

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

FAMILY COURT APPEAL NO.29 OF 2016

Vikrant Yeshwant Jathar .. Appellant
Age-46 years, Occu-Nil,
Resident of: 17, Pushpanjali
Swanandnagar, Near Chetna Nagar,
Aurangabad

Versus

Rekha W/o. Vikram Jathar .. Respondent
Age-41 years, Occu-Household,
Resident of: C/o. Ganpat Pandurang Katkar
Satara Mill, Garud Plot,
Bhuswal, Dist. Jalgaon

Mr.Rahul P. Dhase, Advocate for the appellant
Mr.P.V.Langhe, Advocate for the respondent

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

DATED : 11.09.2017

J U D G M E N T [PER: S.M. GAVHANE, J.]

. The appellant husband (hereinafter referred to as the petitioner) whose petition No.A-174 of 2014 against the respondent-wife (hereinafter referred to as the respondent) for dissolution of marriage under Section 13 (1)(i-a) & (i-b) of the Hindu Marriage Act, 1955 was dismissed on 17.11.2016 by the In-charge Principal Judge, Family Court, Aurangabad, has preferred this appeal being

aggrieved by the said judgment and order of dismissal of the petition.

2. Facts leading to the institution of present appeal, in short, are as under:

A. The petitioner and the respondent got married on 06.12.2000 at Bhusawal as per Hindu rites and ceremonies. Respondent went to the house of the petitioner at Aurangabad for cohabitation. She was pregnant in March-2001 and was under the treatment of Dr. Chobe from Aurangabad. Case of the petitioner is that in spite of the same respondent went to Bhusawal with her parents on 22.09.2001. On 10.11.2001, father of the petitioner was seriously ill and was admitted in Dhoot Hospital, Aurangabad from 10.11.2001 to 16.11.2001. The petitioner informed the respondent about the same and requested her to come to Aurangabad to see his father. However, respondent did not come. The father of the petitioner died on 16.11.2001. The message in this respect was given to the respondent, but she did not attend the funeral of father of the petitioner as well as 13th day rites after death. On 06.12.2001 the petitioner called at the house of father of the respondent and he came to know that she delivered a female child on 05.12.2001. According to the petitioner again he made

telephonic call which was received by brother of respondent who without listening to him abused the petitioner in filthy language and gave life threat. The petitioner again tried to talk to the respondent, but she avoided. Second time, respondent told the petitioner that she did not want to stay with him and abused him.

B. The petitioner further contends that thereafter he called father of the respondent and requested him to send back the respondent as her presence was needed for family after death of his father. However, father of the respondent said that they did not want to send respondent. The petitioner also wrote letters to the respondent, but she did not reply. The petitioner sent invitation card of the Shraddha of his father, but respondent did not come. The petitioner and his relatives made many efforts to bring back the respondent. However, all the efforts were in vain.

C. According to the petitioner, in the above circumstances, he filed petition for divorce bearing P.A. No.394 of 2003 against the respondent. The parties arrived at settlement on 18.02.2004 and the respondent resumed cohabitation. Though the demand of respondent to stay separate from his family members was satisfied, she used to quarrel with the petitioner on small issues. The

petitioner tried to sort out the issues, but respondent was not in a mood to listen. The respondent told the petitioner that she did not want to stay with him. He tried to convince her. However respondent flatly denied to stay with him. The respondent left the petitioner without any reason. The respondent should have stayed with the petitioner and helped him in his responsibilities. The petitioner is required to leave the job to look after his mother. It is contended that since 07.04.2004, the respondent is staying with her father at Bhusawal without any reasonable cause. According to the petitioner cause of action firstly arose in September-2001 and it is continuing. He tried to settle the matter but failed. There is no possibility of his and respondent coming together as they are staying separate for more than eight years. They stayed together only for one year. Finally petitioner prayed for dissolution of marriage on the ground of cruelty and desertion.

