

Ashok Kumar Bhatnagar Vs. Shabnam Bhatnagar

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Court : Delhi

Decided On : Oct-05-1988

Reported in : AIR1989Delhi122; 1989(16)DRJ105

Judge : S.S. Chadha and; Santosh Duggal, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1)

Appeal No. : Letter Patent Appeal No. 80 of 1985

Appellant : Ashok Kumar Bhatnagar

Respondent : Shabnam Bhatnagar

Advocate for Pet/Ap. : Swantantar Kumar, Adv

Judgement :

Santosh Duggal, J.

(1) This is petitioner-husband's Letter Patent Appeal, filed against the dismissal in limine of his appeal by a Learned Single Judge of this Court ; which appeal he had taken against the judgment dated 5th January, 1985 of the Additional District Judge, Delhi, dismissing his petition for a decree of divorce by dissolution of his marriage with the respondent filed under the provisions of Section 13(l)(ia)(ib) Of the [Hindu Marriage Act, 1955](#), as amended by the Marriage Laws (Amendment Act of 1976).

(2) It is a case of short lived marriage between the spouses, as revealed from the facts culled from the record, inasmuch as the wedding had taken place on 7th March, 1976 whereas there has been admitted severance of relationship between them since 10th October, 1976. The petitioner came up with the allegations that the respondent had deserted him and left the matrimonial home on 10th October, 1976 with the intention of permanently abandoning the same and that this was without any reasonable cause, and without his consent ; rather against his wishes.

(3) Petitioner went on alleging that the departure of the respondent from matrimonial home on 10th October, 1976 was with the definite resolve of not returning to the matrimonial home and that this is obvious from the fact that while leaving the house she took away practically all her clothes, valuables, jewellery and other articles. The allegation, thus, was that she had animus deserendi from the very moment, she left the house on 10th October, 1976 and that this determination subsisted throughout inasmuch as respondent never made any attempt to come back nor her parents took up any initiative to send her back and further that their intentions became clear when neither she nor her parents even sent customary greetings to the petitioner or his parents on the Diwali day, which was the first one after their marriage, and fell about 10 days of respondent having left the matrimonial home. The petitioner further alleged that in furtherance of her intention to desert the petitioner and abandon the matrimonial home, for which he pleads to have given no cause or occasion; she again visited his house on 7th November, 1976 and took away the remaining of her clothes, jewellery and other valuables, on the pretext of requiring them for the purposes of attending a relative's marriage, but never returned thereafter nor made any efforts for rapprochement.

(4) There were grave allegations against respondents behavior and conduct while she was staying at petitioners house, describing her nature to be indolent, arrogant, self-indulging and contemptuous of the petitioner and his family ; pleading on the other hand that the petitioner possessed a very gentle and unobvious nature, holding a decent job, with very affluent parents and that he put up with all the alleged mis-behavior and insults from the respondent out of his anxiety not to hurt his parents, and also in the hope of bringing round the

respondent to correct approach and life and their way of thinking but according to him she remained recalcitrant and always looked down upon him indicating in clear words as well as by implications that he was not worthy of her, and she was possessed of better attainments, and deserving of a better person as husband, as compared to the petitioner. This treatment which the respondent allegedly meted out to him, is tantamount to cruelty on the part of the respondent causing mental humiliation and agony to him, so averred the petitioner, (Appellant herein). Further pleading that he was in no way privy to respondent's staying away ; he sought a decree of divorce by dissolution of marriage, both on the ground of desertion as well as cruelty.

(5) Learned trial court after full appraisal of the evidence both oral as well as documentary led before him and also weighing the totality of circumstances as brought on record, came to a clear finding that the respondent had not formed any intent to abandon the matrimonial home when she left for her parents house on 10-10-1976, where she was admittedly dropped by the petitioner himself and that the object of her visit was observance of the fast of 'Karva chauth' which customarily had to be at wife's parents house. Learned Adj has very exhaustively gone into the respective conduct of the parties right from 10-10-76 in the light of the plea set up by the respondent in her written statement and came to a clear finding that respondent was not guilty of any desertion and that it was on the other hand the petitioner, who by his conduct had deserted her, and that her staying away from the matrimonial home, cannot be held in the facts and circumstances of the case, to be without any reasonable excuse or without petitioner's consent.

(6) Learned trial court also recorded a finding against the petitioner on a preliminary issue that had been pressed by the respondent to the effect that the petition was not maintainable for the reasons that it had failed to comply with the requirements of the Rules on the subject, inasmuch as, in spite of the fact that it was known to the petitioner that there was a male child born out of this wedlock, he failed to make any mention of the said child in his petition, which was in clear contravention of the Rule (iv) of the Hindu Marriage (Punjab) Rules, 1956 as adopted by Delhi High Court, then applicable because by that time no rules had been framed by Delhi High Court on this subject. It is noted that the said Rule laid

down that all petitions under Sections 9 to 13 of the Hindu Marriage Act shall state whether any children were born of the marriage and, if so, the date and place of birth and name and sex of each child separately, and the fact whether the child is alive or dead.

(7) RESPONDENT'S contention was that the factum of pregnancy was communicated by her to the petitioner as soon as she came to know of it on 1st November, 1976, which message was received by petitioner's sister who was at the time admittedly residing with petitioner and her parents in their house. Further that, birth of the child itself was conveyed to them on 15th June, 1977, namely the day on which he was born and that this fact of a son having been born was known to the petitioner and his family as well as other relations inasmuch as his cousins, daughters of a paternal uncle, had visited her at her parent's house soon after birth of the child and this fact was also ascertained by another uncle of the petitioner, namely, Sh. J.P. Bhatnagar and subsequently confirmed by his maternal uncle, namely, Shri U.B.L. Bhatnagar in a telephonic conversation and that respondent's sister herself informed petitioner's mother on telephone both on 15th June, 1977 when the child was born, and on 21-6-1977 when she came back home from the hospital, and that in spite of the positive knowledge, the petitioner had, for some ulterior motive, omitted to make mention of the child and this rendered his petition as not entertainable, being not in conformity with the rules framed. on the subject.

(8) Learned trial court fully accepted respondent's evidence in this regard, and recorded a finding that petitioner was throughout posted with the knowledge both of respondent's pregnancy as well as birth of the child, and that in spite of various opportunities, falling his way, when he could have amended the petition ; fact having been disclosed, not only in the written statement filed by the respondent at the earliest opportunity, but also in the application moved under Section 24 of the Hindu Marriage Act for seeking maintenance pendente lite for herself and her child, the petitioner did not take any steps to make amends for the lapse, and when he did so at the fag end of the proceedings ; namely, after the arguments had commenced, he did it in a very half-hearted way, and the incorporation of the necessary clause was done in very vague and ambiguous terms. He, therefore, held that the petition was not in conformity with the relevant rules and on that

account liable to be held as not maintainable. In fact, this issue had been dealt within the judgment as a preliminary issue but the learned trial court thought it fit, having recorded evidence in the case and heard it fully, to record findings on all the issues.

(9) The petition was thus dismissed both on merits, as also on the preliminary issue.

(10) The petitioner obviously felt aggrieved by dismissal of his petition both on the preliminary objection as well as on merits, whereby the trial court had declined to accept his allegations of desertion on the part of the respondent or cruelty, and came up in appeal. As already observed, it was dismissed at the admission stage and this is how the present Letters Patent Appeal has been filed.

(11) We consider it expedient to reproduce the question of law which have been formulated by the appellant in this appeal, so as to focus on the real issues, now raised in the appeal. These are as under :-

(A) Where the allegations made by one spouse against the other with regard to alleged cruelty and apprehension of danger to her life are disbelieved by the Court, can the courts still give the benefit of principle of constructive desertion in favor of such a spouse. (sic.)

(B) Where there is a clear and definite intention on the part of the respondent not to go back to her matrimonial home while the said party had left home voluntarily, would it in law and in facts amount to a complete and conclusive proof of desertion or not ?

(C) Whether animus or intention to desert or contributory desertion can be inferred merely because the petitioner/appellant did not make any efforts to reconcile the matrimonial relations though not admitting that serious efforts were not made by the appellant for reconciliation.

(D) Whether the courts below were not bound to consider the judgment of this Court in *Nijhawan v. Nijhawan*, : AIR1973 Delhi200 which squarely covers the point in issue and as such the judgment of the courts below is affected by the

doctrine of stare decisis.

(C) Whether incidents alleged by the respondent can at best be termed as normal wear and tear of marriage and on the other hand serious frivolous and baseless allegations are made against the appellant, then whether the same did not amount to mental and physical cruelty to the appellant and also desertion on the part of the respondent ?

