

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

FAMILY COURT APPEAL NO. 08 OF 2011

Rakesh s/o. Dhulichand Jaiswal,
Age 31 years, Occu. Business,
R/o. Satish Motors, Near Sadar
Washing Company, Rajapeth,
Amravati, Distrcit - Amravati.

....Appellant.

Versus

Sow. Vaishali w/o. Rakesh Jaiswal,
Age 26 years, Occu. Nil.,
Through her father Suresh
Shivnarayan Jaiswal,
R/o. Ramlal Colony, Padampura,
Aurangabad, District Aurangabad.

....Respondent.

WITH
FAMILY COURT APPEAL NO. 15 OF 2012

Rakesh s/o. Dhulichand Jaiswal,
Age 31 years, Occu. Business,
R/o. Satish Motors, Near Sadar
Washing Company, Rajapeth,
Amravati, Distrcit - Amravati.

....Appellant.

Versus

Sow. Vaishali w/o. Rakesh Jaiswal,
Age 27 years, Occu. Nil.,
Through her father Suresh s/o.
Shivnarayan Jaiswal,
R/o. Ramlal Colony, Padampura,
Aurangabad, District Aurangabad.

....Respondent.

Mr. V.J. Dixit, Senior Counsel i/b. Mr. L.V. Sangeet, Advocate for
appellant.

Mr. N.S. Ghanekar, Advocate for respondent.

**CORAM : T.V. NALAWADE AND
S.M. GAVHANE, JJ.**

RESERVED ON : 26/09/2017

PRONOUNCED ON : 13/10/2017

JUDGMENT : [PER T.V. NALAWADE, J.]

1) Appeal No. 8/2011 is filed against judgment and decree of petition No. A-342/2006, which was pending in Family Court, Aurangabad and which was filed by wife under section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') for decree of restitution of conjugal rights. The Family Court has given such decree in favour of wife. Appeal No. 15/2012 is filed against the judgment and decree of Petition No. A-66/2009 (HMP No. 72/2005), which was pending in the same Court, but which was filed by the husband for dissolution of marriage under the provisions of sections 13 (1)(ia) (iii) of the Act. The Family Court has dismissed the petition filed by the husband. The husband has challenged the decision given in both the proceedings against him. The Family Court decided both the matters together by common judgment and as they involve connected issues, this Court is deciding the two appeals together. Both the sides are heard.

2) The relevant incidents with dates for the present purpose are as under :-

(i) 6.5.2001 - Date of marriage and after that cohabitation

of wife in the house of husband at Amravati.

(ii) 9.1.2002 - A daughter was born in Aurangabad out of the aforesaid wedlock and after that, resumption of cohabitation at Amravati.

(iii) Nov. 2004 - Parties started living separate.

(iv) 13.5.2005 - The husband filed petition for divorce which was originally given number 72/2005 in Amravati Court.

(v) 20.10.2006- The wife filed proceeding under section 9 of the Act.

3) It is the contention of the husband that after one month of the marriage, on 16.6.2001 when his relatives were celebrating his birthday at Amravati, the wife had attack of mental illness. It is his contention that he was virtually shocked and surprised due to the misbehaviour of the wife during that attack and he made inquiry about it with the parents of wife. It is his contention that the parents gave evasive explanation. It is his contention that after inquiry he realized that she was suffering from mental illness from prior to marriage and she was receiving treatment from one Dr. Barhale of Aurangabad.

4) The husband has contended that after 4-5 months of the marriage when he was proceeding to one hospital, for check up and

treatment to the wife as she was pregnant and when they were on the scooty, the wife tried to step down from the scooty by saying that she wanted to commit suicide. It is his case that she started shouting and making loud noise and he somehow controlled her and took her back to home. It is the case of husband that after that day, the wife had many attacks of mental illness and she was not remembering anything done by her during attacks and she was also not caring about whatever she had done during those attacks. It is the case of husband that some times she was inflicting injuries to herself by using razor and he realized that she was suffering continuously from mental disorder. It is the case of husband that due to such illness of the wife, he cannot be expected to live with her.

