

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

WEDNESDAY, THE 9TH DAY OF FEBRUARY 2022 / 20TH MAGHA, 1943

MAT.APPEAL NO. 548 OF 2020

AGAINST THE JUDGMENT IN OP 2395/2016 OF FAMILY COURT,

THIRUVANANTHAPURAM

APPELLANT/PETITIONER:

DR.UTHARA
AGED 41 YEARS
D/O.M.N. SOMAN, 3A, SFS FAIRMONT, M.P. APPAN
NAGAR, VAZHUTHACAUD, THIRUVANANTHAPURAM - 695014.

BY ADVS.
SUMATHY DANDAPANI (SENIOR ADVOCATE)
SRI.MILLU DANDAPANI

RESPONDENT/RESPONDENT:

DR.SIVAPRIYAN, AGED 50 YEARS,
S/O. DR. SREEVARDHANAN, T.C. 30/1377, V.V. ROAD,
PATTOOR, THIRUVANANTHAPURAM - 695 024.

BY ADVS.
SRI.DINESH R.SHENOY
SRI.A.JOSEPH GEORGE
SRI.EBIN MATHEW
SHRI.SILESH S. PRABHU

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
18.01.2022, THE COURT ON 09.02.2022 DELIVERED THE FOLLOWING:

**A.MUHAMED MUSTAQUE &
SOPHY THOMAS, JJ.**

C.R

Mat.Appeal No.548 of 2020

Dated this the 9th day of February, 2022

J U D G M E N T

Sophy Thomas, J.

This appeal is filed by the wife challenging the judgment and decree in O.P.No.2395 of 2016 on the file of the Family Court, Thiruvananthapuram, by which her prayer for divorce on the ground of matrimonial cruelty and desertion was rejected.

2. The appellant/wife is a Ph.D. holder, working as Assistant Professor and Head of the Department of Sociology at S.N College, Chempazhanthi. The respondent/husband is a Dentist, running his own clinic and also a Consultant at Ananthapuri Hospital. Both of them hail from high profile families with well- educated parents and high social status.

3. The summary of the case is as follows:

The marriage between the appellant and the respondent was solemnized on 07.05.1999 as per Hindu religious rites and customs and a male child was born in their wedlock on

16.09.2001. After marriage, the appellant was staying at her matrimonial home. She was subjected to matrimonial cruelties demanding more dowry. She was not permitted to pursue her higher studies. She was totally neglected by the husband and he even alleged extra-marital relationship against her. Since the property of her mother was not given to the respondent as demanded by him, he tortured her mentally, and when her father enquired about the same with the father of the respondent, she was asked to vacate their house, and accordingly in the year 2011, she shifted her residence to the flat given by her mother. Due to the intervention of friends and relatives, the respondent also started living with the appellant in the flat. After one month of peaceful residence there, he started making unwarranted allegations against her, and on 27.09.2011, he left the flat after threatening the appellant, to take away the child with him. Then, she filed petitions for divorce, return of gold ornaments, custody of the child, and also a petition under Protection of Women from Domestic Violence Act against him. In turn, he filed petition for restitution of conjugal rights. Subsequently, after taking evidence in those cases, on

compulsion from everyone close to the appellant, she agreed for a reunion, and withdrew all the cases filed by her, and the respondent started living with her in the flat, from 29.05.2015 onwards. Even after the reunion, there was no physical intimacy or mental unity between them, and he failed to maintain his wife and child. He practically neglected the appellant and she had to undergo medical counselling for the mental trauma she had suffered at his hands. They are living separately for more than two years. Their marital relationship is irretrievably broken and there is no possibility of a further reunion. It is not possible to continue her matrimonial life with the respondent without compromising her dignity and individuality as a woman.