(12) After reiterating the facts and allegations as set out in the petition, it is contended that there were certain material facts established on record which ought to have led to the finding that there was a desertion on the part of the respondent without any just and reasonable cause inasmuch as it had come on record that respondent had voluntarily left the matrimonial home on 10th October, 1976 without any encouragement, dispute, or differences with the appellant and never returned to her matrimonial home till the institution of the suit, in spite of requests and wishes of the appellant and serious efforts made. It is further averred that the learned trial court also erred in not accepting petitioner's plea about respondent having been guilty of cruelty towards him which facts, according to the appellant, were established inasmuch as the respondent had deprived him of matrimonial relations without any reasonable excuse or cause and had made false, frivolous and baseless allegations of very serious nature against him by serving legal notice and threatening to start proceedings under the Anti Dowry Cell and that this not only caused mental torture and tension to the appellant but also adversely affected his status and further that she inflicted cruelty on him by her unequivocal threat and declaration of intention of getting the pregnancy terminated against his wishes and without any information to him and by not informing or permitting the appellant to meet his child and that there was a patent error in the findings of the learned trial court, that he had failed to prove any guilt on the part of the respondent so as to entitle him to get the marriage dissolved by a decree of divorce.

(13) It is stressed that learned trial court ought to have taken into consideration the fact that the appellant was in no way instrumental in respondent's leaving the matrimonial home and that he had, till the last day when she left for her parents' house, cordial relations with her, and could not have given any cause to her to

take a decision to quit the matrimonial home, that there was no such conduct on the part of the appellant which could justify respondent staying away from the matrimonial home. It is also contended that there was definite evidence on record which reveals deliberate deterrents to appellant's visit to respondent's parental house either created by her or her parents and that she had formed a definite intention on 10th October, 1976 to leave the matrimonial home, and gave proof of it by not only not returning after the first but having visited appellant's house again on 7-11-1976 and having collected her other belongings on the ostensible excuse of relative's marriage. This conduct by itself was indicative of her intention to permanently abandon the matrimonial home. The appellant also pleads that the legal notice sent on 15-2-1977 was full of such material which not only betrayed respondent's resolve to put an end to matrimonial relations, but also tantamount to cruelty on account of the allegations made therein, which the appellant repudiates as wholly false and baseless and that the learned trial court has betrayed erroneous approach in explaining this notice as an effort on the part of the respondent to bring about reconciliation.

(14) The emphasis again and again, on various facts narrated in the appeal, to which reference shall be made during discussion, is to the effect that the blame lay wholly with the respondent or her parents and that she had displayed from the very beginning an unconcealed dislike for the appellant and his parents and that he bore with all that untold mental agony but could not persuade the respondent to adjust herself and that it was because of her abnormal temperament and arrogance that she left the matrimonial home with intention not to return, and that the learned trial court definitely erred in holding that conduct of the respondent did not amount to desertion, and that it was the appellant who was responsible for her staying away and that the severance of relations between the parties cannot be treated as desertion on the part of the respondent without any reasonable excuse.

(15) It is also pleaded that the learned trial court adopted an entirely erroneous approach and in spite of the fact that the petition had been amended and necessary facts about existence of the child incorporated, even then, the petition had been held to be not maintainable on the view that it was not in conformity with the Rules, governing the subject. It is added that learned trial court ought to have

appreciated that the birth of a child to the respondent about 8 months after her withdrawal from the matrimonial house was a serious matter, and that the appellant could not have acted in the absence of any definite information and particularly in atmosphere of suspicion and surprise created for the appellant by the respondent herself. He seeks, therefore, reversal of the trial court's judgment.

(16) During hearing, entire thrust of learned counsel for appellant's arguments was that there had been misreading of evidence on the learned trial court's part, and that he would endeavor to show on the basis of respondent's own evidence, that all allegations made by her were false and baseless and that there was no justification for her to stay away from the matrimonial home and that her conduct definitely amounted to desertion of the appellant without any reasonable cause, and without appellant's consent as also against his wishes.

(17) The learned counsel pointed out that there was no Explanation for her not having returned to the matrimonial home after the fast was over and that the factum of her second visit on 7th November, 1976 when she took away further clothes, jewellery and also other valuable articles was in continuation of her resolve to abandon the matrimonial home and that notice dated 15-2-1977 (Ex. Public Witness 1/1) sent through the advocate, for which there was no provocation from the side of the appellant, was a positive proof of the fact that she was bent upon putting an end to the relationship, and not only that she was interested in extracting money from the appellant on the pretext of maintenance, but also threatened him with police, and criminal action, as well as civil litigation, and that in between also there had been no effort on her part to come back or contact the appellant on phone or otherwise.

(18) It was pointed out that the respondent was fully encouraged in this by her father as revealed by the aggressive tone of his letter to appellant's father as well as his uncle and that in spite of appellant and his father having conveyed to the respondent's father that respondent was free to come back at any time she liked, and having fully controverted the allegations made in the notice as well as respondent's father's letter; both she and her father persisted in their non-cooperative attitude clearly indicating that respondent was not interested in the

appellant or in staying at the matrimonial home or resuming cohabitation with her husband. Learned counsel placed reliance on a judgment of the Supreme Court in the case of Bipin Chandra Jaisinghbai Shah v. Prabhavati, : [1956]1SCR838 and urged that desertion was a matter of inference to be drawn from the facts and circumstances of each case and that when there had been admittedly separation, and when it was a case where the respondent had left and stayed away from matrimonial home, then on the facts shown on record, no other inference was possible than that there was total absence of conduct on the part of the appellant to give any reasonable cause to the respondent for living or for keeping away from matrimonial home, and that at no stage the appellant consented to her remaining away, and continuing to stay at her parents' house and that he and his family had made all efforts to see that the respondent came back, and that in this state of facts the findings that it was petitioner's conduct that was responsible for respondent's decision not to come back, smacked of mis-appreciation of evidence.

(19) Learned counsel made reference also to a Division Bench judgment of Karnataka High Court in the case of N.B. Rukmam v. P.M. Srinivasa Air 1984 Kar 131, to argue that the inference as to whether a party had animus deserendi was a question to be drawn, on the basis of facts and circumstances proved on record and that in case the wife failed to prove that the husband was guilty of such acts of omission or commission which can be dubbed as tantamount to cruelty, and that when learned trial court had disbelieved the respondent's defense of appellant having been guilty of cruelty towards her; there was no rational basis for him to record the findings that she had a reasonable cause to stay away from the matrimonial home. He further contended that all allegations set up by the respondent in written statement were unbelievable and none of them duly proved and that learned trial court having held that respondent's plea about demand for such articles like refrigerator, scooter etc. was not worthy of credence, there was no basis for him to hold that the appellant had given her cause to remain away from the matrimonial home, and that she was not guilty of any such conduct which can be characterised as desertion or cruelty towards him.

(20) Shri Swatanter Kumar, Advocate pleaded at the end, that in any case it is now manifest on record that the marriage had irrevocably broken, inasmuch as there

has been so much of acrimony and mistrust, as well as lack of love and affection between the parties that there could be no expectation at all, of their coming together at any time, and that it was a fit case where such a marriage is put to an end by a judicial decree, to absolve the parties from ties of a futile marriage, and unworkable relationship.

(21) Respondent arguing personally, at the outset, expressed herself strongly against the plea of learned counsel for the appellant, for appeal being allowed on account of the marriage having become irretrievably broken ; stating that the appellant ought not to be allowed to take advantage of his own wrong and, to get away after having made her undergo all these litigations, on false and frivolous charges, which have been thoroughly disbelieved, and that court ought not to be a privy or party to such acts as would be tantamount to encouragement of a behavior such as appellant's. She further stated in unequivocal terms that she had been throughout ready and willing to go back to the appellant, and that her only stipulation was that she should be ensured proper safety and self respect and there should be no onslaught on her dignity and that she was, in fact, keenly desirous of going back to the appellant, even now so that their child can grow up in the shadow of his father's protection and care. The response to this offer when the Court wanted to know appellant's response through his counsel, was of unpreparedness to consider this type of offer. The appellant, though present in court, throughout, maintained a stony silence, and did not react at all. The inference is thus inescapable that the appellant is not interested in keeping the marriage, and that his sole concern is to have it dissolved by a decree of divorce.

(22) The respondent was accordingly heard on merits and she very convincingly demolished the case of the appellant and showed from the record, that the appellant had from the very start come up with false allegations and that the very premises on which his petition was based had been proved to be untrue, and in fact given up by the appellant himself.