D. The respondent filed reply at Exh.18. She denied almost all the contentions which are made against her. She has come with the case that parents of the petitioner were dissatisfied from very beginning as their illegal demands were not fulfilled. The petitioner on the say of his parents used to ill-treat her. After her delivery the petitioner and his family members did not come to see

her. After death of the father of the petitioner the parents of the respondent had gone for last rites. After September, 2001 many times respondent herself, her parents, relatives and brother had gone to the house of the petitioner to convince him. However, the petitioner and his family members flatly refused to allow the respondent to resume cohabitation. After settlement in P.A.No.394 of 2003, the petitioner and his family members harassed the respondent and drove her out of the house. The petitioner settled the matter to avoid payments of maintenance and expenses of marriage. The parents of the petitioner compelled the respondent to leave the house by beating her severely. The petitioner himself has neglected respondent and minor child. The petitioner wants to marry second time and therefore, he has interest in getting divorce. The petition has been filed on false and concocted story and the same is hit by the provision of order-VII Rule-11 of the Civil Procedure Code.

E. Both petitioner and the respondent have adduced oral evidence besides documentary evidence in the form of copy of divorce petition No.P.A.No.394 of 2003, Compromise Deed dated 18.02.2004 in the said petition and copy of driving license which are produced by the petitioner. On considering evidence adduced by the parties the learned Judge of the Family Court held that

the petitioner has failed to prove the ground of cruelty and desertion alleged against the respondent and therefore, on holding that the petitioner is not entitled to divorce on the said grounds dismissed the petition on 17.11.2016 with no order as to costs.

3. It is above said order of dismissal of divorce petition of the petitioner is challenged in this appeal at the instance of petitioner husband on several grounds mentioned in the memorandum of appeal. Notice was issued to the respondent wife.

4. Respondent-wife appeared through Advocate.

5. We have heard the learned advocates appearing for the petitioner and the respondent at length and with their able assistance, we have perused the pleadings of the parties and the evidence adduced by them. We have perused the impugned judgment and order.

6. Mr.Dhase, learned Advocate for the petitioner submits that on the basis of evidence adduced by the petitioner, the petitioner has proved the grounds of cruelty and desertion and therefore he is entitled to dissolution of marriage as claimed. On the other hand Mrs.Lange, learned Advocate for the respondent submits

that the evidence adduced by the petitioner is not sufficient to state that the respondent caused cruelty to the petitioner or that she has deserted the petitioner. Therefore, according to the learned advocate trial Court has rightly declined the relief of dissolution of marriage to the petitioner and thus, learned advocate has supported the impugned judgment and order.

7. There is no dispute that marriage between the petitioner and respondent was solemnized on 06.12.2000. Thereafter the respondent delivered a female child on 05.12.2001. The petitioner had filed P.A.No.394/2003 against the respondent for decree of divorce on the ground of cruelty and desertion. There was settlement in the said petition on 18.02.2004 and respondent resumed cohabitation.

8. On going through the pleadings of the petitioner it is obvious that he has claimed divorce on the ground of cruelty and desertion. According to petitioner, respondent caused cruelty to him as the respondent did not come to see his father when he was ill and as she did not attend the last rites of his father. So also, according to him he made telephonic calls to the respondent, but she refused to come and her father and brother gave him threats that he should not contact the

respondent.

9. As observed by the Hon'ble Apex Court in the case of Savitri Pandey Vs. Prem Chandra Pandey, 2002 AIR (SCW) 182, the cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension or bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of one spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general be dangerous for a spouse to live with

the other.

10. To prove the cruelty petitioner has relied upon his evidence and oral evidence of other witnesses. He deposed in accordance with the aforesaid contentions regarding causing cruelty to him by the respondent. It is true that the petitioner deposed that respondent did not come to see his father when he was ill and she did not attend the last rites of his father. In the cross-examination the petitioner admitted that the same grounds were taken by him in the earlier petition for divorce filed against respondent. So also, he admitted that when the respondent went to her parents house for delivery she was pregnant of seven months. Therefore, obviously the respondent was in advance stage of pregnancy. Therefore, it was not possible and it was not expected from the respondent to come to see father of the petitioner who was ill during her advance stage of pregnancy. Similarly, in the above circumstances it was not possible for her to attend the last rites of the father of the petitioner. Therefore, merely because respondent did not come to see father of the petitioner when he was ill and did not come to attend the last rites of father of the petitioner it cannot be said that in any manner she caused cruelty to the petitioner. Another aspect to be noted is that as referred earlier admittedly, the petitioner had filed

petition No.394 of 2003 against respondent for divorce on the same grounds and it was settled on 18.02.2004. In such circumstances whatever allegations were made against the respondent in respect of cruelty in the said petition were given up by the petitioner and therefore, in the present petition he has to specifically establish how the act of the respondent amounts to cruelty quoting specific instance in that respect. But, no specific pleading in that respect is made and pleading is of course vague.

