

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

FAMILY COURT APPEAL NO.21 OF 2016

Raghunath s/o Vasant Tonpe,
Age. 49 years, Occ. Service,
R/o. Mahalumbra, Tq. Tuljapur,
Dist. Osmanabad.

... Appellant
(Ori. Petitioner)

VERSUS

Mangal w/o Raghunath Tonpe,
Age. 40 years, Occ. Business,
R/o. At present, N-13,C-38/01,
HUDCO, Harsool, Harsool Road,
Aurangabad.

... Respondent
(Ori. Respondent)

Mr.Amol P. Ghule Patil, Advocate for the petitioner.
Mr.M.K. Deshpande, Advocate for sole respondent.

**CORAM : PRASANNA B. VARALE &
S.M.GAVHANE, JJ.**

RESERVED ON : 08.08.2018

PRONOUNCED ON : 11.09.2018

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

The appellant-husband whose Petition No.A-427/2013 filed against the respondent-wife for divorce on the grounds of cruelty and desertion under Section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955 was dismissed by the Family Court, Aurangabad on 31.05.2016, has preferred this appeal

being aggrieved by the same. The parties are hereinafter referred to by their status before the Trial Court. The matter was referred to the Mediator for settlement and mediation failed.

2. Few facts relevant to decide this appeal in short, are that, the marriage of the petitioner with the respondent was solemnized on 01.05.1997. After marriage the respondent-wife went to the house of the petitioner for cohabitation and they have a daughter, namely, Bhagyashri born from the said wedlock.

3. Case of the petitioner is that the respondent is residing separate from him since 2000 and causing cruelty to him. He had filed petition No.A-180 of 2001 against the respondent to come to him for cohabitation alongwith her daughter Bhagyashri. So also, respondent had filed application under section 125 of the Criminal Procedure Code against the petitioner bearing No.E-835 of 2000 claiming maintenance. Above said both the proceedings

were tried together and petitioner's petition was dismissed and maintenance application of the respondent was allowed by the Court by order dated 31.08.2001. Thereafter, respondent-wife filed petition No.A-270 of 2004 against the petitioner for restitution of conjugal rights. Said petition was dismissed with costs by the Court and while dismissing the said petition/suit, the Court had blamed the respondent that she had suppressed the true facts from the Court.

4. Further it is the case of the petitioner that after the marriage the respondent had come to Solapur at native place of the petitioner, but within six days the respondent had come with the petitioner at Parsoda, Tq. Vaijapur where the petitioner was serving in the Maharashtra State Electricity Board. In the year 1998, the respondent was pregnant from the petitioner and therefore she went to her parental house for delivery. During this period the petitioner used to go to the respondent and used to make all the

expenses from December 1999 to 25.10.2000. But, as the respondent was loving daughter of her parents they used to tell the petitioner to come to stay at Aurangabad. After the petitioner was transferred to Deogaon Rangari the respondent has quarreled with the petitioner on the ground that petitioner should daily come to Aurangabad from Deogaon Rangari and at that time father-in-law of the petitioner assaulted him. As the respondent had gone to her parental house, the petitioner had given notice to the respondent through Advocate. But she insisted him to cohabit with her and as such there was no effect of notice of the petitioner. On the contrary the respondent filed application for maintenance under section 125 of the Criminal Procedure Code. The respondent is in habit of making false allegations against the petitioner. She had also filed R.C.C. No.264 of 2001 under Sections 498-A, 323, 504, 506 read with 34 of the Indian Penal Code against the petitioner and his relatives. She again filed complaint under Sections 494, 323 and 109 of the Indian Penal Code bearing

R.C.C. No.1460 of 2012 against the petitioner. The Court in petition No.A-180 of 2001 has observed that the petitioner and the respondent cannot stay together. The respondent has left the petitioner for last 10 years without any cause and there is no chance of their coming together. The respondent is not allowing the petitioner to meet daughter Bhagyashri. The petitioner is suffering from Lumber Spondylir C polyassive and Left Kidney shows mild hydronephoris with hydropeter obstructing calculars at lt.vvj and he is in need of companion. Therefore, he filed petition for dissolution of marriage on the ground of cruelty and desertion.

5. Respondent-wife filed written statement at Exh. 10 and she has denied almost all the contentions which are made against her by the petitioner. Her case is that the petitioner demanded Rs.3,00,000/- as dowry from her father and also demanded to set up poultry farm for his brother. The petitioner used to say that as her father was not fulfilling demands, he

did not want child. He used to beat the respondent on abdomen with an object to cause abortion. She was required to be hospitalized for the same. She further contends that after birth of child, the petitioner did not come to see the child. He said, he wanted to have a son. The parents of the respondent used to purchase household articles in the house of petitioner from time to time. The petitioner ousted the respondent at night, when her child was small, under the influence of liquor. One Mr. Deshpande, dropped the respondent at her parents house. The petitioner had illicit relationship with his maternal uncle's daughter Saroja. He is staying with her for last 18 years. They have a daughter and a son aged 18 years. The petitioner has left the respondent. He has never cared for her and her daughter. He threatened to kill her and her daughter, if she comes to him for cohabitation. According to the respondent in case of divorce, she would suffer at the time of settling marriage of her daughter. Thus, respondent-wife had prayed to dismiss the petition.