4. The respondent/husband denied all the allegations of matrimonial cruelties and desertion, and according to him, he was a loving husband and a caring father. He assisted and motivated his wife to achieve all her dreams in life. Himself or his parents never demanded dowry from the appellant or her parents. In fact their parents were friends, and their fathers were Doctors in health service. They never received or misused her gold ornaments. The allegation of neglect levelled against

him is false. Since the appellant wanted to enjoy flat life, both of them shifted their residence to the flat in February, 2011. On 10.10.2011, he was asked by her mother to stay separately for some time, due to some astrological reasons, and he readily obeyed. But, thereafter the appellant filed cases one after the other against the respondent. Later, the appellant withdrew all the cases and they resumed cohabitation in the flat in May 2015. They were leading a normal family life, till December, 2016. Thereafter she began to behave in a rude manner and with an intention to send him out, packed all his belongings and sent it to his paternal house, after informing him over telephone. Subsequently, the appellant again filed a divorce petition against him. He was always ready and willing to live with the appellant, as a responsible husband, and a loving father to the child. There are no grounds existing to dissolve their marriage.

5. The Family Court formulated necessary issues and permitted the parties to adduce their evidence. PW1 was examined and Exts.A1 to A6 were marked from the side of the appellant. CPW1 was examined and Exts.B1 to B3 were marked from the side of the respondent. After analysing the facts and

evidence, the Family Court found that the wife could not prove the grounds alleged, and so, the petition for divorce was dismissed. Assailing the same, she has preferred this appeal.

6. The points that arise for consideration are:-

(i) Whether the respondent subjected the appellant to matrimonial cruelties so as to dissolve their marriage?

(ii) Whether the respondent deserted the appellant?

7. Let us revisit the facts and evidence based on the grounds urged by the appellant.

8. Admittedly, after the marriage on 07.05.1999, the appellant was staying in the house of the respondent. The appellant would say that her matrimonial life was miserable as she was subjected to physical and mental cruelty by the husband and in-laws. Later she was asked to vacate her matrimonial home in February 2011.

9. The case of the appellant in the O.P is to the effect that the respondent and his parents insisted her to vacate their house, and accordingly she shifted her residence to the flat. But her testimony (page 24 of her cross examination) is that since the respondent and his parents abused and insulted her father

for not giving the property, demanded as her dowry, she shifted her residence to the flat. She was not saying that she was asked or forced to vacate the house. But, learned counsel for the appellant suggested to CPW1 (page 16 of cross examination) that the respondent was insisting her to collect the child from school bus, when he comes back from school, and since she was employed, it was not possible, and so she shifted her residence to the flat.

10. From May 1999 till February 2011, the appellant was residing in her matrimonial home along with her husband and child. No complaints or cases were seen filed by her during that period alleging any kind of matrimonial cruelties. In February, 2011, she shifted her residence to the flat owned by her mother. There is nothing to show that she was forcibly evicted or asked to vacate her matrimonial home.

11. The main allegation of cruelty levelled against the respondent is that, he demanded more dowry, more specifically 40 cents of land owned by her mother. According to her when her father reached her matrimonial home in January 2011, he asked the respondent and his parents to take care of the

appellant and to attend her financial needs, and then they insulted her father, finding fault with him for not transferring the land. But no such evidence is forthcoming, and if such an incident occurred, her father might have been the best witness to speak about the unlawful demand for dowry made by the respondent. He was not examined from the side of the appellant to prove that allegation.

12. Another cruelty alleged is regarding transfer of the Uno car given to her, from her family, at the time of marriage, into the name of father of the respondent. Respondent admitted that fact. But, according to him, after closing the hypothecation, her father wanted to sell away that car, but due to emotional attachment, the appellant wanted the respondent to purchase that car. Since he was already having a car in his name, it was registered in the name of his father.

13. At the time of transfer, the Uno car was 5 years old. In cross examination (page 37), the appellant is admitting that the respondent is a very rich man, and several vehicles such as Ford Ikon, Maruti 800, Ford Fiesta, Celerio, Skoda etc were there in his house. She further admitted that, after obtaining driving

licence for her, a brand new Maruti 800 Car was purchased by the respondent. In that situation, demanding an old car by the respondent as dowry is out of place. Moreover the story of demanding the Uno Car as her dowry will not find a place in her pleadings. So the evidence let in with respect to that allegation cannot be admitted.

