

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

FAMILY COURT APPEAL NO. 12 OF 2016

Sou. Vaishali W/o. Nagsen Sarje,
Age : 35 years, Occu. Nil,
R/o. Anand Building, Flat No. 12,
Adinath Nagar, Garkheda Parisar,
Aurangabad.

... Appellant

VERSUS

Nagsen S/o. Kondibarao Sarje,
Age : 41 years, Occu. Government Servant,
R/o. S.T. Quarters, Samarthnagar,
Aurangabad.

... Respondent

.....
Mr V. D. Patnoorkar, Advocate for the appellant
Mr Hemant Surve, Advocate for respondent.
.....

**CORAM : T. V. NALAWADE &
A. M. DHAVALA, JJ.**

DATE : 03.10.2017.

ORAL JUDGMENT (PER A. M. DHAVALA, J.) : -

1. After hearing learned counsel for the parties on 03.10.2017, we have dismissed the appeal stating that the reasons to follow. Here are the reasons.

2. This is an appeal by wife - Vaishali challenging the Judgment & Decree of judicial separation u/s 10(1) of the Hindu

Marriage Act, 1955 delivered by Judge, Family Court at Aurangabad on 16.10.2014 in Petition No.A-57/2013.

3. The facts relevant may be stated as follows :

The present respondent is the original petitioner – Nagsen. For the sake of convenience the parties are herein after referred to by their first names i.e. Nagsen & Vaishali. The marriage of Vaishali was solemnised with Nagsen on 05.01.2003 as per Buddhist rites and customs. Both Nagsen & Vaishali were cohabiting at Aurangabad. Out of the said wedlock, Vaishali was blessed with two sons. Nagsen had filed HMP No. A-57/2013 before the Family Court for judicial separation on the ground of cruelty. He alleged that Vaishali was very much aggressive and quarrelsome in nature. She was quarreling with all persons like vegetable vendor, society watchman, maid servant etc. She used to insult and humiliate the persons with whom she was quarreling. She was not in habit of cooking food. She was extremely suspicious and was raising suspicion about relations of Nagsen with any person coming to his house. She used to make comments that particular persons were not of good morals. Whenever Nagsen was appreciating any woman including actresses acting in T.V. serial, she used to make taunts as to whether he was having any relations with her. She was never contended by purchases made by

Nagsen and she used to make taunts about the quality of articles purchased. She was taking money from the pocket of Nagsen without intimation to him and was indulging into Bhishi of Rs.5,000/- per month. She was not behaving respectfully with the relatives of Nagsen and was making insulting taunts with respect to her parents in-law and suggesting that they should commit suicide. She was in habit of chewing tobacco. She beat her son mercilessly and when she was persuaded not to beat children, she showed aggressive and violent attitude. She was not maintaining peace in the house and was not doing household activities. She was neither teaching her children nor cultivating good habits to them. Nagsen had taken her for Psychological treatment in Shanti Nursing Home and thereafter Doctor opined that she is a psychiatric patient. This fact was brought to the notice of her maternal relatives and they assured that they would try their level best to treat her properly. Vaishali was not taking medicines brought for her and was making comments against the Doctor. She was threatening to commit suicide. Once she broke her Mangalsutra and threw it towards her husband. Once Nagsen was offering prayers to Lord, she assaulted him with broom. She threatened to kill him by smothering under a pillow. When he called his parents, she continuously insulted them and threatened them. Once she confined herself in one room and

threatened to commit suicide. Once she had left her house along with her clothes, ornaments and cash of Rs. 7,000/- without intimation and Nagsen was required to lodge report with Police Station. Later, she returned home of her own and when she was asked where she had gone, she told him that she had gone to commit suicide. Nagsen gave intimation about her behaviour to her maternal relatives. Her brother came on 18.08.2012 and admitted that his sister was wrong and took her to her maternal relatives. Nagsen offered to pay money for her psychiatric treatment. On 15.12.2012, she returned home and tried to make forcible entry. She later on executed Mafinama and thereafter she was allowed to resume cohabitation but she again started behaving in same fashion. She started writing letters making false allegations. Her maternal relatives declined to interfere and disowned her. On 25.12.2012, she quarreled with her husband and compelled him to leave his house. Then she gave a ring to him and called him stating that she had cooked Gulab Jamun for him. He was surprised and took Gulab Jamun to eat. He noticed pungent smell and avoided to eat it. When one cat ate Gulab Jamun, it was revealed that Gulab Jamun was mixed with poison. On 28.12.2012, Vaishali and her maternal relatives forcibly broke open the house of Nagsen and took away cash of Rs. 15,000/- and gold of 11.5 tolas. Nagsen lodged FIR at Mukundwadi Police Station. Vaishali lodged a

false report at Women's Grievances Redressal Cell on 07.01.2013. Hence, Nagsen claimed judicial separation from her.

4. Vaishali appeared in the matter but did not respond to the efforts of Marriage Counsellor and did not file written statement. She did not attend the case for contesting the same. The petition proceeded without her written statement. The petitioner filed affidavit evidence.

