Karnataka High Court
Suvarna vs Ratnakar Vinayak Shet on 6 July, 2011
Author: N.Kumar And Kumar

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IN THE HIGH COURT OF KARNATAKA
CIRCUIT BENCH AT DHARWAD

DATED THIS THE 06FFI DAY OF JULY, 2011

PRESENT

THE HON'BLE MR. JUSTICE N. KUMAR
AND
THE HON'BLE MR.JUSTICE ARAVIND KUMAR

M.F.A.No. 23999/2009

C /W
No. 24000 2009

Between:

Suvarna Kom Ratnakar Shet,
Age: 35 years,
Bank Employee,
Rio. T.S.S. Road. Sirsi. ...Appellant

(Common in M.FA Nos.23999/09 & 24000/09)

(By Sri. A.P Hegde Janmane. Advocate)

And:

Ratnakar Vinayak Shet.
Age: 37 \ears.
Bank Employee,
Currently C/o. Canara Bank,
Jade Branch,
Tq: Sorab.
Dist: Shimoga. .. . Respondent
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(Common in M.F.A Nos.23999/09 & 24000/09)

(By Sri. V.R Datar, Advocate)

M.F'.A No.23999/2009 is filed under Section 28 of the Hindu Marriage Act 1955. against the order and decree dated 15/10/2008 passed in MC.No.29/2006 on the file of Civil Judge (Sr.Dn.) Sirsi, decreeing of judicial separation in favour of the petitioner and against the respondent.

M,F,A No.24000/2009 is filed under Section 28 of the Hindi.i Marriage Act 1955, praying to set aside the judgment and decree passed by the Learned Civil Judge (Sr.Dn.) Sirsi made in M.C.No.8/2007 dated 15/10/2008 and allow the original petition.

These appeals coming on for orders this day. N.Kumar J., delivered the following:

JUDGMENT

M.F,A. No. 23999/2009 is preferred by the wife challenging the order passed by the learned Civil Judge (Senior Division), Sirsi, in MC No.29/2006 ranting a decree for judicial separation in a petition filed for divorce by her husband, M.F.A. No. 24000/09 is also filed by her challenging the order passed by the learned Civil Judge (Sr. Dn.), Sirsi, in M.C No.8/2007 dismissing her petition for restitution of conjugal rights. The learned trial Judge did not club I., both the petitions and record common evidence.

He recorded evidence in both cases separately and decided the petition for divorce on merits.

While dealing with the wif&s petition •M.C No.8/200 7 for restitution of conjugal rights in the judgment, though he has set out pleadings of the case and reco rded evidence, he has not discussed the evidence on record and dismissed the petition on the ground that already he has passed an order for judicial separation, in M.C No.29/2006. which should satisfy the wife. Ther efore both these appeals are taken up for considera tion together and decision to be rendered by this Cou rt in M.F.A. No. 23999/2009 would have a direct bear ing on the decision to be rendered in M.F.A. No. 24000/2009. However, for the purpose of deciding these cases on merits, we have taken up for consideration the pleadings and evidence in the petition filed for divorce, i.e., M.C. No. 29/2006 only.

For the purpose of convenience, parties are refer red to as they are arrayed to in M.C.No.29/ 2006.
FACTUAL MATRIX

2. Sri Rathnakar, the petitioner-husband, on the date of filing of the petition was working as a Clerk in Canara Bank, Haven Branch. On that day, Smt. Suvarna, the respondent-wife was also employed in Corporation Bank at Haven Branch as a Clerk. Prior to the marriage, the petitioner was working

at Karehalli Branch at Hassan District. After marriage, in order to live with the respondent, on his request, he was transferred to Haven.

3. The case of the Petitioner is that he married the respondent on 20.05.2001 at Sri Gopalakrishna temple, Sirsi, in the presence of the elders of the family as per the rites and rituals prevailing in the community. The petitioner is opposed to the mischief of dowry. He did not receive any dowry at the time of marrying the respondent. From his money he provided to the respondent all the day to day requirements in respect of gold ornaments required by the respondent. He lived with the I., respondent happily for a period of 1½ years. A daughter is born and she is named as Kum. Vidyashree. After the marriage he has looked after the respondent with love and affection. She went to her parent's house for confinement. Thereafter, on her return to the petitioner's house, she started harassing him and his aged mother, who was suffering from Cancer by non co-operation. Petitioner advised the respondent, but she started quarrelling with him and his mother on small matters. Even though petitioner requested the respondent to adjust, she has not cared for his suggestion. She insisted that petitioner's mother should be sent back to her native place. then only she would live with him. Petitioner sent his mother back to Santagal village in Kumta Taluk. Even then the respondent is not co-operating with the petitioner in performing her marital obligations and she has neglected the petitioner. Subsequently, respondent stopped doing household work. Without informing the petitioner she used to be away from the house. She was going to her native Vt place, i.e., Sirsi. She was behaving according to her whims and fancies. She has shown disrespect to the petitioner. She left her daughter Kum. Vidyashree in her native place. When petitioner objected to the same, she threatened to live separately. Respondent was taking care of her relatives very well. But if the petitioner's relatives came to the house, she was not taking care of them. Though respondent was given sufficient opportunity to correct and mend her behaviour, there is no improvement. Petitioner has made attempts to adjust to this attitude of the respondent for the purpose of leading a peaceful marital life and also in the interest of his loving daughter. However, respondent is not extending the marital happiness to the petitioner. Everyday the respondent quarrels with the petitioner. She makes accusations, humiliations and talks to him in a very improper manner. She would remove her Mangalsutra and throw it. Still the petitioner tolerated her. Though she was quarrelling with the petitioner and going to her parental house, he has gone and brought her back to his house. However, respondent is indulging in her old habits, she humiliates the petitioner, behaves improperly with him, uses bad words against him. In spite of it, in order to maintain family name he has left his ailing mother, who is suffering from Cancer and left other members of the family and attempted to live with the respondent. Respondent has prevented the petitioner to have the company of his loving daughter. She has denied to the petitioner, his daughter's love and affection. In spite of the same petitioner has shown patience and has attempted to live with her. Respondent everyday did not cook food, she did not attend to the petitioner's daily needs, she has neglected the petitioner. She behaves according to her whims and fancies. Without the knowledge of the petitioner she goes to her parental house, when questioned, respondent told the petitioner that there is no relationship between them, she does not like him, she wants to leave him and live in her parents' house, she did not need him and so saying she removed the at Mangalasutra and quarrelled with the petitioner and wanted to leave him. When the petitioner was not in the house she has taken away all the gold ornaments from the house on 27.12.2003 to her parental house. From that day onwards the petitioner is living alone being dejected in life.

4. When the petitioner went to the respondent's parental house with a request to return to the house, she has humiliated him, she has spoken ill of him and the members in her parental house have also instigated her, they did not show any courtesy to him and he was forced to return. Petitioner went to the house with his family members and elders. At that time she stated that she wants to live alone and she do not want to live with the petitioner. She did not show any respect to the petitioner or to the elders who had accompanied him. She used abusive words and humiliated him by scolding. She has categorically stated that she does not want to have any relationship with the petitioner. In spite of the SI same, petitioner because of his love and affection to the respondent got issued a legal notice calling upon her to join him. In reply, she has made baseless allegations and refused to live with him.

5. On 27-12-2003 when the respondent left the company of the petitioner. she has not come back to the house, she has been living separately from the petitioner for more than two years. Over a period, because of various misunderstanding between the petitioner and the respondent, it is not possible to live together. There is no physical contact between the petitioner and the respondent. The respondent has no love and affection to the petitioner. She looks at him as an animal. Therefore, the existing relationship of husband and wife cannot continue any longer. Therefore petitioner preferred a petition for divorce. He is ready and willing to take care of his daughter.

6. On receipt of notice of the Court, respondent filed detailed objections to the petition. / She admits that marriage was solemnized on 20.05.200 1. She specifically contends that it is highly unnatural and utter false that marriage expenses were borne by the petitioner. She admits the birth of a girl child later named Kum. Vidyashree and she has denied all other allegations. She has denied that she carried the gold ornaments worth Rs. 1.50 lakhs at the time of leaving the premises. She also denied the allegation that she has behaved adamantly when Panchas had come to Sirsi and that she treated the petitioner with cruelty as narrated in the petition, and the allegation that respondent used to quarrel with the petitioner with respect to his ageing mother. She was not going to parental house often and never used to treat the petitioner inhumanly. She has denied that she used to throw her Mangalsutra in the fit of rage. and that petitioner has love and affection towards his daughter and he needs her custody. Her specific case is that everything was well and fine between the petitioner and the respondent for a period of about 1½ years.

H After that. mother of the petitioner Smt. Meenakshi Kom Vinayak shet came and started residing with the couple in Haven. After that, petitioner started giving physical and mental torture to her as per the instigation of his mother. Petitioner has beaten her inhumanly and all attempts made by the respondent and her father to persuade him to desist from such act went in vain. Even this fact was brought to the notice of the father of the petitioner, who did not care to advise petitioner in this behalf. Since the date of marriage, respondent was giving her salary to petitioner regularly, till she was forced away from her house in Haven. Respondent comes from a decent and respected family and was tolerating the tortures of the petitioner, both physical and mental, hoping that he will correct himself. During the marriage, the father of respondent had given in all 20 tolas of gold ornaments and Rs. 25.000/-cash to the petitioner as marriage gift. apart from bearing the entire expenses of the marriage. Moreover respondent had some 10 tolas of gold ornaments, of her own. All those gold o•• ornaments are in the family house of petitioner in Santgal of Kumta taluk and

cash of Rs.25,000/- also is with him only. On the fateful day of 27.12.2003. petitioner beat up respondent severely and kicked her out of his house, in the early morning hours. Since then respondent is living in her parental house, by going up and down from Sirsi to Haven for about two and half years and now she has been transferred to Sirsi in June 2006. Actually respondent ought to have filed complaint to the Police for the offence committed by petitioner to her person. But as respondent being a gentle lady and as she has immense love towards her husband, she has chosen to tolerate it. Respondent and her father made innumerable attempts to persuade the petitioner to take the respondent along with him. But petitioner did not properly respond to the same. Petitioner got issued two notices and respondent through her Advocate replied to it. informing him that she is ready and willing to start the marital life afresh, if petitioner and his elders assure the respondent and c her father that he vill look after her with love, affection, care and concern. But still petitioner chose to file divorce petition without any basis. Even in the said case, when the Court called the parties for reconciliation and asked the petitioner to take the respondent to his house in Hassan for a week as trial to examine the feasibility of joining them, petitioner did not come to Court on the day fixed to take the respondent. This clearly shows that respondent is willing to join the petitioner and lead marital life with him and petitioner without any reasonable cause is keeping her away from him. It is the petitioner who has withdrawn from the society of the respondent without any reasonable excuse. Therefore, she is entitled to seek restitution of conjugal rights and has already filed a petition for the same before the Court. Petitioner has no ground to seek the custody of child. It is only the respondent who can look after the child well. If the petitioner is interested in the welfare of the child, he should join with the respondent and not seek divorce from her. She sought for dismissal of the petition.

7. On the aforesaid pleadings the Family Court framed the following points for its consideration.

1. Whether the petitioner proves that respondent has deserted him for continuous period of two years or more immediately preceding presentation of the petition?

2.If so. whether the petitioner is entitled for the decree so prayed?

3. To what order?

8. In support of his case the petitioner examined himself as P.W. 1. He examined a witness by name Nagina Kom Nazeer Patan as P.W.2, his land lady of the rented premises at Haven, P.W.3 one Sri I Shreedhar Pandurang Shet was examined, who has witnessed one of the Panchayaths. He has produced 4'.

seven documents, which are marked as Ex.P. 1 to Ex.P.7. On behalf of the respondent, respondent was examined as R.W. 1 and she also examined a witness by name Jayashree Chandrashekar Vernekar as R.W.2, who has also spoken about a panchayath. She did not produce any documents.

9. Learned Civil Judge on appreciation of oral and documentary evidence on record, after taking note of the case law governing the parties, held that petitioner has also done some mistakes, which are quite natural in marital life. The petitioner and respondent lived together till 27.12.2003, on

which date the wife left the petitioner. When he tried to bring her back, she refused to come back. All attempts thereafter made to bring back the respondent also did not succeed on account of the respondents stand that she did not want to stay with the petitioner. The petitioner made various attempts to bring back the respondent and panchayaths were convened. More so, the respondent has admitted in the cross-examination that, twice panchayaths were conducted. This would show that respondent is reluctant to Join the petitioner. The evidence of petitioner shows that all attempts to bring back the respondent did not succeed for no fault of petitioner. The pleadings as well as evidence recorded shows that petitioner has discharged the burden cast upon him. In other words the petitioner has made out a ground as stated in Sec. 13(1)(B) of the hindu Marriage Act. Thereafter, he proceeded to hold that. a reading of the oral evidence so adduced by the petitioner and respondent are corroborating and defeating the case of each other because both the parties have produced evidence against each other who are close relatives and friends in support of their allegation. Learned Judge further concludes that he is of the opinion that both the parties are at fault. Even from the evidence spoken to by other witnesses, this respondent has exceeded the limits of decency. She never cared to Join the petitioner. since beginning. Since 27.12.2003 she neglcted him and behaved rudely with him.