14. Another ground of cruelty alleged by the appellant is that, after the marriage, she was not permitted to continue her studies, though an assurance to teach her, was given prior to the marriage. But, her testimony shows that she did her M.A from M.G University and thereafter she got selection as Research Scholar under UGC as JRF, and she acquired Ph.D. Later she got employment in S.N College, Chempazhanthi as Assistant Professor and now she is the HOD in the Department of Sociology. The appellant would say that, no assistance was rendered by the respondent or his family members for her studies, and she, on her own hardwork, acquired the Doctorate and got employed in S.N College.

15. According to respondent, he was giving all sorts of assistance to the appellant for her studies. The appellant has

got a case that the respondent was spending nights over books, totally neglecting her. The respondent is admitting that fact to certain extent. But, according to him, for the Ph.D of the appellant, he was preparing notes and collecting materials spending long hours in the night. The appellant admitted in her cross examination that, in her Ph.D thesis in the acknowledgment, it is written that "I feel obliged to my in-laws for rendering me all necessary support that I needed for pursuing higher studies". In the thesis, it is written that "I am indebted to my affectionate husband Dr.T.S.Sivapriyan for his patience and passionate effort in making me intellectually sound as well as moulding my carrier". But the explanation given by her is quite interesting. In fact, she prepared the acknowledgment thanking God, but the respondent deleted the same and inserted the acknowledgment as it is seen now, deceitfully and dishonestly. She further admitted that she was sending copy of her notes to the mail of the respondent, but it was only to save the copy. Those explanations are not inspiring our confidence. She joined for M.A in the year 2004 and passed in First Class. Thereafter she joined for Ph.D as a Junior

Research Fellow in the year 2006 and she got Ph.D in the year 2010. She got employment in S.N College, Chempazhanthi, and only thereafter she shifted her residence to the flat of her mother.

16. The appellant has got a case that she was compelled to do all the household works including the affairs of the child, and she spent sleepless nights to make up her studies. The appellant admitted that there were three workers in the house of the respondent; one for outdoor work, one in the clinic and one as a housemaid. The mother of the respondent was also a housewife. So the case of the appellant seems to be quite exaggerating. She admitted that she was attending music class, painting class, dance class, computer course, fashion designing class, compering class etc. during her period of stay in her matrimonial home, and she was doing compering in two channels such as ACV and Asianet at that time. She admitted that she was teaching fashion designing in one institution during that period. Moreover, she learned driving during that period and the respondent purchased a brand new Maruti 800 Car for her use, as admitted by her.

17. So, the available facts and circumstances will go to show that the appellant was having full freedom at her matrimonial home for her academic as well as extra-curricular activities and there was every opportunity for her to blossom into an all-rounder. The evidence adduced by her is not sufficient to show that she was suppressed or oppressed by the respondent in developing her academic brilliance and extra-curricular activities as well. There is nothing to show that the respondent did anything by which she lost her individuality and dignity as a woman.

18. Another cruelty alleged is that, the respondent made allegations of extra marital relationship against her. The respondent vehemently opposed that allegation, and according to him, he never made such an allegation, and so far, he has no doubt regarding the integrity of the appellant. Though there was no pleading to that effect, during cross examination of the respondent, it was suggested to him, that he had sent an anonymous letter to Police officials saying that the appellant, who is the daughter of the SNDP President, is entangled in 'Love Jihad' with one Mr.Farooq and those letters were allegedly

produced by the appellant before court. But no such letter is produced in this case. It was further suggested to him that I.G. Zenkumar questioned the appellant, on the basis of the complaint of 'Love Jihad' filed by the respondent. He emphatically denied that suggestion. If such a letter was there, she could have very well called for the same to prove the allegations of cruelty against the respondent. But, no such letters were produced or summoned by the appellant, and it remains as a mere allegation without any factual foundation.

19. She has got another case that, for the delivery she was not permitted to go home which also amounts to cruelty. But there is no pleading to that effect. Moreover she herself admitted that a close friend of her father was the Gynecologist in the hospital where she delivered the child. That may be the reason for selecting that hospital for her delivery. Her mother might have been the best person to say, that even though demanded, the respondent did not permit the appellant to go to her paternal house for delivery. But her mother also was not examined.

