

IN THE COURT OF THE JUDGE, FAMILY COURT,  
BHUBANESWAR.

Present : Shri Pravakar Mishra, OSJS (SB),  
Judge, Family Court, Bhubaneswar.

Civil Proceeding No. 161 of 2014

U/s. 13 (i-a) (i-b) of the Hindu Marriage Act, 1955

Vishal Gagan, aged about 38 years  
S/o- Late Sh. J. Singh,  
D-II, Quarter No. 368, Vinay Marg,  
Chanakyapuri, New Delhi.

....Petitioner

... Versus ...

N.B. Bharati, aged about 43 years,  
W/o-Vishal Gagan,  
Type-IV, Quarter No. 67, Nivedita Kunj, R.K. Puram,  
Sector-10, New Delhi.

.... Respondent

Civil Proceeding No. 162 of 2014

U/s. 7, 9 and 25 of Guardianship and Wards Act, 1890

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S/o- Late Sh. J. Singh,  
D-II, Quarter No. 368, Vinay Marg,  
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... Respondent

Date of Argument: 14.10.2015

Date of Judgment: 02.11.2015

J U D G M E N T

The petitioner, husband-Vishal Gagan has filed two petitions i.e. Firstly, C.P. No. 161 of 2014 U/s. 13 (i-a) (i-b) of Hindu Marriage Act, 1955 (in short, the Act 1955) for dissolution of his marriage on the grounds of desertion and cruelty and secondly, C.P. No. 162 of 2014 U/s. 7, 9 and 25 of Guardianship and Wards Act, 1890 (in short, the Act 1890) against the respondent, wife- N.B. Bharati praying to declare him as the natural guardian and custody of the minor child namely Eshan Priyadarshi. Both the cases are taken up together for a common Judgment as both the parties are same in both the proceedings.

2. The pleadings of the petitioner in C.P. No. 161 of 2014 and C.P. No. 162 of 2014 are same. Similarly, the written statement of the respondent in C.P. No. 161 of 2014 and C.P. No. 162 of 2014 are same. Therefore, for the sake of the brevity, I picked up the pleadings of the parties in C.P. No. 161 of 2014.

3. Admitted facts of the case of the parties are that their marriage was solemnized according to Hindu rites and Customs on 29.01.2001 and thereafter they have also registered their marriage in Sub-Registrar office in Tumkur in Karnataka and out of their wedlock one male child namely Eshan Priyadarshi was born on 21.05.2002. Further both the parties have been living separately since 05.09.2007.

4. The fact of the case of the petitioner are as follows:-

It is the case of the petitioner that after solemnization of marriage, the mother of the respondent namely Smt. N.H. Saraswathi stayed with them who used to interfere in their family life. During their stay, when his mother visited them, the respondent ill-treated her and when he objected it, she abused and misbehaved him for which, he suffered mental agony. It is further averred by the petitioner that in the middle of the year 2003, he came to know about the respondent's unusual friendship with few senior male members of her cadre and when he enquired the same, the respondent got violent and told she did not wish to get marry at all, in the first place as she is of extremely independent nature and preferring her personal freedom in day to day life. She has further told him that she has

marred him simply from financial security point of view. In the year 2004, the respondent and her mother demanded a rental accommodation at Bangalore and cash of Rs. 2,00,000/- and when he refused it, the respondent and her mother threatened to sever the marriage. Finding no alternative he had given a cheque of Rs. 2,00,000/- to the respondent on 26.08.2004. In the year 2005, being pressurized by the respondent he had given cash of Rs. 4,00,000/- for booking a plot of land in Bangalore in her name on 13.07.2005. It is further averred by the petitioner that the respondent always misbehaved and ill-treated him and his family members. According to the petitioner, the respondent is materialistic, arrogant and finicky in behavior and used to get stuck on small issues in deadlock. In the year 2006, when both of them were posted at different head-quarters, the respondent went on tour for ten days without his consent leaving the minor child in the custody of her mother and when he tried to trace out her whereabouts, the respondent told *"how dare you ask me... I am a police Officer and you have no right to inquire into my personal matter... and it would be better you don't interfere with my personal life..."*. The respondent always tried to exploit money for her personal gain and when he showed his inability to fulfill the same, she started torturing him both physically and mentally and also threatened to file false dowry torture case against him. On 12.08.2007, when he came back from Mussorie, the respondent instead of inquiring about his health condition or about his training started demanding Rs. 10,00,000/- for payment of her booked flat in Kewnsington Apartments of Prestige Group and also money for two months household expenses i.e. for the period when he was undergoing training and when he showed inability to fulfill the illegal demand, she started abusing him and also told him not to touch her unless he would transfer all the properties of his mother in her name and also give her Rs. 10,00,000/-. On 24.08.2007, his mother getting information about the disturbances between them, came to Bhubaneswar and when she tried to make the respondent understand, she insulted and abused his mother as to why she came to their place. In the morning of 05.09.2007, the respondent after abusing him and his mother in filthy languages drove them out from Saheed Nagar Flat. On

