[redacted]]
]
]
] Respondent
(Org. Respondent)

.....

Mr. Vikas Singh i/b Ravi Dwivedi, for Appellant.
None for Respondent.

.....

CORAM : UJJAL BHUYAN &
PRITHVIRAJ K. CHAVAN, JJ

RESERVED ON : 15th June, 2021.

PRONOUNCED ON : 24th June, 2021.
[Through Video Conferencing]

JUDGMENT: [Per Prithviraj K. Chavan, J.]

1. Feeling aggrieved with and dissatisfied by dismissal of a Petition bearing No. A-2827 of 2016 under section 13 (1) (ia) and 13 (1) (ib) of the Hindu Marriage Act, 1955 ("Hindu Marriage Act" for convenience) by Family Court No.6, Bandra, Mumbai, the appellant-husband has preferred this appeal amongst following facts and grounds.

2. The appellant is Hindu whereas the respondent is Jain by religion. They were in deep love. Marriage between the appellant and the respondent was solemnized on 5th January, 2004 at Aum Shreyas Apartments Arya Samaj, Ghatkopar (West), Mumbai 400 086 as per the rituals of Hindu religion. Subsequently, the marriage was registered with Registrar of Marriages at Bandra, Mumbai on 6th January, 2004. After having spent eight years in courtship, couple got married.

3. The appellant and the respondent are overseas citizens of Canada. They are Indian citizens by birth, however, they acquired citizenship of Canada and thus, have dual citizenship of India and Canada. The appellant presently resides at Andheri (East), Mumbai. The couple is blessed with a male child namely Mukund alias Manan aged about six years who was born in Canada having Canadian citizenship by birth and overseas citizenship of India. Mukund is residing with respondent-mother in Canada.

4. Before migrating to Canada, the appellant had worked in Saudi Arabia in the year 1999 to earn a better lifestyle for himself and the respondent. The respondent was to join the appellant at Saudi Arabia, however, due to lot of restrictions on women and unsafe working environment, the appellant persuaded the respondent not to come to Saudi Arabia.

5. The appellant thereafter immigrated to Canada and had taken a job making it feasible to bring the respondent over there. The appellant had shifted to Canada in October, 2003. He visited India in the year 2004 to meet the respondent. The appellant had not intimated his family members about his proposal of marriage. However, family of the respondent was initially reluctant to the said marriage. The respondent was persistent in her stand to marry the appellant and, therefore, had convinced her family members. Her family members were convinced that the appellant was going to be settled in Canada and would make a decent living. Thus, after their marriage, the couple moved to Canada wherein the appellant sponsored her spouse visa.

6. The couple led a very happy and normal matrimonial life at Canada. They used to visit India periodically to meet their family

members. As already stated hereinabove, after having acquired Canadian citizenship as well as status of overseas citizenship of India, (OCI) the respondent had taken up a job over there and was financially independent.

7. The couple wanted to have their own home in Canada and hence started saving money. However, sometime in the month of November, 2009, the appellant had met with a car accident in Canada. The respondent took care and nursed the appellant for restoring his good health. Meanwhile, the couple was blessed with their first child Mukund.

8. Thus, the couple was spending a very happy and peaceful married life until February, 2011. However, the circumstances thereafter changed. The appellant started experiencing medical problems namely constant back and shoulder pain as well as skin related problems, especially during summer due to rag weed allergy resulting into sleepless nights and miserable days. To add to it, there was recession in 2010 which hit Canada due to which the appellant lost his job resulting into financial burden upon the respondent. It is the contention of the appellant that they decided to return to India, permanently, due to such a situation. Mother of the appellant was also not keeping well and, therefore, they returned to India with Mukund on 29th January, 2011.