20. During evidence many times the appellant stated that

she was ill-treated by the respondent physically and mentally. Not even one incident of physical violence is pleaded by the appellant in her O.P., and there is no evidence also to prove any such violence against him. It is true that in order to attract 'cruelty' in matrimonial life, there is no need of any physical violence. Cruelty can be either mental or physical. But when there is specific allegations of physical cruelty, the person alleging the same is bound to prove it.

21. The appellant, during cross examination, detailed the cruelties suffered by her from her husband during their Singapore trip. According to her, she was made to walk long distance without availing a cab, and she was not provided food. But that incident also will not find a place in her pleadings.

22. She has got another allegation that while she was teaching fashion designing in an institution named Arena Multimedia, the respondent reached there and picked up quarrel with the Manager, saying that salary given was not sufficient, and on account of that incident, she was terminated from that job. That also will not find a place in her pleadings. Moreover if such an incident occurred, the Manager of that institute might

have been examined to prove the violent behaviour of the respondent. That also was not done.

23. As we have seen, many of the incidents narrated by her during evidence were not pleaded in her petition. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be considered, so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its considerations. Without pleading and an opportunity of hearing being given to the respondent, no amount of evidence, however weighty it may be, can be looked into, to grant any relief (See ***Bachhaj Nahar*** vs. ***Nilima Mandal and another*** [(2008) 17 SCC 491]).

24. In the O.P, the appellant was alleging that, after shifting to the flat in February, 2011, due to the intervention of friends and relatives, the respondent also started residence in the flat. They lived in the flat peacefully for one month and thereafter, he made unwarranted allegations against her. But,

she has not stated what sort of allegations he was making against her. She further pleaded that on 27.09.2011, the respondent left her company 'without any justifiable cause'. So, the impression we could gather is that the respondent left the flat without any reason and against her wish. It follows that there was every chance for them to continue their life in the flat.

25. The respondent would say that his clinic was attached to the tharavad house where his parents were living. Since the appellant was insisting for flat life experience, he agreed, though it was not convenient for him, and both of them shifted their residence to the flat of her mother. Thereafter, mother of the appellant started intervening in their matrimonial life, and her mother prompted him to stay separately for some time, for some astrological reasons. He agreed, and on 10.10.2011, he returned to his paternal house. But only when he received divorce notice, he realised the foul play. So, according to him, there was justifiable cause for his return from the flat.

26. Ext.A1 divorce petition was filed by the appellant on 02.11.2011 before the Family Court, Thiruvananthapuram. In that O.P also, she has made allegations of cruelty against the

respondent. Ext.A2 order was obtained by her under the Domestic Violence Act on 08.11.2011. Ext.A3, O.P for recovery of money and gold, was filed by her on 28.01.2013. While trial was going on, under the compulsion of well-wishers, she agreed for a re-union and all the cases were withdrawn, and they started living together on 29.05.2015 in the very same flat of her mother.

27. During cross examination, her testimony is to the effect that the respondent assured her that he will not repeat any mistakes and he would be a loving, caring and responsible husband in future and in token thereof, he had presented a bangle for her. Believing his words, she agreed for a reunion. But, in the pleadings, we will not find any such assurance given by the respondent, and what is stated in the petition is that, friends and relatives intervened and at their instance, the respondent started residence in the flat. The appellant deposed that her parents and sister advised her for a re-union, considering the future of the child. If the respondent was so cruel, and life along with him was so miserable or un-safe, her parents and sister might not have compelled her for a re-union.

So that is also a circumstance to be looked into.

28. Anyhow, it is an admitted fact that, after withdrawing the cases, the respondent lived in the flat along with the appellant in May 2015. According to the appellant, in October, 2015, the respondent deserted her and left the flat. No particular incident is stated by the appellant which prompted the respondent to leave the flat. But her case is that even after reunion, there was no mental unity or physical intimacy between them, and he neglected his wife and failed to maintain his family. She has got a case that, during that period, due to mental imbalance, she underwent a medical counselling and she was taken to Pushpagiri Hospital, Kochi by her sister Dr.Urmila. Her sister was not examined and no evidence is forthcoming to show that, she suffered mental stress due to the matrimonial cruelties extended to her by the respondent. In the flat she was living with her son. The son also might have been able to say about the life of his parents in the flat, as he was 14 years old at the time of their re-union. During trial of the O.P, he was major also. He was also not examined to prove the so called sufferings of his mother. When the other party is vehemently opposing the

allegations levelled against him, we expect some cogent evidence, especially when there was every opportunity to adduce the same.