(23) She pointed out that in the petition as originally filed, there was a categorical assertion that the respondent left the matrimonial home on 10-10-76 with intent never to return, after having taken away all her clothes, and jewellery. She

submitted that after it was shown that the petitioner himself had dropped her at her parents' house on 10-10-76 in a normal way, for the purpose of observing 'Karva Chauth' fast, on the clear understanding that he would pick her up after two days; the position was shifted while filing replication to the effect that she abandoned the matrimonial home with intention of never to return, on 11-10-76.

(24) Respondent argued that it is admitted on record both by the appellant as well as his father while appearing in the witness box that relation between the parties were perfectly normal as on 10-10-76, and that the appellant was constrained to admit that it was he who had left her at her parents' house, and that it was also on record that appellant's mother and sister along with sister's children visited respondent at her parents' house with customary gifts on 10-10-76 itself, and that she in return visited the matrimonial home with her mother and sister on 11-10-76, to deliver gifts etc. which are customary on the occasion and that in fact of this, it was absolutely wrong on the part of the appellant to have alleged that she had left the matrimonial home with animus deserendi on 10th October, 1976 or 11th October, 1976.

(25) Respondent further laid stress on the fact that it was petitioner's own case that relations between the parties were perfectly normal, and that he had given no cause to her to feel estranged from him nor afforded any occasion to her to decide to leave him, and that in this setting of facts the only acceptable version is as given by her, namely, that his mother felt dissatisfied with the quantity/quality of gifts which she and her mother had taken to petitioner's house on 11th October, 1976, particularly lack of a steel dinner set and that it was this annoyance of appellant's mother which when passed on to him was responsible for his change of attitude, to the extent of hurting the feelings of his own wife on the day of 'Karva Chauth' fast, and declining to come to pick her up the following day as arranged, and instead telling her to return on her own. She pleaded that the story of humiliation to appellant's mother and sister on the occasion of their visit to respondent's parents' house on 10th October, 1976 was on the face of it a concocted one because had it been so, the appellant would not have, as is his own case in evidence, rung her up twice during the course of the day during the fast, to enquire as to how she was feeling, and that these phone calls he had made from his office, and change came

abruptly after return home, when his mind was poisoned by his mother. She pointed out that if the alleged humiliating treatment of the mother and sister had caused any effect on his mind, then he would not have called her twice on phone on 11th October, 1976.

(26) The respondent then gave a resume of the conduct of the parties thereafter and pleaded that after having received a snub from her husband, and a rough treatment on phone, whereby he positively conveyed to her that he was not going to come and pick her up, and she may return on her own ; she could not pick up courage and felt apprehension of mal-treatment and decided to wait and watch. She pertinently pointed out that on Diwali day, which happened to be first Diwali after their marriage, she expected her husband and his family to invite her but nobody came to take her back to spend Diwali at the matrimonial home and that when there was no move from their side, she and her parents also kept quiet but thereafter she took the very first opportunity to get into touch with them when it was confirmed medically that she was in family way. She argued that it is admitted on record that she had rung up appellant's house to break the news, and the phone was picked up by his sister, who was staying there, and news of her pregnancy was conveyed to her, with the request that it be passed on to her mother-in-law and her husband, but no body even bothered to enquire about the fact or her state of health or to show any care for her. Even then on 5th November, 1976 she rang up her mother in law and sought her permission to visit the house with her cousin who wanted to invite the appellant and his family for a wedding in his family. She further pointed out that there was no denial of the fact that she did visit appellant's house on 7th November, 1976, accompanied by her cousin and his wife, when she was met by her mother-in-law, and on her request and with latter's permission, she took few sarees for the purpose of the marriage, as these were required because earlier she had come to her parents' house on the occasion of the 'Karva Chauth' fast with the intention of spending only two days there, and that she had at that time only one set of jewellery on her person, and had brought two sarees. According to her, on her visit on 7th November, 1976, she requested her mother-in-law for some jewellery to be worn by her on the marriage of her cousin, but it was declined on the pretext that it was lying in locker, and thereafter she did not insist.

(27) Respondent further alleged that her mother-in-law did not even broach the subject of her pregnancy and then she (respondent) enquired from her mother-in-law by taking her separately in a room, as to whether she and other family members were aware of the fact to which the mother-in-law replied in affirmative and it was then that in view of the indifference displayed by the appellant and his family to the news of the pregnancy, that she remarked in sheer desperation that she did not find any use in carrying on with it and may as well get it terminated. She explained that she had absolutely no intention of doing so, and that that was only an impulsive remark, on account of the attitude shown by the appellant and his family and that thereafter she came away but no body bothered and that neither at that time nor subsequently any body from the appellant or his family tried to contact her. Her Explanationn for the notice of 15th February, 1977 was also as that of a method adopted, to invoke some response from the appellant, because of the absolute silence she was being confronted with from their side, and that even after this notice the appellant never tried to contact her on even write to her and that exchange of correspondence ensured through their respective father. She, however, stressed that the tenor of her father's letters would reveal that the endeavor was that the matter is reconciled and that whatever misunderstanding had been created could be cleared by the parties taking pledge in the presence of God, and in that context he offered that his daughter ; namely, the respondent was prepared to swear by God as to the truth of the facts stated by her, and if she was shown to be wrong, she would come to their house right away but there was no response even to this offer.

(28) The respondent read out from letters addressed by appellant's father to her father, to highlight the fact that they were full of grievances and complaints, which according to her, were wholly unfounded, and it was conveyed in clear and certain terms that in case she wanted to return she had to do so unconditionally, and with adequate expression of regret and repentance. She pleaded that in face of this attitude, she was constrained to stay away, till appellant and his family were prepared to show her a way of respectful return to her matrimonial home.

(29) She further pointed out that in spite of the fact that birth of the son to her was conveyed to appellant's family on the very first day, and this fact admittedly was

known to the appellant, his parents and other relatives neither the appellant nor his parents cared even to visit her, or show any desire to see the child, or have the mother and son back in their house and that at no stage even a hint was conveyed to her that they were desirous of having her back. She pointed out that, on the other hand posture adopted by the appellant was utterly contemptuous, and full of malice, and that at no stage he had acknowledged the existence of the child and even during these proceedings he has drawn up his pleadings in such a way so as to cast aspersions by firstly altogether omitting to mention the existence of the child, and then describing the factum of his birth as 'shrouded in mystery'. She submitted that this was appellant's attitude right from the beginning, and that the root cause of all this indifference on his part, had been because of his mother's displeasure with her as she was not satisfied with the dowry, or subsequent gifts given to respondent by her parents. The respondent asserted that they certainly desired dowry in spite of their dis-avowals, to the contrary. She cited as an instance of such demand of the steps taken by the appellant to get learner license for Scooter driving for himself and his father, in April, 1977. Her allegation is that this was done on account of the fact that after appellant had told her that he wanted a scooter, she had asked what for he would have a scooter as he did not know driving, and just to defeat this argument he acquired learner's license, and that this was a positive proof of the fact of his keenness to have a scooter.

(30) She made a pointed reference to certain portions of evidence, in which there were clear admissions on the part of the appellant, of certain facts, as pleaded by her, which we propose to discuss in their context. She further pointed out that even in September, 1977, she had made a positive effort personally to contact the appellant but he, even after agreeing to meet her, rang up her father and expressed his unwillingness to see her. She submitted that even then she pursued the matter, and her father contacted Mr. . J.P. Bhatnagar, paternal uncle of the appellant, and on request had a meeting fixed at his house on 10th September, 1977 when both she and her father admittedly went there and appellant was also sent for by his uncle, to his house which is nearby, but the appellant stubbornly declined to have any talk of reconciliation, and even refused to see the child, and so they came back.

(31) The respondent quoted extensively from judicial decisions, to the effect that mere factum of physical separation was not enough to prove desertion, and that it was the petitioner who had to establish that she had either quit the matrimonial home with intention of permanently bringing relations to an end, and that even if it was not so at the initial stage, she had developed such an intention after leaving, and further that this was without any reasonable cause. The first authority cited by her in this regard is *Bipinchandra Jaisinghabai Shah v. Prabhavati*, : [1956]1SCR838 . This can be considered to be a basic authority on the subject of as to what constitutes desertion. It has been laid down that its essence lies in the fact that one spouse leaves the matrimonial home with an intention of bringing cohabitation permanently to an end, and without reasonable cause and without the consent of the other spouse. The former is known as 'deserting spouse' and the latter as 'deserted spouse'. After quoting from Halsbury's Laws of England, and other known authorities on the subject, and taking note of the case law, the Supreme Court laid down the following guiding principles for arriving at the conclusion or inference of desertion on the part of the spouse, arraigned as deserting spouse, by the petitioning spouse. It was held : -

'FOR the offence of desertion, so far 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 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 form the necessary intention aforesaid.'

