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come exercised its extraordinary jurisdiction by commanding the respondents to redress the grievance of the appellant without resorting to a hypertechnical approach. In view of the above, the order passed by the respondents terminating the services of the appellant requires to be set aside and we do so.

22. It is argued by the learned counsel for the respondent that if the delay is condoned and relief is granted to the appellant, the respondent had to bear the brunt of paying huge arrears of salary and other monetary benefits and, secondly, direction to pay arrears of wages is not automatic and it depends on several factors. The learned counsel has drawn our attention to the observation made by this Court in the case of *G. M. Tank vs. State of Gujarat*, wherein this Court has stated :—

> "32. In the instant case, the appellant joined the respondent in the year 1953. He was suspended from service on 8-2-1979 and got subsistence allowance of Rs 700 p.m. i.e. 50% of the salary. On 15-10-1982 dismissal order was passed. The appellant had put in 26 years of service with the respondent i.e. from 1953-1979. The appellant would now superannuate in February 1986. On the basis of the same charges and the evidence, the department passed an order of dismissal on 21-10-1982 whereas the criminal Court acquitted him on 30-1-2002. However, as the criminal Court acquitted the appellant on 30-1-2002 and until such acquittal, there was no reason or ground to hold the dismissal to be erroneous, any relief monetarily can be only w.e.f. 30-1-2002. But by then, the appellant had retired; therefore, we deem it proper to set aside the order of dismissal without backwages. The appellant would be entitled to pension."

23. The facts in the aforesaid decision is more or less akin to the facts and circumstances of this case. Therefore, the issue that we have raised for our consideration need not detain us for a long. Therefore, we are of the view that the appellant is not entitled to backwages. The appellant would be entitled to pension only.

24. In the result, we allow this appeal. We set aside the order passed by the learned Single Judge in CWJC No.14536 of 2005 dated 2-5-2007 as affirmed in L.P.A. No. 521 of 2007 dated 12-7-2007.

However, there shall be no order as to costs.

Appeal allowed.

HINDU MARRIAGE ACT, SECTION 13(1)(ia) AND (ib) : SCOPE

(S. A. Bobde and S. J. Kathawalla, JJ.)

MRS. X .. *Appellant.*

vs.

MR. Y .. *Respondent.*

(a) Hindu Marriage Act (25 of 1955), S. 13(1)(ia) — *Divorce on the ground of cruelty — A temperamental nature of a spouse by itself is not sufficient to establish cruelty.*

Family Court Appeal No. 204 of 2007 decided on 2-12-2009. (Bombay)

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Where the appellant wife used to lose her temper on trivial matters which was insulting and humiliating for the respondent, as a result of which he could not sleep peacefully and this in turn disturbed his work. This is a temperamental problem, which the appellant may have had and by itself is insufficient to establish cruelty towards the respondent, particularly in the absence of any specific instances from which it could have been inferred that this temperamental flaw was so disturbing that it would constitute cruelty towards the respondent in itself. (1975) 2 SCC 326, 1984 Mh.L.J. (FB) 576, AIR 2002 SC 591, AIR 1988 SC 407 and AIR 1993 MP 59, Ref. (Para 3)

(b) Hindu Marriage Act (25 of 1955), S. 13(1)(ib) — *Decree of divorce on the ground of desertion — Both factum of physical separation and animus deserendi i.e. intention to end cohabitation, must be proved to establish desertion.*

If one spouse by his or her words compels the other side to leave the matrimonial home or stay away therefrom, without reasonable cause, the former would be guilty of desertion, though it is the latter who is seemingly separated from the other. The ejection of the other spouse from the home with the intention not to cohabit equally constitutes desertion. This is the principle of '*Constructive Desertion*'. The appellant threw the respondent out of the very house which he had rented for to live in, at Surat and refused to travel and reside with him at Valsad, where he was posted. The incident at Surat clearly compelled the respondent to leave and stay away from the matrimonial home. The conduct of the appellant on the whole, is evidence of animus deserendi. The divorce decree granted by the Family Court, is upheld under section 13(1)(ib) against the appellant on the ground of desertion. AIR 1957 SC 176, Ref. (Paras 4 to 7)

For appellant : *M. P. Vashi with Ms. Prachi Khandke* instructed by
M. P. Vashi and Associates

For respondent : *Vivek Kantawala*

List of cases referred :