It-

4. There was a continuous insolent and erratic behaviour of the respondent. She herself left the company of petitioner on 27.12.2003. Elderly members conducted the panchayat. but the efforts to bring her back to matrimonial home did not succeed. She was advised to mend her ways. In spite of the valuable advise of elderly members, she never acted as per their advise. On her own, she left her matrimonial home and started residing with her parents. She is working in Corporation Bank and must be having a pride that she is working in a Nationalized Bank. Behaviour of the respondent has caused petitioner mental agony. . Thereafter, after referring to various Judgments, learned Civil Judge held that in this case, both the petitioner and the respondent are quite young, they were married in the year 2001; Out of the wed lock, respondent gave birth to female child named Vidhyashree; She is now hardly aged about 6-7 years; Everything has gained momentum under mistrust, which. by passage of time can be sorted out, as the parties are educated and employed in nationalised banks; Time is a great healer; Under these circumstances it was held that while respondent has committed the act of cruelty against petitioner. but these acts have not gone to that proportion so as tp give a finding in favour of the petitioner that, he is entitled to a decree of divorce on those act of cruelty. Learned Judge was of the view that it is just and proper to pass a decree of judicial separation u/S 10 of the Hindu Marriage Act. Resorting to this step u/S 10 of the Act definitely allow the parties to ponder over again. so that, they may be able to unite at least for the welfare of the child who is in the custody of the respondent. Still the parties do not resume the matrimonial obligation within the statutory period of one year, it will be open to either of them to seek a decree of divorce. Though respondent is guilty of cruelty petitioner is not entitled for a decree of divorce. Instead, it is just and proper to pass a decree of judicial separation u/S 10 of the Hindu Marriage Act in favour of the petitioner husband against the respondent wife. Therefore instead of granting a decree of divorce, he granted a decree for judicial separation. Aggrieved by the said decree of judicial separation. the wife has preferred this appeal.

RIVAL CONTENTIONS

10. Sri A.P. Hegde Janmane, learned counsel appearing for the appellant assailing the impugned judgment contended that petition was filed for divorce on the ground of desertion, whereas learned Civil Judge has recorded a finding that cruelty is established. hut not sufficient to grant a decree for divorce, but sufficient to grant a decree for judicial separation. In other words, the case of desertion pleaded is not proved. No case of cruelty is pleaded. hut a finding is recorded that cruelty is established. In the circumstances the impugned order passed by the learned Civil Judge is liable to be set aside. He further contended that material on record discloses that though wife withdrew from the company of the petitioner on 27.12.2003. it is because she was beaten I badly on that day. Husband is the cause for her withdrawal from his company. She was very much interested in joining the husband. All that she wanted was an assurance from her husband and the members of his family that she will be taken care of properly, which was not forthcoming. Though three panchayaths took place, because of the reluctance on the part of the husband to give that assurance and the demand that she has to bring Rs. 1.50 lakhs worth gold ornaments, she could not rejoin her husband. In fact, in the reply notice issued to the legal notice, she has made her intention to rejoin explicitly clear. There is evidence that she actively participated in three panchayaths conducted in her house. All the time she was eager to join her husband. Therefore in the light of these materials, the desertion pleaded by the husband is not established. There is no evidence of cruelty. but still the learned Civil Judge has committed a serious error in holding that cruelty is proved. Therefore he submits that decree for judicial separation is liable to be set aside. In fact the I learned Civil Judge passed order for judicial separation, which in his view, will pave way for reunion of husband and wife; he has dismissed the petition for restitution of conjugal rights without considering the case on merits. Therefore the petition for restitution of conjugal rights which has been dismissed on that ground requires to be allowed.

11. Per contra, Sri V.R. Datar, learned counsel for the husband, submitted that material on record clearly discloses that wife was in the habit of quarrelling with the petitioner and she took exception to his mother joining them. She did not bring back the daughter. She left the child in her parental house, thus, depriving the petitioner the company of his daughter. On 27.12.2003 without notice or consent of the petitioner she left the company of the petitioner. Admittedly, three panchayaths were conducted thereafter and she made it very clear in the panchayath, as is clear from the evidence also that she is not interested in Joining her husband. In fact zz on more than one occasion, she removed the Mangalsutra and threw it on the face of the husband, which clearly indicates her intention not to live with the husband any more. When three panchayaths were conducted subsequently. it shows the bonafides of the husband to take back the wife, but it is the wife who has declined to join him. Even after issue of legal notice, she did not make any effort to join the husband. Under these circumstances, when the wife has withdrawn from the company of the respondent and when she had no intention of living with him, a case of desertion. which is pleaded, is made out. Though learned Civil Judge has recorded a finding that case of desertion is made out, he has proceeded to consider the case as if it was a case of cruelty and then he has held the case which is pleaded, is not sufficient to grant a decree for divorce and in the facts of the case it would be appropriate to grant a decree for judicial separation. Therefore he submits that learned Civil Judge though was in error in granting a decree for judicial separation, still he committed no illegality in passing the decree and petitioner

has not made out any case for interference with the decree for judicial separation. POINTS FOR CONSIDERATION

12. In the light of the aforesaid facts and rival contentions, the points that arise for our consideration in these appeals are as under:

> (i) Whether the case of desertion pleaded by the petitioner stands established as contended by the petitioner?
>
> (ii) In the facts and circumstances of the case whether the learned Civil Judge was justified in granting a decree for judicial separation in a pelition filed by the husband for divorce under Section 13(1)(b) of the Hindu Marriage Act, 1956?

13. A perusal of the petition for divorce shows that the petition was presented under Section 13(lb) of the Hindu Marriage Act, 1.955 (for short hereinafter referred to as Act'). We have set out in detail the a pleadings. The grievance of the petitioner, as set out in paragraph no. 12, the cause of action column, reads as under:

> - The cause of action for this petition arise every time when the respondent did not show love and affection towards the petitioner, every time she left the company of the petitioner. every time when she expressed her desire not to have marital relationship with the petitioner and finally on 27.12.2003 when she left the company of the betitioner and on the dates the legal notice was issued and after the expiry of the period of two years from the day she deserted the petitioner.

14. The pleadings in the petition is also in consonance with the cause of action as pleaded. Therefore this petition is filed for divorce on the ground of desertion and not on the ground of cruelty. However, the learned Civil Judge has held that all the pin pricks that he inflicted on the petitioner constitutes cruelty. i.e., an inference drawn by the learned Civil Judge. Therefore, in the entire \7• discussion in the impugned judgment he has considered the case of desertion and in fact has categorically held that case of desertion is proved. All the judgments, on which reliance is placed, are in respect of law regarding desertion. However. in the end, learned trial Judge has recorded a finding that respondent has committed an act of cruelty against the petitioner. but these acts have not gone to the extent so as to give a finding in favour of the petitioner that he is entitled to a decree for divorce on those acts of cruelty. This finding recorded by him is totally without any basis. The error is apparent on the face of the record. It is in this context he has declined to grant a decree for divorce, but granted a decree for judicial separation. It only demonstrates want of proper application of mind by the learned Civil Judge to the facts of this case. Therefore the said judgment cannot be sustained.

15. Learned counsel for the petitioner-husband submitted that when we read the entire judgment as a whole. it is clear that learned Civil Judge has looked into the pleadings, entire evidence, both oral and documentary, looked into the case law relied on by both the parties and when he has recorded a finding that the case of desertion is proved, this Court being a Court of first appeal should consider

the case on merits and should not remand the matter back to the learned Civil Judge for reconsideration, as any such exercise would in no way benefit the parties, as the present litigation being a matrimonial matter.

16. We find full force in the said submission. Therefore we have considered this case as a case filed by the petitioner-husband for divorce on the ground of desertion and whether the said ground is made out from the material on record.

17. Before we proceed to discuss the evidence on record. it is necessary to notice the law governing the desertion as a ground for divorce. STATUTORY PROVISION

18. Section 13 of Hindu Marriage Act, 1955 Act deals with divorce. It reads as under:

> "13. Divorce. (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wfe, be dissolved by a decree of divorce on the ground that the other party (1) xxx xxx xxx x (ia) x x x x x x x x x (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition:"

Explanation to said Section 13 defines what 'desertion' means. It reads as under:

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

ENGLISH LAW

19. Before we embark upon interpreting the word 'desertion' as defined as aforesaid, it would be useful to refer to the word 'desertion' as understood under English Law, which is as under:

> "What is desertion? "Rayden on Divorce' which is a standard work on the subject at p.128 (6th Edn.) has summarised the case•law on the subject in these terms: -
>
> Desertion is the separation of one spouse from the other, with an intention on the part 1 the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent f the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party.
>
> 20. The legal position has been admirably summarised in paras 453 and 454 at pp.241 to 243 of llalsburv's Laws of England (3rd Edn.) Vol.12. in the following words:

> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse hzj the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of litè involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.
>
> Desertion is not the withdrawal from a place but from the state of things, for what the law seeks g_çjjfpjce is the recognition and discharge of the common obligations of the married state: the state of things may usually he termed, for short, the home'. There can be desertion without previous cohabitation by the parties. or without the marriage having been consummated.
>
> habitation is not necessarily the deserting par tL. The fact that a husband makes an allowance to a LL'je whom he has abandoned is no answer to a charge of desertion.
>
> The offènce of desertion is a course of conduct which. exists independently of its duration, hut as a ground jbr divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or where the offence appears as a crosscharge, of the answer. Desertion as a ground of divorce diLjrs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, hut is inchoate, until the suit is constituted. Desertion is a continuing oftence".
>
> (underlining by us)

21. The Ibliowing observations of POLLOCK M. R. IN THOMAS V. THOMAS, 1924 P 194 AT P.199(B) may usefully be quoled in this connection:

> 'Desertion is not a single act complete in itself and revocable by a single act of repentance.

The act of departure from the other spouse draws its significance from the purpose with which it is done, as revealed by conduct or other expressions of intention: see Charter v. Charter (1901) 84 L T 227 (C). A mere temporary parting is a equivocaL unless and until Its purpose and object Is made plain.

I agree with the observations of Day J. In Wilkinson (1894) 58JP415 (D) that desertion Is nota spec(flc act but a course of conduct As Corell Barnes J. said In Slclcert v. Slckert 1899 p.2?8 at p.282 (el: "The party who Intends brInging the cohabitation to an end, and whose conduct In reality causes Its termination, commits the act of deserllorC. That conduct Is not necessarily wiped out by a letter of Invitation to the wife to return".

22. Lord Macmillan in his speech In the House of Lords in the case of PRAfl' V. PR&fl', 1939A C 417 Al' P.420 (G) are apposite:

> "In my opinion what Is required of a petitioner for divorce on the ground of desertion Is proof that throughout the whole course of the three years the respondent has without cause been In desertion.

The deserting spouse must be shown to have persisted In the intention to desert throughout the whole period. In fulfilling Its duty of determining whether on the evidence a case of desertion without cause has been proved the court ought not In my opinion, to leave out of account the attitude of mind of the petitioner, if on the facts it appears that a petitioning husband has made it plain to his deserting wüe that he will not receive her hack, or f he has repelled all the advances which she may have made towards a resumption Qf married life, he cannot complain that she has persisted without cause in her desertion".

23. The statement of the law in para 457 at p. 244 of HALSBURY'S LAWS OF ENGLAND (3rd Edn. Vol. 12) may be usefully quoted:

> "The burden is on the petitioner to show that desertion without cause subsisted, throughout the statutory period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the three year period. It has been said that a petitioner should be able honestly to say that he or she was all along willing to fuUIll the duties of the marriage, and that the desertion was against his or her will. and continued throughout the statutory period without his or her consent; but in practice it Is accepted that once desertion has been started by the fault of the deserting spouse. it is no longer necessary for the deserted spouse to show that during the three years preceding the petition be or she, actually wanted the other spouse to come back, for the intention to desert is presumed to continue. That presumption may. however, be rebutted"

24. POLLOCK, M. R. flY BOWRON V. BOWRON 1925 P. 187 AT P.192 (H) partly quoting from Lord Gorell as follows: -

> "In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end. and whose conduct in reality causes its termination, commits the act of desertiiorn See also Graves v. Graves 1864.3 Sw. & Tribunol35O (I); Pulford v. Pulford. 1923-P. 18(J) Jackson v. Jackson, 1924 P19(K); where Sir Henry Duke P. explains the same doctrine. You must look at the conduct of the spouses and ascertain their real intention".