11. It has come in the evidence of petitioner that on 06.12.2001 he made telephonic call to the respondent at her father's house and only then he came to know that she delivered a female child on 05.12.2001. He made telephonic call to the respondent which was received by her brother and without listening him her brother abused him in filthy language and gave him threat to life and warned the petitioner of serious consequences if he would dare to call again. However, he again tried to contact the respondent and at that time respondent avoided to talk to him. Further he deposed that due to demise of his father his mother was not feeling well and presence of respondent in his house was necessary to look after his family. He made request to the father of the respondent to send her. But he did not send respondent for cohabitation. According to him said act of the respondent

inflicted cruelty to him. The petitioner has not specifically stated as to when brother of the respondent threatened him not to contact respondent and as to when father of the respondent refused to send her to his house. In fact, he should have specifically stated about the said instance and should have made specific pleading about the said instance. Therefore, vague evidence of the petitioner is not sufficient to infer that the respondent caused cruelty to him.

12. The next is the evidence of Anil Chavan (PW-2) and in his evidence at Exh.49 he has stated about the grounds of cruelty allegedly caused to the petitioner by the respondent as deposed by the petitioner. In the cross-examination he has admitted that after delivery of respondent nobody went to see her. He stated that the petitioner was angry as respondent did not come to see his father and for last rites of his father. He stated that respondent did not come to her in-laws house and therefore petition for divorce was filed. He stated that as the petitioner was annoyed he did not come to see the respondent. Thus, it is clear from his evidence that as respondent did not come to the petitioner's house, petition was filed. Considering reason behind filing petition the evidence of PW-2 is not sufficient to infer that the respondent treated the petitioner with cruelty.

13. Walmik Kedar (PW-3) in his evidence at Exh.50 deposed about the filing of the earlier petition by the petitioner for divorce and settlement in the said petition in February-2004. He stated that thereafter petitioner and the respondent started residing separate from the joint family of the petitioner. Further he deposed that in October-2004 he had gone to the Bhusawal at the house of father of the respondent and at that time father of the respondent refused to send the respondent for cohabitation. So also, he stated that in April, 2005 alongwith the petitioner he had gone to the house of the father of the respondent and at that time also father of the respondent refused to send her for cohabitation. So also, he stated that in September, 2005 also he had gone to the house of the father of the respondent with petitioner to bring the respondent and her daughter and at that time respondent did not meet them and father of the respondent told them to leave the house and he drove them out. The evidence of this witness is beyond pleading as it appears that there is no pleading in this respect made by the petitioner in the petition. Moreover, in his evidence Exh.24 the petitioner has not stated that in the Month of October-2004, April-2005 and September-2005 he had gone to house of his father-in-law at Bhusawal with PW-3 to bring respondent to his house for cohabitation.

PW-3 stated that he does not know about cruelty caused to the petitioner by respondent and about driving him out of the house. Thus, the evidence of PW-3 being beyond pleading is of no help to the petitioner to state that the respondent treated petitioner with cruelty.

14. Tejaswini (PW-4) wife of the younger brother of the petitioner has not stated about the grounds of cruelty allegedly caused to the petitioner by the respondent as deposed by the petitioner. So also, Baburao Vaidya (PW-5) has also not stated about the grounds of cruelty as deposed by the petitioner. Therefore, the evidence of both PWs.4 and 5 is of no help to the petitioner to state that the respondent treated him with cruelty.