6. The learned Judge of the Trial Court had framed following issues at Exh.11.

1. Whether petitioner proves that after solemnization of marriage the respondent treated him with cruelty?

2. Whether petitioner proves that after solemnization of the marriage the respondent has deserted him for a continuous period of not less than two years immediately preceeding the presentation of the petition?

3. Whether the petitioner is entitled for decree of divorce as prayed for?

7. The petitioner has produced his affidavit in evidence at Exh. 15 and the respondent-wife has produced her affidavit at Exh.26. So also, the petitioner has relied upon the judgments, earlier proceeding between him and the respondent and office copy of his notice to the respondent.

8. Considering the evidence adduced by the parties, the learned Judge of the Family Court held that the petitioner has failed to prove that the respondent treated him with cruelty and that she has

deserted him for a continuous period of two years immediately preceding the petition and accordingly by answering aforesaid issue Nos.1 and 2 in the negative, dismissed the petition by the impugned judgment. Aggrieved by the same, this appeal by the petitioner-husband.

9. Mr. Ghule Patil, learned Advocate appearing for the petitioner/husband submitted that according to the respondent/wife the petitioner is having illicit relation with one lady and therefore, there was dispute between the petitioner and the respondent. But, the respondent has failed to prove the same. So also, respondent filed case bearing RCC No.264/2001 under Section 498-A of the Indian Penal Code against the petitioner and his relatives and the Court has not accepted the said case. Moreover, she has filed RCC No.1460/2012 under Sections 494, 323 and 109 of the IPC against the petitioner and others and the learned Magistrate was pleased to issue process against the petitioner and others for the

aforesaid offences. But, the learned Sessions Judge in Criminal Revision No.111/2014 challenging the order of issue of process quashed and set aside the order of issue of process and dismissed the complaint. Thus, according to the learned Advocate for the petitioner, the respondent has caused cruelty to the petitioner by making allegations and filing proceedings as above against him and others and therefore, the trial Court should have accepted the ground of cruelty to dissolve the marriage as requested by the petitioner.

10. Mr. Ghule Patil, learned Advocate for the petitioner further submitted that the petitioner and the respondent are residing separate since 17 years. The respondent has also stated the same in her written statement. Moreover, in her cross-examination she admits that she has been residing separate from the petitioner since last 17 years. In both the proceedings of restitution of conjugal rights filed by the petitioner as well as the respondent referred

earlier, the trial Court has observed that there is no possibility of re-union of the petitioner and the respondent. Therefore, according to the learned counsel for the petitioner, it can be said that there was desertion of the petitioner by the respondent for more than two years preceding to filing of the petition for divorce and therefore, the trial Court ought to have accepted the case of the petitioner for divorce on the ground of desertion also. Thus, the learned Advocate appearing for the petitioner submitted that negative findings recorded on both the issue Nos.1 and 2 by the trial Court are incorrect and he prayed that decree for dissolution of marriage be passed on the grounds of cruelty of desertion as claimed by him by setting aside the impugned judgment and order by allowing the appeal. To support his submissions, learned Advocate for the petitioner has relied upon the decision in the case of Durga Prasanna Tripathy Vs. Arundhati Tripathy, AIR 2005 Supreme Court 3297.

11. Mr. Deshpande, learned Advocate appearing for the respondent/wife on the other hand submitted that this petition for divorce was filed in the year 2013. Till the date of filing said petition there was no question of desertion. He submitted that both the parties had filed petition for restitution of conjugal rights against each other as stated earlier and both were dismissed which shows that the parties were ready to resume cohabitation. Learned Advocate submitted that respondent had filed RCC No.1460/2012 against the petitioner and his relatives for the offence under Section 494 of the Indian Penal Code as he performed second marriage. In the said case process was issued against the petitioner and said order of issue of process was set aside by the Sessions Court and the case was dismissed. Against the dismissal of the complaint under Section 494 of the IPC the respondent/wife has filed criminal Writ Petition No.1005/2017 against the petitioner and others in this Court and said writ petition has been partly allowed on 03.07.2018 and order of the