25. As DENNING, L.J. observed: (DUNN V. DUNN) (1948)2 ALL ER 822 AT P.823):

"The burden he (Counsel Jbr the hushand said was on her to prove just cause (Jbr living aparti The argument contains a fallacy which has been put Jbrward from time to time in many branches of the law, The fallactj lies in a failure to' distinguish between a legal burden of proof laid down by law and a provisional burden raised by the state of the evidence ..... The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden. he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause.

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hut it is not bound to do so.          Once he proves that
fact      of       refusal,    she      maij           seek     to
rebut the inference of desertion by proving                   that
she had just cause for         her refusal        and indeed,
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it is usually wise ICr her to do so, hut there is no legal burden on her to do so, Even if she does not affirmatively prove just cause, the couri has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause? Take this case. The wfe was very deaf. and for that reason could not explain to the court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herseif stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. if there were a legal burden on the wfe he would be right, but there was none, The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himseif at the end of the case: Has that burden been discharged?"

In Rayden on Divorce, (1) [1940] 2 All. E.R. 331,

335. 371 7th Edn., the expression "constructive desertion" is defined thus, at p. 155:

"Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. if one spouse is forced by the conduct of the other to leave home it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial dtfference between the case of a man who intends to cease cohabitation and leaves his wtfe, and the case of a man who compels his wife by his conduct, with the same intention, to leave him. This is the doctrine of constructive desertion." Adverting to the question of animus in the case of constructive desertion, the learned author proceeded to observe, atp. 156, thus "It is as necessary in cases of constructive desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion as it is in cases of simple desertion. The practical dfference between the two cases lies in the circumstances which will constitute such proof for, while the intention to bring the matrimonial consortium to an end exists in both cases, in simple desertion there is an abandonment, whereas in constructive desertion there is expulsive conduct."

The ingredients of desertion as well a constructive desertion are the same, namely, animus and factum. though in one case there is actual abandonment and in the other there is expulsive conduct. Under certain circumstances the deserted spouse may even stay under the same roof or even in the same bed-room. In our society, it is well known that in many a home the husband would be guilty of expulsive conduct towards his wfe by completely neglecting her to the extent of denying her all

marital rights, but still the wfe, because of social and economic conditions, may continue to live under the same roof The words "wiflful neglect" in the explanation were certainly designed to cover constructive desertion in the English law. if so, it follows that wiliful conduct must satisfy the ingredients of desertion as indicated above. Hence, the appellant could not take advantage of the inclusive definition unless he established all the ingredients qf constructive desertion, namely, animus, factum and want of just cause.

INDIAN LAW

26. The Apex Court in the case of BWIN CHANDER JAISINGHBHAT SHAll VS. PRABHAWATI reported in AIR 1957 SC 176 while dealing with the question of desertion under the provision of Bombay Hindu Divorce Act 1947, held as under:

> "Thus the quality of permanence is one of the essential elements which dtfferentiates desertion from wiful separation, if a spouse abandons the other spouse in a state of temporary passion, for example. anger or disgust. without intending permanently to cease cohabitation, it will not amount to desertion.' For the offrmce of desertion, so far as the deserting spouse is concerned, two essential conditions must be there., namely, "ffl the factum of separation, and (2) the intention to bring cohabitation perrnanentltj to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct çiving reasonable cause to the spouse leaving the matrimonial home to form the necessani intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectivelti. "_Here a difference between the English law and the law as enacted by the Bombay Legislature may he pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce; under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case.

Desertion is a matter of intèrence to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case he capable of leading to the same inference: that is to say. the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. f, in fact. there has been a separation, the essential question always is whether that act could he attributable to an cmimus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de jäcto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time: for example. when the separating spouse abandons the marital home with (he intention, express or-implied. f bringing cohabitation permanently to a close. The law in England has prescribed a three year period and the Bombay Act prescribes a period of four years as a continuous period during which the two elements

must subsist. Hence, f a deserting spouse takes advantage of the locus poenttentiae thus provided by law and decides to come back to the deserted spouse by a bonafide offtr qf resuming the matrimonial home with all the implications of marital lfe, before the statutory period is out or even after the lapse of that period. unless proceedings for divorce have been commenced. desertion comes to an end and if tIie deserted spouse unreasonably refuses the oflèr. the latter may he in desertion and not the jôrmer. Hence it is necessary that during all the period that there has been a desertion the deserted spouse must a/jirm the marriage and he ready arid willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce' the plaintjf must prove the offence of desertion, like any other matrimonial offence. beyond all reasonable cloub t. Hence. though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court.

27. The Constitution Bench of the Apex Court in the case of IACHMAN UTAMCHA1VD KIRPALANI VS. MEENA ALIAS MOTA reported in AIR 1964 SC 40 while dealing with the question of desertion under the earlier Section 10(1) (m) of the Hindu Marriage Act. 1955 held as under:

> "(18) ttvxx "In its essence desertion means (he intentional permanent fbrsaking and abandonment of one spouse by the other without that other's consent. and without reasonable cause. It. is a total repudiation of the obligations of marriage. In view of the large variety of circumstances arid of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases."
>
> Two more matters which have a bearing on the points in disputein this appeal might also be mentioned, The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled law that the burden of proving desertion-

the 'factum" as well as the "animus deserendi" is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even f the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause.

XVX XKXO((19) This, in our opinion, is as well the law in this country under the Act.

(2O The other matter is this. Once desertion, as defined earlier, is established there is no obligation on the deserted husband (taking the case where he is the deserted spouse.) to appeal to the deserting spouse to change her mind, and the circumstance that the deserted husband makes no efJbrr to take steps to effect a reconciliation with the wfe does not debar him from obtaining the relief of judicial Separation. jr once desertion is proved the deserting spouse. so long as she evinces no sincere intention to Ifect a reconciliation and return to the matrimonial home. is presumed to continue in desertion. qf course, the matter would wear a different complexion and different considerations

would arise where before the end of the statutory period of 2 years or even thereafter before the filing of the petition for judicial separation the conduct qf the deserted spouse was such as to make the deserting spouse desist from making any attempt. at reconciliation. If he or she so acts as to make it plain to the deserting spouse that any offer on. the part of the latter to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, f before the end Qf the period of two years or the filing of the petition his or her conduct is such as to provide a just cause for the deserting spouse for not resuming cohabitation, the petition cannot succeed. for the petitioner would have to establish that the desertion was without just cause during the entire period referred to in s. I O(1)(aJ of the Act: before he cart succeed, (42) xoxx-x.ttx- Collating the aforesaid observations, the view of this Court may be stated thus:

> Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely.' (1) the factum of separation: (2) anünus deserendi: (3) absence of his or her consent: and (4) absence of his or her conduct 'giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence of desertion must be proved beyond any reasonable doubt and as a rule prudence the evidence qf the petitioner shall be corroborated. In short this Court equated the proof required in a matrimonial case to that in a criminal case, I am bound by this decision. I would.
>
> therefore, proceed to discuss the law from the point reached by this Court in the saidi decision.

(43) There is sonic controversy on the question on Whom the burden of proof lies to establish that the deserting spouse has just cause or not to leave the matrimonial home. The judgment of this Court is clear and unamhiquous and it throws the burden on the petitioner seeking divorce. This view is consistent with that expressed in leading judgment of English Cot iris.

(48) Another aspect of the question may now he touched upon. The dejlnition of desertion under s. 10 of the Act. the argument proceeds. is much wider than that under the English law or under the Bombay Act considered by this Court. Emphasis is laid upon the following words in the explanation to s. 10(1) of the Act:

"includes the wilful neglect of the petitioner by the other party to the marriage."

The expression "includes", the argument proceeds. enlarges the scope of the word "desertion", and takes in by definition the conscious neglect on the part of the offending spouse. without the requisite animus deserendi. This arqumenr. if accepted, would impute an intention to the Parliament. which was entering the field for the first time. to bring about a revolutionary change not sanctioned even in a country like England where divorce or separation jr desertion had long been in vogue. We would be attributing to the Parliament an Incongruity. br. in the JIrsI part of the explanation it was unporling all the salutary restrictions oii the right to Judicial separation but in the second part ii would be releasing the doctrine. to a large extent. of the said restrictions. By such a construction the

leqislation would be made to defeat its own purpose. On the other hand, the history qf the doctrine of "desertion" discloses some limitations thereon conceived in the interests of society and the Parliament by the inclusive definition couched in wide language could not have intended to remove those limitations. The inclusive definition is only intended to incorporate therein the doctrine of "constructive desertion" known to English law and the language is designedly made wide to cover the peculiar circumstances of our society.

(49) There is yet another legal contention which may be disposed of before I consider the facts. It is based on s.9 of the Act, which reads:

(1) when either the husband or the wiJ has, without reasonable excuse. withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court. jbr restitution of conjugal rights and the Court on being satisfied of the truth qf the statements made in such petition and that there is no legal ground why the application should not he granted. inaij decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution Qf conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or jôr vorce."

> The contention on behaif of the appellant is that s. 9(2) of the Act affords a dictionary for the expression without reasonable cause"

and that it shows that reasonable cause in the explanation could only, be that cause which will be a legal ground for the offending spouse to resist the petition by the other fOr restitution of conjugal rights. It is further contended that under cl, (2) thereof such legal ground could only be the legal ground on which there could he judicial separation or nullity of marriage and, therefore. the reasonable cause in the explanation to s. 10 should also be only such grounds like cruelty etc. There is a fallacy in this argument. An illustration will bring it out. A husband files an application against the wj for restitution of conjugal rights under s. 9 of (he Act. The wfe can plead. inter alia, that the husband is not entitled to restitution of conjugal rights as he has deserted her without reasonable cause. Section 9(2) of the Act does not afjbrd any dictionary for ascertaining the meaning, of the expression "reasonable cause". We have to fall hack again for its meaning on the principles laid down by decided cases and the facts of each case. That apart. s. 9 and s. 10 deal with dJferent subjects-one with restitution of conjugal rights and the other with judicial separation. We cannot import the provisions of the one into the other. except in so Jdr as the sections themselves provide for it. The explanation does not expressly or by necessary implication equate reasonable cause with a legal ground for sustaining a plea against an action for restitution of conjugal rights. Indeed, it is a limitation on one of such legal grounds. There is an essential distinction between the scope of the two sections. The Legislature even in socially advanced countries lean..

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on    the side of sanctity                  of marriage:
therefore,    under           S.    9 of the Act,       our
Parliament      imposes stringent conditions to
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nonsuit a claim for restitution of corjugal rights. On the same reasoning. under S. 1 0 of

the Act, ii: does not permit separation of spouses on the ground of desertion except when the desertion is without reasonable cause. The expression "reasonable cause"

must be so construed as to bring about a union rather than separation. The said expression is more comprehensive than cruelty and such other causes. It takes in every cause which in a given situation appears to be reasonable to a Court justfying a spouse to desert the other spouse. This view is consistent with the

English law on the subject. In Hals bury's Laws of England, 3rd Edn., Vol. 12, the author says. in para. 484,at p. 257 thus: "Any matrimonial offence. f proved, is a ground Jbr the other spouse withdrawing from cohcthitation. Further conduct which falls short of a matrimonial offence, that is conduct not amounting to cruelty or adultery. may cxci ise desertion." In Edwards v. Edwards(1) this idea was succinctly brought out. There it was stated that conduct short of cruelty or other matrimonial offence, might afford cause for desertion. So too, in an earlier decision in Yeatman v, Yeatman(2J it was held that reasonable cause was not necessarily a distinct matrimonial offence on which a decree or judicial separation or dissolution of marriage could be founded. I am, therefore. of the opinion that s. 9 of the Act does not throw any light on the cons truction of the expression "without reasonable cause" and that whether there is a reasonable cause or not in a given case (1) LR 11950] P. 8. (2) L.R. [1868] 1. P. & D. 489. 374 shall be decided only on the evidence and the peculiar circumstances of that case. (50) The result of the said discussion may be stated thus : The legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not prevent the other spouse by his or her action by word or conduct from cohabitation The expression "wilful neglect" included in the section does not introduce a new concept in Indian law unknown to the English law, but is only an aJfirmation of the doctrine of constructive desertion. The said doctrine is not rigid but elastic and without doing violence to the principles governing it, it can be applied to the peculiar situations that arise in an Indian society and home. No inspiration could 'be derived from s. 9 of the Act in order to construe the scope of the expression "without reasonable cause" and whether there is a reasonable cause or not is a question offact to be decided on the facts of each case."

28. The Supreme Court in the case of ADHYATMA BIIATTAR ALWAR VS ADIIYATMA BHATTAR SRIDEVI reported in (2002) 1 5CC 308 while dealing with desertion as a ground for divorce under the provisions of the Act, held as under:

"7. Desertion in the context of matrimonial law represents a legal conception. It is djficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are:

1. The factum of separation;

2. The intention to bring cohabitation permanently to an end animus deserendi;

3. The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period;

The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include wilful neglect of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage. Therefore, for the offènce of desertion, so far as the deserting spouse is concerned, two essential conditions must be there. namely. (1) the jactum oJ separation, and (2J the intention to bring cohabitation permanently to an end (animus deserendU. Similarly, two elements are essential solar as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the n iatrimonial home to form the necessary intention aforesaid. The petitioner /br divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.