29.06.2008 i.e. on the birthday of the respondent when he and his mother visited the respondent's place and tried to settle the disputes between them, the respondent threw the cake on the face of his mother for which both of them returned being humiliated. Thereafter several attempts have been made from his side for settlement of the dispute between them but all were in vain due to willful refusal of the respondent. It is further averred by the petitioner that whenever he tried to talk over telephone with the respondent, the respondent uttered abusive and un-parliamentary language to him. In the year 2008, when the respondent was posted as S.P. Vigilance, Bhubaneswar and put herself in Govt. Quarters i.e. Qrs. No. 1/2, Type-VI-A, Unit-I vide allotment order dated 02.01.2008, she did not allow him to reside with her. Rather advised him to occupy the vacant flat of Sheed Nagar which she and her mother had vacated. It is further averred by him that when application for deputation preferring her posting in C.B.I could not materialize due to her past record, the respondent put blame on him and also sent threatening S.M.S to him on 23.08.2008 and also forcibly entered into his bedroom and started abusing him and his mother in filthy languages and also snatched away his mobile phone and when he tried to take back his mobile phone, the respondent manhandled him. In the year 2008, the respondent was posted as Joint Deputy Director, Intelligence Bureau (IB) in Delhi and also taken his son there without his consent or will. During their stay in Bhubaneswar he could not keep his son without him without the consent of the respondent and for such act of the respondent he was deprived his natural rights over his son. Despite such behavior of the respondent, he admitted his son in Sanskriti School in New Delhi and bore all the admission and other expenses. It is also averred by the petitioner that the respondent also intentionally kept the only child away from him and deprived him from his lawful marital and natural paternal rights. It is further averred by the petitioner that on 13.03.2010 he with the consent of the respondent and the consent of the mother of the respondent brought his son for two days in order to spend some time with him but in the morning of 14.03.2010 around 9 A.M., the respondent over telephone asked him to drop his son within one hour and when he replied

that he would drop the child in the evening as that day was Sunday, the respondent got violent and started shouting at him over phone. She has also started yelling stating "*she will lodge a case of kidnapping against him and his mother in local police if he do not sent her son... right now*" for which he suffered mental agony. It is further averred by him that despite such conduct of the respondent he has been regularly sending money amounting Rs. 8,000/- to Rs. 12,000/- almost every month through cheque. He has also depositing an amount of Rs. 26,000/- in the name of his son annually in an LIC Children's Career Plan Policy which will give his son a substantial financial support once when he will attain 18 years of age. The respondent also used to visit foreign countries with her close male friends leaving behind the child with her mother who is old aged lady and is a patient of neurology, BP and epilepsy for a long period of 15 to 20 days and due to such acts of the respondent, it jeopardizes the safety and well-being of minor child. The respondent dishonestly, fraudulently and maliciously removed the minor child from his lawful and legal custody and against his will and consent since 05.09.2007 for which he has been depriving from the company of the minor child which caused him continuous mental torture, pain, agony and suffering. The respondent in collusion and connivance with her mother is also poisoning the mind of the minor child towards him and his family members. The respondent and her mother are also in a pre-planned manner not allowing him to meet the minor child. The respondent is also giving threat to him if he will try to meet the minor child then she and her mother would file false cases against him. Although they are residing in Delhi and their place of residence nearly about three to four kilometers away but the respondent was avoiding to meet him and his mother to his child on one pretext or other. On several occasions her mother went to the house of the respondent for settlement and in all occasions she was insulted, rebuked and threatened by the respondent, even she was not allowed to see her grandson. It is averred by the petitioner that on earlier occasions he requested the respondent over phone for mutual separation as both of them are in Govt. job and entrusted with responsibility of public service and also to avoid public embarrassment and

humiliation as such cases attracted Media attention but the respondent has not yet been agreeing it. According to him he has been deprived of his rights for last four and half years. The respondent has been spreading fabricated defamatory stories about him, his mother and also about his deceased father to tarnish his image and reputation in public domain for which he has been suffering mental agony. The respondent has also given several threats to file false and frivolous cases against him and his family members and to send them behind the bar. According to the petitioner, as it was impossible for him to live with the respondent due to pernicious activities he was obliged to file the present petition for a decree of divorce on the grounds of respondent's cruelty and desertion and also custody of the minor child.

