

common judgment and order passed by the Family Court, Aurangabad in Petition No.A-67/2010 and Petition No.A-81/2011, dated 18th August, 2014.

4. The Petition No.A-67/2010 was filed by the husband Sainand s/o Kashinath Dhakane against the wife- Sau Kalpana w/o Sainand Dhakane on the ground of cruelty and desertion under section 13(1)(i-a)and(i-b) of the Hindu Marriage Act for dissolution of Marriage and in the alternative, for judicial separation under section 10 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act, 1955).

5. Petition No.A-81/2011 was filed by the wife- Sau Kalpana w/o Sainand Dhakane against the husband Sainand s/o Kashinath Dhakane for restitution of conjugal rights under section 9 of the Hindu Marriage Act. Both the parties were directed to lead evidence in respect of both the proceedings common in Petition No. 67/2010 and accordingly they have led their oral as well as documentary evidence in Petition No. 67/2010. To avoid the confusion and for the sake of convenience, hereinafter the husband Sainand will be referred as appellant and wife Sou. Kalpana will be referred as respondent.

6. It is the contention of appellant that he married with the respondent on 06.12.2014 at Aurangabad and their matrimonial ties are still in existence. The respondent is highly qualified than the appellant and her father is serving in Police department. Father and brothers of the respondent are criminal in nature and an offence under 498-A and 302 of the Indian Penal Code is registered against them. After the marriage, the respondent resided with the appellant for 8 to 9 months. The appellant has treated well the respondent and has extended all the facilities including her conjugal rights. The respondent is a pampered child of her parents and had no intention to cohabit with the appellant so, she was behaving irresponsibly. She started ill-treating the respondent and his family members on flimsy grounds. She always used to threaten them by saying that her father is in Police department and she will teach them lesson. The respondent always caused mental cruelty to the appellant and his family members. Meantime, the respondent delivered a girl child.

7. It is further contended by the appellant that in the month of September, 2006, the respondent abandoned the society of the appellant on her own

accord and went to her parents' house along-with ornaments and clothes and household articles. Thereafter, the appellant, his family members and respectable persons from the society have tried to bring the respondent for cohabitation. However, the respondent was not ready to reside with the appellant so also the parents of the respondent were not ready to send her to the home of the appellant. The respondent and her parents have disclosed their intention to breakdown the marriage and demanded huge money from the appellant.

8. Since the appellant was intending to cohabit with the respondent, he sent a notice to that effect through his Advocate on 19th June, 2007. The said notice was received by the respondent, however, no reply was given nor she came for cohabitation.

9. On 26th June, 2007, father of the respondent had filed a complaint against the appellant and his family members for the offence punishable under sections 498-A, 496, 323, 504, 506 read with section 34 of the Indian Penal code and Sections 3 and 4 of the Protection of Women from Domestic Violence Act, 2005, which is still pending. Due to filing of such

complaint, the appellant and his family members are defamed in the society.

10. On 11th July, 2007, the respondent filed a Criminal Application M.A. No. 623/2007 for maintenance. That application is disposed of and maintenance of Rs.4000/- p.m. to the respondent, Rs.2000/- p.m. to her daughter and Rs.3000/- p.m. towards house rent was granted. The appellant and the respondent both have challenged the said order by filing appeals and the same are pending.

11. On 21st September, 2007, the respondent again filed a complaint against the appellant and his relatives for the offence punishable under section 494 and 109 of the Indian Penal Code. In that proceedings, process is issued against the appellant and some of his relatives. Against that order, the appellant has filed appeal before the District & Sessions Court at Aurangabad and the same is pending for hearing.

12. On 19th June, 2007, the father of the respondent has filed a complaint (NC) No. 402/2007 for the offence punishable under section 323, 504 and 506 of the Indian Penal Code

13. Since September, 2006, the respondent, her parents and her relatives are threatening to the appellant and his family members and they are given mental and physical torture. They are also given threats to kill them which amounts to cruelty.

14. Respondent was/is not willing to reside with the appellant. Due to the aforesaid facts, the appellant is mentally disturbed. There is no love and affection between the appellant and respondent and so it is necessary to break the marital tie between them. There is also danger to the life of the appellant and his family members due to the acts of the respondent and they are living under fear and threats. So, on all these grounds the appellant has firstly prayed for divorce and by way of amendment, he has alternatively prayed for judicial separation.