But it is not necessary that at the time the wife left her husband's home she should have at the same Lime the animus deserendi. Let us therefore examine the question whether the defendant in this case, even f she had no such intention at the time she left Bombay, subsequently decided to put an end to the matrimonial tie. This is in consonance with the latest pronouncement of the Judicial Committee of the Privy Council in the case of 1955 A.C.402 at p.417 (F) in an appeal from the decision of the High Court of Australia. to the following effect:

Both in England and in Australia, to establish desertion two things must he proved: .4 first certain outward and visible conduct the factum of desertlort secondly. the animus deserendi the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum Is simple; It Is the act of the absconding party In leaving the matrimonial home. The contest In such a case will be almost entirely as to the animus was the Intention of the party leaving the home to break It up for good.. or something short of or d(fferentfrom that?

29. From the aforesaid definitions and judgments, it Is clear that 'desertion Is the separation of one spouse from the other without reasonable cause and without the consent or against the wish of such party. The Intention of such desertion should be to bring the cohabitation permanently to an end on the part of deserting spouse. It Is a total repudiation of the obligation of the marriage. It Is a continuing state of affair. However, the physical act of departure by one spouse does not necessarily make that spouse a deserting party because desertion is not the withdrawal from a place but from the state of things. Therefore, the person who actually withdraws from the cohabitation is not necessarily a deserting party. One of the salient features of such desertion is wilful neglect by the deserting party in respect of the other party to the marriage insofar as performing marital obligations are concerned. However, if a spouse separates from the other for a cause \TIicI is a reasonable one, it does not constitute desertion in the eye of law. If a spouse abandon the other spouse in a state of temporary emotional outburst, for example. anger or disgust. without intending to permanently cease to have cohabitation, it will not amount to desertion. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that Is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention. both anterior and subsequent to the actual acts of separation. If, in fact. there has been a separation. the essential question always is whether that act could be attributable to an animus deserendi. The act of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that tley should commence at the same time. The party who intends bringing the cohabitation to an end. and whose conduct in reality causes its termination, commits the act of desertion. The inclusive definition is only intended to incorporate therein the doctrine of constructive desertion known to English law and the language is designedly made wide to cover the peculiar circumstances of our society.

30. The Legislature even in socially advanced countries lean on the side of sanctity of marriage. Therefore, under Section 9 of the Act, our Parliament imposes stringent conditions to non-suit a claim for restitution of conjugal rights. On the same reasoning, under Section 13 of the Act, it does not permit separation of spouses on the ground of desertion except when the desertion is without reasonable cause. The expression reasonable cause Iliust be construed so as to bring about a union rather than separation. The said expression is more comprehensive than cruelty and such other causes. It takes in every cause which in a given situation appears to he reasonable to a Court justiMng a spouse to desert the other spouse.

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31. The clause lays down the rule, that desertion to amounting to a ground for divorce must be for a continuous period of not less than two years Immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of "desertion" to include wilful neglect of the petitioning spouse by the respondent. It must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation It Is abundantly clear that the legislature intended to give to the expression a wide import which includes wfllful neglect of the petitioner by the other party to the marriage.

32. The deserting spouse must be shown to have persisted in the Intention to desert throughout the whole of the two year period. In most cases of desertion the guilty party actually leaves the other, but It Is not always or necessarily the guilty party who leaves the matrimonial home. The party who Intends bringing the cohabitation to an end, and whose conduct In reality causes Its termination, commits the act of desertion. We must look at the conduct of the spouses and ascertain their real intention. In its essence desertion means the Intentional permanent forsaking and abandonment of one spouse by the other without other's consent, and without reasonable cause. It Is a total repudiation of the obligation of marriage.

33. The expression "willful neglect" Included in the section does not Introduce any new concept in Indian law unknown to the English law, but is only an affirmation of the doctrine of constructive desertion. The said doctrine Is not rigid but elastic and without doing violence to the principles governing It, it can be applied to the peculiar situations that arise in an Indian society and home. No inspiration could 'be derived from Section 9 of the Act in order to construe the scope of the expression "without reasonable cause" and whether there Is a reasonable cause or not? Is a question of fact to be decided on the facts of each case. Therefore the essential conditions, which must exist in order to constitute 'Desertion' under Section 13(1)(b) of the Act are as under:

> "For the offence of desertion. so jtr as the deserting spouse is concerned, two essential conditions must be there., namely:
>
> (1) the factum of separation. and (2) the intention to bring cohabitation permanently to an end (animus deserendif Similarly two elements are essential so far as the deserted spouse is concerned:
>
> (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.

BURDEN OF PROOF IN MATRIMONIAL PETITION

34. The burden of proving desertion is always on the person who approaches the Court to seek for divorce on the ground of desertion. The burden is on the petitioner to show that desertion without cause subsisted, throughout the statutory period. Heav burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely (1) the factum of separation;

(2) anhnus deserendi;

(3) absence of his or her consent: and (4) absence of his or her conduct 'giving reasonable cause to the deserting spouse to leave the matrimonial home.

35. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period. The legal burden is upon the petitioning spouse to establish by convincing evidence that the respondent abandoned him or her

without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not prevent the other spouse by his or her action by word or conduct from cohabitation.

36. The Apex Court in the case of BWINCHANDRA JAISINGHBAI SHAH Vs. PRABHAVATI reported in AIR 1957 SC 176 at para 10 has held as under:

> "It is also well settled that in proceedings [or divorce the plainrff must prove the offence of desertion, like and other matrimonial offence. beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court."

37. The Apex Court in LACHMAN UTAMCHAND KIRPALANI'S case, at para 18 has observed as under:

> "Two more matters which have a bearing on the points in dispute in this appeal. might aLso be mentioned, The first relates to the burden of proof in these

cases, and this is a point to which we have already made a passing reference. It is settled Lau, that the burden of proving desertion- the :factum" as well as the "animus deserendi" is on the petitioners:

and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even (I' the wife. where she is the deserting spouse. does not prove just cause for her living apart the petitioner-husband has still to satisfy the Court that the desertion was without just cause."

This was the majority view. The minority view is found at para

42. where it has been observed as under:

> heavy burden lies upon a petitinner who seeks divorce on the ground of desertion to prove four essential conditions namely. (1) the factum of separation; (2) animus deserendt (3) absence of his or her consent; and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence or desertion must be proved beyond any reasonable doubt and as a rule of prudence the evidence of the petitioner shall be corroborated. In short this Court equated the proof required in a matrimonial case to that in a criminal case. I am bound by this decision. I would therefore, proceed to discuss the law from the point reached by this Court in the said decision.

38. Following this judgment, a Division Bench of this Court in the case of PRABHAVATHI Vs.K.SOMASHEKHAR reported in ILR 2002 KAR 3505, has held as under:

> '13. We are of the clear view that a finding of this nature is not sustainable, particularly for concluding that there was desertion on the part of one of the spouses and jr consisting a ground for a decree for divorce. In fact the Honble Supreme Court in the very case referred by the learned counsel for the respondent reported in AIR 1964 SC 40 (Lachman v. Meena) and referred to by the trial Court has indicated the nature of proof that is required to prove the qround of desertion to prove essential conditions namely, (1) the facturn of separation: (2j artimus deserertdi; (3) absence of his or her consent: and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence or desertion must be proved beyond any reasonable doubt and as a rule of pwdence the evidence of the L petitioner shall be corroborated. In short, this Court equated the proof required In a matrimonial case to that In a criminal case."
>
> 14. WE degree of proof Is not merely one of preponderance of probabilities, but proof beyond reasonable doubt In the circumstances, we are of the clear view that the husband had failed not simply but miserably in proving desertion. particularly in the light of the maintenance order and the corgfirnatlon order In the criminal matter. Deliberate desertion on the part of the wife could not have been Inferred In the circumstances of the case. In fact It cannot even be said that the wife without any reason had remained living separately and on the other hand circumstances Indicated that she had sqfflcient justification for her living separately. When such Is the situation, the Inference of desertion which requires deliberate conscious living apart can never have been lferred by the trial Court The trial Court Is clearly In error in granting a decree for divorce on the ground of desertion. -

39. The Apex Court had an occasion to consider this question of burden of proof in the case of DR.NAR4YAN GANESH DASTANE VS. SUHETA NARAYAN DASTANE reported in AIR 1975 SC 1534, wherein it is held as under:

> '23 First as to the nature of burden of proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for. ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with common sense as it is so much easier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of Section 10 (1) (h) oJ the Act. But does the law require. as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to he applied in order to judge whether the burden has been discharged?

24, The normal rule which governs civil proceedings is that a fact can he said to he established f it is proved by a preponderance of probabilities. This isJr the reason that under the Evidence Act, Section 3. ajdct is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought. under the circumstances qf the particular case, to act upon the supposition that it exists. The belief reqarding the exLstence of a fact may thus he founded on a balance of probabilities. A prudent man friced with coii]licting probabilities concerning a fact situation will act on the supposition that the Jdct exLsts, f on weighing the various probabilities he finds that the preponderance is in favour of the existence qf the particular fact. As a prudent man, so the court applies this test for finding whether a jdct in issue can he said to he proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage. the improbable at the second. Within the wide range of probabilities the court has often a dfJicult choice to make hut it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note : the ' nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue" Per Dixon, J. in Wright v Wright. (1948) 77 CLR 191 at p.210: or as said by Lord Denning. "the degree of probability depends on the subjectmatter. In proportion as the offence is grave. so ought the proof to be clear. Blyth v Blyth, 1 966-1 All. ER 524 at p.536." But whether the issue is one of cruelty or of a loan on a pro-note, the test to apply is whether on a preponderance of probabilities the relevant Jbct is proved. In civil cases this. normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

25. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may itot be taken away on a mere preponderance of probabilities, if the probabilities are so nicely balanced that a reasonable, not a vacillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the Jcr to be proved and the benefit of such reasonable doubt goes to the accused. it is wrong to import such considerations in trials of a purely civil nature.

26 Neither Section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor Section 23 which governs the jurisdiction of the Court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is ""atisfied""on matters mentioned in Cis. (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature. the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

27. The misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a "matrimonial offence". Acts of spouse which are calculated to impair the integrity of a marital union have a social s(gn(Jlcance. To marry or not to marry and ff so whom, may well be a private affair but thefreedom

to break a matrimonial tie is not The society has a stake in the instilvfion qf marriage and therefore the erring spouse is treated not as a mere defaniter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before It is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

28. In Enqland, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt hut in (1966) 1 All ER 524 at p.536 the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case, like any civil case, may be proved by a preponderance Qf prohability." The High Court of Australia in (1948) 77 CLR 191 at p.210. Wright v Wright, has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery

40. From the aforesaid judgments of the Apex Court it is clear that in Bipinchandra's case. the Supreme Court observed that in proceedings for divorce the plaintiff must prove the offence of desertion like and other matrimonial offence, beyond all reasonable doubt, Though corroboration is not required as an absolute rule of law, the Courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the Court. Relying on this judgment. the Apex Court in Lachman Utamchand's case held that, it is settled Law that the burden of proving desertion- the "faetum" as well as the "animus deserendi" is on the petitioners: and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause.

41. A reading of these two judgments gives an impression that the standard of proof that is required in a matrimonial matter is beyond reasonable doubt as in the case of a criminal case. That is precisely what has been held by this Court in Prabhavathi's case. However, as is clear from Lachman's case, the said observation is a passing reference, That question did not directly arise for consideration in the aforesaid case. However, the said question arose directly for consideration before the Apex Court in Dr.Naravan Ganesh Dastane's case. In para 23, the Apex Court observed as under:-

> "23 ..... First as to the nature of burden of proof which rests on a petitioner in a matrimonial petition wider the The petitioner must therefore prove that the respondent has treated him with crueltj within the meaning of Section 1 0 (1) (b) of the Act. But does the law require. as the High Court has held, that the petitioner must prove his case beyond a 1-ecLsonable doubt? In other words. though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to he applied in order to judge whether the burden has been discharged?

42. After referring to Section 3 of the Evidence Act and the judgments of the English Courts and Australian Courts, the Apex Court held, proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere

preponderance of probabilities. After referring to Sections 10 and 23 of the Act it was held that, the proceedings under the Act are essentially of a civil nature. the word "satisfied" must mean "satisfied on a preponderance or probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases. The misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a "matrimonial offence". Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases. In fact in England, the House of Lords dealing with the case of divorce held, the case, like any other civil case, may be proved by a preponderance of probability. Similar is the view taken by The High Court of Australia to the effect the civil and not the criminal standard of persuasion applies to matrimonial causes. Therefore, the Apex Court categorically held that the High Court was therefore in error in holding that the petitioner must establish the charge of cruelty beyond reasonable doubt.