5. The respondent-wife filed W.S. denying all the allegations made by the petitioner against her. She has averred that the petition filed by the petitioner is not maintainable as there is no cause of action. The specific case of the respondent is that the petitioner has suppressed his identity including, age, caste, social background and residence etc from her. When marriage proposal was being considered, she in good faith believed that he was Vishal Gagan, son of late Dr. J. Singh resident of No. 78 Saket Nagar, Indore. Madhya Pradesh. She did not suspect the fraudulent motive of the petitioner in marrying her with a view to obtain a marriage certificate to enable him to get out of Kerala Cadre. According to the respondent all the marriage functions and ceremonies were organized by her family members and the expenses thereof were borne by her side. It is averred by her that during the marriage functions and ceremonies none except the mother of the petitioner, Smt. Pramila Devi was present. On 29.01.2001 i.e. the on the date of registration of the marriage, one male member namely Mr. Singh who was introduced as the brother of petitioner's mother namely was present. It is further averred by her that the petitioner has assured her that he would organize similar ceremonies and functions at his native place i.e. in Indore Madhya Pradesh where all his relatives will present. However, till date the petitioner on some pretext or other is avoiding to arrange any such functions for which she and her son have had no opportunities to meet and

acquainted with either his parental or maternal family members or relatives. According to her, since both of them are service holders and posted at different places, they used to visit each other from their respective places of postings as per mutual understanding and convenience for discharging the marital obligations. It is further averred by her that her mother was residing in Bangalore and as per her request, she came to Odisha during her pregnancy and also at the time of birth of the child and in the month of May, 2002 when her son was aged about three months, she went to Bangalore and thereafter to New Zealand near to her son and after one year she returned to Bangalore. Thereafter as per her request she against came to Odisha to look after the minor child whereas the whereabouts of the mother of the petitioner is a mystery to her and it was a well guarded secret as to where she resides and where from she travels to visit Odisha. It is also averred by her that in the year 2004 several applications were sent to Delhi Development Authority for allotment of a site in the names of the petitioner, his mother, her name and also in the name of others but no site was allotted by the Delhi Development Authority and the amounts was refunded. Thereafter in the year 2005, the petitioner himself obtained another application from his friend from the Ministry of Communication and deposited cash of Rs. 4,00,000/- and the application was applied in her name since it required a domicile identity of Karnataka but to her knowledge no site has been allotted and the amount has not been refunded. In the year 2005/2006 the petitioner along with his mother had purchased an apartment in Kolkata from the Unitech Builders and another in Noida and informed the same to her that her mother had sold her inherited properties and it was important to reinvest the same elsewhere for tax purposes. Thus, the petitioner and his mother invested in Kolkata/Delhi/Noida which could be ascertained after obtaining the bank transaction details and the money invested in purchasing apartments by the petitioner in the name of his mother could be co-related. It is further averred that in the year 2005, the petitioner fraudulently sold properties impersonating himself as Harish Prasad son of Harendra Prasad. In the year 2006, the mother of the petitioner was arrested when the petitioner

