THIS MISCELLANEOUS FIRST APPEAL IS FILED UNDER SECTION 28 OF HINDU MARRIAGE ACT AGAINST THE JUDGMENT AND DECREE DATED 21.1.2012 PASSED IN M.C NO.10/2003 ON THE FILE OF THE SENIOR CIVIL JUDGE AND PRINCIPAL JMFC, TARIKERE, DISMISSING THE PETITION FILED UNDER SECTION 13(1)(ib) OF HINDU MARRIAGE ACT, 1955.

THIS MISCELLANEOUS FIRST APPEAL COMING ON FOR HEARING THIS DAY, ***B.VEERAPPA J.***, DELIVERED THE FOLLOWING:

JUDGMENT

It is unfortunate that both husband and wife are residing separately for more than 21 years. The marriage is totally dead and even nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

2. The appellant, who is the husband of the respondent has filed this miscellaneous first appeal against the impugned judgment and decree dated 21st January, 2012 made in M.C.No.10/2003 by the learned Senior Civil Judge and Principal JMFC, Tarikere dismissing the petition filed under the provisions of Section 13(1)(ib) of the Hindu Marriage Act,

1955 seeking divorce on the ground of willful desertion by the respondent-wife.

I. Facts of the case

3. It is the case of the appellant-husband that his marriage with the respondent was solemnised as per the Hindu Customs and Traditions on 24.6.1999 at Sri Swarnambha Kalyana Mandira, Malleshwara, Kadur Taluk. The appellant and respondent are permanent residents of Kadur Town and had no issues. Since August 1999, the respondent without any just case has withdrawn from his company and refused to cohabit with him and in the year 1999, she left his house and went to her parents house without informing him. Thereafter, he went to the parents of the respondent and requested her to come back and cohabit with him, but she refused to do so. Subsequently, his elders also went to the parents house of the respondent and requested her to come back and live with him, but all their efforts went in vain. It is the further case of the appellant that

the efforts made by him, his elders, well-wishers and friends to convince and bring back the respondent to her matrimonial house did not yield any result, since the respondent was very arrogant and stated that she would not cohabit with him. The family members and friends of both sides tried to convince the respondent, but she did not care for their advice. Thereafter, the respondent gave birth to a child at Balaji Nursing Home at Kadur and the baby died within a week from the date of delivery, which fact was not at all informed to the appellant. The appellant and respondent were last residing together at Ajjampura and she did not return inspite of repeated requests made by the appellant. Therefore, a petition came to be filed for divorce.

II. Objections filed by the Respondent - Wife

4. On the first occasion, a Vakalath was filed on behalf of the respondent on 24.1.2004, but objection was not filed. Thereby, the trial Court by the order, dated 7.12.2004, allowed the petition filed by the husband and dissolved the

marriage of the appellant by granting a decree of divorce. Against the said order, the wife filed Mis.Petition under Order IX Rule 13 of the Code of Civil Procedure which was allowed and exparte order dated 7.12.2004 passed in M.C.No.10/2003 was set aside by this Court and the petition was restored. Thereafter, the respondent filed objections admitting her marriage with the appellant and contended that in order to defraud her, the appellant had given a false address as resident of Ajjampura and filed a petition before the trial Court under a false impression that she will not come and contest the present petition. She further contended that the appellant was insisting her to bring further dowry from her parents and she was not prepared to give further dowry since at the time of her marriage, golden ornaments and cash were already given to the appellant and all the marriage expenses were met by her parents. The appellant with an intention to have second marriage was forcing her to give consent for divorce and had also sent many people to her house for pressuring her

to give consent. Since herself and her parents did not agree to give consent for divorce, the appellant developed ill-will towards her and started to trouble her. The appellant never provided food and basic necessities of life and she was made to starve. She also contended that she and appellant never resided at Ajjampura at any point of time and they were permanent residents of Kadur Town and even at the time of filing of the petition for divorce by the appellant, the appellant was not residing in Ajjampura and was residing only at Kadur Town. She further contended that the appellant started to give all sorts of trouble in order to drive her from his house and forced her to stay in her parents house. Therefore, she was forced to file a petition under Section 125 Cr.P.C. claiming interim maintenance of Rs.3,000/- per month and she had also filed a suit for injunction restraining the appellant from second marriage. But the petition was withdrawn on the assurance given by the appellant, etc.

III. Issues framed by the Trial Court

5. Based on the aforesaid pleadings, the trial Court framed three points for consideration:-

> *"1. Whether the petitioner proves that the respondent without reasonable cause and without his consent has willfully deserted him for a continuous period of not less then two years immediately preceding the presentation of petition?*
>
> *2. Whether the respondent proves that this court have no jurisdiction to try the present petition?*
>
> *3. Whether the petitioner is entitled for decree of divorce Under section 13(1)(ib) of Hindu Marriage Act, 1955?"*

6. In order to prove his case, the appellant before the Family Court, examined himself as P.W.1 and a witness as P.W.2. He got marked the material documents as Exs.P.1 to 13. The respondent got herself examined as R.W.1 and got marked the document as Ex.R.1 - residential certificate.