5) It is the case of husband that he had requested the parents of the wife to do something, but his efforts were in vain. It is his case that he then took the wife to Gowardhan Hospital of Dr. Laxmikant Rathi, who is psychiatrist for giving treatment. It is his contention that he found that the illness is not curable.

6) It is the case of husband that after 7-9 months of the marriage, the wife tried to jump in to the well to commit the suicide when she was under such attack. It is his case that on one day, during such attack, the wife virtually dashed the daughter on the

floor and in that incident the daughter received injury to eye and daughter was sick for about two months after this incident.

7) It is the case of husband that due to aforesaid conduct of the wife, he went in to depression and the conduct of the wife amounted to cruelty. It is contended that on 19.11.2004 he left home in the depression and due to that, his relatives on parents side were required to give intimation to police. It is his contention that on 20.11.2004 the father of the wife came to Amravati and took the wife and their daughter to Aurangabad by saying that they would give her treatment in Aurangabad. It is contended that in Amravati, the father in law of husband had given report to police that he was taking his daughter to Aurangabad.

8) It is the case of husband that due to illness of the wife and aforesaid incidents, it is impossible for him to cohabit with wife and therefore, he wants divorce.

9) Some other incidents are quoted by the husband by saying that she used to throw household articles from the house, she used to go out of the house without giving intimation to any person from house of husband, she used to give beating to the daughter and she was not taking care of the daughter, she was

misbehaving with the members of the family of the husband and she was not able to discharge her matrimonial obligations. It is his case that this conduct of the wife amounted to cruelty against him.

10) It is the case of husband that since 20.11.2004 the wife is living separate from him and she is under treatment due to her mental illness. According to him, cause of action arose for him on 16.6.2001 when the first incident took place when the wife had first attack of mental illness.

11) The wife has denied allegations that she had attack of mental illness on 16.6.2001 and she had misbehaved on that day and subsequently with the husband and his family members and also with the daughter. She has denied that she used to inflict injuries by using razor and she had attempted to commit suicide first time by jumping from moving scooty and second time by attempting to jump in to a well. It is the case of wife that the husband had left his house to create some false record for getting relief of divorce and as there were threats that he may commit suicide, her father was required to give report to Amravati Police and then the father took her to Aurangabad. It is her case that proper treatment was not given to her by husband and his relatives and due to their treatment, she was feeling lonely.

12) It is the case of wife that due to birth of female child, the husband and his relatives were unhappy and they were giving illtreatment to her on that count. It is her case that due to the bad treatment given to her, she went in to depression and she was facing great stress. It is her contention that as husband was saying that he would leave her, the stress increased. It is her case that he has love and affection towards the husband, but the husband always neglected her. It is her case that her parents tried to convince the husband to behave well, but he did not improve. It is her case that the husband was trying to create case of desertion and other grounds for divorce by asking her to live in her parents house. It is her case that on first occasion when she was deserted, the husband was somehow convinced and she returned in the matrimonial house, but again tricks were played by the husband to see that she was again sent to her parents house. It is her case that in the month of November 2004, her parents had arrived at Amravati to attend a function in the house of maternal uncle. It is her case that the husband and his parents had picked up quarrel with her parents as they wanted that she should be taken back to Aurangabad and they wanted divorce. It is contended that after picking up quarrel, the husband left his house and he had left her and her daughter at the house of maternal uncle. It is her case that the parents of the

husband and relatives created a show that husband was missing and there was possibility that he may commit suicide. It is her case that when they started blaming her and they started pressurising her father, at their instance application was given by her father to police to inform that he on his own was taking her to Aurangabad. It is contended that the husband and his relatives tactfully created aforesaid record against her. It is contended that after that also she and her parents and other relatives made an attempt to convince the husband to accept her back in matrimonial house, but they refused to do so. She has given the names of relatives who had made attempts to settle the dispute.