5. As per his pleadings, the petitioner also examined Dr. Vinay Barhale and filed number of documents. The respondent - Vaishali did not attempt to cross-examine the witnesses of the petitioner. The Id. trial Judge on the basis of uncontroverted pleadings and evidence of the petitioner, was satisfied about the mental cruelty and, therefore, the decree for judicial separation was passed on 16.10.2014.

6. Vaishali has preferred this appeal and seeks remand of the matter on the following grounds:

- (i) She had not appeared before the Family Court and had not sought time for filing written statement. Her

signature in the record is false. She is illiterate, innocent and has no legal knowledge.

(ii) She could not appear personally. She was under tension due to ill-treatment by her husband.

(iii) She wanted to cohabit with her husband in the company of her sons but he was not cohabiting with her. She was ready to cohabit with him without any condition. Her husband has earlier given divorce to his first wife Sheela by *ex parte* decree and his marriage with Vaishali was second marriage.

(iv) Hence, she prayed for setting aside the impugned decree and remanding the matter back to Family Court at Aurangabad.

7. Heard learned counsel Shri. V. D. Patnoorkar for the appellant and Shri. Hemant Surve for the respondent.

8. After hearing the ld. advocate for respective parties, we find no substance in the contention of the appellant that she was not

served, she did not appear and had not filed any application before the ld. trial Court. The record of the trial court shows that she had very much appeared and she was even sent to Marriage Counsellor. She had filed application Exh. 6 for written statement and registered address at Exh. 7. Therefore, decree cannot be set aside on the ground that there was no service of summons on the appellant.

9. A request was made for quashing of the impugned judgment and remanding the matter to the Family Court in the interest of justice as the matrimonial life of the appellant was in danger and she was not likely to get even maintenance. It is also submitted that the husband has filed petition for divorce on the ground of judicial separation and the same would succeed in case the decree of judicial separation is not set aside.

10. Learned advocate Shri Hemant Surve for the respondent has relied upon the judgment of this Court in the case of **Jethabhai Ratanshi Lodaya vs Manabai Jethabhai Lodaya AIR 1975 Bom 88** to submit that, only because there is a decree of judicial separation, the discretion of the court either to grant a decree of divorce or refuse the said decree is not taken away. In this case, it is observed as under :

9. the term 'judicial separation' came to be used for denoting a limited kind of divorce i.e. separation from bed and board thereby putting an end to notice that in India also the remedy of judicial separation was made available to the Christians by the Indian Divorce Act.

12. But judicial separation does not itself dissolve the marriage though it affords a ground for divorce. In this sense a decree of judicial separation aims at divorce but the separation is not final and irrevocable as can be seen from the latter provisions of Section 10(2) and there is always a locus penitential. But since on a decree of judicial separation the duty to cohabit ceases there can be no desertion after such decree.

13. But having regard to the very nature of the remedy of judicial separation and the effect of non-cohabitation provision itself there is no ambiguity or obscurity in construing the provisions of Section 10(2) and they are susceptible of only one meaning namely that after the passing of the decree for judicial separation both the parties are released from their material obligations to cohabit with the other. Therefore as already noticed earlier, the above rule of harmonious construction of several parts of

a statute also militates against appellant's contention that the old clause (viii) of Section 13 did not imply an element of default or wrong on the part of the other party.

14. No doubt after a decree of judicial separation the parties or either of them may make attempts for reconciliation and even the Court is at the hearing of the petition for divorce enjoined in every case where it is possible so to do to make every endeavour consistently with the nature and circumstances of the case to bring about a reconciliation between the parties.

19. As already noticed a decree of judicial separation does not by itself dissolve the marriage but aims at it while leaving time to both the parties for reelection, adjustment and reconciliation.

11. We agree with the submissions of learned advocate – Shri. Hemant Surve that once a decree for judicial separation is passed and thereafter a decree for divorce is claimed on the said ground, the decree of divorce is not a matter of course. Considering the facts, we find that it is not necessary to set aside the decree of judicial separation on equitable grounds as well. It is open for the parties to

make efforts for reconciliation as observed in para 105 of Jethabhai's case (supra) as under:

105. It stands to reason that the decree for judicial separation both the husband and the wife back, would be his duty to do after the decree for judicial separation, both the husband and the wife are entitled to live separately (and in a majority of cases peacefully), as per the orders of the Court and they are, in my opinion, in no way obligated to resume cohabitation or to make overtures to each other, although it can be said that there is nothing in a decree for judicial separation which would prevent the parties, if they are so minded., to be reconciled to each other and to resume cohabitation, if they choose to do so. The only result of such resumption of cohabitation would be able to take recourse to the grounds contained in Section 13(1A) for obtaining a divorce if they should unfortunately, fall out again.

12. With these observations, we dismiss the appeal with no order as to costs.

[A. M. DHAVALÉ]
JUDGE

[T. V. NALAWADE]
JUDGE