was posted in Sambalpur and she was posted in Baragarh and the petitioner was an accused in an SC/ST atrocities case and on registration of an FIR against him, he was transferred to Bhubaneswar from Sambalpur. In the year 2007, while both of them residing together in Bhubaneswar, the petitioner had undergone a three months Mid Course Training Programme at LBSNAA (Lal Bahadur Shastri National Academy of Administration Mussoories for the period from June to August, 2007. On 11.08.2007 the petitioner returned to Bhubaneswar. She and her minor child were eager to receive him at Airport but the petitioner discouraged them on a false pretend told that he had to visit his office at Barabati Stadium and he would proceed directly from the airport. It is further averred by the respondent that to her knowledge the petitioner befriended a lady namely Dr. Anne Mattoo who was posted at (Lal Bahadur Shastri National Academy of Administration Mussoories and when the conduct of the Dr. Anne Mattoo was found, she was removed from the Academy and the petitioner brought that lady to Bhubaneswar and accommodated her in various guest houses such as NALCO, JK Paper Mill guest houses and also in KIIT guest house at Puri. It is further averred by her that on 15.08.2007 the petitioner told her that he has been nominated officially to be taken part in the Independence Day in Angul district and the petitioner instead of going there, he and Dr. Annee Mattoo had gone to Puri and stayed in KIIT guest house. It is also averred by the respondent that the petitioner while staying in JK Paper Mill guest house both the petitioner and Dr. Anne Mattoo were found drinking and dancing. They have also created nuisance for which concerned staff complained to the Head Office at Raigada. Thereafter, the petitioner with the help of Bikas Swain, who is the contractor of NALCO shifted Dr. Anne to NALCO guest house. The said Bikas Swain also facilitated Dr. Anne Mattoo at NALCO guest house and KIIT guest house at Puri. The said Bikas Swain had been introduced by one Dillip Barik, the then D.S.P. CBI Bhubaneswar who was preparing for Civil Service examination along with the petitioner in Delhi. The petitioner with the help of Bikas Swain tried to get Dr. Anne Mattoo appointed in Kalinga Institute of Medical Science. It is averred by her that on 05.07.2007 the

petitioner, his mother and the brother of his mother told her that it was inappropriate to counsel the matter in presence of minor child and on that pretext shifted to a family friend's place at Palaspali, Bhubaneswar where the petitioner, his mother and Mr Singh continued to stay there for ten months i.e. for the period from September, 2007 to July, 2008. According to her she never prevented the petitioner from visiting her residence and also meeting the child. In the year 2009 she joined her new assignment in New Delhi on Central Deputation and the minor child continued his studies till March, 2009 to complete the academic session and by that time the petitioner was meeting the child at his free will. In the month of February, 2009 the petitioner himself brought the child to New Delhi to attend the preliminary examination test in Sanskriti School, New Delhi. Thereafter he brought back him to Bhubaneswar and also assisted in packing the household articles for shifting New Delhi. After completion of formalities, she admitted her son in Sanskriti School and borne all the expenses approximately Rs. 60,000/-. In the mid year of 2009 the petitioner joined in New Delhi on Central Deputation and continued to stay at the department guest house and he has also visited the child at regular intervals without any restrictions. According to her there is no ground of desertion and cruelty and by allowing the petitions of the petitioner and hence, be rejected.

6. The questions that require to be adjudicated are as follows:-
  - (i) Whether, there exists any desertion and cruelty on the part of the respondent to allow the petition for divorce?
  - (ii) Whether the petitioner is capable enough to look after the proper care of the minor son?
  - (iii) Whether the petitioner is entitled to take back the minor son to his custody and he is to be declared as guardian of the minor son?
7. The petitioner-husband in order to prove his case he, himself, has been examined as P.W. 1 and his mother namely Pramila Prasad as P.W. 2 and one Dr. J.S. Nokhwal as P.W. 3 and relied on twenty six documents. They are:- Ext. 1 is the money receipt vide membership No. 10537 dated