13) It is the case of wife that by misusing the aforesaid circumstances, the husband filed proceeding for divorce (Petition No. 72/2005 in Amravati Court). It is her case that as the husband was not showing readiness to accept her back in the matrimonial house, she was required to file proceeding for restitution of conjugal rights. It is her case that the husband has deserted her as he wants divorce and he has created false ground of mental illness. It is her case that she is educated lady. It is her case that she is B.Sc. and she has completed computer course also and the course of D.M.L.T. It is her case that she got 'A' Grade in diploma course of computer and on the date of petition filed by her, daughter was aged about five years.

It is her case that she needs company of husband and her daughter also needs love and affection of father. She prayed for dismissal of the divorce proceeding and for giving decree of restitution of conjugal rights.

14) In both the matters, issues were framed by the Family Court. In view of the grounds mentioned in the petition, the husband was expected to prove that the wife had treated him with cruelty and he was also expected to prove the mental illness of the wife. On the other hand, the wife was expected to prove that the husband had withdraw himself from her society without reasonable excuses.

15) From the rival contentions and the points framed in the two matters, it can be said that if the husband fails to make out the case of mental illness as mentioned in section 13 (1)(iii) of the Act, the Court can infer that the husband has no desire to resume cohabitation and he has deserted the wife. The arguments advanced and the aforesaid contentions show that the ground of cruelty has connected with so called mental illness and so, that ground will also go away if the husband fails to establish mental illness of wife.

16) In the Family Court evidence was recorded in Petition No. A-342/2006. The husband has given evidence as per aforesaid

contentions made in his petition and the written statement filed in the proceeding filed by wife. In the cross examination, he has deposed that on the basis of opinion given by doctor, he is saying that the disease of the wife is not curable. He has admitted that in the year 2006, the relatives of the wife met him at Aurangabad when he had come to Aurangabad to attend the marriage. He has admitted that they had requested him to take the wife to his house for resumption of cohabitation. His evidence shows that he was not ready to take her to Amravati for resumption of cohabitation due to her mental illness.

17) The husband has admitted in cross examination that on 20.11.2004 he was temporarily not at home in Amravati and on that day, the report was given by father of wife to police and the wife was taken to Aurangabad by her father. The wife is also not disputing that since that date, she is living with her parents. He has denied that they had played a trick and they had sent the wife to Aurangabad. He has admitted in the cross examination that at that time, in November 2014 he was feeling that it was not possible for him to cohabit with her. He also admitted that his parents had given missing complaint to police as they were not able to approach him. He has deposed that he was in the house of his friend and he was not having mobile. The report given by him on 27.11.2004 to police

is brought on record as Exh. 30.

18) When the husband was cross examined in respect of two so called attempts of suicide by wife, he gave evasive answers by saying that he does not remember the particulars.

19) In the cross examination of the husband, it is brought on the record that he had made inquiry with Dr. Barhale of Aurangabad and he has taken consultation of Dr. Rathi of Amravati. He has admitted that doctor had advised to take proper care of the wife and give her love and affection. However, he admits that at that time, he had not taken a decision to take divorce. The other suggestions given by the counsel of the wife in cross examination to the effect that she was discharging matrimonial obligations properly are denied by him.

20) The wife in her evidence, in cross examination has admitted that three years prior to the date of her deposition, she was suffering from mental depression and she received treatment as indoor patient in the hospital. She has admitted that initially she was taken to Dr. Barhale and she was indoor patient in his hospital about 15 days. Her deposition was recorded on 29.4.2009 and she has admitted that even on that day, she was under treatment of Dr.

Barhale.

21) In the cross examination, wife has admitted that after the birth of daughter, the husband and his relatives had come to Aurangabad to see the daughter and they had even stayed in the house of her parents on that occasion. Her evidence shows that she returned to Amravati after six months of the delivery. She has denied that she was taken to Amravati after one and half months of the delivery by the husband. She has given explanation that she had trouble of spondylitis and as she was given advise to take rest, she did not return immediately to Amravati after delivery.