Magistrate issuing process against the petitioner and his second wife has been restored. Thus, according to the learned Advocate for the respondent while dismissing the petition for divorce, the trial Court has rightly observed that the respondent has reason to live separate from the petitioner. Therefore, according to learned Advocate simply because the respondent is residing separate from the petitioner it cannot be said that she has deserted the petitioner so as to grant decree of divorce on the ground of desertion. On the contrary according to the learned Advocate, the petitioner has deserted the respondent by performing the second marriage. He submitted that the decision in the case of Durga Prasanna Tripathy (supra) relied upon by the petitioner is not applicable to the present case as the facts of the present case are different from the said decision. Moreover, it is submitted that the petitioner has failed to prove that the respondent has caused cruelty to him. It is submitted that to give go bye to the case under Section 494 of the IPC

against him the petitioner has filed this divorce petition. Finally, learned Advocate submitted that the trial Court has rightly considered the evidence and held that the petitioner is not entitled to divorce as claimed by him and rightly dismissed the petition. As such he claimed that there is no ground to interfere with the impugned judgment and the appeal deserves to be dismissed.

12. We have carefully considered the submissions made by the learned Advocates appearing for the parties and with their assistance we have perused the evidence adduced by the parties and the impugned judgment.

13. There is no dispute about filing of the proceedings against each other by the petitioner and the respondent as referred earlier in detail and the marriage between the petitioner and the respondent was solemnized on 01.05.1997 and from the said wedlock they have a daughter namely Bhagyashri who is

residing with the respondent.

14. As regards the first ground of cruelty on which the petitioner has claimed divorce, the petitioner in his affidavit at Exh.15 deposed that while the petitioner was serving at Parsoda, Tq. Vaijapur in M.S.E.B. department in 1998 the respondent had come to reside with him. Thereafter, she was pregnant. She went to the house of the parents. During the said period petitioner used to go to the respondent and the petitioner used to give expenses to the respondent from December, 1999 to 25.10.2000. However, as the respondent was loving daughter of her parents, she used to say him to come to Aurangabad to reside. Moreover, the petitioner daily used to go to Deogaonrangari from Aurangabad as he was transferred to Deogaonrangari and on that count the respondent used to quarrel with him. At that time as the respondent had gone to her parents house, the petitioner had given notice to her through Advocate calling upon her to resume cohabitation, but

she did not come to cohabit with him and filed proceeding under Section 125 of the Code of Criminal Procedure. Therefore, he also filed Petition No.A-180/2001 against the respondent for restitution of conjugal rights, which was dismissed as stated earlier. The petitioner has further stated that the respondent had filed RCC No.264/2001 against him, his parents, brother and sister under Section 498-A, 323, 504, 506 r/w 34 of the Indian Penal Code which is false case and harassed him and his aforesaid relatives. So also, the respondent is not conducting the said case and therefore unnecessarily he and his relatives are harassed. Moreover, he stated about the filing of the false case bearing RCC No.1460/2012 under Section 494, 323 and 109 of the IPC against him. So also, he stated that in the said case as the Court has given direction to Begampura Police Station to make enquiry he had to unnecessarily face the said case.

15. In the cross-examination on behalf of the

respondent, the petitioner has stated that since when they resided separate the respondent is harassing him and said harassment means though he filed case against her to come to him for cohabitation, the respondent is not coming to him to cohabit. He stated that he has not lodged any complaint in any police station in this respect. So also, he has denied that he has performed second marriage with one Saroja and from her he has one son and one daughter. He also denied that since prior to marriage, he was having illicit relation with said Saroja. He has denied that to avoid maintenance and to give go bye to the case under Section 494 of the IPC he has filed this petition.

16. On perusal of the above referred evidence of the petitioner, it is clear that according to him the respondent caused harassment or cruelty to him since they started residing separate as respondent did not come to cohabit with him though he filed petition for restitution of conjugal rights and as the respondent

has filed criminal cases under Section 498-A and 494 of the IPC. But, merely because the respondent has filed aforesaid cases against the petitioner it cannot be said that the respondent has caused cruelty to the petitioner.

17. Admittedly, the petitioner had filed Petition No.A-180/2001 against the respondent-wife on 17.05.2001 in the Family Court, Aurangabad for restitution of conjugal rights and the respondent had also filed Petition No.A-835/2000 on 18.12.2000 against the petitioner under Section 125 of the Code of Criminal Procedure claiming maintenance for herself and her daughter Bhagyashri. Said both the proceedings were decided by a common judgment and the petition of the petitioner was dismissed and the petition of the respondent for maintenance was allowed and maintenance at the rate of Rs.500/- per month was granted to her and her daughter was granted maintenance of Rs.300/- per month from the date of application. Admittedly, the respondent had also

filed Petition No.A-270/2004 on 04.09.2004 for restitution of conjugal rights against the petitioner and the said petition was also dismissed by the Judge, Family Court, Aurangabad on 06.09.2005. Filing of the petitions by both the petitioner and the respondent against each other for restitution of conjugal rights show that they were interested in cohabitation.