13.07.2005 of communication Employees Cooperative Housing Society, Bangalore, Ext. 2 is the Xerox copy of the Account Payee Cheque bearing No. 006182 dated 26.08.2004, Ext. 3 is the Letter of HDFC Bank dated 04.01.2008, Ext. 4 is the News Paper Publication published in Sambad Kalika dated 15.11.2008 and Ext. 4/a is the relevant portion, Ext. 5 is the News Paper Publication published in Samabad Kalika dated 20.11.2008 and Ext. 5/a is the relevant News item, Ext. 6 is the office copy of official letter dated 20.12.2009 (two sheets), Ext. 7 is the Original Savings Pass Book bearing S.B. A/c. No. 06640110000908, Ext. 8 is the LIC Policy No. 593463153, Ext. 9 and 9/a are the LIC Renewal premium receipts dated 11.02.2013 and 14.03.2014, Ext. 10 is the certified copy of the petition filed before Hon'ble High Court of Delhi in C.M. No. 486/2013 (96 sheets), Ext. 11 is the copy of SLP No. 37327/2013 (116 sheets), Ext. 12 is the certificate of Sanskriti School New Delhi dated 07.03.2012, Ext. 13 is the copy of bill issued by Sanskriti School dated 01.07.2010 along with copy of cheque dated 21.07.2013 of UCO Bank (two sheets), Ext. 14 is the Xerox copy of demand draft No. 1742286 dated 16.03.2009, Ext. 15 is the Xerox copy of demand draft No. 1742120 dated 08.09.2009, Ext. 16 is the Xerox copy of deposit slip in Loyala School, Bhubaneswar dated 17.10.2008 (two sheets), Ext. 17 is the Xerox copy of order No. 1-21015/3/2008-IPS.IV dated 22.11.2012 regarding premature repatriation of Smt. N.B. Bharathi, Ext. 18 is the Xerox copy of the News published in Deccan Herald dated 07.12.2012, Ext. 19 is the Xerox copy of News published in The Hindu dated 07.12.2012, Ext. 20 is the copy of Email sent by the respondent to the petitioner dated 01.01.2008, Ext. 21 is the Xerox copy of the print out SMSs on different dates containing 19 sheets, Ext. 22 is the Xerox copy of allotment letter dated 02.01.2008 issued by G.A. Department in respect of allotment of quarters in favour of respondent, Ext. 23 is the Xerox copy of the allotment letter No. 10508 dated 05.07.2008 regarding allotment of Quarters, Ext. 24 is the Xerox copy of the letter No. 205 dated 03.03.2005 regarding grant of E.L., Ext. 25 is the copy of four numbers of photographs of respondent in her Europe visit in the year 2010 (four sheets), Ext. 26 is the Xerox copy of the Medical certificate, Ext. 26/A is the medical

certificate dated 04.11.2013, Ext. 26/B is the medical certificate dated 10.01.2014, Ext. 26/C is the Medical certificate dated 15.12.2014, Ext. 26/D is the Medical Certificate dated 04.02.2015, Ext. 26/F is the Medical certificate dated 04.03.2015 and Ext. 26/F is the discharge certificate dated 25.05.2015. The respondent did not chose to file any evidence either oral or documentary on her behalf.

8. The petitioner sought divorce on the ground of desertion. It is needless to say Section 13(1) (i-b) of the Act, 1955 provides 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. The petitioner has stated that the respondent deserted him since 05.09.2007. The petition for divorce in this case is presented in the Court on 07.03.2012. Thus, it is clearly established that the petition has been filed after completion of two years from the date as alleged by the petitioner. Therefore, the petitioner could able to prove the factum of two years separation of the respondent from him as on the date of filing of the petition. For proving the offence of desertion, two essential conditions must be there namely (i) the factum of separation and (ii) the intention to bring the cohabitation permanently to an end (*animus deserndi*). Similarly two elements are essential so far as deserted spouse is concerned: (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home.

9. The Supreme Court in the case of *Lachman Utamchan Kirpalani Vrs. Meena*, relying upon the of quoted decision i.e., observed *Bipinichandra Jaisinghbahi Shah reported in AIR 1957 SC 176* observed that the burden of proving desertion-the "*factum*" as well as the "*animus deserendi*" is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period and that such desertion was without any just cause. 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. The petitioner in his pleading, nay, in his oral evidence has stated that on 05.09.2007, the respondent after abusing

him and his mother in filthy languages drove them out from Saheed Nagar Flat on 05.09.2007. He has further stated that in the year 2008 when the respondent was posted as S.P. Vigilance, Bhubaneswar and put herself in Govt. Quarters i.e. Qrs. No. 1/2 Type-VI-A, Unit-I vide allotment order dated 02.01.2008 did not allow him to reside with her. Rather advised him to occupy the vacant flat at Saheed Nagar which she and her mother had vacated. Although, a searching cross examination has been made to P.W. 1 on this point, he could not break down under the pressure of such scathing cross examination. It is also emanated from the evidence of the P.W. 1 that he and his mother made several sincere efforts but all were in vain. Thus, it is patently established that the respondent without any rhyme or reason permanently, forsaking and abandoning the petitioner without his consent and without reasonable cause also meaning not permitting or allowing or facilitating cohabitation between the spouses. This conduct of the respondent is a continuous for more than four and half years. There is also blink chance of their reunion. Therefore, it is a fit case to snap out the marital relation between parties by passing a decree of divorce. In other words the petitioner could establish the ground of desertion.