43. Therefore, the Apex Court while considering the question whether in matrimonial matters, the proof that is required in establishing the ground of divorce should be beyo nd reasonable doubt or preponderance of probabilities have laid down that it is the preponderance of probabilities that has to be proved to establish the ground of divorce under the Act.

Therefore, notwithstanding the passing observations in the earlier two judgments of the Apex Court that what is to be established in a matrimonial offence is proof beyond all reasonable doubt in view of the later judgment of the Apex Court where the said issue arose for consideration, it was held.

that it is the preponderance of probabilities that is requ ired to he established in proving the ground of divorce. It could be fairly laid down as the proposition of law that in matrimon ial matters which are of civil nature, the burden of proof that is required to establish a ground for divorce is preponde rance of probabilities and not proof beyond reasonable doubt. ON FACTS

44. The specific case pleaded by the petitioner in the petition. as setout earlier is on 27.12.2003 when he was not 4' present In the house, respondent, for the last time, left the house with all gold ornaments and she Is living In her parental house at Slrsl and from that day onwards he Is living a dejected life without the company of his wife. Further It Is alleged though he went to her parents' house several times, she humiliated him, abused him and her family members Instigated her and they did not show any decency to send her back. He also stated that she wants to leave him and she Is not Interested In livIng a marital lIfe with him. She also abused him and his elders and they were sent back. It was contended that she has categorically stated that she Is not prepared to have any marital relationship 'With him. Though he has got two legal notices Issued calling upon her to join him to lead marital life, she has sent a reply maldng reckless allegations. Therefore, he was constrained to file this petition for divorce on 23.06.2006, two years after 27.12.2003. In the statement of objections filed to meet his allegations, respondent has categorIcally stated that on the fateful day of 27.12.2003, petitioner had beaten up the respondent severely and kicked her out of the

house In the early morning hours. SInce then respondent Is livIng In her parental house by coming up and down from SIrsi to Haved for about two and a half years and now she has been transferred to Sirsi in June 2006. She has also contended that actually, respondent ought to have filed a complaint to the police for the offence committed by the petitioner to her person. but as respondent being a gentle lady and she has immense love towards her husband. she has chosen to tolerate it. Respondent and her father made innumerable attempts to persuade petitioner to take respondent along with him, but petitioner did not properly respond to the same. Petitioner got two notices issued and respondent through her advocate replied to it informing him that she is ready and willing to start marital life afresh, if the petitioner and his elders assure the respondent and her father that he will look after her with love and affection, care and concern, but still the petitioner chose to the divorce petition without any basis. Even after filing of the petition. when the Hon'ble trial Court called the parties for reconciliation and asked the petitioner to take the respondent to his house in Hassan for a week as trial to examine the feasibility of joining them, petitioner did not come to Court on the fixed date to take respondent This clearly shows that respondent is willing to join petitioner and lead marital life with him and petitioner, without any reasonable cause, is keeping away from her. Petitioner has withdrawn from the society of the respondent without any reasonable excuse, therefore, respondent is entitled to seek restitution of conjugal rights and has already filed petition for the same before this Court. Further, she has stated that she comes from a decent and respected family and was tolerating the torture of petitioner both physically and mentally hoping that he will correct himself. During the marriage, father of respondent had given in all 20 tolas of gold ornaments and Rs.25,000/- in cash to the petitioner as marriage gift. apart from bearing the entire expenses of marriage. Moreover, respondent had 10 tolas of golden ornaments of her own. All these gold ornaments are in the family house at Santgal. at Kumta Thiuk.

45. From the aforesaid pleadings, it is now not in dispute that both of them are living separately from 27.12.2003. AccordIng to respondent-wife, on that day, she was beaten up severely and kicked out of his house In the early morning hours. That is the cause for the respondent to leave the house of the petitioner and live with her parents at Sirsi. Though petitioner has mentioned the date as 27.12.2003, what exactly happened on that day Is not mentioned In the petition. Similarly. In the two earlier legal notices Issued by the petitioners, the Incident of 27.12.2003 is conspicuously missing. However, he has given in his evidence a graphic description of what has happened on that day I.e., 27.12.2003 and sought to support his evidence by examining P.W.2, the landlady who happens to be an eye witness to the said Incident. According to petitioner, on that day. In the morning hours. because he questioned his wife about her conduct of leaving the child In her parents house, she became furious and slapped him on his cheek, removed her 'mangalasutra' and threw it on his face and abused him with filthy language. Unable to bear this trauma, humiliation, when he went out of his house to enable his wife to calm down, she went inside the house and locked the premises. By the time he returned, she had left his house wIth ornaments worth Rs. 1.5 lakhs. Therefore, according to him, It Is respondent who deserted him with an Intention of putting an end to the marital relationship and she willfully neglected to perform her marital obligation that day onwards. It is also In the evidence of the parties that I.

after she left his house on 27.12.2003, before issue of legal notices. three panchayats took place in the residence of respondent at Sirsi. According to petitioner. that shows his bonafides and eagerness

to take back his wife. but it is the respondent and her family members who ill-treated him and his relatives, who participated in the panchayat. abused them and she made her intention clear by saying that she is no more interested in living with him as a wife and she wanted to put an end to the marital status. If respondent has withdrawn from the company of the petitioner without a reasonable cause and she has no intention to live with him in future and admittedly she has not performed any marital obligations towards him from that day onwards. may be a case of desertion is made out. But, if her withdrawal from the company of petitioner is because of the conduct of the petitioner severely beating her and kicking her out of the house and his refusal to change his behaviour even in the three panchayats, which took place between the parties, and his failure to give an assurance to the wife that he would not repeat the same in future and he would take care of her with love and affection, then fault lies with the petitioner and he would not be entitled to a decree for divorce.

46. On record. we have got both oral and documentary evidence. The documentary evidence on which reliance is placed came into existence at an undisputed point of time prior to the institution of the petition which are the legal notices which were exchanged between the parties prior to institution of the petition. The oral evidence though it relates back to the incident was as deposed in the course of time. Therefore, it would be safe to find out the mental status of the parties prior to the commencement of the us for filing the petition for divorce. In this regard. it is necessary to see what the parties state in the legal notice and in the reply which was prior to filing of the petition for divorce. Though respondent left the company of the petitioner on 27.12.2003, petitioner got issued 1 legal notice on 11.03.2004. which is marked as Ex.P.2 in the case. In the said legal notice all that has been stated about the incident on 27.12.2003 is as under:

> On 27.12.2003 Saturday at about 7 a.m. you have left the house without the knowledge of our client and went with 1½ Lakhs of rupees gold ornaments, at the time our client Ratnakar & yoursef were residing in the house of Mr.Pathan Driver (KSRTC) on monthly rent basis cit haven, till today our client alone residing in those house."

47. Therefore, what transpired on 27.12.2003 is conspicuously missing in the legal notice issued on 11 .03.2004 hardly about three moHths after Ihe said incident. In reply notice dated 26.3.2004 sent to the legal notice, it is stated as under:

> "3. Actually and factually, every thing was well and jIne between you and our client, till one and half year hack. But one and haif year hack, your mother Meenaxi kom Vinayak Shet started residing with you in Haven. After that you have started giving physical and mental torture to your wife. as per the instigation of your mother. You started bearing her inhumanltj and all the attempts made by our client and her father to persuade you. became in vain, Even this fact was brought to the notice of your father, who did not cared to advise you in this behalf Since the date of marriage, our client was giving her salary to you regularly, till she was forced away from your house in Haven.

> 4. Our client comes from a decent and respected family and was tolerating your tortues, both physical and mental. hoping that you will correct yoursef During the marriage the fizither of our client had given in all 20 tolas of Gold ornaments and Rs.25000/- cash to you as marriage gft. Moreover our client had some 10 tolas of gold ornaments, of her own. All those gold ornaments are in your family house in Santgal qf Kumta taluk and cash of Rs.25,000/ also is with you only. On the fateful day of 27.12.2003, you beat up our client severely and kicked her out of your house, in the early morning hours. Since then our client is living in her parental home, by going up and down from sirsi to haven. Actually our client ought to have filed complaint to the police Jbr the qjfence committed by you to her person. But our client being a gentle lathj has not done it just because you were her husband:

48. Petitioner sent one more legal notice on 17.03.2006 nearly two years after the said reply. In the said reply notice, again there is no whisper about the incident that took place on 27.12.2003 nor denial of the cruelty which was alleged against him in reply to the 1 notice. It was specifically stated in the aforesaid reply notice dated 26.3.2004 that gold ornaments are all in the family house at Santgal of Kumta Taluk, and therefore, the question of respondent taking away gold ornaments worth Rs. 1.5 lakhs when she left the house at Haven, would not arise. Not a word has been stated in the reply about this aspect of the matter. It is in that context, divorce petition was filed. It is also silent about the incident, which took place on 27.12.2003. Nor in the petition it is averred that the incident described by respondent is false. Respondent in her written statement before the Court has reiterated those allegations of assault and cruelty. In the entire cross-examination, which runs to pages, there is no cross- examination on that aspect or even a suggestion that he did not indulge in any such assault or acts of cruelty. If, from the aforesaid material, it is to be held that cause for respondent to leave the company of petitioner is, his conduct of beating his wife and kicking her out of the house, then it cannot be said that there was no reasonable cause. If there is reasonable cause and it is because of the act of the petitioner, she was forced to leave his house, the fact that she went out of the house, living separately from him for more than two years and that she is not performing her marital obligations would not come to the aid of petitioner to prove the case of desertion. Petitioner, being a party at fault, whose conduct resulted In respondent going out of matrimonial house and living separately would not amount to desertion by the wife. On the contraq, it would amount to desertion by the husband. It is not in dispute between the parties that three panchayats took place during the interregnum. The specific case of the petitioner is though he went to the parental house of respondent with his elders in the family, he and his elders were humiliated. Respondent's family members Instigated her in such acts. In the course of such panchayats, she has categorically made her intention clear stating that she does not want to live with him any more. Infact, she had admitted that she had thrown her 'mangala sutra' on petitioner's face with an intention to put an end to marital status and, therefore, he submits that those acts during the panchayats would demonstrate the willful neglect on the part of wife to perform her marital obligations which proves his case of desertion. In support of his case, he examined one of his relatives as P.W-2, whereas wife has also examined a witness RW-2, who is a party to those panchayats. to prove her case.

49. Before looking into oral evidence regarding what transpired at panchavat, it is necessary to look into the stand of wife in the legal notice regarding her intention to rejoin her husband. In the legal notice, Ex.P.2 dated 11/3/2004 after expressing his intention to take his wife back by forgetting what transpired till then. he called upon his wife to join him in within 15 days subject to conditions, Therefore, it was not unconditional offer. Conditions which the wife was expected to perform or comply with are:

> (i) she should bring back all the articles which she has taken when she left the house, thereby meaning gold ornaments worth Rs. 1 .5 lakhs:
>
> (ii) she should join him with the daughter:
>
> (iii) she should not put any conditions. her rejoining should be unconditional: and
>
> (iv) she should conic with proper security and elderly persons within 15 days of notice.

50. Therefore. this offer to take wife back was not an unconditional one. If the wife has not taken away gold ornaments worth Rs. 1.5 lakhs at the time of leaving the house,, the question of her bringing back the ornaments would not arise. When a demand was made in the 1' legal notice she has sent a detailed reply Ex.P-3 dated 26/3/2004. in categorical terms, stating that 20 tolas of gold ornaments were given at the time of marriage and in addition she had 10 tolas of gold ornaments of her own. All those gold ornaments are in the family house in Santgal of Kumta taluk. They were living in a rented premises at Haven and it is from that house on 27.12.2003, at 7.00 a.m. in the morning, she walked out. The fact that those gold ornaments were in the family house at Santgal of Kumta taluk is not disputed by the respondent/petitioner either in the second legal notice ExP-4 dated 17/3/2006 sent or in the petition for divorce or in his evidence. Nor any cross-examination is done on this aspect insoftr as respondent is concerned. Therefore, unless, he proves that while leaving the house at Haven, on 27.12.2003. she walked away with Rs, 1.5 lakhs worth gold ornaments, he cannot insist on her bringing back the same. No such evidence is adduced. In this context. material on record discloses that both of them are employed in bank which is transferable and they were transferred from place to place. In the normal Its circumstances. it Is highly probable that gold ornaments are kept In the family house since they are moving around because of exigency of employment with minimum ornaments on person of the respondent. In the light of aforesaid material on record which does not demonstrate that she walked away with Rs. 1.5 laths of gold ornaments and when she asserted that gold ornaments are in the family house, if such a condition Is put forth and made a condition precedent for joining of the respondent by the petitioner, It cannot be said that respondent Is at fault and she did not join him and, therefore, said act constitutes an act of desertion.

