

Madras High Court

Vijayalakshmi Balasubramanian vs R. Balasubramanian on 19 December, 1996

Equivalent citations: I (1998) DMC 210, (1997) IIMLJ 370

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Bench: A Hadi, P Sathasivam

JUDGMENT P. Sathasivam, J.

1. Against the order of judicial separation in a petition filed by the husband in O.P. No. 1 of 1988 under Section 13 of the Hindu Marriage Act, the wife has filed the present appeal. Originally the husband has filed O.P. No. 450 of 1982 before the City Civil Court, Madras for grant of divorce under Section 13 of the Hindu Marriage Act on the ground of desertion as well as cruelty. After the formation of the Family Court, the said O.P. has been transferred to the Family Court and numbered as O.P. 1 of 1988. Though in the petition it is mentioned as under Section 13 of the Hindu Marriage Act, actually the relief is sought for under Sections 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955. The case of the husband as seen from the petition is narrated hereunder :

Both the appellant and the respondent got married on 6.7.1969 at Madras. The marriage was an arranged one. Even during the initial few days after the marriage the petitioner (husband) was shocked and pained by the behaviour and attitude of the respondent (wife). She picked up quarrel with every one in the family even for small matters. When a few months after the marriage the petitioners took the respondent to Ooty, her behaviour was so unpredictable and unreasonable towards not only the in-laws but also the petitioner himself. On many occasions, she inflicted injuries on herself, dashed against the wall and behaved almost like a mad girl. It is further averred that within a month after the marriage in one night she consumed overdose of sleeping pills. Immediately she was taken to their family doctor who saved her by prompt medical treatment. Even thereafter, she had taken overdose of sleeping pills several times and had been threatening to commit suicide. The family doctor suggested that a psychiatrist may be consulted. But the wife refused to come to a psychiatrist saying that there was nothing wrong with her. Later the petitioner felt that the respondent was using the threat of suicide only to harass him and did not mean it seriously. The petitioner is a leading income tax practitioner and earning enough to maintain his family in a comfortable position. As such, he did not want the respondent to work. But she insisted on her taking up a job and is employed as L.J.D.C. in Accountant General's Office at Madras. It is further averred that in the respondent was in the habit of constantly nagging the petitioner especially when he returned from a tour. She suspected his fidelity and kept on asking him as to how he spent his free hours in outstation. At times she would also ring up his office and enquire as to when the petitioner left the office. This sort of behaviour of the respondent caused humiliation and annoyance to him.

2. It is further averred that in the month of February, 1971 first child was born and in the month of May, 1975 second female child was born. The respondent also demanded separate establishment. Even after some time there was no improvement in the respondent's behaviour. In the evening it was invariably a shower of abuses and shoutings at the children and beating them for nothing. It is also averred that the petitioner decided to stop talking with the respondent thinking that it would teach her a lesson to behave better and make her mend her ways. From June, 1979 things worsened

to such an extent that the respondent used to leave the house whenever she wanted and return at odd times in the evenings and night. The petitioner was shocked when the respondent told him in August, 1979 that she had conceived. However, he did not believe the same and thought that the respondent was saying it only as a threat. In September, 1979, she left the house without informing anybody and the petitioner verified and found that she had gone away to her parents' house at Nanganallur. Since then she has been staying there. It is also averred that the respondent left the petitioner against his expressed wishes and without any justifiable cause despite the warning of the petitioner that he will not entertain the respondent back if she leaves home this time. But without paying heed to the words of the petitioner, she left for her parents house at Nanganallur. Till date she continues to stay there. Moreover her conduct and character are not above board and the birth of the third child is a mystery. With these averments he prayed for decree for divorce on the ground of desertion as well as cruelty.