9. The respondent had stayed with the appellant at her matrimonial house till 19th February, 2011. On 20th February, 2011, the appellant had dropped the respondent and Mukund at the parental house of the respondent on the request of the respondent herself. The respondent thereafter visited Kutch without intimating the appellant about her whereabouts over there. After her return from Kutch, when the

appellant asked the respondent to resume co-habitation, she refused. It is contended that the respondent was insisting for a separate accommodation. Despite attempts by the appellant to convince the respondent as regards requirement of his family, the respondent did not pay any heed. However, as per the advise of his mother, the appellant informed the respondent that he would arrange for separate accommodation within two days. The respondent was, however, interested in returning back to Canada.

10. On 27th March, 2011, the respondent had visited the appellant's house along with her father, brother and massi (mother's sister). They demanded her passport along with documents and jewellery. When the appellant asked the respondent the reason for such conduct, he was threatened that they would call the police and, therefore, the appellant had returned her passport, documents etc. An unsuccessful attempt was made to resolve the dispute amicably between couple on 3rd April, 2011. However, the respondent was adamant in her stand to settle in Canada for a better future. The appellant, however, expressed his unwillingness to shift to Canada owing to his health issues and other related reasons. The appellant in order to show his *bona fides* as well as his love and affection towards the respondent had paid her CAN $ 25,000 plus Rs.1,25,000/- in Indian currency to facilitate her departure to Canada. The respondent left for Canada with their son.

11. The appellant started looking for an accommodation and a good job with the hope that the respondent would return after a short span. However, the respondent did not return nor made any attempt to contact the appellant.

12. Sometime in June, 2011, respondent's massi had called the appellant and demanded money on behalf of the respondent. The appellant refused to part with money as it was neither demanded by his in-laws nor by the respondent. According to the appellant, said massi of the respondent conveyed that the respondent did not desire to speak and did not wish to keep any relations with him.

13. Despite making various attempts to contact the respondent either by e-mail or by other modes, the appellant could not establish any contact. After a couple of days, the respondent responded by demanding money from the joint savings by accusing the appellant that he had cheated and abused her financially.

14. It is further contended that the couple had arrived at a settlement by which the appellant gave in all the money that was agreed between them. The appellant had, at all times, through emails inquired with the respondent about her stand on their relationship and marriage. The respondent, however, conveniently ignored queries made by the appellant. Only once she had informed through an email that she will never settle back in India. The appellant too conveyed his inability to shift to Canada due to his health issues.

15. As such, despite all the efforts, there was no amicable settlement of their dispute and, therefore, the appellant was constrained to issue a legal notice dated 7th May, 2012 calling upon the respondent to come and co-habit with him. It was neither responded to nor complied with.

16. The appellant, therefore, preferred a petition under section 9 of the Hindu Marriage Act bearing No.958 of 2014 for restitution of conjugal rights. Despite due service, the respondent did not appear. An

attempt for mediation also failed as there was no response from the respondent's side. Since the appellant realized that there would be no hope of any restitution, he filed the related petition seeking divorce.

17. In the months of July, 2013 and July, 2015, the appellant had visited Canada to meet the respondent and his son. He was not treated properly by the respondent and allowed their son to see him only for 20 to 25 minutes. It is contended that the respondent even did not permit the appellant to introduce himself as father of his son Mukund. The respondent also did not allow the appellant to have a photograph with the son. In this background, the appellant had sought a decree of dissolution of their marriage on the ground of willful desertion by the respondent.

18. The petition proceeded *ex parte* as despite due service the respondent remained absent. Evidence of the appellant, therefore, remained unchallenged and un-rebutted. After considering the affidavit of evidence sworn in by the appellant, the learned Judge of the Family Court dismissed the petition, *inter alia*, observing that no case had been made out of the alleged cruelty to the appellant by the respondent wife; rather they had happily cohabited till the child was born. It was also observed that they had mutually decided to shift to Canada forever having better prospects and subsequently the appellant had been to Canada to meet the child, twice. It was, thus, observed that pleadings and evidence were quite vague, though *ex parte* and as such the learned Family Court Judge dismissed the petition.

19. We have heard the learned counsel for the appellant extensively and have also perused the pleadings and evidence on affidavit. We have also meticulously gone through the case laws pressed into service

by the learned counsel for the appellant.