22) The wife has admitted in her cross examination that she has taken treatment in Amravati and she was indoor patient in hospital from Amravati for about one day. She has denied that she had treated the husband with cruelty and due to mental illness, she is not able to discharge the matrimonial obligations.

23) The wife has examined her uncle Rajendra in support of her contentions. His cross examination shows that he is not ready to admit few things like the visit of the husband to the parent's house of Aurangabad to see newly born baby. His evidence shows that he was arrested for murder in the month of November 2003 and till

27.4.2005 he was in jail. This circumstance shows that probably he has no personal knowledge about the things which were going on after the marriage till 27.4.2005. Due to this circumstance, it is not necessary to discuss more his evidence.

24) The husband has examined Dr. Barhale in Petition No. A-66/2009. The doctor has given evidence that the wife has been under his treatment since 9.6.2004 as she is suffering from schizophrenia. He has given evidence that even on the date of his deposition i.e. on 28.7.2009, the wife was under his treatment and illness of the wife is treatable, but not curable. He has deposed that the wife requires continuous medical treatment. In the cross examination, he has admitted that if the patient of such disease is given proper treatment, he may fulfill marital obligations. The discharge card prepared by his hospital is given Exh. 36 in his evidence and it shows that from 20.7.2004 to 9.8.2004 the wife was indoor patient in his hospital. Initial diagnosis was written as unspecified psychosis. It is not disputed that the wife was taken to this doctor in Aurangabad by his father. In view of the circumstance that wife is educated, the symptoms which are given to doctor can be used in the present matter. It was informed that there was irritability at times, there was disruptive behaviour, she was argumentative and hostile. As there was hostility, she was crying

and she was restless, she was admitted. Some other symptoms are also mentioned.

25) The Trial Court has dismissed the petition by observing that the doctor has given opinion that if treatment is continued, the wife may be in a position to discharge the matrimonial obligations. The learned Senior Counsel took this Court through the relevant provisions of the Act and submitted that in view of the aforesaid evidence and admitted facts that the wife is still under treatment, the Trial Court ought to have granted decree of divorce atleast on the ground of mental illness. The learned counsel for wife submitted that the mental illness should be of such nature and extent that the husband cannot reasonably be expected to live with the wife and there is no sufficient evidence to prove that condition. Both the sides have cited some reported cases. In view of the submissions made by both the sides, it has become necessary to ascertain as to whether only on the ground of incurable unsoundness of mind, the husband can get divorce. Alternatively, it was submitted that if the illness is of such kind and extent that the husband cannot reasonably expected to live with wife, the husband is entitled to divorce. The learned Senior Counsel for the husband submitted that the interpretation of the provision of section 13 (1)(iii) is necessary as there is no such interpretation available from this Court or from Supreme Court. He

took this Court through the reported cases of the Supreme Court and submitted that there are some passing observations of the Apex Court on the point involved, but it is desirable that the point raised by him is interpreted in the present matter. For mentioning the point and for ascertaining the object behind the provision of section 13 (1) (iii), this Court is quoting the relevant portion of this provision which is as under :-

"13. Divorce.- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree on the ground that the other party-

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurable of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.- In this clause,-

- (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
- (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or
- (iv)"

26) It was submitted by the learned Senior Counsel that there are two parts in clause (iii), giving two grounds as under :-

- (a) The respondent has been incurably of unsound mind.
- (b) The respondent has been suffering from mental disorder of the nature and extent mentioned in the provision.

The learned Senior Counsel submitted that condition mentioned in clause (iii) of this ground is attached to the second ground, ground (b) and it is not attached to ground (a). On the other hand, the learned counsel for wife submitted that if legislature wanted to create two separate grounds, the legislature would have given ground (b) as a separate ground in different clause of the section.