3. The wife filed a counter wherein she had admitted the marriage which took place on 6.7.1969. At the time of the marriage, the petitioner was aged about 32 years and the respondent 25 years. It is averred that soon after the marriage, the respondent (wife) found that the petitioner had illicit relationship with one Hyma, wife of R. Padmanabhan, who appears to have been a neighbour of the petitioner in Lloyd's Road, Madras. The said Padmanabhan is a Sales Executive in the Britannia Biscuits. This came to the knowledge of the respondent and she was ill-treated by the petitioner. The father and mother of the petitioner used to frequently abuse and ill-treat her for no reason and on flimsy pretext. The respondent has depression consequent to the knowing of the parallel romances of the petitioner and his attitude and attachment with other women. The petitioner's family consisting of his parents, his brother and his wife frequently called the respondent as "pichakari". She had denied the averments that the respondent was hysterical and all of a sudden inflicted injuries on herself, dashed against the wall and tore her hair and behaved like a bad woman. On the other hand, the petitioner used to beat the respondent mercilessly whenever she questioned him about his waywardness. She has also denied the averments that the family doctor advised her to go and consult psychiatrist. She has also denied that she was using the threat of suicide to harass the petitioner. The respondent was a fond and affectionate mother to the children and it was the petitioner who was trying to alienate them from the mother. It is true that the petitioner is doing well as an income-tax practitioner. He is having office at Catholic Centre, Armenian Street, Madras, from 1967 to 1968. The respondent took the employment in the year 1971 after the birth of her first child to take her mind off the unhappy matrimonial home. It is also averred that she is informed and she believes the same to be true that the petitioner is carrying on with one Miss Maya Nichani, an Advocate, who is presently working with the petitioner. The allegation that the petitioner has only two children is utter false. There is another child Kamakshi alias Bharathi which was born on 21.8.1980. The allegation that from April, 1979 the petitioner stopped talking to the respondent is incorrect. The petitioner went to Calcutta around June, 1979 and on his return was cohabiting with the respondent. Even during May, 1979, there was cohabitation with the respondent. At all material times, the petitioner had access to the respondent. The allegations that from June, 1979 the respondent used to leave the house and return at odd times in the evening and night are false and totally untrue. The averment that the respondent informed the petitioner of her conception in September, 1979 is incorrect. It was in July, 1979 itself that the respondent gave this information no sooner she skipped her periods after cohabitation. In September, 1979, the respondent went to her

parents' house for a short stay. This was to perform a shanti to avert the discards that were threatening her family life. She left the petitioner's house on 10.9.1979. She did not take her children because they had school to attend. The petitioner came to the respondent's parents house on 12.9.1979. It is not true to say that the respondent left her matrimonial home without the knowledge of the petitioner. It was only after taking the permission of the petitioner which was obtained by her brother that she left for a few days. The respondent wanted to have a medical check-up as she was in the family way, The last child is the child of the petitioner. The respondent is willing to undergo scientific tests and challenges the petitioner to accept the same if he wants to establish the illegitimacy. It is also averred that the respondent is only anxious to live with the petitioner for his sake and for the sake of the children. The allegation that the third child's birth is a mystery is itself cruelty entitling the respondent to live separately and entitle her to maintenance. With these averments, she prayed for dismissal of the petition.

4. The petitioner, husband himself was examined as P.W. 1 and he has also examined one Ramakrishnan alias Mani as P.W. 2 apart from marking Exs. A1 to A6 in support of his plea. On the other hand, the wife herself was examined as R.W. 1 and one Vaidynathan was examined as R.W. 2. She also produced and marked Exs. B1 to B24 in support of her defence. By order dated 19.5.1992, the Court below after holding that the petitioner has established both the grounds, namely, desertion and cruelty, in view of family circumstance and considering the welfare and interest of the two minor female children, instead of relief of divorce, granted a decree for judicial separation under Section 13A of the Hindu Marriage Act. The said order is being challenged by the wife in the present appeal.

5. We have heard Mr. R. Sundar Rajan, learned Counsel appearing for the appellant/wife and Mrs. Uma Ramanathan, learned Counsel appearing for the respondent/husband.

6. The learned Counsel appearing for the appellant after taking us through the pleadings and the lengthy oral evidence of both the husband and wife submitted that the petitioner had failed to prove both the grounds namely, desertion and cruelty, hence the conclusion reached by the Court below is without any evidence and cannot be sustained. He also submitted that the order of the Court below granting judicial separation under Section 13A of the Hindu Marriage Act (hereinafter referred to as "the Act") is unwarranted and liable to be set aside. On the other hand, the learned Counsel for the respondent/husband submitted that the petitioner had placed enough materials both for desertion and cruelty, consequently the order of the Court below, according to her, cannot be said to be either erroneous or improper.

7. Originally the petitioner/husband has filed O.P. No. 450 of 1982 before the City Civil Court, Madras, for divorce on the ground of desertion and cruelty. Evidence was also recorded in the said Court. Thereafter, in view of the constitution of Family Court, the said case has been transmitted to the Family Court and it was taken on file as O.P. No. 1 of 1988. Now we have to find out whether the petitioner had proved his case for divorce on the ground of desertion and cruelty. The petitioner is an income-tax practitioner. In the petition the petitioner has pleaded that even during the initial few days after the marriage, he was shocked and pained by the behaviour and attitude of the respondent. He has also mentioned that even about a month after the marriage, the respondent had in a middle