IT was further emphasised that, 'The petitioner for divorce bears the burden of proving those elements in the two spouses respectively.' And that, 'desertion was a matter of inference to be drawn from the facts and circumstances of each case.'

(32) In the case aforesaid, a question was pertinently posed as to

'WHAT is the desertion'? Then, there is a reference to a standard work, namely 'Rayden on Divorce', where while setting out the ingredients, the learned Author specifically said :- 'But the physical act of departure by one spouse does not

necessarily make the spouse the deserting party.'

(33) The same legal position has been summarised in Halsbury's Laws of England to the effect that , 'That person who actually withdraws from cohabitation is not necessarily that deserting party'.

(34) Another Supreme Court judgment relied upon by the respondent is Lachman Utamchand Kirpalani v. Meena alias Mota, : [1964]4SCR331 where the principles as set out in the case of Bipin Chandra Jaisinghabai Shah (supra) have been reiterated, with pertinent emphasis on the fact that; 'legal 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 as well as such desertion was without just cause, . It was held :-

'IN other words, even if 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.'

(35) Respondent further supported her plea that it was for the appellant as petitioner to prove desertion on her part by relying on a Db judgment of Karnataka High Court reported as N.B. Rukmini v. P.M. Srinivasa Air 1984 Kar 131, wherein it was laid down :-

'THE ingredients of legal desertion are- (i) the factum of desertion and (ii) the intention of a party to bring cohabitation permanently to an end (animus deserendi). therefore, in a petition for divorce by husband on the ground of desertion, it is not enough if it is established that the wife left the marital home without reasonable excuse and against the wishes of husband, it must further be shown that the intention was to bring cohabitation permanently to an end.'

(36) She also made a reference to a judgment of Delhi High Court reported in Smt. Nirmal Gupta v. V.K. Gupta 1979 Hlr 37, where on more or less identical facts; husband's petition for divorce on the ground of desertion sought under Section 13(I)(ia) of the Hindu Marriage Act was dismissed holding that it had to be

established by the petitioner-husband that besides act of physical separation of the parties to the marriage; there was intention on the part of the spouse to withdraw from the discharge of matrimonial obligations without the consent of other spouse, and without there being reasonable cause.

(37) She thus wound up her arguments by pleading that the only inference that could be drawn from the facts and circumstances of the case was that the petitioner did not want her back, for no fault of hers, and that although it was she who was ostensibly living away from matrimonial home but, in fact, had been compelled to do so by petitioner's own conduct and that the trial court rightly dismissed his petition, holding that he had failed to prove his allegations both on desertion as well as cruelty.

(38) We approach this case in the light of the legal position laid down in the cases referred to above, and on the facts and circumstances of this case, as brought out on record.

(39) The appellant came up with the petition seeking dissolution of his marriage with the respondent by a decree of divorce, imputing desertion as well as cruelty to her. We have carefully analysed the pleadings as well as the evidence and we are constrained to observe that the appellant came on an entirely false footing in the petition which he filed in January, 1979 inasmuch as there is a categorical and clear assertion that respondent left the matrimonial home on 10th October, 1976, intent not to come back, and have since deserted without reasonable cause, and without consent of and against the wishes of the petitioner. This is set out in para 3 of the petition and after narrating the facts justifying his grievances of desertion and cruelty, reiterates in para 11 that she left the matrimonial house on 10th October, 1976 and went away to her parent's house with intent not to return and she took away with her nearly all her jewellery, valuables, clothes and other valuable etc. The starting point of desertion is again repeated to be 10th October, 1976 in para 21 which according to the petitioner gave him cause of action, against the respondent.

(40) The respondent has, however, established that on 10th October, 1976 she was escorted by the petitioner himself to her parent's house where she went with

the consent of his parents for the purpose of observing first 'Karva Chauth' fast and that there was a clear understanding that she would be brought back by the petitioner on 12th October, 1976 as the fast fell on 11th October, 1976.

(41) Faced with this situation, as taken in the written statement, the appellant coolly changed his stand in the replication and shifted the date 11-10-1976 when according to him, respondent visited her matrimonial home again in the company of her mother and sister to deliver some customary gifts on the occasion of 'Karva Chauth' fast, and that it was on that day that she had finally gone, with intention not to return.

(42) RESPONDENT'S plea is that it was no where in her contemplation to leave the matrimonial home when she went in a normal way to her parent's house to observe the 'Karva Chauth' fast, which had customarily to be there on account of being the first one after marriage and that for that reason she had taken only two sarees and some cosmetics in a small suit case, packed in the presence of the petitioner and his mother, and she took out that much jewellery, that was on her person, consisting of one golden set, and bangles.

(43) The fact that the respondent had been dropped by the petitioner himself at her parent's house on the morning of 10th October, 1976 is not denied, and was, in fact, admitted on the very first occasion, namely, in the replication after the respondent had submitted true facts in the written statement. Appellant thus came with a case, which was false to his knowledge, in the petition when he alleged that respondent left the matrimonial home on 10th October, 1976, with intention to never come back, and that on that occasion she took away with her almost entire jewellery, clothes and valuables. The question is as to whether he has been able to establish his changed stand, as set out in his replication. We have no hesitation in recording that answer has to be firmly in the negative, on appraisal of evidence, oral as well as documentary, and their respective conduct.

(44) The mutual recriminations apart, and the description of respondent's habits and nature, as set down in the petition, notwithstanding; the petitioner himself admits in cross-examination at more than one place that relations between him and the respondent were perfectly normal when he left her at her parent's house in

the morning of 10th October, 1976. He further admits that his parents had also no complaints against her on that day, and respondent's relation with them were also normal. To the same extent is the admission of his father as Public Witness -2, when he had categorically stated, when asked in cross-examination, that the relations with him, his wife and petitioner were normal when the respondent left on 10th October, 1976. Their only witness who is petitioner's paternal uncle Sh. J.P. Bhatnagar, Public Witness -3 also states that petitioner or his parents never complained to him, till respondent left, about abnormal or offensive behavior on her part, or expressed any grievance they might have nurtured against her. The question then is, if that was so then what was wrong between the parties as a result of which respondent stayed back at her parent's house. The reason has to be assessed from the circumstances established on record. The respondent was a young wife of seven months' old marriage when she went to her parent's house in the normal course to observe the first 'Karva Chauth' fast which according to religious belief is meant solely for the welfare and long life of the husband. She takes with her only two sarees, and leaves with one golden set and bangles she is wearing, and does not insist on anything further. She has thus to be fully believed that she had gone only for two days with the belief and understanding, that she would be picked up by her husband, after observance of the fast on 11th October, 1976, on the day next to that. Both the parties have their respective Explanations of what went wrong. According to the appellant, the respondent did not return because of the guilty conscience as when his mother and sister had visited her parent's house on the evening of 10th October, 1976 to deliver gifts to her on the eve of 'Karva Chauth', they were humiliated by her father, and that for that reason she did not return and was rather on the offensive when he contacted her on telephone on the night of 11th October, 1976, asking her when she proposed to return and in reply she spoke rudely to him and, evaded a direct reply, as to when she intended coming back.

(45) RESPONDENT'S plea, on the other hand is, that there was no such conduct on the part of her father when petitioner's mother and sister visited them and that they were shown all due respect and regard and that it was dissatisfaction of petitioner's mother with the gifts her parents had given on the occasion of the 'Karva Chauth', which her mother and sister had brought to petitioner's house on

11th October, 1976, accompanied by her. She rightly pleaded while arguing her own case, that had they humiliated petitioner's mother and sister as now alleged, respondent would not have dared to come to petitioners house with her mother and sister on 11th October 1976 nor would they have brought the gifts. She had alleged that the fact of the matter was that petitioner's mother had told her before she left that she should bring a steel dinner set along with other customary gifts on the occasion of 'Karva Chauth' whereas her parents had already bought steel glasses which they had been advised, had to be given customarily on this occasion, and so she did not think it proper to tell that they should buy steel dinner set, also and that when she came with her mother and sister with gifts, her mother-in-law was very much annoyed, as her wishes had been flouted, and had told her so adding that she need not come back, and might as well remain at her parent's house. She alleged that it was this anger of the mother-in-law, that was passed on to the petitioner and his mind was poisoned to such an extent that he gave vent to that displeasure on telephone, on that very night, when she had expected some tender words from him, having had observed the fast throughout the day, but he on the other hand snubbed her and told her that she could return on her own, and he was not going to come and pick her up.