51. His second demand that she should come and join him with daughter Is a reasonable one. It cannot be found fault with. May be. It was not practicable, because on the day the demand was made. child was hardly 1½ to 2 years. Both of them are employed. There was nobody to lookafter the child at Haved. In those circumstances, she had left the child with her parents at Sirsi. Though

the husband cannot be found fault with for insisting on the daughter to be brought along with her, thIs Is a matter which the husband and wife should have V sorted out amicably and not make it a condition precedent for rejoining. I lowever. what we are unable to understand from the conduct of the petitioner is that his insistence that his wife should come with proper security and elderly person". It is here the cat is out of the hag. Why does a wife needs security that too proper security after marriage to live with her husband. In the normal circumstances, if they are living together. it is the husband who has to take care of the security concerns of the wife. It is not proper to leave the security concerns to third persons. even if it be her parents. In what context this condition is put is un-understandable. But, if we look into the case of the respondent that husband is in the habit of beating her up and on 27.12.2003. she was severely beaten and kicked out of the house and she was insisting on an assurance that such things should not repeat and she should have a proper and cordial atmosphere in the house, If in that context, the husband were to say 'I cannot assure the same, but you come with proper security and elderly person', it cannot be said to be reasonable condition which a husband can put forth. On the contrary, it probablises the case of wife, that husband was in the habit of beating her up, may be intentionally or emotionally he is unable to restrain himself. and If she wants to restrain him, she must come with proper security and elderly person, who could probably prevent the recurrence of such ugly incidents between husband and wife in the house. In fact it also draws support from the evidence of RW.2, 'where she has stated that she had accompanied the respondent after the birth of the child to the petitioner's house at Haved and then in her presence, the petitioner slapped the respondent on her cheeks. However, in the cross-examination, she has given a clear graphic description of the said Incident that took place on the second day after their arriving in Haven; she did not know as to why respondent slapped on her cheeks; when she came out crying. she enquired and respondent stated that petitioner has slapped on her cheeks. Therefore, the conspicuous absence of denial of controverting these allegations In the second legal notice dated 17/3/2006 Ex.P.4 and, in the petition and also in the evidence Is ununderstandable. The aforesaid material establishes the fact that husband is in the habit of assaulting, slapping or beatIng up his wife in their day-to-day lIfe and therefore, the case of the respondent that on 27.12.2003 in the morning at 7.00 a.m. when she was severely beaten up and kicked out of the house, she had no option except to return to her parental house and she has been insisting on change of attitude and an assurance from him that such things do not reoccur and he would look after her with love and alYection is more probable than the case of the petitioner. It cannot he said that respondent has not performed her marital obligations or willfully neglected in performing such obligation by not joining him either at the time of panchayats or when the legal notices were issued. In the 1 reply noice she has set out her case and made it very clear that in spite of it. if he wants to take action. she would ably defend the same, but in the 2' legal notice reiterating the very same grounds as continuation of the 1t legal notice, when a demand was made to her to unconditionally rejoin him after complying with the aforesaid demands setout above, she has categorically said in the reply that she is ready and willing to start marital life afresh, if the petitioner and his elders assure her and her father that he would look after her with love. affection, care and concern. Thus, all that the respondent wanted was an assurance from her husband, which was not forthcoming. It clearly demonstrates that she had no intention of leaving the company of her husband forever: she had no Intention of putting an end to the marital status; she had not mentally cut-off her connections from her husband. On the contrary. In unequivocal t.enns. she has expressed her readiness and willingness to Join him and all that she wanted from her husband was

an assurance from him that she would be taken care of and past incidents would not repeat. which admittedly was not forthcoming from the petitioner.

52. It Is also to be noticed that three panchayats have taken place between the parties - the let one on 2.1.2004 at respondent's parents house at Sirsi, 2M one on 29.2.2004 again at her parental house and the third one after the exchange of 1t legal notice and reply on 26.05.2004 again at Sirsi. If as contended by the petitioner, the respondent had thrown 'mangalasutra' on his face with an Intention of putting an end to the marital status and If she had no Intention of leading a matrimonial life with the petitioner, she and her parents would not have entertained the petitioner and his elders at their house at Sirsi. The very fad that petitioner and his parents visited the place of respondent's parents at Sirsi. sat together and negotiated for an amicable settlement shows that there was no Intention on the part of respondent to put an end to the marriage. On the contrary. the attempt was to bring about a settlement. It Is a different matter that settlement did not result from such panchayats. It Is In this context, petitioner relies on the oral evidence to show that respondent was adamant even during panchayats she was using abusive language against petitioner and his parents. and she had made known her Intention to leave the matrimonial life with her husband, she had admitted that she had thrown 'managala sutra' on the face of the petitioner and, therefore, It amounts to a conduct, which proves the Intention to put an end to the marrIage. It Is In this context, It has to be noticed that If they were not Interested In the marriage and respondent joining the husband, they would not have Invited the petitioner and his parents to theIr house not once but three times. That would be the normal conduct of a person who Is not Interested In joining other spouse. The very fact that they were Invited to sit In panchayats that took place and elders of the family exchanged their views. may be during the course of such panchayats I-

> parties might have lost temper and used words which they should not have, show that there was Intention to rejoin.

53. As Is clear from the evidence on record, petitioner Insisted on her to return with Rs.1.5 lakhs worth gold ornaments that she had taken away at the time of leaving her husband's house, which he has failed to prove. If this Is a condition precedent to join, certainly, panchayats would not succeed. Similarly, when the wife Insisted that he should not Indulge In physical assault. slapping on the cheeks and kicking her and she wanted an assurance from her husband and his elders that they would look after her with love and affection, care and concerns, and if the attitude of the petitioner Is, you come to my house with proper security and elderly persons, then the conduct of the petitioner Is to be suspected. The husband who wants his wife to return to his house with the child and if he cannot assure his wife of security and he wants his wife to have her own security, the Intention Is clear that he did not want his wife. He wanted to make It appear that she Is at fault and, therefore, he put conditions which are not capable of being complied with and indirectly there Is an element of 'I threat to her safety If she joins him. which is the cause for the respondent not rejoining him. It is very strange that he has put conditions to be compiled by his wife and he wants his wife to return to his house unconditionally. That shows the dominating conduct of the petitioner on the wife. It Is in this context, when evidence is examined it is very clear that both of them are educated, decently employed in natlonalised banks and probably petitioner stifi feels that wife has to be his subordinate and subservient to him and she cannot claim any equal status notwithstanding the

social status the respondent enjoys. Ifshewantstoenjoythemarltal life, shehas togive up her status and be sub-servient to husband. That appears to be the mental makeup of the husband and that appears to be the cause for disharmony in the family, because it is averred in the legal notice that for 1½ years they led a happy married life, a female child was born and really what transpired after 1½ years Is not forthcoming from the petitioner's side. Evidence on record shows that when they were in Haven. petitioner's mother, who was not living with them earlier, joined them: she was suffering from cancer; she needed medical attention. The fact remains that both husband and wife are employed and 1--

a therefore, respondent could not give proper attention to her mother-in-law. That appears to be the culminating point for disharmony between the spouses. Though wife says It is after the arrival, of her mother-in-law, who instigated the petitioner to ill-treat her, the fact remains that trouble started, after sometime her mother-In-law left their company. May be having regard to the fact she was employed and might not have taken care of her mother-in-law as she was expected to, which must have enraged the husband. It Is stated in the evidence that she took care of her relatives with love and affection, whereas his relatives were not taken care of with same love and affection. This Is yet another cause for disharmony, but this Is what happens in many household. It Is quite natural in the set up of our society, especially when a wife Is educated and employed, they would like to live Independently without any interference from the elders of both the families. Mother-in-law to them Is a nuisance. When a child Is born, as both of them are employed, both of them cannot take care of the child. Child Is to be taken care off eIther by a mald-senrant or the elders of the family. As the mother-In-law, in this case was suffering from cancer, she was not the right person to take care of the child. In those circumstances. wife has chosen to leave her child in her parental house at Sirsi, which is about 60 Kms. away from Haven. and therefore, she felt her child's interest is well protected in her parents place. She could have been more considerate to her husband by taking him either on Saturdays or Sundays to her parental house so that he could be in the company of the child or brought the child to Haven during holidays. That is what a reasonable man is exected to do, But the parties, being young, educated and drawing handsome salary, probably are unable to see from this angle and everybody is asserting their rights and it is a clash of egos. Unfortunately, it has resulted in disharmony and has spoiled the matrimonial life.

54. Learned counsel for the respondent submitted that when the trial Court has carefully considered the oral evidence on record and recorded a finding of fact. the appellate Court should not interfere with the said finding of fact merely because on the same set of facts one more view is possible. He contends this is a case where trial Court which had the advantage of observing demeanour of the witnesses has appreciated the oral evidence on record and recorded a finding that case of desertion is. proved. Therefore, no case for interference is made out. In support of his contention he relied upon the judgment of the Apex Court in the case of Jagadish Slngh Vs. Natthu Slngh reported in 2008 (10) SCC 487. There is no quarrel with the said position as it is well settled. In the instant case the parties have adduced not only oral evidence but also documentary evidence. If the trial Court has not looked into the documentary evidence on record and has not been able to appreciate the stand of the parties as contained therein and misread the said documentary evidence which is not in dispute. it cannot be said that the appellate Court should not look into the said documentary evidence to arrive at a proper conclusion.

55. The Apex Court dealing with the scope of a second appeal and the power of the High Courts to reappreciate the evidence in the second appeal in the case of Jagadish Singh Vs. Natthu Singh reported in 1992 S.C. 1604, held that where the findings by the court offacts, vitiated by non consideration of relevant evidence or by essentially erroneous approach with the matter, the High Court is not precluded from recording proper findings. To the similar effect is the Judgment of the Apex Court in the case of Damadilal and others Vs. Parashram and others reported in AIR 1976 S.C. 2229, where it was held that it is well established that If a finding of fact would arrive at ignoring important and relevant evidence, the finding is bad in law, the High Court was within its Jurisdiction in setting aside the finding of the lower appellate Court and restoring that of the trial Court on this point. In the instant case we are exercising powers of the first appellate Court. It is well settled law that the first appellate Court being the final Court of facts can reappreciate the entire evidence on record and record its own finding and if the findings recorded by the trial Court is erroneous unsupported by evidence, it owes a duty tt to set aside the same and record findings of fact and grant relief to the parties. It is only when the trial Court records finding of fact purely on the basis of oral evidence, the said finding should not be lightly interfered with by the first appellate Court, because the Appellate Court did not have the advantage of watching the demeanour of the witnesses, which advantage the trial Court had. But, it cannot be said if the trial Court records a finding of fact ignoring the material evidence on record without any basis, misreads the documentary evidence and do not properly appreciate the context in which the said evidence is adduced, this Court is powerless. The first appeal is a continuation of the original proceedings. This Court is duty bound to appreciate the evidence on record and record a finding by giving reasons and that if the finding recorded by the trail Court is erroneous it is well within the Jurisdiction of the first appellate Court to set aside the same.

56. Even in respect of oral evidence, in appreciating the same about the instances which are anterior to filing of the petition, when notices were exchanged between the parties or even in the pleadings before the Court the instances which are deposed to by way of oral evidence is not referred to or set out. The trial Court failed to notice the significance of the same and this aspect is ignored by the learned trial Judge. Therefore, a case for interference is made out. When oral evidence has to be appreciated the Court has to keep in mind what is the case pleaded by the parties and this oral evidence which is adduced is in consonance with the conduct of the parties prior to the litigation or is it a case of improvement. If it is a case of improvement the Court has to view that evidence carefully lest such evidence seriously affect the rights of the parties. This exercise has not been done by the learned trial Judge. as we intend demonstrating the same by referring to the findings recorded by the learned trial Judge.

57. Learned trial Judge at paragraph no. 48 of the Judgment has observed what the law requires is the desertion for continuous period of two years. Till 27.12.2003 the respondent lived with the petitioner. When he tried to bring her back, she refused to come back. All attempts made thereafter to bring back the respondent also did not fructify on account of the respondent's stand that she did not want to stay with the petitioner. Therefore, in the evidence of the petitioner. various attempts by him to bring back the respondent has spoken to by him. So also conducting of the panchayaths to bring back her. The evidence on record as it stands, has not been properly rebutted. It is here we find it difficult to agree with the reasoning of the learned trial Judge. All the aforesaid facts have

been denied and extensive cross examination is made to demonstrate that the petitioner is not speaking the truth. However, the learned trial Judge observed that respondent has admitted in the cross-examination twice, panchayath was conducted. This according to him would show that the respondent is reluctant to join the petitioner. This finding is absolutely without any substance. Merely because the respondent admitted that two panchayaths took place. it is no proof of the fact that wife was reluctant to join her husband. The evidence on record discloses that not two panchayaths. 3 panchayaths took place. All the 3 panchayaths were conducted at the parental house of the respondent. If the petitioner and his elders were received at the respondent's house and 3 times they met together, exchanged views, but in spite of such panchayaths respondent did not return to the petitioner's house. that by itself would not constitute desertion as understood by the learned trial Judge. kle should have found out that in spite of three panchayaths, why the parties did not reunite. who is at fault. what are the conditions imposed by either of the parties for resumption of their marital obligation. If he had looked into the two legal notices issued, which also refers to this panchayath, it would be amply clear that wife was willing to rejoin the husband. But the V petitioner insisted on her to bring Rs. 1.50 lakhs worth gold ornaments, as well as to come with proper protection and elderly persons. which shows the husband wanted respondent to come back conditionally. Wife was ready to go unconditionally, but all that she wanted was an assurance that he would take care of her with love and affection which was not forthcoming from the husband. In the light of this material on record the learned trial Judge without noticing the same, places the blame on the wife saying that she was reluctant to join the petitioner.