of one night consumed over-dose of sleeping pills and so many times she had been threatening to commit suicide. It is also averred that though the petitioner is not interested, on her own insistence, she was employed as U.D.C., in Accountant General's Office, Madras. She suspected the petitioner's fidelity. She used to shout and abuse at the children and was beating them for nothing on many occasions. He further pleaded that in August, 1979 she informed that she had conceived and he did not believe the same and thought that the respondent was saying it only as a threat. In September, 1979 she left the house without informing any body and on verification, it was found that she had gone to her parents' house at Nanganallur. Since then she has been staying there. He also pleaded that he had only two children and the third child to the respondent is not his. The birth of their third child is in mystery. Except the above-mentioned statements, we do not find any other averments relating to desertion and cruelty. In the counter, even though she has admitted that only once that i.e. on 25.8.1969 she has swallowed sleeping pills, she explained that after coming to know that her husband was having illicit relationship with one Hyma, wife of R. Padmanabhan and out of desperation, she had committed the said mistake. She also pleaded that only after conception of the third child she left the house of the petitioner to her parents' house, that this was known to her husband and that she informed the same through her brother. According to her, her husband did not take any step to recall her even after delivery of the third child. She specifically denied the alleged cruelty mentioned in the petition. She also specifically pleaded that immediately after returning from Calcutta her husband was cohabitating with her and even during May, 1979 that is prior to the visit of Calcutta there was cohabitation with her. Hence she denied that the third child was also born to them. The assertion of the wife as mentioned above clearly shows that even though on one occasion, she had consumed sleeping pills, she has specifically denied the allegation that she made any attempt to commit suicide nor any threat for committing suicide.

8. Now first we shall take the plea of divorce on the ground of desertion. According to the petitioner, in the month of September, 1979 she left the matrimonial home without informing anybody to her parents' house at Nanganallur, and since then she has been staying there. Even though there is a plea regarding the wife leaving the matrimonial home, there is no plea at all with regard to the steps taken by the petitioner for taking her to the matrimonial home. In the evidence, the husband as P.W. 1 deposed :

".....on 23.8.1969 I woke up by a noise of vomiting. I saw her going here and there. Then I called my parents and others. We found that she took over-dosage of sleeping pills....

We took her in a car to our family Dr. P.M. Bhat. He directed me to go to voluntary health service, Adyar. She was admitted....From the hospital she came to our house and then she was taken to her parents' house on the same day evening. For 4 or 5 months, my father-in-law and mother-in-law made no efforts to bring my wife back. I went to her parents' house to invite her. In early January or February, 1970 my wife came back to my house.....From April, 1979 I stopped talking with her. It did not bring any effect because she would leave her house in odd hours and return. She did not bother about her children. In middle of August, 1979 I was shocked to hear that she was pregnant as I stopped talking with her from April, 1979. She left our house on 10th September, 1979 and did not inform anyone about her going. On 11th September, 1979 I had to leave for Bangalore. I got a message from my brother that she did not return home. On 12th I returned and brought a friend

from there who know all of our family incidents. From the airport he went to my father-in-law's house. Her father said my wife was occupied with Devi Pooja. I told him that I wanted to meet my wife. I told him that she had to accompany me if she was in the house. After 10th September, 1979 she did not return....."

At this stage it is relevant to mention that the oral evidence of the husband, namely, that after return from Bangalore, he went straight to his father-in-law's house from airport alongwith his friend and the further evidence that he informed his father-in-law that his wife had to accompany him were not at nil mentioned in the petition. According to the learned Counsel for the appellant, the alleged attempt by the husband requesting his father-in-law to send his wife is an imaginary one and that is the reason the same has not been pleaded in the petition. Likewise, the further evidence that his father-in-law informed that his wife was occupied with Devi Pooja has also not been pleaded in the petition. In those circumstances, the contention of the petitioner that he has made every effort to bring her back on 12th September, 1979 immediately after returning from Bangalore cannot be accepted. Further even after the birth of third child in the month of March, 1980, the evidence shows that he did not evince any interest in taking her back. In this regard it is relevant to extract his evidence in the cross-examination thus :

"....In March, 1980, my wife delivered the 3rd child. I don't know who informed me about the same. I received only a telephone call regarding the birth of her 3rd child....."

It is also relevant to refer the following evidence of the husband in the cross-examination which is extracted hereunder :

"After the petition the respondent had visited my house on several occasions in my presence and in my absence. I don't have to remember for all her visits.....The respondent had deserted me apart from being cruel to me. I was always willing to permit her to join me on my condition. I have not stated these conditions as there was no need. Suggestion made by Justice Sengottuvelan was that both of us should live together. I refused to live with her during the end of 1981 and beginning of 1982. From 1979 September till end of 1981 there was talks of settlements. Several persons attempted to settle the matter. I don't want to disclose their names. "....." informed my mother when my wife informed that she is pregnant in the year 1979. I did not inform my father and brother. They were aware of the pregnancy of my wife. I fixed up appointment with Dr. Lakshmi Kumari, C.I.T. Colony on 10.9.1979 to check-up my wife. Respondent did not keep up the appointment fixed by me. I don't know whether there was any quarrel between my family members and my wife on 10.9.1979. I say that there was no such quarrel...."