10. The next question for consideration is cruelty. It is well settled that the expression 'cruelty' includes both (i) physical cruelty; and (ii) mental cruelty. In this connection, I bestow my attention to English as well as Indian authorities. I will refer to some of them.

11. The concept of cruelty has been dealt with in Halsbury's Law of England (Vol.13. 4<sup>th</sup> Edition Para1269) as under:-

*"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a*

*complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse."*

12. In *Gollins V. Gollins*, 1964 (AC 644: (1963) 2 All EF 955, Lord Reid Stated:-

*"No one has ever attempted to give comprehensive definition of cruelty and I do not intend to try to do so. Much must depend on the knowledge and intention of the respondent., on the nature of his (or her) conduct, and on the character and physical or mental weakness of the spouse, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probably injury to life, limb or health."*

13. Lord Pearce also made similar observation:-

*"It is impossible to give a comprehensive definition of cruelty, but when the reprehensibly conduct or departure from normal standards of conjugal kindness causes injury to health or an apprehension of it, it, I think, cruelty is a reasonable person, after taking due account of the temperament and all the other particular circumstances would considered that the conduct complained of is such that this spouse should not be called on to endure it"*

*(See also Russel V. Russell, (1897) AC 395: (1895-99) All ER Rep 1)*

14. The test of cruelty has been laid down by the Apex court in the leading case of *N.G. Dastane V S. Dastane*, reported in AIR 1975 2

SCC 326, thus:- *“The enquiry therefore has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent....”*

15. In *Sirajmohmedkhan Janmohamadkhan V. Haizunnisa Yasinkhan & Anr.* Reported in AIR 1981 4 SCC 250, by the Apex Court stated that the concept of the legal cruelty changes according to the changes and advancement of social concept and standards of living. It was further stated that to establish legal cruelty, it is not necessary that physical violence should be used. Continuous cessation of marital intercourse or total indifference on the part of the husband towards marital obligations would lead to legal cruelty.

16. In *Shobha Rani V. Madhukar Reddi* reported in AIR 1988 1 SCC 105, this Court examined the concept of cruelty. It was observed that the term “cruelty” has not been defined in the Hindu Marriage Act. It has been used in Section 13 (1) (i-a) of the Act in the context of human conduct and behavior in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of the one spouse which adversely affects the other spouse. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of degree which is relevant. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the other spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. *Mens rea* is not a necessary

element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or willful ill-treatment.

17. In *V. Bhagat V. D. Bhagat (Mrs)* reported in AIR 1994 1 SCC 337, the court observed:- “Mental Cruelty in Section 13 (1) (i-a) can broadly be defined as that the conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must be as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or willful ill-treatment or conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What

is cruelty in one case may not amount to cruelty in another case. It is matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.”

18. The Apex Court in *Chetan Das V. Kamala Devi* reported in AIR 2001 4 SCC 250 stated:- Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of “irretrievable broken marriage” as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case”.

19. Mental cruelty has also been examined by the Apex Court in *Parveen Mehta Vrs. Inderjit Mehta* reported in AIR 2002 5 SCC 706:- “Cruelty for the purpose of Section 13 (1) (i-a) is to be taken as a behavior by one spouse towards the other, which causes reasonable apprehension in the mind of the later that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct

of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The approach should be take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.”

20. In *A. Jayachandra Vrs. Aneel Kaur* reported in AIR (2005) 2 SCC 22, the Apex Court observed that:- “The expression ‘cruelty has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to the cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept poof beyond the shadow of doubt, it is to be applied to criminal tries and not to civil matters and certainly not to the matters of such delicate personal relationship as those of husband and wife. Therefore, one has to be what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the

effect on the mind of the complaint spouse because of the acts or omission of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may be not at the same time be direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial dispute.”

21. In *Vinita Saxena Vrs. Pankaj Pandit* reported in AIR (2006) 3 SCC 778, the Apex Court said:- It is settled by the catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such willful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case. The word “cruelty” has not been defined and it has been used in relation to human conduct or human behavior. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be causes where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.”

It was further stated:- ‘Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether

the act complained of was a cruel act is to be determined from the whole acts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

The legal concept of the cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of the injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in a case of apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellants' side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The Court has then to decide whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not to be called upon to endure.

22. In *Samar Ghosh Vrs. Jaya Ghosh* (2007) 4 SCC 511, this Apex Court held:- "No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the case of "mental

cruelty". The instances indicted in the succeeding paragraphs are only illustrative and not exhaustive.