27) Due to use of comma prior to word 'or' in clause (iii), the submissions of aforesaid nature are made. On this point, both the sides were asked to produce some literature on use of conjunction 'or' and also the meaning of the terms used to describe mental illness in clause (iii). In dictionary, it is mentioned that conjunction 'or' can be used to link alternatives viz. 'a cup of tea or coffee' or 'or' is also used for introducing a synonyms or explanation of a preceding word or phrase viz. 'Yoga is a series of postures or asanas'. The learned counsel for wife submitted that as per the rules of grammar, when comma is placed before the word 'or' then what follows it means the same what precedes it. Two illustrations are given on this viz. (i) please pass the salt, or sodium chloride and (ii) please pass the salt or paper. The aforesaid contentions made on the basis of rules of grammar or use of conjunction can help the interpretation suggested for wife, but that is not the only way of ascertaining the object behind use of first comma and then 'or' between two kinds of mental illnesses given in clause (iii) of section 13 (1). It needs to be ascertained as to whether the meaning of the two terms mentioned on two sides of 'or' is the same.

28) In the case reported as **AIR 1988 SC 2031 [Atmaram Mittal Vs. Ishwar Singh Punia]**, the Apex Court has referred BLACKSTONE, Commentaries on the Laws of England which is as

follows :-

"According to BLACKSTONE the most fair and rational method for interpreting a statute is by exploring the intention of the Legislature through the most natural and probable signs which are 'either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law'".

29) To ascertain the intention of the legislature, the provision needs to be read as a whole and then it needs to be ascertained as to whether the condition mentioned in clause (iii) is applicable to both the terms mentioned on the two sides of word 'or'. This is because the word 'or' is used generally to separate two separate things. In the case reported as **(2010) 10 SCC 744 [Competition Commission of India Vs. Steel Authority of India Limited]**, it is laid down that word 'or' generally does not mean 'and' and word 'and' does not generally mean 'or' unless some other part of the same statute says so or the clear intention of the statute requires that to be done. This Court wants to add that when separate terms are used to describe illness, it needs to be presumed that legislature had gone through the research in medical field and had formed opinion that the aforesaid two kinds of mental illness 'unsoundness of mind' and 'mental disorder' are separate and distinct from each other. This proposition also needs to be kept in

mind.

30) When the statute is carefully punctuated and there is such doubt, necessary weight is ordinarily required to be given to the punctuation as it may have meaning in some cases. However, in some cases, punctuations cannot be certainly regarded as controlling element and it cannot be allowed to control the plain meaning of the text. (Reliance placed on **AIR 1952 SC 369 [Aswini Kumar Ghose and Anr. Vs. Arabinda Bose and Anr.]**).

31) The statement of object and reasons of the Act shows that it was made to amend and codify the law relating to marriage amongst Hindus. The object of legislation was mainly (i) to liberalise the provisions relating to divorce. The amendment which introduced clause (iii) in the year 1976 was intended to remove certain anomalies and handicaps that had come to light after the passing of the Act of 1955. Prior to amendment of 1976, the ground of mental illness was as under :-

"(iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition."

Prior to enactment of the Act, as per Hindu Law, no divorce was permissible as the relation, tie of marriage was presumed to be indissoluble sacred tie. Thus, it needs to be presumed that by the enactment, and by making amendment, the legislature made it possible to get divorce and then liberalise the provisions relating to the divorce. It is true that the two kinds of mental illnesses

mentioned in clause (iii) could have been given in two separate clauses instead of mentioning them together and by separating them by using word 'or'. However, that circumstance itself cannot lead to inference that the two kinds of mental illnesses are similar.