The above referred passage clearly shows that the husband was aware of her pregnancy (third pregnancy), and according to him, his father and brother were aware of the pregnancy of his wife. As a matter of fact, it was he who fixed up appointment with Dr. Lakshmi Kumari on 10.9.1979 to check-up his wife. It is the contention that only in the very same month, namely, September, 1979 she left the house without informing him. In those circumstances, namely, the husband was aware of the fact that his wife was pregnant, the other family members were also aware of the said pregnancy and the husband himself had fixed upon appointment with the doctor on 10.9.1979, the

allegation of the husband that his wife deserted in the month of September, 1979 could not hold water. He has also specifically deposed, namely, "I say that there was no such quarrel". Further. in the cross examination, he has admitted that "from December, 1981 and beginning of 1982 January, I did not desire to live with the respondent. She did not approach me to live with me after the petition. As on date I am not willing to hike her back". He has also further admitted that his wife is an Asthma patient and she used to take pills for Asthma. In this regard he deposed thus :

She is an Asthma Patient, she will take pills for Asthma. Over dosage of pills for Asthma is poisonous. I have financed her to purchase of pills for Asthma and sleeping pills."

9. Now we have to see the oral evidence of the wife as R.W. 1 She deposed that she joined her husband on 7.7.1969 after the marriage on 6.7.1969; She further deposed that the marriage was consummated in 1970. Since, according to her husband wanted to forget Hyma, the consummation was postponed. She admitted that in 1969 both the petitioner and the respondent went to Singapore, and stayed in a hotel for about ten days. They also went to Malaysia and Kuala Lumpur. She deposed in her chief examination thus :

"He (husband) told me that he had married me to be a cook in the house. He refused to permit me to assert my rights as a wife. As I had (rust ration I took my Asthma tablets....." "My husband had never purchased sleeping pills for my use. He will purchase only pills for Asthma. I had never attempted to commit suicide. Except for my confinement I was not admitted in the hospital at any time."

Regarding her visit to her husband's office, she deposed ;

"I had visited my husband's office when I was with my husband, I had never attended any pooja in my husband office. There is no special reason for me to visit my husband's office.

I had not visited my husband's office to have quarrels with him Only once I quarrelled with my husband at his office.

Once he asked me to sign on the papers to make me as Director I protested and refused. My husband shouted at me. Then I signed."

With regard to Maya Nichani, an Advocate, she deposed thus :

"I have travelled in the car with Maya Nichani. I had been to cinema with her. My husband had made special arrangements for the picture. I had not been to any other place with Maya Nichani. She asked me to meet her at Nageswara Rao Park. I met her at the park. I don't remember the date. She wanted my consent to marry my husband. That day only I came to know that both of them are having an affair. It was shocking to me. For more than an hour she was talking with me. There was exchange of abusive words. No third party was present at the time. She told me that one day you will come and kneel before me and ask the husband."

She further deposed :

"It is not correct to say that my husband stopped talking with me from 1979. Till September, 1979 our relationship was cordial. We celebrated the wedding Anniversary on 6th July, 1979. He went to Calcutta in 1979. Before and after our relationship was cordial. In July, 1979 I told my husband about my pregnancy....My husband will entertain his friends. I will mingle with ladies. I will wish the gents and talk with ladies.....It is not correct to say that at Ooty, I did not mingle with others, but bolted myself inside a room."

With regard to swallowing more tablets, she deposed thus :

"On 23.8.1969 as the petitioner was talking about Hyma for 2 or 3 hours and as he refused to permit me to kiss him. I swallowed tablets, but I did not quarrel with him. I don't remember the time when I swallowed the pills."

She further deposed:

".....In 1975 we went to Singapore and enjoyed the trip. It is after the birth of the 2nd child. Till 1975 there was no problem."

With regard to her third pregnancy and leaving her husband's home to her parent's house, she deposed thus :

"On 10.7.1979 P.W. 1 fixed an appointment with Dr. Lakshmi Kumari. Even after the slip of 1st menses I told to my mother-in-law and P.W. 1 that I have conceived. I went to my mother's house and went to Dr. Neela for check-up. I informed the matter to P.W. 1 and went to my mother's house. Only on Monday P.W. 1 told me that he will take me to Dr. Lakshmi Kumari. My brother also asked the permission of my husband. I told P.W. 1 that I will return home after a week taking rest at my mother's house....." "Within a week (from 12.9.1979) I went to P.W. 1's house. I was not permitted to enter the house by P.W.'s mother told me that P.W. 1 asked her not to join me in the house.....On 10.9.1979 I set out from P.W. 1's house with my purse alone.....I used to go and beg before P.W. 1 and his mother to take me. Therefore, I did not file any petition for restitution of conjugal rights."