20. The learned counsel in his arguments reiterated what has been pleaded and deposed in the affidavit. While assailing the impugned judgment and decree, the learned counsel would argue that the un-controverted evidence of the appellant is quite sufficient to establish the fact that the appellant had been treated with mental cruelty by his wife who had left his company despite an objection from the appellant. He would argue that the appellant is entitled for a decree of divorce as the respondent had deliberately remained absent despite due service. The learned counsel would further emphasize that the conduct of the respondent in not responding to any of the appellant's emails, notice and not making any effort to resume co-habitation with him itself amounts to cruelty as contemplated in section 13 (1) (ia) of the Hindu Marriage Act.

21. A short question arises as to whether the appellant has been, in fact, subjected to cruelty by the respondent-wife to such an extent as to entitle him to a decree of divorce, more particularly in view of the admitted fact that the couple had themselves decided to shift to Canada after their marriage for better prospects and admittedly acquired overseas citizenship of Canada with their free consent and will?

22. We are of the considered view that pleadings and the evidence are absolutely insufficient to reverse the impugned judgment and decree of the Family Court for the reasons to follow.

23. It is an admitted fact that even today the appellant and the respondent are holding dual citizenship of India and Canada, so also their son Mukund.

24. The evidence of the appellant indicates that he had met the respondent in the year 1996 at V.J.T.I College, Mumbai. They were in deep love with each other and wanted to marry.

25. Since the appellant was financially unsound, he left for Saudi Arabia in the year 1999 to earn a better income for himself and the respondent. However, he persuaded the respondent not to join him in that country due to several restrictions upon women and as the working environment was not safe.

26. The evidence indicates that the appellant had, therefore, immigrated to Canada sometime in the month of October, 2003 and had taken a job there making it feasible for him to bring the respondent over there. Though parents of the respondent were initially unwilling to their marriage but the respondent had been persisting for the marriage and ultimately convinced her parents on the basis that the appellant was settled in Canada and made a decent living.

27. The marriage took place on 5th January, 2004 as already stated hereinabove and then the appellant took the respondent to Canada by sponsoring her spouse visa. It is pertinent to note that the couple spent a very happy and normal married life at Canada and used to visit India periodically to meet their families. Meanwhile, the respondent too had taken up a job in Canada and was financially independent.

28. The evidence also indicates that in order to fulfill their dream to have their own house in Canada, both started saving money. However, in November, 2009, the appellant had met with a car accident in Canada. The respondent took his care and nursed him till he recovered fully. By that time, the respondent was pregnant and gave birth to Mukund on 21st May, 2010. The appellant had also attended her

properly. Thus, the couple was blissfully leading a very happy married life till February, 2011.

29. The evidence further reveals that after the accident of the appellant in 2009, the appellant started facing constant back and shoulder pain as well as skin related problems due to dry climate. In summer season, the appellant would suffer from rag weed allergy due to which he experienced sleepless nights. It is worthwhile to note that there is absolutely no medical evidence or any prescription of the Doctor supporting this fact. In the absence of any evidence to that effect, it would be quite difficult to believe the bare words of the appellant.

30. Be that as it may, the appellant further deposed that due to recession in 2010 which hit Canada, he lost his job and financial burden fell upon the respondent. Since they could not manage the heightened financial burden, they decided to return to India permanently. His mother was also not well during those days.

31. The evidence reveals that they came to Mumbai on 29th January, 2011. The respondent was dropped at her parental house as per her request. She stayed with her parents for a month or so and made visit to Kutch. She did not inform about her whereabouts to the appellant. After her return from Kutch, the respondent did not come to the appellant's house in spite of request by him. She conveyed that the appellant should arrange for a separate accommodation.

32. The appellant alleges that though he informed the respondent about the tension prevailing at his house and difficulties of the family, the respondent did not pay any heed. The respondent rather conveyed that she desires to return to Canada. The evidence indicates that on

27th March, 2011, the respondent, her father and massi (mother's sister) visited the appellant and demanded her passport, documents and jewellery. When the appellant had asked her the reason for such behavior, she refused to answer and threatened to call the police. In such circumstances, the appellant had handed over her passport, documents and jewellery.