32) In section 13 of the Act, the meaning of expression 'mental disorder' is given and meaning of expression 'psychopathic disorder' is also given. However, the meaning of 'unsound mind' is not given in this section. The meaning of 'unsound mind' or the definition of this term is available in other Acts like Indian Penal Code or Contract Act. But, the purpose behind inclusion of that term in the relevant provisions of that Act needs to be kept in mind. The same meaning cannot be attached to the term 'unsound mind' as used in clause (iii) of section 13 (1) of the Act as the term is not separately used, but it is affixed by the word 'incurably'. Thus, the mental illness mentioned in first part of section 13 (1) (iii) is incurably unsound mind. In view of the absence of meaning of this term in the Act itself, it needs to be presumed that the word needs to be understood in its natural, ordinary or popular sense. In THE LAW.COM DICTIONARY, the meaning of 'unsound mind' is given as "a person of unsound mind is an adult who from infirmity of mind is incapable of managing himself or his affairs. The term, therefore, includes insane persons, idiots and imbeciles". This definition is also found in BLACK'S LAW DICTIONARY, 2nd Edition. This Court holds

that the meaning given above to 'unsound mind' needs to be used in the present matter. If the word 'incurable' is prefixed to this term, one can find that this kind of illness is different from the mental illness mentioned after word 'or' in clause (iii) of section 13 (1). The explanation given to the clause shows that such mental illness mentioned after word 'or' includes schizophrenia. Though schizophrenia also can be called as incurable mental illness, that illness may not be of kind mentioned above viz. the patient is incapable of managing himself or his affairs. So, this Court has no hesitation to hold that the mental illness mentioned on two sides of word 'or' in aforesaid provision are of different kinds.

33) Now the question arises as to whether the condition attached to mental illness of second kind used after word 'or' can be applied to mental illness mentioned prior to word 'or'. It is already observed that as per the rules of grammar, one can say that due to use of comma before word 'or', it needs to be presumed that what follows word or means the same what precedes the word 'or'. Such interpretation is not be possible in the present matter in view of the legislative intent. In similar case when there was use of comma before word 'or', the Apex Court had held that the two parts need to be read separately. In the case reported as **(2012) 12 Supreme Court Cases 787 [Union of India Vs. Rabinder Singh]**, the

following observations were made by the Apex Court.

"25. We accept the submission of Shri. Tripathi that the two parts of Section 52 (f) are disjunctive, which can also be seen from the fact that there is a comma and the conjunction "or" between the two parts of this clause (f) viz. (i) does any other thing with intent to defraud, and (ii) to cause wrongful gain to one person or wrongful loss to another person. If the legislature wanted both these parts to be read together, it would have used the conjunction "and". As we have noted earlier in *Vimla*, it was held that the term "fraudulently" is wider than the term "dishonestly" which however, requires a wrongful gain and a wrongful loss. The appellants had charged the respondent for acting with "intent to defraud", and therefore, it was not necessary for the appellants to refer to the second part of Section 52 (f) in the charge. The reliance by the Division Bench on the judgment in *S. Harnam Singh* to justify the conclusions drawn by it was clearly erroneous."

34) The interpretation made by the Apex Court of the use of punctuation comma and of the word 'or' in the case cited supra show that in the same clause of the provision, there can be two grounds for right or there can be liability under two different circumstances. The Apex Court held that the condition which was attached to the second part of provision in such a case can be read only for second

part and not the first part. This interpretation will be in consonance with the object behind separating two different kinds of mental illness by using punctuation and word 'or' in section 13 (1)(iii) of the Act. From the meaning which is given to the mental illness appearing in the second part and the meaning which can be found to the mental illness mentioned in the first part, it can be said that they are two different situations. This Court holds in the present matter that the condition mentioned in clause (iii) viz. the petitioner cannot reasonably be expected to live with the respondent, is attached to the second kind of mental illness.

35) The question arises in the present matter now as to whether the evidence given by the husband is sufficient to make out the case for first kind of illness or second kind of illness or whether the evidence is not sufficient to make out the case under both the grounds. This Court has already quoted the evidence of the husband and the evidence given by doctor, who is giving treatment to the wife. The illness is described as schizophrenia and the evidence shows that the illness can be kept under control by medicines. However, the evidence like description of the symptoms given in discharge card shows that during attack, wife shows irritability, disruptive behaviour and also hostility. The husband has given evidence that in the month of June 2001 itself, he first noticed the