With regard to the relationship with Maya Nichani by her husband, she deposed thus :

"I saw P.W. 1 and Maya Nichani freely laughing at P.W. 1's office. Once I saw Maya Nichani and P.W. 1. When I went there, she suddenly went into the room- Both had gone to pictures together. Therefore, I concluded that they are having illicit intimacy."

10. A careful perusal of the pleadings and oral evidence as discussed above clearly shows that there is no clinching evidence with regard to desertion of wife in terms of Section 13(1)(ib) of the Act. Before going into the decisions cited by both sides with regard to desertion, two conditions have to be satisfied, namely, (1) factum of separation, and (2) animus deserendi. In other words, both the abovesaid factors have to coincide in order to prove desertion.

11. In *S.K. Chowdhary v. Smt. Satirani*, , with regard to desertion, the Division Bench has held thus :

"It is well-settled now that in essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other, without the other's consent, and without reasonable cause, and that it is a total repudiation of the obligations of marriage. In a case of desertion there must be two conditions : namely, (i) factum of separation and (ii) the intention to bring cohabitation permanently to an end."

12. In *Perumal Naicker v. Sitalakshmi Ammal*, 1956-I-M.L.J. 174, it is held thus:

"Desertion may be defined as the active or wilful termination of an existing state of cohabitation without the consent, express or implied of the party alleging desertion and against such party's wish. The party that voluntarily puts an end to such a state is said to desert. Abandonment or desertion must therefore be (a) wilful and deliberate, (b) without consent, express or implied for the deserted party, (c) against the wish of the party deserted, and (d) without reasonable cause."

13. In *Rohini Kumari v. Narendra Singh*, , it is held thus :

"Desertion within the meaning of Section 10(1)(a) of the Act read with the Explanation does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation. Without animus deserendi there can be no desertion with the meaning of Section 10(1)(a), the consideration that in case the husband remarries the wife is entitled to separate residence and maintenance under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 or any other enactment could not be utilised as a reason or coming to the conclusion that the fact of the remarriage of the husband must necessarily afford a reasonable cause for desertion."

14. In *Rajinder Kumar v. Padma Prakash*, , it is held thus :

"When the Hindu Marriage Act, 1955 was brought on the statute book, the ground of desertion was not available for a decree of divorce. It could only be available for a decree for judicial separation, desertion, in that context, came to be interpreted and elaborated by the Supreme Court in *Lachman Uthamchand v. Meena*, . It was held that in its essence, desertion meant the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. It was taken as a total repudiation of the obligation of marriage. The offence of desertion was said to commence when factum of separation and the animus deserendi co-existed, it being not necessary that they should commence at the same time. But, ultimately at one point of time the animus deserendi had to co-exist."

15. In *Ram Chander Lamba v. Adarsh Lamba*, AIR 1987 Delhi 79, wife left for her parents' home in an advanced stage of pregnancy and with intention of returning home after delivery. Husband, however, treated her and child with utter neglect and cruelty and he did not even visit her in nursing home which was very near his house though she underwent a caesarean operation. He did not bother to come and take her back or make any arrangements, financial or otherwise. The wife

wanted him to live as "Ghar Jawel" with her father. In that case the learned Judge opined that the case of the husband that wife was harassing him because she wanted him to live as "Ghar Jawel" with her father does not appear to be correct, because the wife's brother who was married, was living with her parents. In the facts and circumstances of that case, it was held that the husband has not been able to establish that the desertion was without just cause.

16. In Sukumar Mnkherjee v. Tripti Mukherjee, AIR 1922 Patna 35, the learned Judge of Patna High Court has opined thus :

"The desertion was not a ground of divorce prior to the amendment of Section 13 by the Marriage Laws (Amendment) Act, 38 of 1976. According to the amended Section 13(1)(b) the parties to the marriage can get a decree of divorce on the ground that either party to the marriage has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. The desertion has been defined in the explanation to Section 13 of the Act according to which desertion with all its grammatical variations and cognate expression means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party of the marriage. According to the aforesaid definition the essence of desertion is permanent forsaking or abandonment of the one spouse and without consent or against wish. The desertion is a matter of inference which is to be drawn from the fact of each case. It is neither permissible nor possible to say with definiteness as to what act or conduct would amount to desertion. Particular act or conduct may amount to desertion in one case but not in the other case. Before a person can obtain a decree of divorce on the ground of desertion two essential factors are to be proved from the side of the deserting party namely, (a) factum of separation, and (b) animus deserendi - intention to bring co-habitation to an end. He has also to prove two other elements from his side (deserted spouse) namely, that there was no consent from his side and his conduct was not such which gave reasonable cause to the deserting spouse to leave the matrimonial house to form necessary intention. The desertion, in substance, means total denial of the obligation of marriage."

