husband had started enquiry why I went to attend the program without his permission and in this respect, started altercation and finally assaulted me physically causing trauma on my face. I had to bear the pain and on the next day, I left my marital home and lodged an FIR to Women's PS. I also went to GB Hospital for my treatment. Later on I filed a petition to Women's PS not to proceed with that case..."

In her cross examination, she reiterated her statements made out in her examination in chief and denied the suggestion of her husband that she gave false statement before the court. She asserted in cross examination that she never deserted her husband because she was always willing to live conjugal life with her husband.

[19] Smt. Maya Debbarma [DW-2] a distant relative of the respondent wife stated that she was a tenant in the ancestral house of the appellant from the year 2001 to 2004. She supported the statement made by the DW-1 and stated as follows:

"In one occasion, I along with the wife of the petitioner and one of her sister-in-law went to attend a program in the Astabal market. At about 10/11 pm. before my arrival, the op came to her marital home to feed her baby. After arrival to my house, I used to her hot altercation / quarrel between the petitioner and his wife. On the next day morning , I was called by the petitioner and his mother to his Mat.App.12/2015 house and accordingly I went to their house and found both of them in altercation. The husband petitioner suddenly slap to his wife on her face to which I raised strong objection. Thereafter, I came back to my house, but the altercation was going on."

In her cross examination she reasserted the incidence of physical torture of the appellant on his wife and denied his suggestion that she gave false statement before the court.

[20] DW-3, Smt. Rakhi Debbarma who is the sister of respondent wife also supported the incidence of physical assault on her sister by her appellant husband. She stated that at about 12.45 O'clock, in one night her sister wanted to speak to her over telephone. Soon after she picked up the receiver, she heard her sister crying from the other end. Her appellant brother-in- law then came between them. The PW asked her appellant brother-in-law to give the phone to her sister. Reluctant appellant then gave the phone to her sister who told the PW over telephone that she was physically assaulted by her appellant husband and she requested the PW to take her back from her matrimonial home.

Immediately the PW along with her husband and one of her neighbours rushed to the house of her sister and noticed bleeding injury on the face of her sister. She brought her sister to her home. But the appellant did not Mat.App.12/2015 allow his son to go with them. On the following day, the PW had taken her sister to hospital. After treatment she was sent to her matrimonial home. But ultimately thereafter, she had to leave her in-law's house because of appellant's cruel treatment. In her cross examination, it was suggested to her on behalf of the appellant that entire statement of her was a falsehood. She denied the suggestion.

[21] Though the appellant did not specifically assign any ground of divorce in his petition dated 13.05.2009, from his averments in the petition it can be gathered that his petition is founded on the grounds of cruelty and desertion. The relevant averments made by the appellant in paragraph 11 and 12 are as under:

"11. ....The defendant had without any rhyme or reason withdrawn her from cohabitation and had not shown any intention for resumption any conjugal right nor did she show any respect for the performance of martial obligation. The marriage had for all purposes failed and has become a deadwood. The defendant received the said letter on 26.12.2008. Despite that the defendant has neither come back nor replied to that.

That the defendant wife left her husband and matrimonial home out of her own wish and without consent of the plaintiff and has not so far made any attempt to come back to the plaintiff's house. The marriage is not only to have any symbolical value but also meaning of marital good relationship between the parties of the marriage.

Mat.App.12/2015

12. From the statement made in the foregoing paragraphs, it would be clear that the plaintiff has been subjected to intentional cruelty by the defendant soon after the marriage and such cruelties are sufficient ground to get a decree of dissolution of marriage between the plaintiff and the defendant." [22] Apart from these two grounds, learned counsel appearing for the appellant also emphasised on the ground of irretrievable break down of marriage. It has been submitted by him that during the last 15 years, there was no meeting between the spouses which lead to the presumption that their marriage has broken down irretrievably and denial of divorce will cause misery to both of them.