(46) The appellant cannot be believed that respondent had undertaken to be dropped by her father on 11th October, 1976 itself because it cannot be expected that she would have planned to come back on the same day as of the fast which is broken at night fall on sighting of the moon. Her Explanation is perfectly understandable and acceptable, when she says that she was to be picked back by the petitioner on 12th October, 1976 i.e. a day following the day of the fast. We also find ring of truth in her plea that the change came abruptly in appellant's attitude, on the night of 11th October, 1976 after he reached home, when his mind was poisoned by her mother-in-law because of her annoyance at the respondent for not bringing the steel dinner set. Petitioner himself says that he had rung up the respondent twice during the course of the day, from office, to find out as to how she was fairing.

THIS shows a normal concern of a husband for his young wife, on the occasion of the fast that she was observing. Had his mother and sister been humiliated, on

their visit on the previous day to respondent's parents' house as now alleged, the petitioner would not have called the respondent twice during the course of the day on 11th October, 1976. We say so, because even after so much has passed between the parties, the only cause the appellant could give, when asked as to what was according to him responsible for respondent's decision to quit the matrimonial home, was that she was afraid of coming back because of her father having humiliated his mother and so had decided to gain time in the hope that petitioner's anger would wash away in the course of time. and that he could be brought down if he visited her parents house to bring her back. If the alleged slighting of his mother was so intense, and of such momentous consequences so as to scare the respondent that she staked her entire future, by staying away from matrimonial home; then there is no reason that this would not have been conveyed to the appellant on that very day itself.

(47) Inspire of this alleged occurrence, which according to him as well as his father, was a very grave provocation, he talked to the respondent on telephone and enquired about her welfare. This gives rise to the inescapable inference that the appellant had come up with a false accusation. In this context, respondent's Explanationn is fully plausible and acceptable, otherwise there is no other possible reason for this sudden change because the petitioner himself admits that some rough conversation did take place on telephone between him and the respondent on the night of 11th October, 1976. The respondent having visited his house in the evening with her mother and sister while observing the fast whole day, had obviously no cause to be rude to the petitioner or to avoid telling him when she proposed to return. She has to be believed when she says that it was the petitioner who told her that he was not going to come in any case to pick her up and to bring her back, and she could be dropped back or come on her own. The respondent as a young wife, cannot be accused of being unreasonable in any manner, in expecting her husband to come and take her back home in a customary way after the 'Karva chauth' fast, as arranged between the parties, nor can her failure to return on her own, be in any manner. treated as a decision on her part to bring their relations permanently to an end.

(48) It is further to be noted that the appellant as well as his father admit that they did not contact the respondent at all thereafter to ask her to come back and waited for her to return on her own. Respondent as an intelligent, and educated young wife could have justifiably waited for some initiative on the part of her husband because it was he, who had left her at her parents house.

(49) He remained stoically silent. The respondent took the very first opportunity to break the ice between them, as admittedly on 1st November, 1976 she rang up appellant's house to inform them that she was in family way. The telephone message was received by appellant's married sister. The respondent had requested her to convey the news to the appellant as well as his mother. The information was admittedly passed on to him on that very day. Even then he does not contact his wife, though the news would have caused anxiety as well as excitement to any normal husband.

(50) The Explanation as given in the replication, in appellant's own words, is as outrageous, as his conduct. For what he says is that :- 'the respondent did inform the petitioner's sister on November 1, 1976 of her pregnancy, but taking this to be only a ruse to lure the petitioner into her parents house he did not believe the news, aware of the lying habit of the respondent'.

(51) Apart from the fact that he does not elucidate as to on what occasions, respondent earlier had lied to him, even otherwise, silence or non-action was not the normal reaction, as the factum of pregnancy is such a matter which could be confirmed medically, or observed during the course of next following days. Appellant's conduct was thus wholly indefensible when on receiving the news of his wife's pregnancy, conveyed by her personally, he did not even contact her, not to speak of bringing her to his house and taking care of his wife, who was carrying his child. His parents remain as wooden as their son, inspired by the fact that petitioner is the only son of his parents, and the most natural reaction should have been to immediately to express solicitations for respondent's health and welfare, and show her tender care and love. They do nothing of the sort. This was enough for her to feel unwanted, and dampen her enthusiasm. Inspired by that, the respondent contacted petitioner's mother on 5th November, 1976, seeking her

permission to visit the house to take few more sarees for the wedding of her cousin, and also informing her that her cousin and his wife wished to visit them for inviting them for the wedding.

(52) The respondent admittedly came with her cousin and his wife as well as her sister to appellant's house on 7th November, 1976, when she was met with by his mother. The respondent's case is that she in her mother-in-law's presence took few sarees and blouses with her, and when she asked for jewellery her mother-in-law declined to give saying that same was lying in the locker, and she did not insist thereafter, and that her mother-in-law showed complete annoyance to her so much so that she told her that she could take away even other things given in marriage, such as blankets and transistor etc. and need not come again. The respondent again has to be believed because the mother has not come forward to corroborate the appellant, on whatever he alleged in the petition, or to pledge her oath to say as to what transpired between her and the respondent when she visited her house on 7th November 1976. There is no allegation that on that date she took away any jewellery or any other belongings or insisted on the same being given to her or that she created any scene. Even according to the appellant, she took with her blankets and transistor etc. Unless his mother had said, in anger, that the respondent could -take the things given to her in marriage, there was no occasion for the respondent to pick up these things, when she had gone to take only some sarees.

(53) Respondent has sworn to the fact that appellant's mother did not at all enquire about her pregnancy, and then the respondent took her aside, and asked whether she knew that she was in family way, to which the mother-in-law retorted that they were aware of the fact, but did not care for the same, and that it was in frustration that she said that if that was so, she may as well have the pregnancy terminated. The respondent reiterated that she did not have the remotest intention of doing so, and that it was only in desperation that she uttered these words. The mother of the appellant has not come in the witness box to state about the truth of the allegations that the respondent had unilaterally declared that she proposed to get her pregnancy terminated.

(54) It is further pertinent to note that appellant was admittedly in the house when the respondent visited on 7th November, 1976. There is nowhere any suggestion that she was informed of his presence in the house. It is not believable that petitioner would not have been told by his mother that respondent was expected with her cousin, to come to extend invitation and also take some sarees because she had informed her mother-in-law on 5th November, 1976 itself. Even then, he did not show the ordinary courtesy to respondent's cousin, his wife and the respondent's sister. He completely ignored his wife's visit. His mother did not take any steps to ask him to come down, and meet his wife, nor did she tell respondent to go and meet her husband who is stated to have been up-stairs. There is no suggestion that respondent was aware of his presence at home, and deliberately avoided meeting him. It was for him to come and meet her when she went there. His failure to do so, for which there is no Explanationn leads to the only inference, that the appellant and his family had taken a firm and resolute decision not to give any encouragement to the respondent to return to the matrimonial home, much less asking her to come over or bring her back.

(55) Although the appellant, as petitioner, endeavored to create an impression of injured innocence but we have no hesitation in holding, in the light of above facts that although ostensibly the respondent was away from the matrimonial home but it was the appellant who is blatantly guilty of expulsive conduct.

(56) It has to be seen as to what was the reason for their adopting this stance towards the respondent. Relations between them were admittedly normal when she left on 10th October, 1976. Whatever campaign of vilification may have been launched against her in the subsequent correspondence of petitioner's father ; admittedly no complaint was made to her or her father up to the date she left, about her behavior. Petitioner's uncle Sh. J.P. Bhatnagar examined as Public Witness -3 admits that his brother or nephew never expressed any grievance about respondent's conduct or behavior. The marriage was an arranged marriage, and petitioner admits that selection was that of his parents, in response to a matrimonial advertisement given by his father. It was a fully probed alliance because according to the respondent and she has not been controverter, the appellant and his family had made full verification after her father responded to the

advertisement, given by his father, and after fully satisfying themselves about the respondent and her family from the neighborhood and otherwise, that they entered into this relationship. There is also no truth in the allegations of appellant's father made in one of the letters, that respondent's father had hustled him into this marriage because it is admitted on record that engagement had taken place on 12th July, 1975 whereas the marriage took place on 7th March, 1976. It cannot thus be said that the appellant's side had been rushed into the marriage. The cause has thus to be seen for petitioner and his family's subsequent displeasure with the respondent to such an extent that even when they are informed that she was expecting a child, they do not show any concern, and even when she visits the house, the petitioner does not even care to see her, much less show any love and affection to make her come back. The reason as given by them cannot be sustained, because there has never been any grievance expressed, or given vent to, on any occasion till she left in good faith to observe the 'Karva chauth' fast. It has definitely to be something else.