18. It is pertinent to note that the petitioner-husband has not specifically pleaded as to how the respondent has caused cruelty to him and his pleading which is referred earlier in respect of harassment caused to him by the respondent, is vague. Therefore, uncorroborated evidence of petitioner is not sufficient to state that the respondent has caused cruelty to the petitioner within the meaning of Section 13 (1)(i-a) of the Hindu Marriage, Act.

19. As regards ground of desertion on which the petitioner has claimed divorce from the respondent-

wife, his evidence shows that as per the judgment in Petition No.180/2001 in paragraph No.34 the Court has observed, "that a decree for restitution of conjugal rights pre-supposes that parties will make an endeavor to live together peacefully and happily where the circumstances of the case discloses that there is no possibility of the parties living together in a state of happiness a decree for restitution of conjugal rights would be unjustified." Moreover, he has stated that he is suffering Lumber Spondylir C Polyassive and recently in the sonography it is found that his Left Kidney shows mild hydronephoris with hydropeter obstructing calculars at lt. vvj and therefore he is in need of partner. He stated that the respondent is not coming to him for cohabitation and hence it is necessary to dissolve his marriage with the respondent and to perform second marriage. Before accepting or rejecting the above said evidence of the respondent on the ground of desertion, it is necessary to refer the evidence of respondent-wife.

20. The respondent-wife in her evidence at Exh.26 deposed in accordance with her case regarding mental and physical cruelty caused to her by the petitioner, about filing of the case for the offence under Section 494-A of the IPC against the petitioner and others and about filing of the case under Section 494 of the IPC against the petitioner as he has performed second marriage. She has stated that the petitioner has one son and one daughter from the second wife namely Saroja. He has also stated that to give go bye to her case under Second 494 of IPC against the petitioner, the petitioner has filed the present petition. In the cross-examination on behalf of the petitioner, she has denied that she has deposed false to harass the petitioner. Thus nothing is found in favour of petitioner in the cross examination of the respondent.

21. It appears from the evidence of the petitioner that the respondent is residing separate from him since 2000. But, as the evidence of

respondent shows that the petitioner has performed second marriage with one Saroja and he has son and daughter from the marriage with Saroja, it cannot be said that she has deserted the petitioner. On the contrary her evidence shows that she has just and sufficient ground to reside separate from the petitioner. Moreover, as observed earlier merely because the Court has observed while deciding the petitions for restitution of conjugal rights of the petitioner and the respondent that there is no possibility of re-conciliation between the parties, the same is not sufficient to infer that the respondent has deserted the petitioner within the meaning of Section 13 (1)(i-b) of the Hindu Marriage Act.

22. The trial Court on proper appreciation of the evidence of the petitioner and the respondent held that the petitioner has failed to prove that the respondent has caused cruelty to him and that she has deserted him for a continuous period not less than

two years immediately preceding the petition for divorce and answered issue Nos. 1 and 2 in the negative. For the reasons discussed hereinabove we find no fault with the said findings recorded by the trial Court.

23. Learned Advocate appearing for the petitioner relying upon the ratio laid down in the case of Durga Prasanna Tripathy (supra) submitted that as the petitioner and the respondent are residing separate for almost 17 years, the trial Court ought to have granted decree for divorce in favour of the petitioner. As per the facts of the said decision, the respondent-wife in the said case was not prepared to lead conjugal life with husband and they were residing separately for almost 14 years. Moreover, there was an irretrievable breakdown of marriage and hence decree of divorce on the ground of desertion was granted by the Hon'ble Apex Court. In the present case, the respondent is residing separately for almost 17 years. But, the respondent-

wife was ready to live conjugal life with the petitioner-husband and therefore, she had filed petition for restitution of conjugal rights against the petitioner which was dismissed. Moreover, as the respondent has filed criminal case against the petitioner for the offence under Section 494 of the IPC as observed earlier, she has just and reasonable ground to reside separate from the husband and hence it cannot be said that she has deserted the petitioner. Therefore, ratio laid down in the above decision cannot be suitably made applicable to the present case to grant decree of divorce on the ground of desertion. Therefore, the arguments advanced by the learned Advocate appearing for the petitioner is not accepted.

24. For the reasons discussed hereinabove, we hold that the trial Court has rightly dismissed the petition for divorce of the petitioner by the impugned judgment and there is no justifiable ground to interfere with the same. Therefore, the appeal

being devoid of merits, the same is liable to be dismissed. Accordingly, we dismiss the same. No order as to costs.

[S . M . GAVHANE , J .]

[PRASANNA B. VARALE , J .]