(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 board 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 behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and 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.

23. Bearing the above parameters of law, in my mind, I proceed to analyse the evidence adduced by the parties to determine whether there is existence of any cruelty either physical or mental, so that the Court can pass a decree of dissolution of marriage. Herein the instant case, there is

no physical violence or physical cruelty. The petitioner attributed mental cruelty on twelve aspects. They are as follows:-

- (a) Respondent is a lady of vicious temper.
- (b) Developing unusual friendship and closeness with her several senior officer and when the petitioner objected it, the respondent threatened to file false cases against him and his family members.
- (c) Assaulting the petitioner and his mother both physically and mentally.
- (d) Demanding money for the taking up a rented accommodation in her home town at Bangalore for her mother and also for booking a flat in her name.
- (e) Going on tour to Foreign Countries with her close male friends for a long period of 15 to 20 days leaving the minor child in the custody of her mother.
- (f) Passing comments and laughing in loud voice towards him.
- (g) Driving out him and his mother from his Saheed Nagar Flat after brutally insulting them.
- (h) Sending threatening Email and SMS to him.
- (i) Throwing cake on the face of the petitioner's mother on the birthday of the respondent.
- (j) Abusing him and his mother in his bedroom in slang languages.
- (k) Manhandling him in presence of his mother in his bedroom.
- (l) Not allowing the petitioner to retaining the custody of the minor child and also not allowing the petitioner to talk, meet and spend time with the minor child.

24. On the contrary the respondent has made counter allegations against the petitioner that he has developed extra marital relationship with Dr. Anne Mattoo while undergoing training in Lal Bahadur Sastri National Academy of Administration Mussoorie.

25. It is not disputed that the petitioner appeared in the witness dock and got himself examined along with two more witnesses in support of his plea regarding cruelty and desertion raised by him and allowed the

respondent cross examined P.W. 1 and 2 and declined to cross examine P.W.3 yet, failed to mole out any substantial evidence from the mouth of P.W. 1 and 2 to shatter the allegation leveled against her. On other hand, the respondent failed to produce any evidence in rebuttal to the contrary. Therefore, I have no hesitation to accept the allegation of the cruelty leveled against the respondent by the petitioner. The conduct when considered, as noted above, in the background of the social status of the parties, their education, physical and mental conditions, customs and tradition, it must be of the type satisfying the conscience of the Court that the relationship between the parties had deteriorated to such an extent, it would be impossible for them to live together without mental agony, torture or distress to entitles the petitioner to secure divorce. Additionally, in the instant case, the petitioner alleging that the respondent all throughout that he has extra marital affairs and petitioner's allegations are that wife had sexual intercourse with other senior officers of her cadre which neither party could establish and therefore, such false allegations one thing is very much clear and obvious that the marriage of the two cannot in any circumstances be continued any further. The marriage appears to be practically dead as from cruelty alleged by the husband, it has turned out to be at least intimacy of the husband with a lady doctor and unbecoming of the conduct of the Hindu wife. Therefore, it is a fit case to grant divorce on the ground of cruelty also.

26. In C.P. No. 162 of 2014, the petitioner prayed to declare him as the natural guardian and custody of the minor child namely Eshan Priyadashi. Normally when the father is alive, he is the natural guardian and it is only after him that the mother becomes the natural guardian. The fact that the father and mother of the child have fallen out and the mother was living separately for about eight years. It was the mother who was actually being managing the affairs of her minor son, his care and protection. Since the petitioner has not been taking any interest in the affairs of the minor son. In the fact situation, the mother can be considered to be natural guardian of the minor son. Perhaps that being so, the petitioner at the time of hearing argument did not put much stress for declaring him the natural

guardian and custody of the child. He however, made a submission to give a visiting right to the child. In that view of the matter, the C.P. No. 162 of 2014 is disposed declaring the respondent as the natural guardian and the respondent would retain the custody of the child but with a visiting right to the petitioner. Hence, it is ordered;

O R D E R

The petition U/s. 13 (i-a) and (i-b) of the Act of the 1955 filed by the petitioner allowed on contest in favour of the petitioner without any cost. A decree of divorce is passed and the marriage between the petitioner and the respondent is declared dissolved with effect from the date of decree. The C.P. No. 162 of 2014 filed by the petitioner U/s. 7, 9 and 25 of the Act of 1890 is allowed in part in favour of the petitioner. The petitioner is allowed to visit the child. The respondent is directed to leave the child in the company of the petitioner for five days each during winter vacation, Dusserah, Christmas vacation and for 20 days continuously in summer vacation besides, the respondent is directed the petitioner to visit the child on mutual arrangement as per conveniency of the child without hampering his education.