[23] As discussed, Mr.Sankar Deb, learned counsel of the appellant husband has relied on few decisions of the Apex Court to support his contentions. Reliance has been placed by him on the decision of the Apex Court in the case of Dr.N.G.Dastane (supra) in which the factual context is entirely different. In that case, the Apex Court first examined whether the conduct of the respondent wife amounted to cruelty. The court held that constant threat of the wife of the appellant that she would put an end to her own life or that she would set the house on fire, her threat that she would make her husband lose his job and have the matters published in newspapers and her Mat.App.12/2015 persistent abuse and insults hurled at her husband and his parents imperilled the appellant's sense of personal safety, mental happiness, job satisfaction and reputation which



amounted to cruelty within the meaning of the law. The next question which was examined by the court was whether the husband had at any time condoned the cruelty of his wife. With regard to the question of condonation, the Apex Court held that condonation means forgivingness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. In the said case, the court held that though the respondent wife was guilty of cruelty, but her appellant husband condoned it and her subsequent conduct was not such as to amount to a revival of the original state of cruelty or cause of action. Accordingly, appeal of the husband was dismissed. The facts of the two cases being entirely distinguishable, the appellant cannot derive any benefit from the said decision.

[24] In the case of V.Bhagat(supra) which has also been relied upon by the learned counsel of the appellant, the appellant husband sued his wife for divorce on the ground that his wife was guilty of adultery. The divorce petition was transferred from the district court to the high court to expedite Mat.App.12/2015 its disposal. Even thereafter, petition was pending over a period of 8 years at the trial stage. The appellant husband came to the apex court seeking direction for speedy hearing of the divorce petition on day to day basis. Accordingly, direction was issued by the apex court for day to day hearing and disposal of the matter within a reasonable time. The matter could not be disposed of even after 28 months. The appellant husband again approached the apex court. The court found that a good part of the lives of both the parties has been consumed in this litigation and yet the end is not in sight. In these circumstances the apex court had withdrawn the case to its file and decided the matter. Though the grounds of adultery against the wife was not proved, the apex court granted divorce in the case observing as under:

"20.....She is fully aware that the marriage is long dead and over. It is her case that the petitioner is genetically insane. Despite all that, she says that she wants to live with the petitioner. The obvious conclusion is that she has resolved to live in agony only to make life a miserable hell for the petitioner as well. This type of callous attitude in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the petitioner with mental cruelty. It is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together, or living together again. Having regard to the peculiar features of this case, we are of the opinion that the marriage between the parties Mat.App.12/2015 should be dissolved under Section 13(1)(i-a) of Hindu Marriage Act and we do so accordingly. Having regard to the peculiar facts and circumstances of this case and its progress over the last eight years- detailed hereinbefore -we are of the opinion that it is a fit case for cutting across the procedural objections to give a quietus to the matter.

21. Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter- allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while

scrutinising the evidence on record to determine whether the ground(s) alleged is/are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the court finds it in the interest of both the parties.

22. The petition for divorce H.M. Case No. 1 of 1986 pending in the Delhi High Court is withdrawn to the file of this Court and is allowed. The marriage between the parties is dissolved. In the circumstances, the allegations levelled by the petitioner against the wife are held 'not proved'. The honour and character of the respondent wife stands vindicated."

[25] The facts of the two cases are completely distinguishable. The apex court had withdrawn the case to the file of the apex court under unusual circumstances and decided the matter. The case in hand is not covered by the said decision of the apex court.