58. Yet another finding recorded by the trial Court is, that it is seen in the first reply notice, she has not shown her intention to come back. In the second notice she has stated she is ready to come back, if the petitioner provide security. In both the notices the petitioner has called upon to forget all sins and come back and join him to lead marital life. After filing objections, she has filed M.C. No. 8/07 for a restitution of conjugal rights. Learned trial judge has not understood the significance of this piece of evidence. This evidence clearly shows the wife has no intention of putting an end to the marital relationship. She was ready and willing to join the husband. When he did not accede to the request of the respondent, she has filed a petition for restitution of conjugal rights, which shows her intention. If the intention was to put an end to the marital relationship and not to live with him any more and as alleged, if she has thrown Mangalasutra on the face of the husband with the intention of putting an end to the relationship, she would not have filed a petition for restitution of conjugal rights, but she would have filed a petition for divorce. After setting out the above facts, learned trial judge, has observed that on considering the oral evidence of the witnesses so examined by the petitioner and respondent it is corroborating and defeating the case of each other. Because both the parties have produced evidence of their close relatives and friends. In support of their allegation, if both the parties have proved their respective cases, then the finding recorded by the learned trial judge that the case of the petitioner alone is proved cannot be sustained. The respondent has been consistently saying that it is the petitioner who is responsible for her living in the matrimonial house. She had no intention of living separately. she was kicked out of the house, she wanted an assurance from him that he would take care of her with love and affection and he would not repeat the habit of beating her time and again. If that case of the respondent is said to have been established as observed by the learned trial judge, there was a reasonable cause for the wife to leave the house and live separately, in which event the case of desertion is not proved.

59. Similarly learned Civil Judge observed that evidence of petitioner shows that all attempts to bring her back did not succeed for no fault of the petitioner. This finding is contrary to the evidence on record and cannot be sustained. Further, he has held that pleadings as well as evidence recorded shows that petitioner has discharged the burden cast upon him. In other words petitioner has made out ground as stated in Sec. 13(1)(b) of the Hindu Marriage Act. Here we may point out what the learned trial Judge has done in the Judgment is to extract the evidence of each witnesses and few sentences in the legal notices and record his findings without appreciating the said material evidence. After extracting the same, he owed a duty to appreciate them with reference to what each witnesses stated on any aspect and look into the documentary evidence, the pleadings of the parties and the law governing the same and he should have arrived at a conclusion. This exercise has not been done. Mere extracting the evidence of the witnesses or reproducing the documents and then finally saying that the aforesaid material will prove the case of the petitioner, would not satisfy the requirement of the law. Therefore the said finding recorded by the learned trial Judge on the face of it is unsustainable and then it becomes the duty of first appellate Court, being the final court of facts to appreciate the evidence on record and record a finding based on the said evidence. That is precisely the exercise undertaken by this Court. Therëfore, it cannot be said that this Court should not interfere with the finding of fact recorded by the trial Court. when in reality the trial Court has not appreciated the evidence on record and recorded finding on the said basis.

60. In fact, the petitioner in order to substantiate his case relied on the evidence of two independent witnesses. One such witness is P.W.2 -- Nagina, the land lady. It is her evidence that parties to the proceedings became tenant of her premises in December 2003. According to her, the respondent stayed in the house for a period of one month, that too one or two days in a week. She was going to Sirsi to see her daughter. she was coming to the Corporation Bank at Haven where she was employed. directly from the house at Sirsi. Not one day she .4 brought her daughter to the house. She learnt that in spite of the petitioner forcing her to bring the child, she did not bring the child. At 07.00 a.m. in the last week of December 2003, the respondent was abusing the petitioner, she and her husband went to the house. At that stage she heard the respondent saying that she would leave the house, she would send the divorce papers through post, it is open to the petitioner to sign the same or not, they enquired with the petitioner the cause for such an act. The petitioner stated that because he insisted his daughter should be brought to the house, his wife is abusing him. The petitioner requested P.W.2 and her husband to advise her suitably. For that the respondent told the petitioner that why he is requesting outsiders to interfere in their matter. Then she removed her Mangalasutra and threw the same at the foot of the petitioner. When the petitioner tried to prevent her, she slapped him on his cheeks and she stated that he has no right to touch her. She further stated that she has no connection with him. They did not know what to do. At that stage the petitioner went inside the house, the respondent stated that she would commit suicide and therefore she went inside the house, after 4-5 minutes she came out and again started abusing the petitioner. The said witness took the Mangalasutra and she put her back into the neck of the respondent. Thereafter, they left to their respective houses, 5 minutes thereafter respondent left the house. If really this incident has happened. as the witness has stated, there is no whisper of such an incident in two notices issued as well as in the petition filed before this Court. This incident is spoken to for the first time in the year 2007 when her evidence was recorded. It was held that she has no ill will against the respondent and therefore there is no reason to disbelieve her evidence. In support of the

same learned trial judge relied on the admission of the respondent in the cross examination where she has admitted that she has no ill will. In fact she has stated that she has not seen them at all.

61. In the cross examination the respondent has admitted that she was having good relationship with the neighbours. The land lady was staying in the ground floor, she did not talk to the land lady, she had no ill will against the land lady, they also did not have any ill will against her. The reason is she was there for 12 days only. In 12 days what acquaintance could have developed with the land lady. Because the evidence of the land lady shows respondent was living there for a day or two in a week as she was travelling from Sirsi to Haven. Therefore question of either of them having love and affection or ill will does not arise. On the contrary the evidence on record shows that petitioner continued to live in the house, that lady seems to be providing food to him for a period of two years and therefore they know each other well and probably that is the obligation which made her to come to the witness box and give evidence to prove the case of the petitioner. That is the reason why this incident do not figure anywhere either in the first 'F legal notice or in the second legal notice or even in the petition filed before the Court and it is this evidence which was taken note of by the learned trial judge, without appreciating the circumstances and in believing the same. to record a finding against the respondent. Therefore said finding recorded on the basis of unsubstantiated evidence is an after thought and cannot be sustained.

62. Similar is the evidence of P.W.3, a person who is said to have been a party to these panchayaths. Nothing turns out from the said evidence. All that he has stated is the respondent is adamant. and does not want to join the petitioner. unless the petitioner assures her of love, affection and safety. which the petitioner was not willing to. Therefore, P.W.3 is not aware of the conditions prescribed by the petitioner. which is to be fulfilled. before he takes the respondent. He is not speaking the truth. which aspect also has been missed by the learned trial judge.

63. Strangely at paragraph no. 52 learned trial Judge has again recorded a finding that he has made assessment of the oral evidence, he is of the opinion both that parties are at fault. According to him her evidence and the evidence of other witness shows that the respondent has exceeded the limits of decency, she never cared to join the petitioner, since beginning i.e., from 27.12.2003 she behaved rudely with him, there was a continuous insolent and erratic behaviour, she herself left the company of the petitioner on 27.12.2003. Elderly members conducted panchayath, but the efforts to bring her back to the matrimonial home failed. She was advised to mend her ways by the elderly members. She never acted as per their advise. On her own she left the matrimonial home and started residing with her parents. She is working in Corporation Bank, must be having a pride that she was working in the Bank. The behaviour of the respondent has caused petitioner mental agony as per his evidence. According to the learned trial judge, the said acts constitutes the act of cruelty, the case U which is not pleaded by either of the parties nor any evidence is adduced in support of the same. Therefore he holds, in the facts of this case one more opportunity should be given to the parties to resume their cohabitation to save the marriage and therefore instead of passing a decree for divorce, he chose to pass a decree for judicial separation.

64. Therefore, this is not a case where the learned trial judge has recorded a finding of fact based on oral evidence after observing demeanour of the witnesses. As stated earlier, learned trial Judge is

not sure whether the alleged act constitutes desertion or cruelty. At any rate. he was not prepared to grant a decree for divorce, though, according to him, the case pleaded by the petitioner is proved. We see lot of confusion in the thinking of the learned trial judge which is evidenced by his inconsistent findings recorded in the impugned judgment. In that view of the matter, the findings of fact recorded by learned trial judge cannot be sustained. Accordingly it is hereby set aside and we hold the case of desertion pleaded by the petitioner is not established. DOCTRINE OF PER INCURIUM

65. Learned counsel appearing for the petitioner relied on the judgment of this Court in the case of A. Anfl Kumur Vs. Vanishri. A. reported in 2009 Karnataka 201, wherein it is held what is to be proved to constitute desertion is (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (animus deserendi) and that both the above conditions should continue during the entire statutory period. According to the learned trial Judge when admittedly from 27.12.2003 the wife was living separately from her husband and the act of throwing Mangalsutra either on his face or at his foot, is a clear intention to bring to an end cohabitation permanently and such state of affairs is continued for a period of more than two years and therefore the case of desertion pleaded. is proved. The Division Bench of this Court in the above ease at paragraph no, 31,

32. 33 and 34 has held as under:

> "31. Therefore, a legal definition has been given to the concept of desertion under the Act and it envisages the jbllowing ingredients viz; (1) The factum of separation and (2..) the intention to bring cohabitation permanently to an end (animus deserendU and that both the above conditions should continue during the entire statutory period. Therefore. in order to constitute a matrimonial offence. desertion must he for a continuous period jôr not less than two years bejbre the presentation of the petition. In the case of Bipirt Chctndra Vs Prabhawati (AIR 1956 SC 176) the Hon'ble Supreme Court has explained in concept of desertion under the Act and pointed out that desertion is a matter Qf injèrence to he drawn under the circumstances of each case. The inference may be drawn from certain facts, which may not in another case be capable of leading to the same inherence. in fact there has been a separation, the essential question always is whether that act could he attributable to an aninius deserendi since both the j'actum and animus should coexist for a period of atleast two years. In the case of Lakshnian Vs Meena (AIR 1964 SC 40,?

and Rohini Kumari Vs lVarendra Singh (AIR 1972 SC 459) the lion 'hie Supreme Court has reqjjirmed the principles stated in the earlier case with regard to the concept of desertion under the Hindu Marriage Act.

32. The re!hre, one of the essential ingredients of desertion is separation of one spouse from another and there can be no desertion while parties are living together. Further continuing evidence of desertion for the statutory period of at least two years can never become complete until the petition is actually presented. Further f the deserting spouse genuinely desires to return to matrimonial

home, the other spouse cannot refuse reinstatement.

33. The question whether deserting spouse has a reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period is always a question of fact. In considering the conduct of the deserted spouse in any such case, the Court will have regard to the facts of the particular case. in order to ascertain what in jet was the impact on the mind of the deserting spouse of anything which was said or done by the deserted spouses. Further the agreement to pay main tencrnce is not in ftsef proof of consent to live apart.

34. The expression 'wiliful neglectS used in the explanation though not dejinecl excludes acts or omissions done by accident or inadvertence. On the other hand there must be conscious acting in a reprehensible manner in discharging all marital obligations which connote a degree of neglect resulting in wiliful neglect. The refore. breach QI every tie of marriage or jáilure to discharge every tie of marriage or obligation cannot be regarded as wiliful neglect. The neglect to become desertion must he such as amounts to forsaking or abandonment of one spouse by the other by a conscious disregard of the duties and obligations qf the married stare considered as a whole. Further a spouse may be guilty of such misconduct as would render the continuance of marital relations so unbearable that the other spouse feels compelled to leave the matrimonial home and in such a case it is the former and not the later, who is the deserter. It is incumbent on the petitioner to prove that desertion without reasonable cause subsisted throughout the statutory period. Before granting relief on the ground of desertion the Court must he satisfied that the matrimonial offence complained of is established. The legal burden of proof lies on the petitioner to establish that the desertion wa. I' without cause and to discharge that burden the petitioner may rely on thefact that he asked her to Join him and she refused Once he proves that fact of refusal she may seek to rebut the Inference of desertion by proving that she had Just cause for her refusal and usually It would be wise for her to do scf.

66. Though paragraph 31 read in isolation, gives such an impression, if we read the entire Judgment, at paragraph no. 34. it is held that it is incumbent on the petitioner to prove that desertion was without reasonable cause and subsisted during the statutory period. That is the correct position of law. but what is stated in paragraph no. 31 is not the correct statement of law, for the following reasons.