JUDGE, FAMILY COURT,  
BHUBANESWAR.

Dictated, corrected by me and is pronounced on this the 2<sup>nd</sup> day of November, 2015.

JUDGE, FAMILY COURT,  
BHUBANESWAR.

In C.P. No. 161 of 2014

Witnesses examined for the petitioner:

P.W.1	Mr. Vishal Gagan,
P.W. 2	Pramila Prasad
P.W. 3	Dr. J. S. Nokhwal

Witnesses examined for the respondent:

None

List of documents by petitioner:

- Ext. 1 Money receipt vide membership No. 10537 dated 13.07.2005 of communication Employees Cooperative Housing Society, Bangalore
- Ext. 2 Xerox copy of the Account Payee Cheque bearing No. 006182 dated 26.08.2004
- Ext. 3 Letter of HDFC Bank dated 04.01.2008
- Ext. 4 News Paper Publication published in Sambad Kalika dated 15.11.2008
- Ext. 4/a The relevant portion
- Ext. 5 News Paper Publication published in Samabad Kalika dated 20.11.2008
- Ext. 5/a The relevant News item
- Ext. 6 The office copy of official letter dated 20.12.2009 (two sheets)
- Ext. 7 Original Savings Pass Book bearing S.B. A/c. No. 06640110000908
- Ext. 8 LIC Policy No. 593463153
- Ext. 9 & 9/a LIC Renewal premium receipts dated 11.02.2013 and 14.03.2014
- Ext. 10 Certified copy of the petition filed before Hon'ble High Court of Delhi in C.M. No. 486/2013 (96 sheets)
- Ext. 11 Copy of SLP No. 37327/2013 (116 sheets)
- Ext. 12 Certificate of Sanskriti School New Delhi dated 07.03.2012
- Ext. 13 Copy of bill issued by Sanskriti School dated 01.07.2010 along with copy of cheque dated 21.07.2013 of UCO Bank (two sheets)
- Ext. 14 Xerox copy of demand draft No. 1742286 dated 16.03.2009
- Ext. 15 Xerox copy of demand draft No. 1742120 dated 08.09.2009
- Ext. 16 Xerox copy of deposit slip in Loyala School, Bhubaneswar dated 17.10.2008 (two sheets)
- Ext. 17 Xerox copy of order No. 1-21015/3/2008-IPS.IV dated 22.11.2012 regarding premature repatriation of Smt. N.B. Bharathi

- Ext. 18 Xerox copy of the News published in Deccan Herald dated 07.12.2012
- Ext. 19 Xerox copy of News published in The Hindu dated 07.12.2012
- Ext. 20 Copy of Email sent by the respondent to the petitioner dated 01.01.2008
- Ext. 21 Xerox copy of the print out SMSs on different dates containing 19 sheets
- Ext. 22 Xerox copy of allotment letter dated 02.01.2008 issued by G.A. Department in respect of allotment of quarters in favour of respondent
- Ext. 23 Xerox copy of the allotment letter No. 10508 dated 05.07.2008 regarding allotment of Quarters
- Ext. 24 Xerox copy of the letter No. 205 dated 03.03.2005 regarding grant of E.L.,
- Ext. 25 Copy of four numbers of photographs of respondent in her Europe visit in the year 2010 (four sheets)
- Ext. 26 Xerox copy of the Medical certificate 24.03.2008
- Ext. 26/A Medical certificate dated 04.11.2013
- Ext. 26/B Medical certificate dated 10.01.2014
- Ext. 26/C Medical certificate dated 15.12.2014
- Ext. 26/D Medical Certificate dated 04.02.2015
- Ext. 26/F Medical certificate dated 04.03.2015
- Ext. 26/F Discharge certificate dated 25.05.2015

List of documents by respondent:

Nil

In C.P. No. 162 of 2014

Witnesses examined for the petitioner:

None

Witnesses examined for the respondent:

None

List of documents by petitioner:

Nil

List of documents by the respondent

Nil

JUDGE, FAMILY COURT,  
BHUBANESWAR.