Mat.App.12/2015 [26] In the case of Savitri Pandey (supra), case of the appellant wife seeking divorce against her husband on the ground of cruelty and desertion was allowed by the family court. In the said suit, the wife also claimed return of her ornaments given at the time of marriage. While granting divorce the family court also directed her husband to return a sum of Rs.12,000/- as the price of the scooter which was given to him at the time of the marriage and payment of a monthly sum of Rs.500/- as permanent alimony. No direction was issued for return of jewellery to the wife. Husband appealed in the high court against the decree of divorce. Wife also filed appeal against the said judgment on the ground that no order was issued for return of her jewellery. The appeals were disposed of by the high court by holding that the appellant wife herself was a defaulting party and neither the allegations of cruelty nor the ground of desertion were proved. Decree of divorce granted by the family court was set aside. In this backdrop of circumstances, the matter came to the Supreme Court. In the said case allegations of the wife were that their marriage was solemnized on 06.05.1987 and they lived together till 21.06.1987 and their marriage was never consummated. During marriage, parents of the wife gave cash and valuables. Despite Mat.App.12/2015 that the husband was demanding more cash and started torturing her on false pretext. Aggrieved with his attitude, she filed the divorce petition. The husband denied all allegations and pleaded that his wife was taking advantage of her own wrongs. The apex court found that neither desertion nor cruelty was proved against the husband. It was held by the apex court that the wife could not lead any evidence to show that she was forced to leave the company of her husband or that she was thrown away from the matrimonial home or that she was forced to live separately and that the husband had intended animus deserendi. It was observed by the apex court that approach of court should be to preserve the matrimonial home and as such there should be reluctance to dissolve the marriage on the asking of one of the parties. In the said case, court found that the appellant wife herself was trying to take advantage of her own wrong and in the circumstances of the case, their marriage cannot be held to have become dead for invoking the jurisdiction of the court under article 142 of the Constitution for dissolving the marriage. Accordingly the Apex Court dismissed the appeal of the wife against the judgment of the High Court. With regard to the irretrievable breakdown theory of marriage as pleaded by Mat.App.12/2015 the learned counsel of the appellant, the Apex Court in the

said judgment vide paragraph 17 has held as follows:

"17.The Marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in V. Bhagat v. Mrs. D.Bhagat [AIR 1994 SC 710] held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it."

[27] In the case of Naveen Kohli(supra), husband Naveen Kohli sought for divorce against his wife Neelu Kohli which was dismissed by the family court. Appeal of the wife was allowed by the High Court and divorce granted by the family court was dismissed. Appellant husband then came to the Supreme Court. In the said case the husband alleged in his divorce petition that his wife was a bad tempered woman and she was of rude behaviour and after marriage she started quarrelling and misbehaving with her husband and parents. As a result, the husband and his parents left their ancestral house and Mat.App.12/2015 started living in a rented house. In the said case it was also alleged by the husband that he found his wife indulging in an indecent manner in a party and she was also found in a compromising position with another man. The wife also showed extreme cruelty against her husband by lodging series of criminal cases under various sections of IPC against her husband. It was proved by the husband that she lodged at least 10 criminal cases against him. Moreover, she also opposed the bail application moved by her husband and in one case in which final report was filed for lack of evidence, she raised a protest petition. The Apex Court observed that conduct of the wife clearly demonstrates her deep and intense feeling of revenge against her husband and the Apex Court held as under:

"83...From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again."

Mat.App.12/2015 [28] In this factual context, the Apex Court granted divorce in favour of the husband Naveen Kohli by observing as under:

"86.In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond

between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond."

[29] In the case of Samar Ghosh(supra), the appellant husband Samar Ghosh and his wife Jaya Ghosh were both IAS officers. The factual context reveals that they were in marital tie for as long as 22 years. After solemnization of their marriage on 13.12.1984, they started living separately from 27.08.1990. The wife was a divorcee who had a daughter from her first marriage. The daughter lived with her because custody of the daughter was given to her while she obtained a decree of divorce against her first husband who was also an IAS officer. According to the Mat.App.12/2015 appellant husband right from the beginning of their marriage, his wife imposed rationing in emotions in the area of love, affection, future planning and normal human relation. According to the appellant, she also declared that she would not have any child from her marriage with the appellant and it was her firm decision. As a result of her stubborn attitude serious problems developed between the couple right from the beginning of their marriage which kept growing. The wife was contemplating divorce and her daughter also told the appellant that her mother had decided to divorce him. Ultimately, from 27.08.1990, she started living separately. In this factual backdrop, the appellant husband filed a suit for grant of divorce in which the wife pleaded that her husband was guided by his relatives who were interfering in their family affairs. Ultimately, Addl. District Judge, Alipur, granted divorce on the ground of cruelty. In the appeal filed by the wife, High Court reversed the judgment on the ground that the husband could not prove cruelty. The Apex Court on consideration of the cumulative facts and circumstances of the case, granted divorce in favour of the appellant husband observing as under:

"102. When we take into consideration aforementioned factors along with an important circumstance that the Mat.App.12/2015 parties are admittedly living separately for more than sixteen and half years (since 27.8.1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent."