(57) According to the respondent petitioner's family was unhappy with her because of insufficiency of dowry. On a consideration of the conduct of the appellant and his family, respondent's allegations have a ring of truth. She has pin pointed 3-4 items which they had specifically desired. One of the such items is the alleged demand for a scooter. Whatever may be appellant's protestations about his family's affluence, and their uncovetousness, the fact remains that he was holding a non-executive job, though in Air India. His total salary, on his own showing, as proved by certificate procured from his office in -connection with respondent's application, for maintenance pendente lite, was even in February, 1979 a total of Rs. 863.05. His basic pay as shown, was Rs. 365.00 , the carry home salary after deductions, was Rs. 740.00 . He admittedly did not possess any conveyance nor did his father. The marriage had taken place in March, 1976, and according to the respondent he expressed a desire for a scooter, and wanted her to tell her parents to give one, some time in April, 1976. This fact is corroborated by the steps taken by him and his father, to have learner licenses for themselves, some time during those days, as proved by an official of the office of the Regional Transport Authority examined as RW-3, and certified by letter Ex. Rw 3/1.

(58) The above is thus a prima-facie evidence for the fact that there was at least a desire expressed to have the scooter. Appellant's assertion that they did not need anything, and in fact wanted a dowry less marriage is also not borne out on record, because admittedly neither the matrimonial advertisement nor the subsequent correspondence indicated that no dowry was desired. It is also admitted on record that respondent's father had given everything at the time of betrothal/engagement as well as marriage what families of that status could have legitimately given and expected. Except for a refrigerator everything else needed for house hold such as sofa set, double bed, dressing table, steel almirah, besides clothes, jewellery and other items were given. Refrigerator may no doubt be there in petitioner's house but none could have prevented his sister if she was so minded to taunt respondent that she had not brought any refrigerator in dowry. In so far as bangles are concerned, it is admitted that although the respondent had been given enough jewellery in marriage, but there were no bangles, and appellant's mother, had to put bangles on her as a symbol of 'Suhag shagun'. Respondent cannot be totally disbelieved when she says that because her mother-in-law had to part with her own bangles, she had been telling her, that she should tell her parents to give her bangles but she had expressed her inability to do so as she felt diffident to tell her father who was a Govt. servant to give her gold bangles and told her mother in law that she could herself tell her parents.

(59) We have gone in relative details into these facts because there is no other conceivable cause for the appellant's family for adopting this type of resolute stance against the respondent not to have her back to the extent of ignoring the news of her pregnancy which she herself conveyed to them, and to the extent of hardening the appellant, so much that she would not see his wife, when she visited the house. If he had really been desirous of having his wife back, he would have grabbed at this opportunity, which she herself afforded by visiting his house.

(60) Keeping in mind the raw social realities when the pernicious custom of dowry, continues to be prevalent, and when it is not unusual to harass young brides on account of inadequacy of dowry; we have no hesitation in holding that the real cause for appellant's wrath against his wife, as ignited by his mother, with the silent acquiescence of his father, was her inability or unwillingness to ask or

pressurise her parents to meet with the demands. We have already observed that according to the appellant, he and his family gave no provocation to the respondent and that she was kept with all love and care. There is no suggestion that she was having her eyes on any other target. In this milieu, it is inconceivable that a young wife after seven months' marriage, who is also in the family way, would take such a drastic decision to stay away from the marital home, unless she was given a feeling of being wholly unwanted ; which attitude was adopted owing primarily to unhappiness over the lack of certain articles in the dowry, or subsequent gifts. We say so, because we cannot perceive and other reason for this inflexibility on the part of the appellant, when he assumed a relentless course of willful neglect of his wife, and remained unmoved even after receiving the news of his wife's pregnancy.

(61) A reading of the pleadings, conveys an unmistakable impression that the appellant has been prevaricating throughout. When he filed the petition for divorce, he alleged desertion on the part of the respondent right from 10th October, 1976 but even when he had admitted incorrectness of the date in his replication and change it over to 11th October, 1976, in the amended petition which he filed after five years, namely, in August, 1984, he again repeated the same allegations, namely, the respondent having left the matrimonial home with intent never to return, on 10th .October, 1976, with the added allegations of having removed almost her entire jewellery, clothes and other valuables. This was after the evidence had been recorded fully in the year 1980, when he had in cross-examination admitted complete facts as to how he had dropped the respondent at her parents' house on 10th October, 1976 for the purposes of 'Karva chauth' fast. It is also pertinent to note that in the petition, there was no reference to this fast at all. It was only when the respondent came up in written statement with this plea that in the replication another story was doled out ; namely, that appellant's mother had desired and even arranged for the 'Karva Chauth' fast to be at the matrimonial home and had told respondent that it was to be observed customarily at their house, and further had invited some ladies for the purposes, but respondent defied them all and went to her parents' house. This is apparently an after thought, to get over the false averments made in the petition.

(62) Same type of ambivalent attitude on his part is discernible throughout the pleadings. He even does not want to ascribe the status of a 'married woman' to the respondent because not only the relevant column in the petition, was left blank but even after the respondent had taken up preliminary objection in the written statement, and mistake was explained by; the petitioner in replication as due to inadvertence ; and same was repeated again in the amended petition, filed in 1984.

(63) APPELLANT'S attitude in so far as child is concerned is inexcusably deplorable, and betrays utter callousness on his part. and reveals him to be a person bereft of all sensitivity and finer human values. inspire of the fact that respondent had taken objection at the earliest opportunity, namely, in her written statement that there was a male child born out of this wedlock and that petition was defective in omitting any mention to that effect ; even then the appellant as petitioner did not take the steps to rectify the mistake or to make good the omission. She had again asserted this fact, in the petition filed by her in 1981 for maintenance pendente lite. Evidence had been recorded even before that when both appellant, and his father, had been cross-examined in the year 1980 itself, where they had admitted having been informed on 1st November, 1976 by the respondent on telephone about her pregnancy. It had also come in evidence of his uncle Sh. J.P. Bhatnagar PW-3, that his brother, namely, appellant's father had mentioned to him in June, 1977 itself, that a male child had been born to the parties ; even then the appellant never took any steps to incorporate the necessary averments. His attitude was that of a psychopathic suspicious person, when he repeatedly went on saying that: 'the fact of birth of the child was shrouded in mystery'. Without having any courage to give even a whisper of a suggestion, about the paternity of child ; he kept on disowning him. When faced lastly, after the conclusion of arguments, with a situation where the petition could become liable to dismissal, because of failure to conform to be the requirement of the rules, he made an attempt at amendment. The trial court was indulgent to him, and allowed his prayer but the amendment which he incorporated, after five years of filing of the petition, was as bad, as having never been brought about because all that he added, after reiterating his doubts about pregnancy of the respondent and about factum of the birth ; was to the following effect :-

'THAT according to the respondent a son was born to her on 15-6-1977 at Irwin Hospital. The petitioner does not know the name of the child as the same has not been disclosed by the respondent. The child is at present about seven years of age. If respondent discloses his name the same may also be allowed to be added.'

IN earlier portion of the same paragraph, he repeated the averments that he was in the dark whether respondent was really pregnant or not, and if pregnant did she give birth to a child or got the pregnancy terminated. The respondent again pointed out that this was no compliance with the requirements of the rules and the reply given in replication filed as late on 14th September, 1984, was that , 'Petitioner feels deeply mystified about said pregnancy and birth...' Before that, however, he wailed that the respondent was guilty of cruelty towards him, having deprived his child of father's life long love and affection, but again added the rider ; if the petitioner was father of the child and posed a very strange query that it was not understandable as to why the respondent would have carried on petitioner's child, when she herself had disliked him, and had leveled grave charges of dowry demand and torture against him.

(64) It is to be noted that lis' in matrimonial cases is between the two spouses. It is because of this that we have felt constrained to discuss at length on this aspect of the matter, just to throw appellant's character, and attitude towards his wife ; namely, the respondent in right perspective. We have no hesitation in saying that, this type of a husband, as the appellant, who was totally unresponsive to his wife, full of suspicion and mistrust towards her, having left her to fend for herself at her parents' house without showing any care or concern even after learning about her pregnancy, cannot, with any degree of credibility, complain of desertion on the part of his wife.