1	*Dastane vs. Dastane, (1975) 2 SCC 326*	(Para 3)
2.	*Keshaorao vs. Nisha, 1984 Mh.L.J. (FB) 576 = AIR 1984 Bom 413 (FB)*	(Para 3)
3.	*Savitri Pandey vs. Prem Chandra Pandey, AIR 2002 SC 591*	(Para 3)
4.	*J. L. Nanda vs. Veena Nanda, AIR 1988 SC 407*	(Para 3)
5.	*Indira Gangele vs. Shailendra Kumar Gangele, AIR 1993 MP 59*	(Para 3)
6.	*Bipinchandra Jaisinghbhai Shah vs. Prabhavati, AIR 1957 SC 176*	(Para 4)

ORAL JUDGMENT

S. A. BOBDE, J. :— This as an appeal filed by the wife against the Judgment of the Vth Family Court, Mumbai, decided on 28th September 2007, decreeing the petition for divorce filed by the Respondent (Petition No. A – 1804 of 2003), under sections 13 (1) (ia) and 13 (1) (ib) of the Hindu Marriage Act, 1955, on the grounds of cruelty and desertion. The brief facts are that the parties got married on 1st May, 1987. It appears that soon thereafter on 25th January, 1989, the appellant wife left the company of the respondent husband, but later she filed a petition for restitution of conjugal rights (Petition No. 789/89), which was decreed on 11th April, 1990. She resumed cohabitation with the respondent after he paid her a sum of Rs. 24,500/-. The parties apparently lived together for the period between 1st July, 1993 and 15th January, 1994. On 7th April, 1994, she left the company of the respondent again. She returned the next day and

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lodged a criminal complaint against him for harassment, which she ultimately withdrew on being paid Rs. 10,000/- by the respondent. According to the respondent, on 1st August, 1996, he was transferred to Valsad, but she refused to accompany him there as she was working and giving tuitions at Surat at the time. On 12th January, 1997, when he visited her at Surat, she threw him out of the very premises, which he had rented for her to live in and further threatened him of dire consequences if he entered again. Since this incident, the parties have not cohabited till the date of filing of the divorce petition on 8th October, 2003 and thereafter.

2. There is little dispute between the parties about the period over which they have lived together. Rather, the dispute is about who is the cause for their being unable to cohabit. The learned Family Court has in fact observed that the parties have been married for a period of 20 years and have been litigating against each other for a period of 18 years. Having considered the evidence on record, the learned Family Court has decreed the petition for divorce both on the ground of cruelty and desertion.

3. We have heard the learned Counsel for both parties and also perused the evidence before us. We find that the evidence is insufficient to grant a decree of divorce on the ground of cruelty. As defined by the Hon'ble Apex Court in *Dastane vs. Dastane, (1975) 2 SCC 326* and reiterated in several decisions thereafter :

> *"The enquiry has to be whether the conduct charged as cruelty is of such 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..."*

As opined by a Full Bench of this Court in *Keshaorao vs. Nisha, 1984 Mh.L.J. (FB) 576 = AIR 1984 Bom 413 (FB),* the 'cruelty' contemplated is a conduct of such type that the affected party cannot be reasonably expected to live with the other party. Each case is to be decided on its own merits. At the same time, we bear in mind the caveat laid down by the Hon'ble Apex Court in *Savitri Pandey vs. Prem Chandra Pandey, AIR 2002 SC 591*, that there is a difference between cruelty and the ordinary wear and tear of married life. Petty quarrels and troubles, caused by differences in the temperament of the parties cannot be cruelty. Notably, in the case of *J. L. Nanda vs. Veena Nanda, AIR 1988 SC 407,* the Hon'ble Apex Court held that it is not cruelty if petty quarrels result because the temperament of spouses is not conducive to each other, even if these quarrels might result in physical or mental ailments. The Madhya Pradesh High Court too, in the case of *Indira Gangele vs. Shailendra Kumar Gangele, AIR 1993 MP 59* held that the unruly temper or whimsical nature of a spouse is not sufficient to establish cruelty. We examine the present facts in the light of these legal principles. The respondent deposed before the learned trial Court that the appellant used to lose her temper on trivial matters, which was insulting and humiliating for him, as a result of which he could not sleep peacefully, and this in turn disturbed his work. We find that this is a temperamental problem, which the appellant may have had and by itself is insufficient to establish cruelty towards the respondent, particularly in the absence of any specific instances from which it

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could have been inferred that this temperamental flaw was so disturbing, that it would constitute cruelty towards the respondent in itself.