33. Even this part of the evidence *sans* corroboration from any other angle cannot be accepted as a gospel truth, as at least the appellant could have examined some witness in order to buttress his contention that as per the respondent's demand, he had returned her documents, passport and jewellery.

34. An unsuccessful attempt was made on 3rd April, 2011 to resolve the dispute by the family members. However, the respondent maintained that she would settle in Canada. The appellant, however, stated that due to his ill health he could not go to Canada. On respondent's demand and to show his *bona fide* as well his love and to give her confidence that he is not cheating her for money, it is deposed that he gave CAN $ 25,000 and Rs.1,25,000/- to the respondent. The respondent had taken the same and left for Canada with the son.

35. Here also there is no corroboration to his evidence which is very much required obviously in view of the fact that the entire evidence of the appellant remained un-controverted and unchallenged as the petition had not been contested. It being a matrimonial dispute, it has to be dealt with very cautiously.

36. It seems that the main reason for the appellant not to accompany the respondent to Canada was the health issue. However, in the absence of any believable and acceptable evidence as regards the alleged

ailment in the form of any medical certificate, it becomes difficult to accept the same. It is, therefore, quite clear from this part of the evidence that except the reason of the alleged ill health of the appellant, there is no other reason. The relations between the couple were otherwise quite normal, in the sense, the appellant had supported the respondent financially to go to Canada and it was also the wish of the respondent that the appellant should accompany her.

37. It is pertinent to note that the respondent has been working as a Regulatory Affairs Associate at Teva Canada Limited which appears to be a pharmaceutical company. It would not be out of place to reproduce the summary of her resume tendered by the appellant himself at Exhibit F which is as follows;

> *"Talented and versatile pharmaceutical with experience in Quality and Regulatory; Sound understanding of Canadian and US Food and Drug Regulations; Strong project management skills; Hands-on with eCTD submissions, validating and publishing tools;*
>
> *Experience in Quality systems such as Supplier and Product Qualification program, Change controls, specification management, Analytical investigation support, Compendial reviews (USP, BP, EP) Risk assessment reviews and Regularly Audits, Health Canada and FDA.*
>
> *Skills/Competencies:*
>
> *.Strong organizational, leadership and communication skills*
>
> *.Knowledge of cGMP, FDA and ICH guidelines*
>
> *.Excellent technical & regulatory writing skills*

.Attention to detail

.Project management skills

.process improvement

.Relationship building

Proficient in Adobe Acrobat,LIMS:.

This being the status of the respondent, it would not be justified, in any way, expecting her to return to this country when she is already well settled over there. The appellant still being overseas citizen of Canada could very well rejoin the company of his wife.

38. The desire of the respondent to settle in Canada is actuated by the fact that it was the appellant who had first consciously decided to settle in the foreign country. As such, the wish of the respondent cannot be branded as an act of selfishness or the act on her part cannot be said to be unjustified. It is pertinent to note that it was the appellant's initiative and desire to immigrate to Canada for better prospects.

39. Thus, in no way, it could be said to be cruelty meted out to the appellant by the deserting spouse. Moreover, except mere words of the appellant, no corroboration is forthcoming to buttress the fact of an attempt at conciliation being made by the family members of the respective families. The appellant could have produced some witnesses/ family members in support of his contention.

40. The appellant's evidence is quite vague, insufficient and lacking in material particulars i.e he has not named the so called massi (mother's sister of the respondent) who is alleged to have demanded money from the appellant in the name of the respondent or on behalf of the respondent. No date or manner and mode of the alleged demand

by massi has been pleaded or deposed to in the affidavit. It appears that the appellant has attempted to create a ground for seeking a decree of divorce as he deposed that the said massi had conveyed that the respondent does not desire to speak to the appellant and does not wish to keep any relationship.