15. The respondent-wife in her evidence at Exh.59 deposed that while she was residing at the house of the petitioner after marriage, her father-in-law, mother-in-law and brother of her husband used to taunt her and caused mental and physical cruelty to her as they were not given proper respect in the marriage, but she was cohabiting with the petitioner with the hope that there would be change. She further deposed that as she was carrying 7 to 8 months pregnancy, she went to her parental house. Thereafter, her father-in-law was ill and

due date of her delivery was very close and in the meantime her father-in-law died. At that time her father, brother and other relatives had gone to attend the funeral at Aurangabad, but as she has completed nine months of her pregnancy and due date was coming nearer, the petitioner himself informed her on phone not to come to attend the funeral and therefore, she had not gone to attend the funeral. The petitioner was annoyed due to that and therefore did not come to see her after delivery. She deposed that petitioner and his family caused her mental and physical cruelty and deserted her and refused to cohabit with her and therefore filed petition No.394 of 2003 for divorce without any reason. After settlement in the said petition also she was harassed and driven out of the house. She deposed that since 2004 petitioner himself refused to cohabit with her without any reason and compelled her to stay her at parental house without any fault on her part. The Court at Bhusawal had granted her monthly maintenance of Rs.2,000/- and to avoid the same the present petition for divorce has been filed by the petitioner. Nothing has been found in the cross-examination of the respondent in favour of the petitioner. Thus, it is clear from the evidence of the respondent that she did not come to see her father-in-law when he was ill and did not go to attend his funeral after his death due to advance

pregnancy. Therefore, it does not amount to any kind of cruelty to the petitioner by the respondent.

16. As regards the grounds of desertion under Section 13(1)(i-b) of the Hindu Marriage Act is concerned the petitioner will have to establish that the respondent has deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. As referred earlier there is no dispute that earlier petition No.A-394 of 2003 for divorce filed by the petitioner was settled and then respondent started cohabiting with the petitioner. According to the petitioner, respondent left him without any reason on 07.04.2004 with her father and as such deserted him for continuous period of not less than two years prior to filing of petition on 28.04.2014. The desertion is a matrimonial offence which needs two ingredients to be fulfilled i.e. intention on the part of respondent to end matrimonial relationship and actual act in furtherance of the same. Unless and until both the ingredients are present the desertion is not complete. So also, it is important that the deserted spouse should have always be ready to save the marriage and to stay together. Bearing the above aspect of desertion in mind, let us, consider the evidence adduced by the petitioner to prove the same.

17. The petitioner in his evidence stated that he and the respondent started staying together. However, the respondent left his house without any reason on 07.04.2004. Thus, it is clear that after settlement of earlier petition on 18.02.2004 the petitioner and the respondent stayed together for one and half month. But, the petitioner has not given the details about the behavior of respondent during said period. He has of course stated that he tried many times to bring back the respondent but all his efforts were in vain. He stated that not only he himself but his relatives also tried to bring him and the respondent together, but those efforts were also in vain because of adamant attitude of the respondent and she neglected him and failed to perform matrimonial obligations. He has not stated about the names of his relatives who tried to bring back the respondent for cohabitation after she allegedly left his house on 07.04.2004. Moreover, he has not stated about the day, date and month when he made attempts to bring back the respondent for cohabitation after 07.04.2004. Even it is not the case of the petitioner that he had given notice to the respondent calling upon her to resume cohabitation with him after she left his house on 07.04.2004. So also, it is not his case that he filed any application under Section 9 of the Hindu Marriage Act for restitution of conjugal rights against the respondent to

show that he was ready and willing to cohabit with respondent and to save the marriage, but the respondent was not ready. It is admitted that earlier he filed petition No.394 of 2003 for divorce against the respondent which was settled on 18.04.2004. Thereafter, he filed the present petition on 28.04.2014 for divorce on the same grounds which were taken in the earlier petition. This shows that the petitioner was never ready and willing to save the marriage and it cannot be said that the respondent intended to end the matrimonial relationship and that she did the act in furtherance of the said intention. Another aspect to be noted is that the petitioner has not made specific pleading of the grounds of desertion and whatever pleading is made in respect of said ground is very vague. Therefore, the evidence of petitioner is not sufficient to infer that the respondent-wife deserted him for a period of two years preceding the filing of petition.