17. In Ganesan, A. v. G. Gnanasoundari, 1995-1-L.W. 113, Thangamani, J. has held:

"The expression 'desertion' in the context of matrimonial law represents a legal conception and is one very difficult to define. The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the wish of the other. It is a well-established principle that the spouse who withdraws from cohabitation for what is described as a good cause, such as cruelty, cannot be said to be guilty of desertion. For, in such a case, it is the conduct of the offending spouse that is the cause of separation and the spouse who leave the matrimonial home cannot be said to have acted from any animus deserendi and it is also well-settled that the legal burden throughout the case is on the petitioner to prove that the wife deserted him without cause."

18. In Sulochana v. Rajgopal, 1996-2-L.W. 288, (Division Bench), Division Bench of this Court has held that:

"A separate living by a spouse against the wish or consent of the other spouse will not amount to desertion if there is a reasonable cause.

From the averments in the petition, it is seen that the petitioner is very much affectionate towards his wife and that he is a loving husband. In the counter statement, the wife has also no allegation against the husband. She also says that she was being treated with love and affection. If this is the admitted relationship between the parties, under normal circumstances the parties will not think of separating themselves. There must be some reason for [lie wife to live separately..."

"If the wife who is expecting a happy life is disappointed by the conduct of the respondent, in not providing necessary protection, and she is compelled to leave the matrimonial house, it will not amount to desertion, but the person responsible is the husband himself....."

"The question is, whether the wife has explained why she had to live separately with no intention to put an end to the marital relationship. In such case, we have to consider whether there is reasonable cause and therefore, the separate living will amount to desertion....."

"When the wife is not in a position to preserve herself, the question of her discharging the marital duty does not arise. We must also note that to constitute desertion, there must be an intention to put an end to the marital relationship...."

"Learned Counsel for the petitioner (husband) submitted that it is now more than 18 years since the parties are living separately and there is no purpose in continuing the relationship. According to him, the marital relationship between the parties has become irretrievable, and for that reason, the judgment of the learned Judge has to be confirmed."

"We cannot agree with the said submission. When the petitioner has failed in the discharge of his marital obligations, he cannot exploit his own wrong. Section 23 of the Hindu Marriage Act expressly provides bar of granting any such relief. Further, both the parties have now passed 50 years of age, and it is in their old age the dependency on one another becomes a necessity, especially when we take the background that both of them loved each other, and their son is now aged 19, who was also questioned by us. The boy was also over anxious to have his mother and father united. The age of the in-laws is also now past 30, and we do not think that the strained relationship between the mother-in-law and daughter-in-law will be there even now...."

The Division Bench has dismissed the petition filed by the husband for divorce.

19. The above mentioned decisions clearly show that mere desertion is not sufficient and there must be animus deserendi to establish desertion. In this case, we have already seen that the wife had a reasonable cause for leaving away the matrimonial home and no attempt ever had been made by the husband to bring her back. Moreover, the husband has doubted the birth of third child without any reasonable cause or apprehension. The other important factor is that the husband in order to succeed on the ground of desertion has to initially prove that he on his part was not guilty of such conduct which gave a reasonable cause to the wife to leave the matrimonial home. In this case, the

evidence clearly shows that the factum of separation by the wife was there. But no animus deserendi appeared on behalf of the wife to desert her husband permanently forsaking the matrimonial bond, hence husband is not entitled to relief on the ground of deserendi. We are also in entire agreement with the argument of the learned Counsel for the appellant that the following four conditions namely, (a) wilful and deliberate, (b) without consent, express or implied of the descried party, (c) against the wish of the party deserted, and (d) without reasonable cause (as pointed out in "1956-1-M.L.J. 174) have not been satisfied by the petitioner. Therefore, the relief sought for by the husband on the ground of desertion by the wife has only to be rejected.