41. The appellant further states on oath that he tried to reach out to the respondent on a number of occasions through email as she had not provided her number or details of contact. However, we do not find any such evidence forthcoming on record. The learned counsel has not drawn our attention to any such material on record. It has been specifically deposed in paragraph 15 of his affidavit by the appellant that once she had mentioned in an email that she will never settle back in India. However, no such evidence, much less, documentary evidence has been produced on record. Adverse inference, therefore, is required to be drawn against the appellant. It is, therefore, very difficult for us to place implicit reliance upon the bare words of the appellant, especially when there is no corroboration.

42. What has been tendered on record is an advocate's notice dated 7th May, 2012. Be it noted that before filing a petition for divorce, the appellant had filed a petition under section 9 of the Hindu Marriage Act for restitution of conjugal rights bearing No.958 of 2014. An attempt at mediation through video conferencing failed and, therefore, the related petition was filed as the petition under section 9 was withdrawn.

43. The appellant has deposed as regards his two visits to Canada, one in the month of July, 2013 and second in July, 2015.

44. During his first visit in July, 2013, he visited the residence of the respondent along with his Canadian friend namely Brian on the address "Apt # 405, 1050 Markham Road, Toronto, ON M1H2Y7". He was not received well by his father-in-law i.e respondent's father. The respondent was not at home. She was called by her father; however, the respondent refused to talk to the appellant and even did not permit him to meet Mukund. It is deposed that the respondent permitted the appellant to meet Mukund only after an intervention by their common friend Mr. Brian who convinced her. The appellant could meet his son Mukund at Brian's residence, that too, only for 20 to 25 minutes.

45. The evidence reveals that during his second visit in July, 2015, he could meet Mukund outside a library with his friend Brian. The respondent objected to the appellant disclosing his relationship with Mukund and disallowed him to take a photograph. He, therefore, did not tell Mukund anything about his relationship. What is surprising is that had it been the intention of the respondent to sever the marital tie, she would not have allowed the appellant to meet Mukund. This is an important aspect of the case indicating that neither the respondent treated the appellant with cruelty nor did she desire to desert him. On the aspect that the respondent objected to the appellant from introducing himself as the father of Mukund, it is to be seen that if the respondent did not wish to introduce the appellant as her son's father, she would not have even allowed the appellant to meet Mukund. The evidence of the appellant on this count is also incredible and does not inspire confidence.

46. As regards the mental illness, hypertension and other related ailments as testified by the appellant, no evidence of any Doctor or any other convincing material was produced and, therefore, it is difficult to

accept and rely upon the same.

47. Having considered the entire pleadings, evidence and the materials on record, it hardly needs to be reiterated that the matrimonial tie has not reached stage of such deterioration that it is beyond repairs, especially when Mukund is still a child who could be a bond between the couple to reunite them once again. We may at this stage quote the observations made by the Hon'ble Supreme Court in a judgment of **Samar Ghosh Vs. Jaya Ghosh, (2007) 4 Supreme Court Cases 511** relied upon by the learned counsel for the appellant himself. While elaborating the ingredients of section 13 (1) (ia) of the Hindu Marriage Act, the Hon'ble Supreme Court had succinctly carved out some instances of human behavior relevant in dealing with the cases of mental cruelty which are illustrative and not exhaustive. That was a case of irretrievable break down of marriage.

47.1. The appellant and the respondent both were senior I.A.S officers. Respondent-wife had a female child from her first marriage. She obtained divorce from her husband who was also an I.A.S. Officer. Female child was given in the custody of the respondent by the Court. The appellant-husband and the respondent-wife got married in the year 1984. The respondent thereafter declared her decision unilaterally not to give birth to a child for two years and that the appellant should keep himself long from herself as far as possible. The appellant thereafter suffered a prolonged illness. Further, the respondent left him and went to other place where there were none to look after her. The appellant and the respondent lived separately since 27th August, 1990. The respondent refused to cohabit and also stopped sharing bed with the appellant. The appellant was not permitted to show his normal affection