(65) We also find ourselves, in full agreement with the view the trial court has taken in respect to the notice served by respondent through an advocate on 15th February, 1977, because even though it may not have been an ideal way of invoking some response from her husband but faced with a frustrating situation, as respondent found herself in, on being utterly ignored, and not even being called up after she conveyed the news of her pregnancy, then she cannot be faulted for

having sent this notice which she explains to have been done with the object of invoking some response from the appellant. Even then, he remains totally mum and gives the matter in the hands of his father.

(66) The correspondence was, thenceforth, taken up by their respective fathers. Both of them seem to be fond of indulging in high verbosity but on a comparative reading of the correspondence, it becomes apparent that respondent's father was still reflecting a conciliatory approach, by giving his own solutions like swearing before God in some temple etc., but appellant's father was totally arrogant, and insisted in his letter that the respondent was acceptable only if she returns on her own and unconditionally. Tone and tenor of his letter is remarkable for the uncompromising attitude. In one of his letters, written on 31st March, 1977 (Ex. R-4) he says ,

'BUT she must come back contrite and fully reformed, with a complete, genuine change of heart and manners so she is a credit to our family name.'

BEFORE that he describes her hyper-sensitive, snobbish, self-important guest. Earlier in his letter dated 28th February, 1977 (Ex. A-4) he describes her possessed of lying, exaggerating, a nagging, sarcastic tongue and a sour, supercilious manner, and tells her father that he must reform Shabnam, and make her worth of their families' name, describing her as a . spoiled and disoriented child. The letter is full of allegations that she refused to adjust to them, and was all the time humiliating her mother-in-law, and that in case she wanted to return, she must do so unconditionally. He ends up with a pre-emptive query, demanding a clear and concise reply: (1) Does she wish to unconditionally return or (2) if she no longer wishes to continue with the marriage.

(67) RESPONDENT'S father rightly pointed out that after all that had: passed between the parties she could not be expected to return unconditionally, unless there was some assurance that she would be treated with dignity and honour, and given her rightful place in the matrimonial home. We are not referring to this correspondence to look for a justification for the respondent because in law she is under no obligation to establish her defense. We do so, to reinforce our finding that appellant cannot complain, on the facts and circumstances of this case, that

respondent had been staying away without any reasonable cause.

(68) We observe that the respondent had done everything in her power to adjust to the family atmosphere. Apart from the fact that as already discussed, there was never any complaint made to her father directly or through Sh. J.P. Bhatnagar who is a *majo domo*, as tape recorded conversation which now stands admitted by the appellant, reveals, there are certain admissions in cross-examination of the appellant and his father, which lend support to respondent's plea that the allegations that she shirked work, are totally unfounded. One of such admitted fact is that after the marriage on 7th March, 1974, appellant's sister, who already had a young child gave birth to another son on 25th March, 1977 and her mother-in-law was all the time busy attending upon her daughter and thereafter the said sister was also busy with her two kids and further that appellant's maternal grand father who was living close by fell ill and his mother used to spend the entire day looking after her old father, and that the servant who was allegedly kept in the house was primarily attending to appellant's father's work which he was carrying on in connection with his export business at home and that in that setting respondent had to look after the entire household which according to her she did ungrudgingly.

(69) The only persons who could have controverted her are the mother and sister of the appellant, but they have not been examined for reasons best known to him.

(70) We would further like to point out that most of the allegations against the respondent are based either on respondent's conversation with his mother, or her treatment towards her because it is the mother to whom respondent is alleged to have unequivocally told that she would get her pregnancy terminated; it is the mother in whose presence the respondent is stated to have taken away all her valuables on 7th November, 1976, and had left saying that rest of the things would be sent for, it is again the mother who is alleged to have subsequently requested the respondent on phone to come back home, but she declined to comply ; it is the mother who was allegedly humiliated by respondent's father when she along with her daughter visited their house on the eve of the 'Karva Chauth'. Unless the mother came in the witness box, and withstood cross-examination, no credence can be attached to these averments. As held in a Division Bench judgment of

Calcutta High Court in the case of Sankar Prosad Paul Chowdhury v. Madhabi Paul Chowdhury, : AIR1982 Cal474 , 'that the Court ought to draw an adverse presumption against the petitioner-husband for non-examination of the members of his family who were describe as witnesses to be alleged acts of cruelty and insult by his wife'.

(71) To the same effect are observations of Punjab & Haryana High Court, in the case : Constable No. 440 Thakar Dass v. Smt. Krishna alias Kunti w/o Constable Thakar Dass 1977 Hlr 391, wherein it was held that uncorroborated testimony of the wife, who was the petitioner in a petition under Section 10 of the Hindu Marriage Act, in face of failure to examine material witnesses could not be taken as sufficient, and her sole evidence was too meager to afford the basis for a decree for judicial separation.

(72) On these authorities we may also dispose of another aspect of the matter; namely, information about the birth of the child because according to respondent a definite message was given to appellant's family on 15th June, 1977, the very date of birth of the child, and also on 21st June 1977 when she came back home with the child from the hospital, and that this fact was within the knowledge of appellant and his family and instead of visiting themselves they sent their relative to verify the facts. Two of them are named. They are Vibha Bhatnagar and Shashi Bhatnagar, nieces of the appellant, who according to the respondent visited their house, to look her up and spent a couple of hours and were given all information, about the time and date of birth of child to be passed on to appellant's family. The appellant though denied that these ladies went to respondent's house, did not examine them inspire of the fact that they were included in the list of his witnesses. Similarly, according to the respondent a maternal uncle of the appellant, namely; Sh.U.B.L. Bhatnagar rang up her father in November, 1978 on behalf of appellant's family, to probe the possibility as to whether respondent and her father would be agreeable to a divorce by mutual consent, and that he also positively asked about particulars of date of birth of the child, and the same were duly supplied to him.

(73) Transcript of the telephonic conversation is placed on record, as Ex. Rw 4/2-A. Respondent's father swore to the correctness of the same but no steps were taken to examine Sh. U.B.L. Bhatnagar to admit or deny the correctness of the fact. This tape recorded conversation is very significant because it not only belies appellant's complaint about lack of knowledge of particulars about the birth of the child but also bears out respondent's allegations that the appellant and his family were not interested in her, and they were trying to persuade her to agree to a divorce by mutual consent. She cannot be totally disbelieved on this, because Sh. U.B.L. Bhatnagar has not been produced to contradict the correctness or otherwise of this conversation. Appellant's father admits that Sh. U.B.L. Bhatnagar did tell him about having talked to respondent's father though he disowned knowledge of the contents of such a conversation. Appellant himself does not have the honesty to even admit that fact.

(74) The fact that the appellant and his family were keen to get rid of the respondent is also discernible from the material on record. There was a veiled hint in that directions by appellant's father; namely, when in his letter dated 25th April, 1977 (Ex. R-7) he writes that, 'the possibility could be explored with the approval of the Court we can take some mutually agreed honourable decision, the same may also be possible, thus sparing further bitterness and litigations by both sides. In such an event, as a parting gesture, our side does not propose to contest on mere technical grounds the awarding by Court, a reasonable maintenance.' This could be nothing but a divorce through court by mutual consent as now provided by Section 13-B of the Hindu Marriage Act, with some alimony. There is also a suggestion in one of his earlier letters, that in case she was not prepared to return unconditionally, with a resolve to reform herself, then. she was welcome to stay away, and in that event they can exchange jewellery etc., and respondent can have all the things given to her in marriage removed from the house. The inescapable impression conveyed by this correspondence which appellant's father addressed, on his, as well as appellant's behalf, is such that, conditions were being imposed deliberately of a nature, which no self respecting girl could possibly have been expected to submit to unless she proved to be a cringing type of woman, ready to unquestionably demean herself. It was thus a case, where doors were closed for enabling the respondent to find a way out for a return to the

matrimonial home, consistent with her dignity as a person, and also as daughter-in-law of the house.

(75) This conclusion is reinforced from the fact the appellant did not move a little finger to contact wife or the new born child. The respondent and her father took another initiative after about three months of the birth of the child, because on 9th September, 1977, she rang up the appellant in his office expressing a desire to see him personally but he inspired of having agreed, developed a suspicion, and after asking her father on phone as to why she wanted to see him, told him that he was not prepared to meet her. Even then the respondent and her father persevered and contacted appellant's uncle Sh. J.P. Bhatnagar on phone, and went to his house on the evening of 10th September, 1977. This fact is admitted at all hands and the uncle sent for the appellant from his house as his parents were at that time out of India but the appellant is reported to have refused to talk to the respondent. Appellant's uncle at whose house meeting took place does not say that he made any effort to bring about re-conciliation and reason given is, he could not do so without his brother, namely, appellant's father's consent. He says he left the parties to talk amongst themselves but found that nothing had come out of the meeting. He does not say as to whether he asked the appellant, as to what proposal he had made to the respondent and what was the reply given by her. He admits, however, that the respondent was very much disturbed and her father looked very unhappy. This lends support to respondent's plea that she had gone there to persuade the appellant, through the good offices of his uncle to patch up the differences, for the sake of the newly born child, if for nothing else, but that the appellant was impervious to all suggestions of rapprochement.