29. In paragraph 10 of the petition, she has stated that she was never in a position to accept the respondent as a husband. But under the compulsion of her parents and well-wishers she agreed for a re-union. The respondent would say that, after reunion in May 2015, till December 2016, they were leading a normal family life, but later she asked him to move out and sent his belongings to his house without his knowledge, and thereafter he received notice in the present O.P for divorce. The present O.P was filed by the appellant on 13.12.2016. So, it more or less tallies with the case of the respondent.

30. In the present O.P, in paragraph 12, the appellant has stated that she is not narrating the earlier incidents further, due to the fact that the entire issues have been settled and the appellant and respondent decided to live together. So, it gives an impression that she had condoned the mistakes she was alleging against the respondent and agreed for a reunion.

31. Learned counsel for the appellant contended that,

though the cruelties alleged in the earlier divorce petition was condoned and she agreed for a reunion, since the respondent continued his ill-treatment towards her, it will revive, so that she is entitled to get a decree of divorce on the grounds urged in the earlier petition also.

32. As observed by the Apex Court in **Narayan Ganesh Dastane vs. Sucheta Narayan Dastane** (1975 KHC 183), 'the condonation of a matrimonial offence is not to be likened to a full Presidential pardon under Art.72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned, or of any other variety. "No matrimonial offence is erased by condonation. It is obscured but not obliterated" Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation, there must be, therefore, two things: forgiveness and restoration.

33. In **Santhosh kumar S vs. Jayashree Damodaran** [2020 (2) KHC 33], a Division Bench of this Court had occasion to deal with the subject, whether condonation of cruelty can revive. This Court held that an act of cruelty once condoned can revive and give rise to a cause of action for dissolution of marriage, when the offending spouse exploits and takes unfair advantage of generosity or the benevolence shown by the wronged spouse and takes to matrimonial misdeeds over again. It was observed that condonation of cruelty is a benevolent and generous act of an offended spouse forgiving the misdeeds of the offending spouse and restoring the latter to the original company. In every condonation there is an implied condition that the excused spouse will not repeat or commit matrimonial wrongs in future. No wrong is permanently wiped out by condonation; but is only hibernated. So an act of cruelty once condoned could certainly revive and give rise to a cause of action for dissolution of marriage, when the offending spouse repeats the misdeeds.

34. Now two questions arise for consideration:

(i) Whether the appellant was subjected to matrimonial

cruelties by the respondent-husband and if so, she condoned the same?

- (ii) After condonation of the cruelties, whether it would revive?

35. From the foregoing discussions, we have found that the allegations of cruelty upto the first divorce O.P in the year 2011 could not be proved by the appellant, to reach a finding that it was impossible or injurious to continue with the respondent. Re-union in the year 2015 fortifies that fact.

36. Now the question is, if at all there was cruelty, whether it will revive after condonation?

37. If the cruelty once condoned has to revive, there should be repetition of matrimonial wrongs which amounts to cruelty. Admittedly, after reunion, the appellant and respondent were living in the flat of the appellant. Her case is that after reunion, there was no mental unity or physical intimacy between them, and he failed to maintain his family. At the same time she is admitting that the respondent was remitting the fees of the child, and he was keeping cordial relationship with his son. She is alleging that she was practically neglected by the respondent-

husband. With regard to the allegations of neglect and want of physical intimacy, the respondent gave evidence to the effect that, after reunion, they were leading a normal family life in the flat. But, the mother of the appellant intervened in their life, and he was thrown out in December, 2016. Nothing cogent is emerging out to show that after re-union, the respondent subjected her to cruelties either physical or mental.