[30] In the case of Gurbux Singh (supra), the appellant husband wanted dissolution of the marriage with his wife by a decree of divorce for which he filed a petition in the court of Addl. District Judge. He founded his petition on the ground of cruelty. His petition was rejected. In appeal, High Court also rejected his petition. Then he approached the Supreme Court. The appellant alleged that his wife was indignant and rude to his parents and she was of the view that parents of the appellants were nuisance in her life and she pressed upon the appellant to have a separate abode away from his parents. Ultimately, she left her matrimonial home along with her 03 years' old son. The respondent wife on the other hand defended her case by saying that her husband was a habitual drunk and he threatened her to kill with poison. She also asserted that her husband committed physical assault on her by pulling her hair and giving merciless beatings in presence of his parents. The Apex Court agreeing with the concurrent findings of the trial court and High Court declined to allow divorce infavour of the appellant husband observing as under:

Mat.App.12/2015 "16. The married life should be assessed as a whole and a few isolated instances over certain period will not amount to cruelty. The ill- conduct must be precedent for a fairly lengthy period where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, one party finds it extremely difficult to live with the other party no longer may amount to mental cruelty.

Making certain statements on the spur of the moment and expressing certain displeasure about the behaviour of elders may not be characterized as cruelty. Mere trivial irritations, quarrels, normal wear and tear of married life which happens in day to day life in all families would not be adequate for grant of divorce on the ground of cruelty. Sustained unjustifiable and reprehensible conduct affecting physical and mental health of the other spouse may lead to mental cruelty. Both the appellant and respondent being highly qualified persons, the appellant being Principal in ITI College, the respondent working as a Librarian in a Government Institute, an isolated friction on some occasion like festival of Lohri even in the presence of others cannot be a valid ground for dissolving the marriage."

[31] In the case of U.Sree vs. U.Srinivas (supra) the family court dismissed the application of the wife for restitution of conjugal rights and granted decree of divorce in favour of the husband in a separate petition filed by him on the ground of cruelty committed by the wife against her husband. The aggrieved wife preferred appeal in the High Court against the decree of divorce as well as against the order by which her petition for restitution of conjugal rights was rejected. Both the appeals were dismissed by the High Court. The appellant wife Mat.App.12/2015 then approached the Apex Court. Their marriage was solemnized on 19.11.1994. In 1995, a son was born to them. The first birth day of the son was celebrated at the parental house of the wife. After the celebration, the wife stayed back with her parents for some time. She returned to her husband on 04.10.1995 and lived with the husband at his place till 03.01.1996. On 03.01.1996 her father-in-law by force had taken her back to her parental home. He left her daughter in law at her parental home and came back to his home. Ultimately the husband also abandoned her company. She made several efforts to get back to her husband. But her efforts did not work. Then she filed a petition for restitution of her conjugal rights. Husband's stand was that his wife did not like anything of him. She always found fault with his lifestyle, daily routine, his likes and dislikes and she picked up quarrel with him on trivial issues. She also used to hurl abuses at him and his father when they were practising music together. She spread rumours among the relatives and friends pertaining to her husband's fidelity, character and habits. The husband, therefore, filed petition for divorce against his wife on the ground of cruelty. The wife pleaded that she was proud of the accomplishments of her husband and all allegations brought against her were untrue. Mat.App.12/2015 She stated that after her husband had gained reputation and popularity in music and his financial status was rising, he started neglecting his duties as the husband. His parents were trying second marriage of their son so that they could get enormous dowry. In this factual backdrop the Apex Court affirmed the decree for dissolution of marriage by dismissing the appeals preferred by the appellant wife on the ground of mental cruelty observing as under:

"28. Tested on the touchstone of the aforesaid principles, we have no trace of doubt that the finding returned by the Family Judge which has been given the stamp of

approval by the High Court relating to mental cruelty cannot be said to be in ignorance of material evidence or exclusion of pertaining materials or based on perverse reasoning. In our view, the conclusion on that score clearly rests on proper appreciation of facts and, hence, we concur with the same.

29. Presently, we shall advert to the finding recorded by the learned Family Judge and the High Court relating to desertion by the wife.