20. Now we have to consider whether the petitioner has proved the other ground namely, cruelty in order to get divorce. In order to prove the above aspect the petitioner has mentioned the respondent-wife threatened on many occasions to commit suicide by taking overdose of sleeping pills. Likewise, she used to abuse and shout at the children and beat them for nothing. Only these two allegations have been made in the petition. In the counter the respondent had admitted that she had taken number of Asthma pills (not sleeping tablets) out of desperation. She also explained that she came to know that her husband had illicit relationship with one Hyma, wife of R. Padmanabhan. She also deposed that even during night before going to sleep, he used to mention only the name of Hyma. She also denied the allegation that she used to abuse and beat the children. Apart from the above facts the husband in his evidence deposed thus :

"After that also she attempted to take sleeping pills on two or three occasions. On one occasion, when I refused to accompany her to a place which was so> indecent place, she wanted to commit suicide....Even on normal circumstances she would flare up. She would not mingle with others..... Whenever I returned from a tour she would accuse me stating that I would have spent nice time with air-hostesses and other fair girls.....If I am delayed even for 5 or 10 minutes, she would telephone my friends and find out on what business I had gone there."

He also deposed:

"My wife, mostly used to come in the morning hours only to quarrel with me,I don't remember the date or month but I remember that in 1975 she came in one morning by about 10.30 a.m. when I was discussing some matters with one of my clients, she probably had come there with all her jewels and the moment she entered into my room even when the said client was there since placed all her jewels on my table and said that she was not prepared to live with me any longer and to leave me and go away."

On the other hand, the wife as R.W. 1 deposed :

"Petitioner used to tell me that he wanted to marry Hyma, but fate had changed his life. My husband used to tell me that he wanted time to forget her. Hyma is at Madras with her husband. She used to write letters to my husband even after the marriage".

She also deposed that only due to frustration she took Asthma tablets and denied any attempt to commit suicide. She further deposed that:

"When I had been to my husband's office, I used to see Maya Nichani. About 10 times I had visited my husband's office. There is intercom to Maya Nichani's chamber. They had special calling bell to indicate the visitor's arrival. From her table Maya Nichani will hear all the conversation of my husband with others... I had suspicion about the conduct of my husband. Every prudent wife will watch on the husband's movements. He had narrated many matters about Hyma.... Two years after the birth of my son, my husband had forgotten Hyma. He stopped hearing the record Rick Nelson. "I need you", "A wonder like you" are the two songs of Rick Nelson. My husband used to end the name of Hyma with that song. I had protested for these songs. I spoiled the record. He threw it on me."

She has also denied the statement that she had taken all the jewels to his office. We have considered the necessary allegations as well as the oral evidence of both parties with regard to cruelty. As far as taking sleeping pills and attempting to commit suicide, the wife had denied that she had overtaken sleeping pills. However, she had admitted that after knowing the relationship with one Hyma by her husband after their marriage, due to desperation, she had taken more Asthama tablets. She had also deposed the various instances how the petitioner was moving with Hyma at one stage and Maya Nichani at later stage. Though the relationship with Maya Nichani, a practising Advocate may not be found to be wrong, as deposed by the wife herself, "every prudent wife will watch on the husband's movements", that maybe the reason for the wife leaving the matrimonial home or taking more Asthma tablets. In other words, we are of the view that the husband who approached the Court for divorce on the ground of cruelty said to have committed by the wife has not proved or substantiated his plea by any acceptable evidence. On the other hand, we are satisfied that wife had sufficient cause for her action during her stay with her husband.

21. Now we shall consider the decisions cited by both sides with regard to cruelty. In Geetha Nainy Kante v. D.B. Nainy, I (1985) DMC 275, Delhi High Court has held thus :

"It is settled law that the burden of proving cruelty lies on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the Court the factum of cruel behaviour on the part of respondent. Generally speaking cruelty does not consist of a single isolated act but consists in most of the cases of a series of acts spread over a period of time."

22. In Saikumari v. Mohanasundaram, 1995-I-M.L.J. 66, a Division Bench of this Court has considered the aspect of cruelty in the following manner :

"What is cruelty is not defined in the Act. The legal conception of cruelty and the kind or degree of cruelty necessary to amount to a matrimonial offence is not defined by any statute of the Indian Legislature relating to marriage and divorce. It may be noticed that cruelty per was not a ground for relief by any of divorce prior to the amendment by the Amending Act, 1976. It was only made a ground for judicial separation. After the amending in the year 1976, the term "cruelty was made a ground of 'divorce' and the entire Section 10(1)(c) is not incorporated in Section 13(1a). The reason behind is that actions of men are so divorce and infinite that it is almost impossible to expect a general definition which could be exhaustive and not fail in some cases. The consequences of the acts of cruelty depend upon facts and circumstances of each case.....There is no bar for granting the

relief from the Scheme of the Act, even after amendment in 1976 is not to make divorce easy. Divorce in case of Hindu Marriage, is not favoured not it is encouraged, it is the duty of Court to see that the relationship is retained and it cannot grant a divorce on vague allegation. In dealing with cases of divorce, the Court is not dealing with an 'ideal husband' or "ideal wife' but 'with this man and tins woman only'."