(a) Desertion has been defined in the explanation. The opening words of the said Section

makes it explicitly clear, to constitute desertion mere factum of separation is not éufficient. What is required is the desertion of petitioner by the other party to the marriage without reasonable cause. If one spouse is forced to live separately and for such a separation there is a reasonable cause, then the spouse living separately cannot be accused of desertion. Therefore mere factum of separation is not proof of desertion. The said judgment runs counter to the definition of desertion contained in Explanation to Sec. 13.

(b) That apart, the Apex Court in the aforesaid two judgments referred to above and in particular the Constitution Bench of the Apex Court in Lachman's case (AIR 1964 s.c 40) has categorically held as under:

> For the offence of desertion, so far as the deserted spouse is concerned, two essential conditions must be there. (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to jorm the necessary intention aforesaid."

Therefore the aforesaid four conditions have to be read together, whereas in the judgment of ANIL KUMAR they have taken into consideration oniy the first two aspects, which gives a totally different rn caning.

(c) That apart, yet another Division Bench of this Court in the case of HUVAKKA VS. VISHWANATH reported in ILR 2009 KARNATAKA 4193, has stated as under:

> 18. The next ground urged in desertion, Desertion has been made a ground for divorce under clause (i-b) of sub-Section (1) ot Section 13. Hindu Marriage Act. This expression has been defined in the explanation attached to sub-Section (1) of the said Section which lcujs down that "in this sub Section the expression 'desertion' means the desertion of the petitioner by the other parW to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect Qf the petitioner by the other party to the marriage and its grammatical variations and cognate expressions shall he construed accordingly. The essence of desertion is the abandonment of one spouse by the other for no good cause. Desertion is not withdrawal from a place hut from a slate of things. for what law seeks to enjbrce is the recognition and discharge of common obligations of the married state. What amounts to desertion in a particular case depends upon the circumstances and mode of lfe qf the parties. But, there can be no doubt than an active withdrawal from cohabitation and breaking off the mctrital relations is an indication of an intention of the husband to foresake his wife, It is well settled that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case and those facts have to be viewed as to the purpose which is revealed by those facts or by conduct and expression of intention, both anterior and subsequent to the actual act of separation. Desertion of a wife by the husband is a breach. of matrimonial duttj ".

(c) The said judgment in ANIL KUMAR's case is rendered by a Co-ordjnate Bench of this Court, which, in the normal course, would be binding on this Court Lv..

also. However. if it is demonstrated that the said decision does not have the effect of laying down the correct law, on account of failure in considering statutory provision/rule and is passed without

considering a binding precedent of the Apex Court as well as the judgment of a Co-ordinate Bench, then it would not be a binding precedent. In this context it is necessary to know what this principle of per incuriurn means and when it applies.

67. In IIALSBURY LAWS OF ENGLAND, 4th Edition Volume 26 it is stated as under:

> "A decision is given per in curiam when the court has acted in ignorance of a previous decision of its own or of a court ol coordinate jurisdiction which covered, the case before it, in which case it must decide which case to follow or when it has acted in ignorance of a House of Lords decisions, in which case it must Jbllow that decision: or when the decision is given in ignorance of the lernis of a statute or rule having statutory Jbrce."

68. The principle of per incuriam has been very succinctly formulated by the Court of Appeal in YOUNG VS. BRISTOL AEROPLANE COMPANY, LIMITED reported in 1944 (1) K.B.718.

Lord Greene, Master of Rolls formulated the principles on the basis of which a decision can be said to have been rendered per incuriam'. The principles are:

"Where the court has construed a statute or a rule having the jôrce of a statute its decision stands on the same footing as any other decision on a question of law, hut where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very dJferent. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam."

69. The same principle has been reiterated by Lord Evershed, Master of Rolls, in MORELLE LD. VS. WAKELING & ANOTHER 1(1 955) 2 QB 379 AT PAGE 406)1. The principle has been stated as follows:

> .As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases sonic part qf the decision or some step in the reasoning on which it is based is frund, on that account, to be demons trabltj wrong....."

70. In the case of MUNICIPAL CORPORATION OF DELHI VS. GURNAM KAUR reported in (1989) 1 SCC 101, a three-Judge Bench of this Court explained this principle of per incuriarn very elaborately in paragraph 11 at page 110 of the report and in explaining the principle of per incuriam the learned Judges held:

> A decision should be treated as given per incunarn when it is given in ignorance of the terms qf a statute or f a rule having the force of a statute In paragraph 12 the

learned Judges observed as follows:

One of the chief reasons JOr the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to he reopened. The weight accorded to dicta varies with the type of dictwm Mere casual expressions carry rio weight at all. Not every passing expression of a judge. however eminent, can be treated as an cx cathedra statement, having the weight of authority."

Pronouncements of law, which are not part of the ratio decidendi are classed as ohiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das' case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument. without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavement or public streets, and without any citation of authority. Accordingly. we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot bejustfied by the terms of the relevant provisions. A decision should he treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the Court on the question or not whether any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a PG NO 939 pavement squatter.

71. The Apex Court in the case of STATE OF BIHAR VS. KALIKA KUER @ KALIKA SINGH AND OTHERS reported in AIR 2003 SUPREME COURT 2443, held as under:

5. At this juncture we may examine as to in what circumstances a decision can be considered to have been rendered per incuriam. In Hals hurry's Laws of England (Fourth Edition,) Vol.26: Judgment and Orders Judicial Decisions as Authorities (pages 297298. Para 578) wejind it observed about per incuriam as follows: "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction while covered the case before it, in which case it must decide which case to follow or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutorq force A decision should not be treated as given per incuriam. however, simpltj because of a deficiency of parties or because the court had not the benefit of the best argument. and. as a genera! rule, the only cases in which decisions should be held to he given per incuriam are those given in ignorance qf some inconsistent statute or binding authority Even f a decision of the Court of Appeal has misinterpreted a previous decision of the House of lords, the Court of Appeal musfollou' its previous decision and leave the House of Lords to rectfy the mistake."

> Lord Godard CJ in Huddersfield Police Authorities case observed that where a case or statute had not been brought to the Court's attention and the court gave the decision in ignorance or forgetfulness f the existence of the case or statwe. it would be a decision rendered in per incuriam.
>
> 72. In the instant case desertion has been defined in the explanation to Section 13. The said provision as stated earlier, makes it clear that desertion means desertion of the petitioner by the other party to the marriage without reasonable cause.

So. mere factum of separation with the intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse, is not sufficient to constitute desertion. Separation must be without reasonable cause. If there is a reasonable cause and the spouses are separate, that would not constitute desertion. In Lachman's case the Supreme Court held that the factum of separation and the intention to bring cohabitation permanently to an end, is the requirement of desertion. They have also held the other two elements are essential as far as the deserted spouse is concerned, absence of consent and absence of conduct giving reasonable cause for leaving matrimonial home. But this portion of the judgment has not been noticed by the Division Bench in Anti Kumar's case. A reading of the judgment in Huvakka makes it very clear that essence of desertion is. the desertion of one spouse by the other for no good cause. The said judgment also has not been noticed by the aforesaid Co-ordinate Bench. As the Division Bench in Anil Kumars ease overlooked the statutory provisions and a binding judgment of the Apex Court as well as the judgment of Co-ordinate Bench. For the aforesaid reasons we are constrained to hold that the statement of law as contained in para 31 of the aforesaid judgment do not represent the correct interpretation of the word desertion as defined under the Act and to that extent it does not lay down any binding law. Is not good law to that extent only.

73. Learned counsel for the respondent relied on the judgment of a Co-ordinate Bench in the case of PRABHAVATHI Vs. K.SOMASHEKHAR reported in ILR 2002 KAR 3505 dealing with the burden of proof wherein it was held that offence of desertion must he proved beyond any reasonable doubt under the rule of prudence.. The evidence of the petitioner in a matrimonial case, is to be equated to that in a criminal case. In fact, the Co-ordinate Bench in coming to the said conclusion was relying on the paragraph No. 48 of the Constitutional Bench judgment of the Apex Court in the case of Lachmart V. Meenai reported in AIR 1964 S.C. 40. As set out earlier by us. in view of the judgment of the Apex Court in Dr. Naravan Ganesh Dastane. which judgment has not been noticed. The judgment of the Co-ordinate Bench runs counter to the judgment delivered by the Apex Court and it is a decision given per incuriam and therefore it does not state the correct legal position. as such we hold that it is not a good law in view of the judgment of the Apex Court in Dr. Narayan Ganesh Dastan's case.

RESTITUTION OF CONJUGAL RIGHTS

74. The respondent-wife after initiation of divorce proceedings. initiated proceedings for restitution of conjugal rights which was numbered as M.C, No. 8/2007. Though the said proceeding was also

pending in the very same Court, strangely neither parties requested the Court for clubbing the cases and for recording of common evidence nor did the Court adopted such a procedure. The evidence was recorded in both the cases separately. However, in the proceedings for restitution of conjugal rights, learned trial Judge after setting out the pleadings of the parties and also evidence of the witnesses, chose not to appreciate the same and record any finding. Learned trial judge declined to grant a decree for restitution of conjugal rights on the ground that in the connected matter filed by the petitioner for divorce, he has granted a decree of judicial separation. According to the learned trial judge the effect is the parties are allowed to ponder upon the state of things again, so that they may join at least for the welfare of the child who is in the custody of the wife. Welfare of the child is prime consideration. If the parties did not reconcile within the stipulated period of one year, it will be open to either of them to seek a decree of divorce. Though wife is guilty of cruelty and desertion she is not entitled for decree for restitution of conjugal rights by way of restitution. as already other decree has been passed against her. Therefore the learned trial judge declined to grant a decree for restitution of conjugal rights.

75. Petition for restitution of conjugal rights has to be decided, when separate evidence is adduced, by appreciating the evidence and recording a finding. On the contrary he imports his finding recorded in the petition filed for divorce and holds the wife is guilty of desertion and cruelty and refuses to decree restitution of conjugal rights. Now that we have set aside the finding recorded by the learned trial Judge in the said petition for divorce and recorded a finding that she has not deserted her husband and also held that the finding of cruelty is without any basis. the order declining to grant restitution of conjugal rights is unsustainable.

JUDICIAL SEPARATION

76. In this regard it is necessary to have a look at Section 10 which deals with judicial separation. which reads as tinder:

> "Sec. 10 -- Judicial Separation -- (1) Either party to a marriage, whether solemnised bejbre or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in suh section (2) thereof. as grounds on which a petition for divorce might have been presented.
>
> (2)Where a decree for ludicial separation has been passed. it shall no longer be the respondent. hut the court maL]. on the application by petition of either party and on being satisfied of the truth of the statements made in such petition. rescind the decree if it considers it just and reasonable to do so.

(underlining by us)

77. Section 10-A provides that in any

proceeding under the Act for a decree for dissolution of marriage, by a decree of divorce the Court may, if.

it considers it just. so to do having regard to the circumstances of the case instead pass a decree for judicial separation. That is how the decree for judicial separation is passed in a petition for divorce. Sub Section (2) of Sec. 10 makes it clear where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabitate with the respondent but the Court may. on the application by the petitioner or either party and on being satisfied that the truth of the statement made in such a petition rescind the decree, if it is considered just and reasonable to do so. This aspect has been completely missed by the learned trial judge.

78. If intention of the learned trial judge was.

by passing a decree for judicial separation. he has granted a decree for restitution of conjugal rights to the wife and therefore he has dismissed the petition for restitution of conjugal rights, he was wrong. In the case of restitution of conjugal rights, the husband is compelled to take the wife back. However, in a petition filed for divorce where a decree for judicial separation is passed in his favour, he is not obliged to cohabitate with the wife. He has no obligation to live with the wife. All that he has to do is to wait for a year's time to elapse and then seek for divorce. When there was no obligation on the part of the husband to join the wife, which obligation could have been imposed by the Court while granting a decree for restitution of conjugal rights, granting a decree for judicial separation, cannot be a ground for declining to grant a decree for restitution of conjugal rights. Again it shows the confusion and want of clarity in the mind of the learned trial judge who has passed this order.

79. However, we are dismissing the petition for divorce on the ground that desertion is not proved. Consequently. we set aside the order passed by the trial Court in dismissing the petition for restitution of conjugal rights. We cannot consider the case of the wife for restitution of conjugal rights for the first time as the learned judge has not independently appreciated the evidence on record and has not recorded any finding based on such evidence. It would be proper for us to set aside the decree dismissing the petition for restitution of conjugal rights and remand the matter back to the trial court for reconsideration after hearing both the parties. That would meet the ends of justice. Hence we pass the following order.

(1) M.P.A. No. 23999/2009 is allowed. Decree for judicial separation is set aside. Petition filed for divorce on the ground of desertion is hereby dismissed.

(ii) M.F.A. No. 24000/2009 is allowed. Dismissal of the petition filed for restitution of conjugal rights is hereby set aside. The matter is remanded back to the trial Court for fresh consideration in

accordance with law.

Sd! 3UDGE Sd[.

IUDGE BVV/VNP