7. Considering both oral and documentary evidence on record, the trial Court recorded a finding that the appellant has failed to prove his burden that the respondent-wife without reasonable cause and consent of him has willfully deserted him for continuous statutory period of two years as required under Section 13(1)(i-b) of the Hindu Marriage Act, 1955 and as such, dismissed the petition filed by the husband. Hence, the present miscellaneous first appeal is filed by the husband.

8. We have heard the learned Counsel for the parties.

IV. Contentions raised by the learned Counsel for the appellant

9. Sri B. Bopanna, learned Counsel for the appellant-husband contended that the impugned judgment and decree passed by the trial Court dismissing the petition filed by the appellant-husband under Section 13(1)(i-b) is erroneous and contrary to the material on record. He would further contend

that the wife herself has left the matrimonial home in the month of August, 1999 and inspite of the efforts made by the appellant and the relatives of both sides, all went in vain since she refused to come to matrimonial home and there were also no issues. He would further contend that the appellant has already got second marriage after the exparte decree dated 7.12.2004 and is having two children. Absolutely there is no possibility of reconciliation of the marriage and the marriage is irretrievably broken and they are residing separately for more than 21 years which aspect has not been considered by the trial Court while passing the impugned judgment and decree. He would further contend that as on today, both the parties are aged about 56 years and trial Court has awarded maintenance of Rs.3,000/- which has been enhanced to Rs.12,000/- per month. Therefore, there is no possibility of appellant and respondent residing together, at this stage, as the appellant has married for the second time and having two children. Therefore, he submits that the appellant has offered

to pay a sum of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) as permanent alimony to the respondent. Therefore, he sought to allow the miscellaneous first appeal.

V. Contentions raised by the learned Counsel for the Respondent

10. Per contra, Sri C Sadashiva, learned Counsel for the respondent-wife sought to justify the impugned judgment and decree passed by the trial Court and contended that the appellant has not made out any ground to grant divorce as contemplated under the provisions of Section 13(1)(i-b) of the Hindu Marriage Act and he has not filed any petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights as well as not made any efforts to get back his wife-respondent to the matrimonial home though he is paying a maintenance of Rs.3,000/- and subsequently enhanced to Rs.20,000/-. He would further contend that the wife is not interested for permanent alimony and she wants to join her husband-appellant even after knowing the fact that he has

already got married. Therefore, he sought to dismiss the present miscellaneous first appeal.

VI. Points for consideration

11. In view of the aforesaid rival contentions urged by the learned Counsel for the parties, the points that arise for our consideration in the present miscellaneous first appeal are:-

i) *Whether the appellant-husband has made out a case to interfere with the impugned judgment and decree passed by the trial Court dismissing the petition filed by the husband under the provisions of Section 13(1)(i-b) of the Hindu Marriage Act? And*

ii) *Whether the appellant-husband has made out a case to grant divorce as both the parties are residing separately for more than 21 years and the marriage is totally dead in the facts and circumstances of the present case?*

12. We have given our thoughtful consideration to the arguments advanced by the learned Counsel for both sides and perused the entire material both oral and documentary evidence on record carefully.

VII. Consideration

13. It is undisputed fact that the marriage between the appellant and respondent was solemnized on 24.06.1999 at Sri Swarnamba Kalyana Mandira, Malleshwara, Kaduru Taluk. It is the specific case of the husband that he was working as a lecturer in Government First Grade College, Ajjampura. Both appellant and respondent lived and cohabited together in their residence at Ajjampura as husband and wife. But, had no issues. In the month of August 1999, the respondent without any just reason, left the appellant and went to her parents' house without informing him. When the appellant went and requested her to comeback and cohabit with him, she refused. All the efforts made by the elders of the appellant went in vain.

14. It is the specific case of the respondent/ wife that appellant/ husband himself deserted her. The appellant, with an intention to have second marriage, forced her to give consent for divorce. The appellant never provided food and basic necessities of life and made her to starve without food.