to the daughter of the respondent. The appellant's petition for divorce on the ground of mental cruelty and desertion at the hands of the respondent was allowed by the trial court which found six instances constituting mental cruelty and, therefore, granted decree of divorce to the appellant-husband. High Court had reversed the decree of the trial Court; however, the Hon'ble Supreme Court by way of this judgment found that the matrimonial bond had ruptured beyond repair because of mental cruelty caused by the respondent. It was thus a clear case of irretrievable break down of the marriage and it was impossible to preserve the same. The Hon'ble Supreme Court, therefore, set aside the judgment of the High Court and restored the judgment of the trial Court granting decree of divorce. Following are the salient features/instances of human behavior relevant in dealing the case of mental cruelty as expanded by the Hon'ble Supreme Court;

> *"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.*
>
> *(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.*
>
> *(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.*
>
> *(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.*
>
> *(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.*

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the

> *matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.*

48. As already discussed, taking into consideration the salient features hereinabove, it would be very difficult to construe that the marriage of the parties has deteriorated to such an extent that it would be impossible to unite the couple. It cannot be said to be a fiction in light of the attending circumstances. We hope that there is still scope for the couple to restore the bond at least for the sake of their child Mukund.

49. The learned Counsel placed reliance upon a judgment of Andhra Pradesh High Court in case of **Puneet Kumar Trivedi Vs. Nitika Pathak, III (2020) DMC, 150 (DB) ALL MR**. This judgment is based on the facts of that case wherein there was an irretrievable break down of the marriage. Litigation lasted as long as for 14 years. There was absolutely no hope of settlement or reunion between the parties and the matrimonial bond was beyond repair. This cannot be considered as a precedent to be applied to the present set of facts.

50. The learned counsel then placed reliance on a judgment of this Court in case of **X vs. Y, 2014 (3) ABR 83**. It was a case wherein the appellant husband sought divorce on the ground of desertion and cruelty. The trial Court had dismissed the petition against which the appellant had approached this court. The facts of the case are quite peculiar. Having considered all the relevant circumstances and evidence on record, this Court set aside the judgment of the Family Court and granted a decree of divorce to the appellant. The Division Bench of this

Court after surveying the various case laws on the subject observed that the respondent's acts and conduct amounts to desertion and, therefore, the appellant-husband was entitled to a decree of divorce. Paragraphs 6, 7 and 8 of the aforesaid judgment read thus;

> *"6. There is no reference in the Respondent's pleadings or evidence to any serious illness or pregnancy related complication during this period. No report or medical record is produced. No evidence of doctor's advice is led. In the absence of such evidence, it is hard to believe on the basis of her bare word that during this entire six months period, i.e, from 14 December, 1999 (when she left for Ahmednagar saying that she would return the next day) and 8 June 2000 (when she was admitted for delivery) the Respondent could not come back to Mumbai for medical reasons or on the doctor's advice. The Respondent's act of not returning to the matrimonial home during the period must be, therefore, attributed to her conscious decision not to return. At the same time, it ought to be noted that this conscious decision is not actuated by any fault or wrong on the part of the Appellant. The Respondent has not alleged any act of cruelty on the part of the Appellant at any time before 14 December, 1999. The Respondent has admitted in her Written Statement that in Mumbai there were only 2-3 persons in her matrimonial family and sufficient accommodation where she comfortably enjoyed her privacy. Even during the period of the Appellant's stay at Ahmednagar, in April, 2000, the*

Appellant admittedly visited Ahmednagar and stayed at her parent's house for a couple of days when the parties "celebrated the birthday of the Respondent and Marriage Anniversary, showed love and affection to each other". The inescapable inference from the pleadings and evidence noted above is that the Respondent left, and stayed away from, her matrimonial home of her own volition and for no wrong on the part of the Appellant from 14 December 1999 till 12 June, 2000.