As the factual matrix would reveal, both the Courts have proceeded on the base that the wife had not endeavored to reunite herself with the husband and there had long lapse of time since they had lived together as husband and wife. On the aforesaid foundation, the conclusion has been drawn that there is an animus deserendi on the part of the wife. To test the tenability of the said conclusion, we have perused the petition for divorce from which it is evident that there is no pleading with regard to desertion. It needs no special emphasis to state that a specific case for desertion has to be pleaded. It is also interesting to note that the petition was not filed seeking divorce on the ground of Mat.App.12/2015 desertion but singularly on cruelty. In the absence of a prayer in that regard, we are constrained to hold that the conclusion arrived at as regards desertion by the learned Family Judge which has been concurred with by the High Court is absolutely erroneous and, accordingly, we overturn the same.

30. From the foregoing analysis, it is established that the husband has proved his case of mental cruelty which was the foundation for seeking divorce. Therefore, despite dislodging the finding of desertion, we conclude and hold that the respondent husband has rightly been granted a decree of divorce."

[32] Ms. P.Dhar, learned counsel appearing for the respondent wife has also relied on the following observation of the Apex Court in the case of Savitri Pandey(supra):

"13. In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties."

[33] According to Ms. Dhar, learned counsel, in the given case, there are adequate materials available against the husband with regard to cruelty. It is pointed out by Ms. Dhar, learned counsel that there is corroborative and consistent Mat.App.12/2015 evidence that the husband physically assaulted the wife by slapping her in presence of children. She could have filed a case seeking divorce against her husband because such grievous and un-excusable act of offence satisfies the test of cruelty. But the wife always tried for adjustment and condoned all his cruel conduct. Even day after the filing of the case under Section 498 IPC, she rushed to the police station and had

withdrawn her complaint. The wife had thus, consistently shown her intention to stay with her husband amidst differences. But her husband who himself was at fault, brought the divorce suit against the wife. It is submitted by learned counsel that in the case of Savitri Pandey (supra) the Apex Court declined to grant divorce in favour of the appellant who tried to take advantage of her own wrong. Learned counsel of the appellant submits that in the present case also the appellant husband is trying to take advantage of his own wrong which should not be entertained by this court.

[34] We have already pointed out that in his divorce petition, the appellant has merely mentioned Section 13 of the Hindu Marriage Act and in the body of the petition he has highlighted certain instances which indicate that he wants divorce on the ground of cruelty and desertion. The evidence of Mat.App.12/2015 the parties have been discussed in detail. We have re-evaluated and examined such evidence in the light of the judgments of the Apex Court relied upon by learned counsel of the parties. In all the cases, relied upon by the learned counsel of the appellant, the factual contexts are completely different. In the case of Gurbux Singh(supra), the Apex Court has succinctly held that mere trivial irritations, quarrel, normal wear and tear of married life which happen in day to day life in all families would not be adequate for grant of divorce on the ground of cruelty. In Savitri Pandey(supra), the Apex Court has emphasised on the move of protecting the institution of marriage which is the basic unit of society. Also in the case of Naveen Kohli(supra), the Apex Court has held that except in the cases when the marriage is found totally dead, it would be appropriate for the courts and all concerned to maintain the marriage status as far as, as long as possible and whenever possible. In the case of Samar Ghosh(supra), the Apex Court after analysis and scrutiny of its past judgments on the issue, laid down certain decisions on the basis of which the allegations of mental cruelty can be decided. We are of the considered view that none of these tests is satisfied in the given case.

Mat.App.12/2015 [35] It is true that the parties are living apart over a considerable period of time. But this is not the only test of irretrievable break down of marriage. Divorce is found on fault theory. Husband applied for divorce on the ground of cruelty and desertion. He has not been able to prove either of these grounds. We have already discussed that the basic element of desertion is animus deserendi which has not been proved in this case. With regard to cruelty, it is seen that the respondent wife has pointed out to serious instances of cruelty against her husband, which have also been supported by consistent and coherent evidence of her witnesses. The husband on the other hand has not been able to substantiate his allegations of cruelty against his wife.

[36] In the light of the above discussions, we are of the view that there is no merit in the appeal. Consequently, the appeal fails and the same is dismissed with no order as to costs.

Prepare the decree.

Send down the LC records.

JUDGE

JUDGE

Saikat Sarma, PA

Mat.App.12/2015