23. In Ranga Rao A.P. v. Vijayalakshmi, 1989-2-L.W. 463, a Single Judge of this Court has held that attempts by wife to commit suicide constitute cruelty so as to get a decree for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act. There is no dispute that an act attempting to commit suicide certainly would amount to cruelty and if either of the spouses proves their case, certainly they are entitled divorce under the said section. Here we have already pointed out that the evidence in this regard is lacking in our case.

24. In Shobha Rani v. Madhukar Reddi, . Their Lordships of the Supreme Court have explained the word 'cruelty' and the same is extracted hereunder :

"Section 13(1)(ia) uses the words 'treated the petitioner with cruelty'. The word 'cruelty' has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the Court will have no problem to determine it. It is a question of fact and degree if it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Secondly the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and price unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes a complaint about the treatment of cruelty by the partner in life, or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case, ('he cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and Lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, (1966) 2 All ER 257 (259) "the categories of cruelty arc not closed". Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings the time limit to the kind of cruelty may crop up in any case depending upon the human behaviour, capacity or

incapability to tolerate the conduct complained of. Such is the wonderful real of cruelty.

These preliminary observations are intended to emphasise that the Court in Matrimonial Cases is not concerned with ideals in family life. The Court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Reid observed in *Gollins v. Gollins*, (1963) 3 All ER 966 (972):

"In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman."

Chandrachud, J. (as he then was) in *Narayana Ganesh Dastane v. Sucheta Narayan Dastane*, (1975) 3 SCR 967 (978) said :

"The Court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with particular man and woman before it. The ideal couple or a near-dear one will probably have no occasion to go to a Matrimonial Court, for even if they may not be able to drown their differences, their deal attitudes may help them overlook or gloss over mutual fault and failures."

25. Further in *Rajeni v. Subramanian*, (Division Bench), the Division Bench have explained cruelty in detail and the same is extracted . hereunder:

"Cruelty as a ground for dissolution of marriage has necessarily to be proved by the petitioner by establishing a course of conduct on the part of the respondent adversely affecting the petitioner. Matrimonial conduct constitution cruelty is treatment in respect of matrimonial duties and obligations. Mutual love and affection and the concern of one for the opposite spouse form the foundation of a happy family life. The Court is not certainly concerned with ideals in family life. The Court has only to understand the spouses concerned and consider their particular grievance. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance. Judged by standards of modern civilization in the background of the cultural heritage and traditions of our society, a young educated woman is not expected to endure the harassment in domestic life whether mental or physical, intentional or unintentional. Her sentiments have to be respected, her ambitions and aspirations taken into account in making adjustments and his basic needs provided, though grievances arising from temperamental disharmony is irrelevant."

26. In the light of the said decisions and after going through the case of the parties as discussed above, we are of the view Hint the petitioner had failed to establish his case that the respondent-wife had treated him with cruelty as found in Section 13(1)(ia) of the Act. In cases of cruelty the Court has to approach the problem not by having regard to isolated incident alone, but the whole of the marital relations of the parties and the Court in such cases, is not concerned with the reasonable man or a woman but it has to deal with a particular man or woman before it.

27. Finally, we have to consider whether the Court is competent to grant the relief of judicial separation under Section 13A, when the petitioner had prayed for relief under Section, 13(1)(ia) and (ib) of the Act. In this case, the Court below after holding that the husband had established both desertion and cruelty in view of the family background, growing children, granted relief of judicial separation under Section 13A of the Act. In this respect it is useful to refer the decision which we have already mentioned above i.e. 1995-1-M.L.J. 66. In the said decision, it has been held that when a petition is filed under Section 13 the Court can only grant or refuse the relief on the grounds mentioned in Section 13 of the said Act and not any other relief, in the case before the said Division Bench also in a petition filed under Section 13 by the husband, a relief under Section 13A namely, judicial separation has been granted by the Lower Court therein. The main reason for passing such an order was that the parties have a daughter who is aged about 16. The strained relationship between the parties, will affect the future of an innocent girl and as such the Court below therein thought that inspite of the alleged cruelty, divorce cannot be granted. However, the Division Bench disagreeing with the order of the Court below therein has held :

"We do not find any ground to grant a divorce and the decision of the Lower Court granting judicial separation also cannot be justified. On the available evidence, we are of the view that the decree and judgment of the Lower Court have to be set aside and we do so."

In other words, if the Court comes to a conclusion that the person who approached the C

28. Net result, we are satisfied that the petitioner-husband has not established his cas