38. The appellant is admitting that, the son was taken from coaching class by the respondent but according to her when the respondent went there to collect his nephew, at times he used to take his son also in his car. The respondent produced Exts.B1 to B3 documents to show that, he had taken medical insurance for the wife and child, though the appellant is of the view that only to save tax, he took that policy. Though several rounds of mediation and counselling were done, the respondent was adamant for a reunion, whereas the appellant was insisting for a divorce. We also tried our best to reconcile the parties. But, both of them were adamant in their respective stand and so, we could not succeed in our attempt.

39. As observed by the Apex Court in ***Samar Ghosh vs.***

Jaya Ghosh [(2007) 4 SCC 511], human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. But 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. It was further observed that 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. 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.

40. In the case in hand, after living in the matrimonial home for about 12 years along with husband and child, after getting a job, the appellant moved out to live in a flat. In the year 2011 itself, she filed cases one after another against the respondent and that separation extended upto 2015. The respondent cannot be blamed for not resuming cohabitation with the appellant in her flat during that period as she had filed several cases against him including divorce case, and she had obtained Ext.A2 protection order against him under the Domestic Violence Act. Ext.A2 order dated 08.11.2011, shows that the respondent was restrained even from communicating with the appellant. After re-union in the year 2015, according to respondent they were leading a normal family life, but in December 2016, her attitude became changed, and she packed up all his belongings and sent it to his house. In December 2016 itself, she filed the present Divorce O.P against him.

41. It is pertinent to note that, in the year 2013, the appellant had filed O.P. against the respondent and his parents claiming 50 sovereigns of gold ornaments and cash worth Rs.26,13,920/-, maintenance both past and future to the minor child, and also Rs.25 lakh as compensation. During cross examination, the appellant admitted that the respondent had purchased a land in her name, but, it was after selling away her 85 sovereigns of gold ornaments in the year 2006. But, that fact was never mentioned in any of her O.Ps filed in the year 2011 or in the present O.P filed in the year 2016. If her gold ornaments were sold away in the year 2006 for purchasing a landed property in her name, her claim for return of gold ornaments in Ext.A3 O.P might not have been a genuine one. On reunion in the year 2015 after withdrawing all the cases, she was alleging revival of cruelties from the part of the respondent and so she again filed divorce O.P. But she had not filed any other O.P. against him for recovery of money, gold or compensation. She would say that the respondent has threatened to hook her in cases, and that is why she has filed only the Divorce O.P. The facts stated above point a doubting

finger regarding the credentials of her monetary claim.

42. Now coming to the other ground of desertion, Section 13(1)(i)(ib) of the Hindu Marriage Act, 1955 says that, any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party, has deserted the petitioner for a continuous period of not less than two years, immediately preceding the presentation of the petition.

43. According to the respondent, after reunion in May 2015, the respondent left her company in October 2015. But, according to the respondent, it was in December 2016, he was forced out of the flat. Even if we go by the date mentioned by the appellant, then also it was in October 2015, and by December 2016, just one year has been completed and so, the stipulation of two years of desertion immediately preceding the presentation of the petition is not satisfied.

44. The appellant deposed that, for the last 18 years they have no physical relationship. If so, it will relate back to 2001, just 3 years after their marriage. But, admittedly, she was

staying in his house till 2011, and thereafter they were staying together in the flat till September 2011. Again after re-union in the year 2015, they were staying in the flat. So that allegation is not a believable one.

45. As we have already seen, in the year 2011, the appellant filed Divorce O.P as well as a petition under the Domestic Violence Act against the respondent and so, now the appellant cannot blame him for not living with her from September 2011 till October 2015 as he was prevented by court order. Since the statutory period of two years was not there, immediately preceding the presentation of the petition, the appellant is not entitled for a decree of divorce on the ground of desertion.

46. Learned counsel for the respondent contended that the appellant shifted to the flat after obtaining job, though the respondent was doing everything for her education and future. More over no grounds could be proved against the respondent so as to dissolve their marriage.

47. The Family Court, on analysing the facts and evidence, found that the appellant could not make out grounds

of cruelty or desertion to get a decree of divorce.