18. Next evidence relied upon by the petitioner to prove the ground of desertion is of Tejaswini (PW-4) who deposed that she is member of the family of the petitioner since 07.07.2003. She deposed that on 07.04.2004 father of the respondent, her brother Prashant had come to petitioner's house at Bhusawal to take away the respondent and when petitioner asked them about the

reason, the respondent had told that she does not wish to cohabit with the petitioner. At that time father and younger brother of respondent took away her with daughter Vaishnavi and the respondent and her father in clear terms told that respondent does not wish to cohabit with the petitioner. She further deposed that she tried to convince the respondent, but in vain. The above evidence of PW-4 is not sufficient to state that the petitioner was ready and willing to save the marriage with the respondent but the respondent had intended to end the matrimonial relationship with the petitioner. The evidence of Baburao Vaidya (PW-5) is that in February-2004 there was settlement between the petitioner and the respondent in Family Court and he was present at that time. He deposed that it was decided as per the settlement that petitioner and respondent would reside at Aurangabad in separate room and they resided for one month in rented house. Then he came to know from the petitioner that respondent went to parental house with her father and mother in April-2004 and since that time petitioner and the respondent are residing separately. He has denied that he was not present in the Court at the time of settlement in the earlier petition. The petitioner does not claim that this witness was present when the settlement was made in the earlier petition. So also, he has not stated that he disclosed this witness

that the respondent had left his house in April-2004. Therefore, as this witness has no direct knowledge of the fact that respondent left house of the petitioner with her father and brother in April-2004, his evidence is not sufficient to state that the respondent deserted the petitioner.

19. It has come in the evidence of respondent that she had gone to house of the petitioner for cohabitation after settlement, but in 2004 the petitioner drove her out of the house without any fault on her part and refused to cohabit with her and therefore, she is compelled to reside at her parental house. As referred earlier she stated that to avoid maintenance granted to her and her daughter the petitioner has filed present petition to harass her. This evidence shows that the respondent never intended to put an end her matrimonial relationship with the petitioner, as a wife.

20. For all the reasons discussed above we hold that above referred evidence of the petitioner is not sufficient to infer that respondent treated petitioner with cruelty or she deserted him for a continuous period of not less than two years immediately preceding presentation of the petition for divorce, in the light of provision under Section 13 (1)(i-a) and (i-b) of the

Hindu Marriage Act. Thus, the petitioner has failed to prove both the grounds of cruelty and desertion on which dissolution of marriage with respondent is claimed. The trial Court has rightly held so.

21. On behalf of the petitioner reliance was placed on the ratio laid down by the Hon'ble Supreme Court in the case of **Satish Sitole Vs Ganga - AIR 2008 SC 3093** wherein it was held that when the marriage is dead emotionally and practically and there is no chance of its being retrieved, the continuance of such a marriage would amount to cruelty. The Hon'ble Supreme Court exercising the power under Article 142 of the Constitution of India, passed a decree of divorce on the ground of irretrievable break down of marriage. In the present case the petitioner has failed to prove that the respondent has deserted the petitioner and it has come on record that respondent is residing with her parents since 07.04.2004. But the said aspect is not sufficient to state that there is irretrievable break down of marriage between the petitioner and respondent. Even assuming that there is irretrievable break down of marriage no decree for dissolution can be granted in favour of the petitioner relying upon the ratio laid down in the case of **Satish Sitole (Supra)** as decree for dissolution in the said case was granted under Article 142 of the Constitution of

India. Therefore, ratio laid down in the said case cannot be made applicable to the present case to state that the petitioner is entitled to decree for dissolution of marriage.

22. It is held that the petitioner has failed to prove the grounds of cruelty and desertion. Therefore, petitioner is not entitled to decree of divorce. The learned Judge of the Family Court has rightly refused to grant decree of divorce by dismissing the petition. Therefore, there is no justifiable ground to interfere with the impugned judgment and order. Thus, the appeal being devoid of merits, the same is liable to be dismissed in the circumstances with no order as to costs. Therefore, the appeal is dismissed. No order as to costs.

[S.M. GAVHANE, J.]

[T.V. NALAWADE, J.]