illness of the wife. His evidence shows that even after that he continued cohabitation. Some record of giving treatment in Amravati is also produced though doctor from Amravati is not examined by the husband. The wife had admitted that circumstance. One incident of November 2004 is admitted by both the sides and the evidence of the doctor shows that few days prior to that incident, wife had come to him as patient for receiving treatment for the same illness. Though the defence is taken that her father had taken her to Aurangabad due to situation created by husband, the fact remains that father of the wife had informed to police that on his own he was taking the wife to Aurangabad due to her mental condition. After that the wife continued to receive treatment of doctor due to her mental illness. The evidence of husband shows that even after learning about mental illness, he continued cohabitation with the wife and he got female issue from her. He approached police first time in November 2014 and informed to police that due to illness of the wife and due to the incidents which are mentioned in the petition also like her suicidal tendency and tendency to cause harm even to daughter she was taken back to the parents house by her parents. He had expressed apprehension that there was possibility of his false implication from the side of his wife. Since then the parties are living separate. If the evidence of husband and the medical evidence is read together, it can be said that the probability as required by

second part of section 13 (1) (iii) is created by the husband. The matter needs to be decided on preponderance of probability. Due to independent evidence of doctor, who has given treatment to the wife in Aurangabad, there is no reason to disbelieve the husband on his case that he cannot reasonably be expected to live with the wife. However, the evidence is not sufficient to make out the case of illness of first part of this clause.

36) The learned Senior Counsel for husband placed reliance on some observations made by the Apex Court in the cases reported like **(2011) 12 Supreme Court Cases 1 [Pankaj Mahajan Vs. Dimple alias Kajal]**. In this case, after discussing the behaviour of the wife due to mental illness like attempting to commit suicide causing injuries to herself and others, the Apex Court held that such acts caused pain, agony and suffering and those acts amount to cruelty in matrimonial law. In the case reported as **(2003) 4 Supreme Court Cases 493 [Sharda Vs. Dharmpal]**, the relief claimed was different, but the Apex Court had an opportunity to discuss the provision of section 13 (1) (iii) of the Act. The relevant observations are at para No. 13, which are as under :-

"13. The decisions rendered by various courts of this country including this Court lead to a conclusion that a decree for divorce in terms of Section 13(1)(iii) of the

Act can be granted in the event the unsoundness of mind is held to be not curable. A party may behave strangely or oddly inappropriate and progressive in deterioration in the level of work may lead to a conclusion that he or she suffers from an illness of slow growing developing over the years. The disease, however, must be of such a kind that the other spouse cannot reasonably be expected to live with him or her. A few strong instances indicating a short temper and somewhat erratic behaviour on the part of the spouse may not amount to his/her suffering continuously or intermittently from mental disorder."

37) In the petition filed by husband, provisions of section 13 (1)(ia) of the Act was mentioned, but in the pleadings the ground of mental illness was mentioned. The Trial Court had framed the issue on the provision of section 13 (1)(iii) also. Thus, the finding can be given on both the issues and the finding on both the issues need to be given in favour of husband. Thus, this Court holds that the Trial Court has committed error in dismissing the petition filed by the husband and allowing the petition filed by the wife. When this Court comes to the conclusion that the husband cannot be expected to live with the wife due to aforesaid circumstances, it cannot be said that he has deserted her or without reasonable cause, he has withdrawn himself from the society of the wife. Thus, the petition of the wife needs to be dismissed.

38) In the result, both the appeals are allowed. The decision given by the Family Court, Aurangabad in Petition Nos. A-66/2003 and A-342/06 is hereby quashed and set aside. The petition filed by husband, Petition No. A-66/09 is hereby allowed. Marriage between the petitioner and respondent stand dissolved on the grounds mentioned in sections 13(1)(ia) and 13(1)(iii) of the Act. The petition filed by the wife under the provisions of section 9 of the Act for restitution of conjugal rights stands dismissed. Both the sides are to bear their own costs of the proceedings.

[S.M. GAVHANE, J.]

[T.V. NALAWADE, J.]

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