15. The Family Court, considering the averments made in the petition filed by the husband under Section 13(1)(ib) of the Hindu Marriage Act, 1955, has recorded a finding that, "the record discloses that according to the petitioner/husband, the respondent/wife has deserted him in the month of August 1999. The petition was filed on 07.08.2003 i.e., after four years of the alleged desertion. It is pertinent to note that the petitioner is a highly educated person working as lecturer in Government College. After the alleged desertion by the respondent, the petitioner has not made any attempts to bring her back to his matrimonial house. The petitioner has not even issued a legal notice to the respondent calling upon her to join him and has not filed a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. If the respondent has willfully deserted the petitioner as

alleged, the petitioner, as a prudent man would have certainly made some attempt to bring her back to the matrimonial house and would not have remained silent for four years. The evidence on record discloses that no sincere efforts were made by the petitioner to bring back to respondent. The records disclose that the respondent filed Original Suit in the year 2004 for permanent injunction restraining the petitioner from taking a second wife during her life time. She also filed Crl. Misc.No.18/2004 for maintenance on the ground of ill treatment and desertion". Thereby, the Family Court disbelieved the averments made in the petition and also the evidence of P.Ws.1 and 2 and dismissed the petition filed by the husband under the provisions of Section 13(1)(ib) of the Hindu Marriage Act.

16. In view of the above circumstances, before proceeding with the Appeal on merits, taking into consideration the fact that the parties are residing separately since 21 years, the matter was adjourned from time to time to see the possibility of settlement. We also secured the presence of the parties. But, it appears that there is no possibility of reunion. The husband agreed to pay

permanent alimony of ₹25,00,000/- to the wife within a period of four months. But, knowing fully well that the appellant/ husband has been already married and is having two children out of the said wedlock, the respondent/wife is not agreeing to receive the permanent alimony and she claims that she wants to continue with the appellant and is not ready to give consent for dissolution of marriage. Therefore, we are forced to decide the matter on its merit.

17. It is not in dispute that, according to the appellant, in the month of August 1999, the respondent deserted the appellant and went back to her parents' house and never returned. The husband filed a petition in the year 2003 and obtained ex-parte decree of divorce on 07.12.2004. Admittedly, the parties have no issues and are living separately since 21 years. It is also not in dispute that after the ex-parte decree of divorce dated 07.12.2004 passed by the Family Court in M.C.No.10/2003, the husband got married for the second time and is having two children out of the second marriage. If the respondent/ wife really wanted to join the appellant, she would have filed a petition under Section 9 of the

Hindu Marriage Act. Admittedly, she has not made any efforts to join her husband through the process of Court. Though she has not joined her husband, she has filed Crl.Misc. No.18/2004 for maintenance and the Family Court awarded interim maintenance of ₹3,000/- per month which was subsequently enhanced to ₹20,000/- and the husband is paying the said amount.

18. 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 confirm 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 as 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.

19. Taking into consideration the fact that the parties are aged 56 years and are residing separately for more than 21 years, though this Court tried to persuade the parties for settlement, same could not be fructified. The appellant/ husband has already got married for the second time after exparte decree of divorce passed by the Family Court and is having two children out of the said wed lock. The respondent/wife has not filed any petition for restitution of conjugal rights. There is no possibility of reconciliation. Therefore, we are of the considered view that there is no scope for settlement between the parties and there is no chance of parties living together and the marriage has irretrievably broken down. Therefore, it is a fit case to grant decree of divorce.

20. It is well settled that, once the parties have separated and the separation has continued for a sufficient length of time of more than 21 years and one of them presented a petition for divorce, it can well be presumed that the marriage has broken down. The Court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences

of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

21. Though efforts were made by this Court for settlement, even at this stage, when the parties are aged about 56 years, the respondent/wife neither wants divorce nor permanent alimony. From the analysis and evaluation of entire material on record, it is clear that the respondent/wife has resolved to live in agony and make life miserable and hell, not only for herself but also to the appellant as well. This kind of adamant and callous attitude, in the facts and circumstances of the case leaves no manner of doubt in our mind that the respondent is bent upon to treat the appellant with mental cruelty. It is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their reunion.

22. Undoubtedly, it is the obligation on the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by

trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the Family Court would encourage continuous bickering, perpetual bitterness and may lead to immorality. Therefore, we are of the considered opinion that it is a fit case to grant a decree of divorce.

23. Though the marriage between the parties took place on 24.06.1999 and wife left the company of her husband during August 1999 till today, no efforts are made by the husband as well as the wife for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. As such, there is no possibility of reunion of the parties. During the course of discussion with regard to settlement, the husband offered to pay permanent alimony of ₹25,00,000/- to the wife, within a period of four months. Considering the facts and circumstances of the present case and taking into consideration the fact that the appellant/husband is working as a lecturer and the status of the parties, we are of the considered opinion that, in the peculiar facts and circumstances of

the case, it is appropriate to resolve the problem, in the interest of the parties.

24. The Hon'ble Supreme Court, while considering the provisions of Section 13(1)(ib) of the Hindu Marriage Act, in the case of ***Geeta Jagdish Mangtani vs. Jagdish Mangtani*** reported in ***2005(4) KCCR SN 267***, held that, the parties knew, even prior to marriage, their respective income. The marriage survived only for seven months. Even after lapse of about four years, there was no attempt on the part of the wife to stay with her husband. She had not made any attempt to join her husband even on vacation to school. Hence there was *animus deserendi* on the part of the wife to desert her husband. Thereby, decree of divorce was upheld.