15. The respondent wife resisted the petition by filing her say. The sum and substance of her petition filed under section 9 of the Hindu Marriage Act and the say filed by her to the petition for diverse is that, after the marriage, the appellant treated her well only for about six months. On 26.04.2005, the appellant and his mother met with an accident and due

to which the behaviour of the appellant is suddenly changed. After the marriage, when the appellant and the respondent were residing at Shriharisiddhi Society, Jadhavwadi, the appellant started construction of new house and for which there was demand by the appellant of Rs.2 lakhs from the respondent. The respondent communicated this demand to her parents but at the relevant time, her father was facing financial crises, so he could not fulfill the said illegal demand. The father of the respondent tried to convince the appellant and told that he would give money afterwards. Due to such reason, ill-treatment was started to the respondent. Physical and mental cruelty was caused to her. So her father, by taking loan from others, paid Rs.50,000/- to the appellant in presence of relatives. Subsequently, the appellant husband and in-laws of the respondent have demanded Rs.3 lakhs for purchase of machinery and on that count again cruelty was caused to her.

16. On 15th May, 2006, the respondent told the appellant to take her to the hospital as she was pregnant. That time, the appellant assaulted her with kick and fists blow on her stomach. Her in-laws and sister in-laws were instigating the appellant to do so.

So the respondent made a phone call to her father, then her father along-with other relatives came there and convinced the appellant and his family members.

17. On 13th September, 2016, the appellant insisted the respondent to give consent for second marriage of the appellant and on refusal to do so, the appellant and his family members gave ill-treatment to her.

18. On 14th September, 2016, the appellant and his family members took ornaments from the person of the appellant. She was made to sit in a vehicle No. MH-20-AG-2017 and was left at her parents' house and she was warned that she should not return back. Due to the aforesaid reason, the respondent is residing with her parents. On 6th January, 2007, the respondent was blessed with one daughter. Due to the ill-treatment and the illegal demands, the respondents approached to the CIDCO Police Station and filed criminal complaints as referred above.

19. Considering the rival contentions of the respective parties, the learned Judge of the Family Court framed issues in reference to the cruelty, desertion, second marriage and entitlement to divorce /judicial separation/restitution of conjugal rights.

20. To establish the claim of restitution of conjugal rights, the respondent filed affidavit under the provisions of order 18 Rule 4 of the Civil Procedure Code and has reiterated all the contents of her petition under section 9 of the Act of 1955 and her say filed in the divorce petition. Besides her oral evidence, the respondent examined her father Laxman Sonawane. As against this, the appellant has filed affidavit under the provisions of Order 18 Rule 4 of the Civil Procedure Code and has reiterated all the contents of the divorce petition and the ground for divorce mentioned therein. The appellant examined his father Kashinath Dhakane. Besides the oral evidence of both the parties, copies of criminal complaints/applications are produced on record, from which it reveals that various criminal proceedings between the parties are pending before the Criminal Court.

21. Considering the oral as well as documentary evidence on record, the Family Court has allowed the petition of the respondent for restitution of conjugal rights, whereas the petition of the appellant for divorce/judicial separation is dismissed by its order dated 18th August, 2014, against which the present appeals are preferred by the appellant.

22. We have heard Mr. A. S. Barlota, the learned Advocate for the appellant and Mrs. Wankhede, the learned counsel appearing for the respondent and gone through the oral as well as documentary evidence on record. Upon hearing both the parties, following points arise for our determination:

Sr. No.	Points	Findings
1)	Whether the appellant is entitled for the divorce/ judicial separation from the respondent on the ground of cruelty and desertion ?	... No
2)	Whether the respondent proves that the appellant abandoned his society without lawful excuse ?	... Yes
3)	What order ?	... Both the appeals are dismissed with no order as to costs.

R E A S O N S

23. **Point Nos. 1 and 2:** Since Point Nos. 1 and 2 are inter related, therefore, they are taken together for discussion.

24. It is material to note that the appellant has claimed divorce from the respondent on the ground of cruelty and desertion as contemplated under section

13(1)(i-a)and(i-b) of the Act, 1955 and the respondent claimed restitution of conjugal rights under section 9 of the Act, 1955. The appellant as well as respondent have led their oral evidence by way of filing affidavit under Order 18 Rule 4 of the Civil Procedure Code and they have reiterated their contentions in their respective petitions. Therefore, it is necessary to appreciate the evidence on record and whether the appellant has established the ground of cruelty and desertion.

25. At the outset, it is material to note that the appellant has deposed that the respondent and her family members were threatening him and were insulting him. The respondent was saying that her father was in the Police department and she will teach lesson. Further, he deposed that the respondent filed criminal complaint against the appellant and his family members with false allegation in order to give harassment and by this way, the respondent treated the appellant with cruelty and therefore, on this count, he prayed for divorce.