4. We now proceed to the contention of desertion of the respondent by the appellant. Section 13(1)(ib) of the Hindu Marriage Act, provides that a decree of divorce may be granted 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. The Explanation to the section reads as follows :

> *"Explanation – In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly."*

As has been laid down in several cases, including the landmark case of *Bipinchandra Jaisinghbhai Shah vs. Prabhavati, AIR 1957 SC 176,* the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case. Both factum of physical separation and *animus deserendi* i.e. the intention to end cohabitation, must be proved to establish desertion. Moreover, as laid down in the aforementioned Explanation, there must be absence of consent of the other party and absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the intention to leave. Importantly, *Bipinchandra's* case (supra), among others, has made it clear that it is not necessary for the deserting spouse to leave the home in order to constitute desertion. If one spouse by his or her words compels the other side to leave the matrimonial home or stay away therefrom, without reasonable cause, the former would be guilty of desertion, though it is the latter who is seemingly separated from the other. The ejection of the other spouse from the home with the intention not to cohabit equally constitutes desertion. This is the principle of '*Constructive Desertion.*'

5. In the present case, we find that the respondent has established and in fact, the appellant has not denied, that she did not allow the respondent to cohabit with her at the house in Surat, when he visited on 12th January 1997. She threw him out of the very house, which he had rented for her to live in, and threatened him with dire consequences if he dared to enter. This incident occurred over and above the fact that she herself had refused to travel and reside with him at Valsad, after he was posted there on 1st August 1996, ostensibly because she was teaching and giving tuitions at the time in Surat. The learned Family Court has observed that there is no challenge by the appellant to the evidence of the respondent that she was not interested in cohabiting with him at Valsad. In any case, we find that merely because the respondent had moved to Valsad, due to his transfer, it cannot be considered to be reasonable cause for the appellant refusing to cohabit with him when he visited her in Surat, and in fact constitutes wilful neglect on her part. Her conduct on the whole, is evidence of *animus deserendi.* The incident at Surat clearly compelled the respondent to leave and stay away from the matrimonial home. There is no dispute as to the factum of separation i.e. that the parties did not reside together from the date of the incident at Surat i.e.

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12th January 1997, until this petition was presented on 8th October 2003 and thereafter.

6. At this stage, we may note that the learned Family Court has not passed any orders as regards maintenance, as no prayer for such orders was made by the appellant. However, Mr. Vashi, the learned advocate for the appellant has submitted that the appellant has preferred an application for maintenance before this Court. It would be proper if this application is heard and decided by the Family Court itself. Accordingly, the learned advocate for the appellant seeks leave to withdraw the application and present it, in accordance with the law, before the Family Court. The said application is allowed to be withdrawn.

7. In the result, the divorce decree is upheld under section 13(1)(ib) against the appellant on the ground of desertion. The appeal is hence dismissed. No order as to costs.

8. At this stage, the learned advocate for the appellant seeks a stay of this order to enable the appellant to approach the Hon'ble Supreme Court. We see no reason to grant such a prayer. However, we consider it appropriate to continue with the injunction, already passed against the respondent pending final decision of this appeal, which restrains him from remarrying, for a period of eight weeks from today.

Appeal dismissed.

MAHARASHTRA ZILLA PARISHADS AND PANCHAYAT SAMITIS ACT, SECTION 67 AND MAHARASHTRA ZILLA PARISHADS (PRESIDENT, VICE-PRESIDENT AND CHAIRMEN OF SUBJECTS COMMITTEE) AND PANCHAYAT SAMITIS (CHAIRMAN AND DEPUTY CHAIRMAN) (RESERVATION OF OFFICES AND ELECTION) RULES, 1962, RULE 2F(6)

(Naresh H. Patil and K. U. Chandiwal, JJ.)

VITTHAL s/o DATTU GORE *Petitioner.*

vs.

STATE OF MAHARASHTRA and others *Respondents.*

(a) Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962), S. 67 and Maharashtra Zilla Parishads (President, Vice-President and Chairmen of Subjects Committee) and Panchayat Samitis (Chairman and Deputy Chairman) (Reservation of Offices and Election) Rules, 1962, R. 2F(6) — *Election of Chairman of Panchayat Samiti — Reservation of office of Chairman — Where the candidate from the reserved category is not available, then the draw of lots will have to be drawn from the categories of reserved class for which the office of the Chairman would be reserved under section 67 of the Act.* (Paras 13, 14, 16 and 17)

(b) Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962), S. 67 — *Reservation of office of Chairman of Panchayat Samiti — Challenge by petitioner — Petitioner being elected member of Panchayat has locus standi and is entitled to file the petition and raise an issue.* (Para 15)

W. P. No. 8083 of 2009 decided on 10-12-2009. (Aurangabad)