25. The Hon'ble Supreme Court while considering the grounds for divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955 in the case of ***Sivasankaran vs. Santhimeenal*** reported in ***2021 SCC Online SC 702***, at paragraphs 12 and 18, held as under:

12. *In R. Srinivas Kumar, the parties had been living apart for 22 years and all endeavours to save the marriage had failed. We may note that in Hitesh Bhatnagar v. Deepa Bhatnagar, it was opined by this Court that courts can dissolve a marriage as irretrievably broken down only when it is impossible to save the marriage, all efforts have been made in that regard, the Court is convinced beyond any doubt that there is actually no chance of the marriage surviving, and it is broken beyond repair. It could be useful to reproduce the observations made in para 5.2 to para 8 as under:*

> ***"5.2.*** *In Naveen Kohli [Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558], a three-Judge Bench of this Court has observed as under:*
>
> > *"74. … once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised 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.

***

85. Undoubtedly, it is the obligation of the court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. …

86. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is

beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto."

(emphasis supplied)

A similar view has been expressed in Samar Ghosh [Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511].

6. In the similar set of facts and circumstances of the case, this Court in Sukhendu Das [Sukhendu Das v. Rita Mukherjee, (2017) 9 SCC 632 : (2017) 4 SCC (Civ) 714] has directed to dissolve the marriage on the ground of irretrievable breakdown of marriage, in exercise of powers under Article 142 of the Constitution of India.

7. Now so far as submission on behalf of the respondent wife that unless there is a consent by both the parties, even in exercise of powers under Article 142 of the Constitution of India the marriage cannot be dissolved on the

ground of irretrievable breakdown of marriage is concerned, the aforesaid has no substance. If both the parties to the marriage agree for separation permanently and/or consent for divorce, in that case, certainly both the parties can move the competent court for a decree of divorce by mutual consent. Only in a case where one of the parties do not agree and give consent, only then the powers under Article 142 of the Constitution of India are required to be invoked to do substantial justice between the parties, considering the facts and circumstances of the case. However, at the same time, the interest of the wife is also required to be protected financially so that she may not have to suffer financially in future and she may not have to depend upon others.

8. This Court, in a series of judgments, has exercised its inherent powers under Article 142 of the Constitution of India for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted. In the present case,

> *admittedly, the appellant husband and the respondent wife have been living separately for more than 22 years and it will not be possible for the parties to live together. Therefore, we are of the opinion that while protecting the interest of the respondent wife to compensate her by way of lump sum permanent alimony, this is a fit case to exercise the powers under Article 142 of the Constitution of India and to dissolve the marriage between the parties."*

18. *There are episodes of further harassment by the respondent even at the place of work of the appellant including insulting the appellant in front of students and professors, as is apparent from the judgment of the Trial Court. She is stated to have threatened the appellant of physical harm in front of his colleagues as per the testimony of PW.3 and complained to the appellant's employer threatening to file a criminal complaint against him (PW.3). The first appellate court somehow brushed aside these incidents as having not been fully established on a perception of wear and tear of marriage. The moot point is that the marriage has not taken of from its inception. There can hardly be any 'wear and tear of marriage' where parties have not been living together for a long period of time.*

The parties, undisputedly, never lived together even for a day.

VIII. Conclusion

26. For the reasons stated above, the first point raised for consideration is answered in the affirmative holding that the appellant has made out a case to interfere with the impugned judgment and decree passed by the Family Court dismissing the petition filed by the husband under Section 13(1)(ib) of the Hindu Marriage Act. Accordingly, the second point is also answered in the affirmative holding that the appellant has made out a case to grant divorce, as the parties are residing separately for more than 21 years and the marriage is totally dead, in the facts and circumstances of the case.

27. In view of the above, we pass the following:

ORDER

(i) The Miscellaneous First Appeal filed by the appellant/husband is ***allowed***.

(ii) The impugned judgment and decree dated 21.01.2012 made in M.C.No.10/2003 on the file

of the Senior Civil Judge and Prl. JMFC, Tarikere, is hereby set-aside.

(iii) The petition filed by the husband under Section 13(1)(ib) of the Hindu Marriage Act, is allowed. The marriage solemnized between the appellant and respondent on 24.06.1999 is hereby dissolved by granting a decree of divorce.

(iv) The appellant/husband is directed to pay permanent alimony ₹30,00,000/- (Rupees thirty lakhs only) to the respondent/wife, within a period of four months from the date of receipt of copy of this Order, failing which, it is open for the respondent/wife to file an application for revival of this Order.

(v) Parties to bear their own costs.

Sd/-
Judge

Sd/-
Judge

Nsu paragraphs 1 to 12
kcm-paragraphs 13 till end