26. Perusal of the evidence on record, it appears that various proceedings under the provisions of

Domestic violence Act, Indian Penal Code are pending between the parties in the criminal court. Therefore, at this stage, it is premature to say that the proceedings filed by the respondent against the appellant are false or frivolous. Such inference can be drawn only after the conclusion of the criminal proceedings pending before the Criminal Court. Therefore, at this stage, it cannot be said that by filing false complaint against the appellant, the respondent treated the appellant with cruelty.

27. The word "cruelty" is not defined under the Act, 1955. Concept "cruelty" is a willful and unjustifiable conduct of such a character as to cause danger to the life, limb or health, bodily or mental or to give rise to reasonable apprehension of such danger. The cruelty contemplated under section 13(1) (i-a) of the Act, 1955 is conduct of such a type that the appellant cannot reasonably be expected to live with the respondent. It has to be of a type which would satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent that due to conduct of the other spouse it has become impossible for them to live together, without mental agony, torture or distress.

28. "Cruelty" has been used in relation to human conduct or human behaviour. Cruelty may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. First, enquiry must begin as to the nature of the cruel treatment. Second, 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, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse.

29. The ground of cruelty contended by the appellant is that the respondent has filed three criminal complaints against himself and his family members. Father of the respondent also filed a false complaint against him. As a matter of record, these complaints are pending before the concerned courts for its adjudication. The appellant has alleged that filing of such false complaints against him and his family members amounts to mental cruelty to them. It is difficult to accept such contention and argument of the appellant, because, all these proceedings are

pending and are not decided finally. Therefore, at this stage, it cannot be said that all these proceedings are false and frivolous. Therefore, the ground of cruelty based upon such pleadings and evidence on record is unacceptable.

30. The second ground complained is of desertion under section 13(1)(i-b) of the Act, 1955. It is argued on behalf of the appellant that respondent has deserted the appellant and abandoned his society without any reasonable cause for more than two years preceding to the institution of the petitions and therefore, the appellant is entitled to have divorce from the respondent.

31. The appellant deposed that after the marriage, the respondent resided with him for about 8 to 9 months. In the month of September, 2006, the respondent went to her parents' house by taking ornament, clothes and household articles with her brother on motorcycle. Thereafter, the appellant, his family members and other respectable persons from the society have tried to bring the respondent to the house of the appellant, however, the respondent refused and parents of the respondent also refused to send the

respondent and thereby they have showed their intention to breakdown the marriage permanently.

32. Subsequently, the appellant has sent a notice to the respondent on 19.06.2007 for restitution of conjugal rights. Such notice was received by the respondent, however, she did not reply the same nor came for cohabitation.

33. During the cross examination, the appellant has admitted that on 14.09.2006, the respondent went with her brother on a motorcycle. Looking to the above admission, it appears that it would be impossible for the respondent to go with her brother on a motorcycle along-with clothes and household articles, as alleged by the appellant. As against this, it is contended and deposed by the respondent that on 14.09.2006, she was made to sit in a vehicle and she was sent to her parents' house at Padegaon. Evidence of the respondent to that effect is more particular in reference to the date, time and the manner in which the appellant drove away the respondent from his house. As against this, the oral evidence of the appellant to that effect is very vague and unbelievable.

34. To consider the bonafides on the part of the

appellant as well as respondent, it is material to note that the appellant came with the case that respondent herself abandoned the society of the appellant. He tried to bring her back, but the respondent refused. Such pleading and evidence of the appellant appears to be false, because, the appellant has admitted in clear words that after 14.09.2006, he did not went to bring his wife back. Even it is seen from the evidence on record that the appellant and his father have shown their ignorance about the fact of pregnancy of the respondent. It is an admitted fact that the respondent gave birth to a female child on 06.01.2007. On this background, conduct of the respondent and his father appears to be most irresponsible as even they do not know or remember the fact of pregnancy of the respondent. During the cross examination, the appellant has further admitted that he never went to bring the respondent after 14.09.2006 nor he went to see his daughter.

35. On perusal of contents of the notice, particularly, in para 2 of the notice it is mentioned that on 16.07.2005, when the respondent was with appellant, she met with an accident and sustained head injury and injury to her back, due to which she is

unable to have sexual intercourse. Since then there was no sexual relationship between the respondent and the appellant.