48. The appellant categorically deposed before court that, she wants to escape from this relationship and wanted to marry another man for leading a respectable and happy married life. Her intention we can appreciate. But, when the spouses are not able to arrive at a consensus for dissolving their marriage, we can only go by the law and procedure, and if only they could satisfy the statutory requirements, a court of law could grant a decree of divorce, to dissolve their marriage.

49. As observed by the Apex Court in the judgment cited supra, human mind is extremely complex and human behaviour is equally complicated. In the case in hand, both the spouses are highly educated and both of them command respect and high status in society. The appellant would contend that their marriage is irretrievably broken and there is no chance for a re-union. First of all, irretrievable break down of marriage if at all there, is not a ground for divorce recognised by Hindu Law. When one spouse alleges irretrievable break down of marriage, he/she has to plead and prove the grounds recognised by law which lead to such a break down. If one spouse wants to avoid

the other spouse without any justifiable reasons recognized by law and unilaterally takes a decision to break the marital tie, he/she may not get the legal sanction, for that separation.

50. Irrespective of cast and creed, marriage is an institution, in which inter personal relationships, usually intimate and sexual, are acknowledged, and it is a socially or ritually recognized union or legal contract between spouses that establishes rights and obligations between them, between them and their children and between them and their in-laws. Sometimes lot of sacrifice may be involved from either side to preserve the family and to protect the children.

51. Family building demands surrender of individual autonomy in favour of mutual reliance, and care. A family is an amalgamation of distinct individual interests. It is difficult to define and demarcate the rights and duties of husband and wife in their matrimonial life. The fiduciary duty in matrimonial relationship requires the highest standard of care, good faith, fair dealing and loyalty. The mutual rights and obligations undertaken by the couple, forms the basis of their partnership in love, called family, which is the basic unit of the society. Mere

trivial irritations, quarrels, normal wear and tear of married life which happens in day to day life may not destroy that institution, leaving desperate human beings and orphaned children across the globe. In the case in hand, as there is no evidence to prove the matrimonial cruelties or desertion alleged by the wife, her claim for divorce cannot sustain legally.

52. From 1999 to 2011, the couple were living in the house of respondent. From 2011 to 2015, cases filed by the appellant for divorce, and injunction order under Domestic Violence Act were pending. After re-union in the year 2015, in the year 2016 she again filed Divorce petition. So the absence of co-habitation during that period may be due to the pendency of cases for which the respondent could not be blamed. The husband/wife keeping the other spouse out of reach for long, by filing cases against him/her, or by simply avoiding him/her cannot contend later, that their marriage is irretrievably broken or emotionally dead so as to make a claim for divorce.

53. It is true that the delay in justice delivery system also may be adding years to their separation. Long years of separation and the bitter battle fought in court with allegations

and counter allegations may still keep them away, blocking their reunion. Even for very simple reasons, the spouses may break co-habitation, intending to mend the ways of the other spouse, expecting a re-union after clearing all their apprehensions. But the litigations once begun may take them to unknown shores, never intended at the beginning. That is why we could see a simple claim for maintenance or restitution ending up with divorce.

54. The period of non-co-habitation however long it may be, if it was due to deliberate avoidance or due to pendency of cases filed by one party, the other party cannot be found fault with, when the other party is still ready to continue his/her matrimonial life, and no grounds recognized by law are established against the other party to break their nuptial tie. So legally, one party cannot unilaterally decide to walk out of a marriage, when sufficient grounds are not there justifying a divorce, under the law which governs them, saying that due to non-co-habitation for a considerable long period, their marriage is dead practically and emotionally. No one can be permitted to take an incentive out of his own faulty actions or inactions.

55. The Family Court analyzed the evidence in its correct perspective and found that the appellant was not entitled for a decree of divorce on the ground of cruelty and desertion. The trial court rightly dismissed the O.P., and so, we find no reason to disturb that finding.

The appeal is dismissed upholding the impugned judgment and decree of the Family Court. No order as to costs.

Sd/-

**A.MUHAMED MUSTAQUE
JUDGE**

Sd/-

**SOPHY THOMAS
JUDGE**

smp/AS