7. The learned trial Judge has, so far as this period is concerned, whilst acknowledging that the Respondent has not produced any documentary proof of the fact that she was medically advised not to take the long journey (between Ahmednagar and Mumbai) during the days of pregnancy (i.e from the third month of pregnancy till her delivery in the ninth month) or not examined any doctor in support, found her evidence believable because "the evidence of the petitioner proves that she underwent various tests of sonography". The learned trial Judge observed that it has been brought on record that the Respondent's health was very delicate and she was weak. As we have discussed above, there is absolutely nothing on record to conclude that the Respondent's health was so delicate or weak that she could not undertake the journey from Ahmednagar to Mumbai. A pregnant lady undergoing sonography

on a couple of occasions proves nothing concerning such delicate or weak health. That the Appellant himself took her for medical check up in February, 2000 also proves nothing. The observation that "had there been no medical advice, he would have insisted the Respondent to come back to the matrimonial home but the fact that neither he nor his family members insisted her to come back to the matrimonial home, is sufficient to prove that the Respondent was under medical advice of Dr. Joshi and that she was advised not to undertake the journey", is a rather strange assessment. The entire appreciation of evidence by the learned trial Judge in his behalf exhibits a serious error.

8. The second period is between 12 June 2000 (when the Respondent was discharged from the maternity home after giving birth to a still born baby) and 7 November 2000 (when the Appellant filed his petition for restitution of conjugal rights). The Respondent continued to stay at her parents' house in Ahmednagar throughout this period. There is no case of any medical reason for this stay. The only explanation of the Respondent for not returning to the matrimonial home during this period is that "the petitioner or his family members was (sic were?) never turned back from 14 June 2000 to take the respondent back to Mumbai"; that they had "not enquired about her health or asked her to return back to her matrimonial home";that

> *""the respondent never denies to go with the petitioner for cohabitation; and that "the respondent herself requested and called many times to the petitioner to take her back but the petitioner himself never responded to the Respondent's request". None of this is, however, testified by the Respondent in her examination in chief. Whilst it is the case of the Appellant that he made several attempts by himself and through his family members to persuade the Respondent to come back, the Respondent has denied such attempts. At the same time, the Respondent has admitted in her Written Statement that there were no disputes between the Appellant and the Respondent during this period and there was therefore no question of any reconciliation. In the face of these pleadings and the state of evidence as it stands, it is not possible to believe the Respondent's case that she was keen to return the matrimonial home. The Respondent had left the matrimonial home on her own, never bothered to return to it and cannot be heard to say that this was because the Appellant did not come to take her back".*

50.1. The Division Bench, *inter alia,* placed reliance on a judgment of the Hon'ble Supreme Court in case of **Bipinchandra Jaisinghbhai Shah Vs. Prabhavati, A.I.R 1957S.C. 176** wherein the essential requisites of desertion were set out by the Hon'ble Supreme Court which read thus;

"The essential requisites of desertion have long been settled by the Supreme Court even before the Hindu Marriage Act, 1955 came into force. The Supreme Court, whilst dealing with a case under Bombay Hindu Divorce Act, 1947, in Bipinchanda Jaisinghbhai Shah Vs. Prabhavi, A.I.R 1957 S.C.176, held as follows:

"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. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively … Desertion is a matter of inference to be drawn from 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 deserandi. 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 facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserandiconincide in point of time".

51. We are afraid, the ratio decidendi in the citation (supra) would not be applicable to the case in hand for the reason that the appellant in this case initially filed a petition on the ground of cruelty and thereafter attempted to expand the scope by raising a ground of desertion. Nevertheless, from what has already been discussed hereinabove by us even a case of desertion has not been made out by the appellant. We are, therefore, of the view that no inference can be drawn from facts and circumstances on record that the respondent had deserted the appellant.

52. Having taken into consideration the entire facts, circumstances and evidence on record, we are of the considered view that at this stage no case has been made out by the appellant for seeking a decree of divorce on the ground of either cruelty or desertion. The impugned judgment and decree, therefore, does not warrant interference in the appeal. However, we grant liberty to the appellant to approach the Family Court again, if so advised, to seek appropriate relief.

53. With these observations, the appeal stands dismissed. However, there shall be no order as to costs.

[PRITHVIRAJ K. CHAVAN, J.] [UJJAL BHUYAN, J.]