36. Though it is mentioned by the appellant in his notice that due to the injuries caused to the respondent she is unable to perform sexual intercourse, such contention and pleading is not taken by the appellant in his petition. The notice issued by the appellant seems to be for the restitution of conjugal rights but the appellant has not filed a petition for restitution of conjugal rights. On the contrary, he turned around and filed a petition for divorce. Therefore, from the contents of the notice, particularly in para 2, intention of the appellant is very clear that basically he does not want to reside with the respondent. We think that notice with such allegation is sent to create one of the grounds for divorce, because it is mentioned in the notice that the respondent abandoned the society of the appellant without any reasonable cause. The evidence on record shows that in fact, the appellant had drove away the respondent from his house and therefore the respondent is constrained to live with her parents.

37. To test the bonafides of the parties, it is material to note that the respondent was ever ready to reside with the appellant and this fact is very clear from certain admissions given by the appellant and his father during cross examination. The respondent has admitted that during the pendency of the petition, the matter was referred for conciliation for 5 to 7 times. Further, the father of the appellant has also admitted in the cross examination that when the proceedings under the Domestic Violence Act were initiated in the year 2007, decided in 2008, during that period the matter went for conciliation for three times. The proceedings under the Domestic Violence Act were decided by the Court in the year 2012. During conciliation proceedings, the respondent had shown willingness to go with the appellant but the respondent took her at his married sister's house and not to his house.

38. From the above admissions, it is very much clear that the appellant or his parents never tried to bring the respondent to their home. On the contrary, the respondent was ever ready to reside with the appellant. There is no reason for the respondent to abandon the society of the appellant nor there is evidence on record to that effect.

39. Mr. Barlota, the learned counsel appearing for the appellant has argued that the evidence on record is sufficient to hold that respondent treated the appellant with cruelty and therefore has relied on the observation of the Apex court in the case of **V. Bhagat Vs. D. Bhagat (Mrs)**, reported in **1994 AIR (SC) 710** in which it is observed that-

"Mental cruelty is that 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-- when the circumstances are such that there is irretrievable breakdown of the marriage, the marriage between the parties must be dissolved."

40. The observation of the above cited authority is inapplicable to the facts of the present case because, basically, the appellant failed to establish that the respondent treated the appellant or his family members with cruelty.

41. Mr. Barlota further relied on the observations of the Division Bench of Madhya Pradesh High Court in the case of **Basudev Jata Vs. Smt. Rekha Jata, reported in AIR 2015 Madhya Pradesh 176**. We have gone through the facts and observations of the said authority, from

which, it appears that the wife left the matrimonial house and husband lodged a report to that effect. On the other hand, the wife had not reported against her husband but stayed with her parents and never bothered to go to her husband. The facts and observations of the above cited authority are altogether different.

42. As against this, Mrs. Wankhede, the learned counsel appearing for the respondent has relied on the observations in the case of the Apex Court in the case of **Jagdish Singh Vs. Madhuri Devi, reported in 2008 DGLS(Soft.)618**, in which it is observed that -

“33. Three requisites should normally be present before an appellate court reverses a finding of the trial court;

(i) it applies its mind to reasons given by the trial court;

(ii) it has no advantage or seeing and hearing the witnesses; and

(iii) it records cogent and convincing reasons for disagreeing with the trial court.”

43. Mrs. Wankhede, the learned counsel for the respondent further relied on the decision of the Apex Court in the case of Darshan Gupta Vs. Radhika Gupta,

reported in 2013 (4) Bom.C.R. 706, which reads thus:

"The party seeking divorce under the "Matrimonial offence theory"/the "fault theory" must be innocent. A party suffering "guilt" or "fault" dis-entitles himself/herself from consideration. Illustratively, desertion for a specified continuous period, is one of the grounds for annulment of marriage. But the aforesaid ground for annulment is available only, if the desertion is on account of the fault of the opposite party, and not fault of the party which has approached the Court. Therefore, if a husband's act of cruelty, compels a wife to leave her matrimonial home, whereupon, she remains away from the husband for the stipulated duration, it would not be open to a husband to seek dissolution of marriage, on the ground of desertion. The reason being, that it is the husband himself who was at fault, and not the wife."

Observation of the above case is applicable to the facts of the present case.

44. Considering the evidence on record and the legal position, we are of the opinion that the appellant failed to establish the grounds for divorce. On the other hand, it has been established by the respondent that the appellant has abandoned the society of the respondent without any reasonable excuse. Hence, the

point Nos. 1 and 2 are answered accordingly. In the result, we proceed to pass following order:

O R D E R

Family Court Appeal Nos.13/2016 and 14/2016 are dismissed. No order as to costs.

Civil Application No.591/2015 in Family Court Appeal No.13/2016 also stands disposed of.

(K. L. WADANE, J.)

(S. V. GANGAPURWALA, J.)

JPC