(76) This thus gives a complete lie to appellant's averments in the petition that it was only his side who had made efforts at reconciliation, and there had been nothing from respondent's side whereas the evidence reveals and his father admits this, and so does his uncle, that they never made any effort to even speak to the respondent right up to the time she sought a meeting with the respondent on 9th September, 1977, and eventually came to meet him at his uncle's house. The uncle, on whom respondent and her father had pinned their hopes, remained completely indifferent, out of fear of appellant's father. The mother, stated to have

asked the respondent to come back, has not been produced, and so no credence can be attached to the appellant's version.

(77) The fact that there was attempt from time to time on the part of the respondent's father to keep up the relations, is borne out from another letter written on 24th February, 1977 (Ex. RW4/P1), when on learning about the death of appellant's maternal grand father, he sends a letter of condolence and also makes a grievance of the fact, as to why he was not informed, so that he could attend cremation etc. Had there been any intention on the part of the respondent and her father to breakaway, he would not have sent such a conciliatory letter.

(78) Even during the proceedings, a letter was written on 22nd September, 1979 by the respondent's father to appellant's father (Ex. Rw 4/C-2) informing him that they intended to perform 'mundan' ceremony, as well as 'Namkaran' of the child at Hardwar on 29th September, 1979, and it was requested that unless they propose to continue with the strategy of disowning the child; 'and in case you have any inclination that the child may on this auspicious occasion, have his due share of blessings from his paternal side also, you might consider whether your side could temporarily bury the hatchet for this brief auspicious hour so as to participate in the above mentioned ceremonies.' He assured that the meeting will be a friendly and cordial one, confined to the purposes of these ceremonies, and no party shall discuss any other matter especially the one pending in the Court.

(79) This letter was admittedly received by the appellant's family but no one took any steps to even acknowledge the same or sent a gift; monetary or otherwise to the child, much less participating in the ceremony, if not personally, through some relative or the other. It is also pertinent to note that at no stage there is even a suggestion that the respondent sent for remaining articles of dowry or claimed her 'stridhan' or the maintenance or pursued the course of action as indicated in her notice; dated 15th February, 1977, or hinted at. in her father's letters or that she went about discrediting the appellant in his office or among relatives, acquaintances or neighbours. He was such a stringy or prosaic type of person that even for his honeymoon, he undertakes a journey by bus to a place like Simla, and there also arrangements were made by respondent's father because admittedly

they spent 5-6 days of honeymoon at Simla at the house of family friends of respondent's father. This type of attitude could have acted as a damper on the expectations of any young wife but there is not even a suggestion that respondent even expressed any grudge at that. One wonders, that on these facts, with what face the appellant boasts of his, and his family's affluence, or complaining about respondent's alleged lack of adjustment.

(80) All this establishes beyond a shadow of doubt that the appellant has failed to establish his allegations of desertion on part of the respondent. Even though, there was no burden on respondent to show that she was staying away from the matrimonial home on account of some reasonable cause, even the evidence suggests that she had a justification in not returning on her own, without being asked for by the petitioner-appellant herein, and that it was he who is guilty of willful neglect of her and of expulsive conduct.

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

(82) We have already noted the guiding principles laid down by Supreme Court in case of Bipinchondra Jaisinghbai Shah (supra) and N.B. Rukmani (supra); we find another authority : [1975]3SCR967 Dr. N.G. Dastane v. Mrs. S. Dastane where it has been held that,

'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 and the belief regarding the existence of a fact may be founded on a balance of probabilities.' It is in this context that we have examined the facts in detail right from the time the respondent left the matrimonial home for observation of 'Karva Chauth' fast, and we are of the firm view that the concatenation of circumstances discussed above are conclusive of the fact that it was the appellant who abandoned his wife, without any apparent cause; and it is not at all open to him to

make a grievance of any fact, and accuse the respondent of having left the matrimonial home without any reasonable cause, so as to give him a ground, to seek dissolution of marriage by a decree of divorce.

(83) Faced with this situation, Sh. Swatanter Kumar learned counsel for the appellant pleaded that from all appearances, the marriage has irrevocably broken down, and that it was futile for the parties to keep up a pretence of this relationship, and that the same be better dissolved by a decree of the Court. He quoted in support of his plea a judgment of the Supreme Court in the case of Smt. Saroj Rani v. Sudarshan Kumar Chadha : [1985]1SCR303 , and also referred to a single Bench judgment of this Court, reported as Narinder Kumar v. Smt. Suresh Kumari Air 1988 Delhi 222.

(84) We have gone through both the reported judgments, and fail to find any support for the proposition propounded by the learned counsel that in case a marriage is found to have been broken down to an extent that it was beyond all rapprochement or reconciliation, then whether any ground as laid down by law exists or not, the Court ought to, or can take this circumstance alone, as a ground for dissolving the marriage.

(85) Apart from the fact that in this case, having found as a fact that it is the appellant as husband who had failed his wife right from the beginning, due to his own unexplained aversion for her, and under the irrational influence of his parents, and thus in view of the interdict, as enjoined by Section 23(l)(a) of the Hindu Marriage Act, he cannot be allowed to take advantage of his own wrong, and now seek a decree for divorce without establishing the legal ground of desertion or cruelty on which he founded his petitions otherwise also, we do not find any such proposition laid down in the aforesaid two authorities as suggested by the appellant's counsel.

(86) There is a passing observations in both the cases but only in the light of the facts of those particular cases. In the case before Supreme Court the legal ground to the effect that in the event of non-compliance of a decree for restitution of conjugal rights; the other spouse can seek a decree of divorce, was there, and in that context their Lordships casually remarked that they felt no compunction in

rejecting the wife's plea that the husband should be held disentitled to the relief sought by him, for the reason that he had led her into a trap to obtain a decree for restitution of conjugal rights, as they found that the marriage had broken down, and parties could no longer live together as husband and wife.

(87) It is noteworthy that in the same paragraph, an argument of the wife to the effect that since the husband had misled her into obtaining a decree of restitution of conjugal rights, and deliberately created circumstances where the same could not be complied with; and that to that extent he should be held debarred from taking advantage of 'his own wrong within the meaning of Section 23(l)(a) of the Act; was repelled with the . observation that no such intention of the Legislature could be read into the expression; 'his own wrong' as employed in the aforesaid provision. Similarly in the case before Delhi High Court, the legal ground of desertion was held to be duly proved, and then it was only by way of a passing remark, that it was recorded that marriage had broken down beyond all retrieve. There is not even a suggestion that this by itself could be a ground for dissolution of marriage, or for a decree for divorce.

(88) It is, therefore, not possible to subscribe to this line of argument of the learned counsel for the appellant, which, in fact, is an argument in desperation; having failed to establish the grounds on which the petition was brought forth. Irretrievable break down of the marriage, is not contemplated to be one of the grounds for dissolution of the marriage, in the Scheme of the Hindu Marriage Act, and as such cannot be by itself taken as a ground for a decree for dissolution of marriage. It is pertinent to note that the law as it stands, the causes of action for a decree of dissolution of marriage are either fault oriented or defect based. Inspire of recommendations of the Law Commission in its 71st Report, the legislature did not consider it advisable to introduce irretrievable break down of marriage, as one of the grounds for a decree of divorce. We, therefore, cannot take into consideration, any such situation, as not recognised by law, to pass a decree of dissolution of marriage between the parties.

(89) In the result, we confirm the judgment of the trial court, as well as the order of the learned Single Judge dismissing husband's appeal in limini. The questions as

propounded in this Letters Patent Appeal, and as extracted in the beginning of this order, are thus answered to the effect that inspire of the fact that opposite party fails to establish her allegations of cruelty or apprehension of danger to life, even then the petitioning spouse has to succeed on the strength of his own allegations, and if allegations of desertion or cruelty remain unsubstantiated; then petition is bound to fail On fact, we have already confirmed findings of the trial court that the petitioner has wholly failed to establish allegations of desertions and physical or mental cruelty, on the part of the respondent. We, thereforee, find it to be a fit and apt case where husband's petition has been rightly dismissed. We accordingly dismiss the present appeal. Since respondent has been conducting her case herself, we pass no order as to costs.

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