

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

**FAMILY COURT APPEAL NO.41 OF 2017
WITH
CIVIL APPLICATION NO.136 OF 2017**

Sow. Sumaiyya Naz W/o. Sheikh Gufran Ahmed,
Age-24 years, Occu-Household,
R/o.C/o. Abdul Hamid Abdul Majid,
Akhtar Plaza, Flat No.11, 3rd floor,
in front of Seema Clinic, Azam Colony, ...**APPELLANT**
Roshangate, Aurangabad (Ori.Respondent)

VERSUS

Shaikh Gufran Ahmed S/o. Shaikh Kasim,
Age-28 years, Occu-Labourer,
R/o.Muksud Colony, Galli No.1, ...**RESPONDENT**
Aurangabad (Ori.Petitioner)

Mr.D.Y.Nandedkar, Advocate for appellant (appointed)
Mr.N.T.Tribhuwan, Advocate for respondent

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

DATED : 10.07.2018

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

. The appellant-wife (hereinafter referred to as 'the respondent') against whom the judgment and decree of restitution of conjugal rights has been passed by the Judge, Family Court, Aurangabad on 31.03.2016 in petition

No.A-57/2015 under Section 281(1) of the Mohomedan Law filed by the respondent-husband (hereinafter referred to as 'the petitioner'), has preferred this appeal being aggrieved by the said decree. With the consent of the learned Advocates appearing for the parties, the appeal is heard finally at the admission stage.

2. At the out set, it must be mentioned that attempt of amicable settlement between the parties was made during the proceeding before the Family Court and in this Court also but failed.

3. Facts as are relevant to decide this appeal, in short, are that marriage between the petitioner and the respondent was solemnized on 03.05.2014 as per Muslim rites and ceremonies at Aurangabad and they have no issue born from the said wedlock. After the marriage, the respondent went to the house of the petitioner for cohabitation while petitioner was residing in Aurangabad city with his joint family consisting of his parents, brother and sister.

4. Case of the petitioner-husband before the Family Court was that the respondent stayed properly with him during initial few days and then she started fighting

with his relatives in his absence for no reason. His relatives did not inform the same to him as the respondent was newly married. He and his parents tried to convince the respondent. However, she did not pay attention to it. She did not want to stay in the joint family of the petitioner. The respondent used to call her parents and used to go to her parents' house every now and then, without his permission. Every time he used to bring the respondent back for cohabitation. Her parents demanded that she and the petitioner should stay separate from his parents. Therefore, they started residing in a separate room. However, there was no change in the behavior of the respondent and she continued to go to her parents' house without informing him.

5. Further, it is the case of the petitioner that on 08.09.2014 after he left the house for his work, the respondent left his house with all her belongings including jewellery. After returning home when he realized the said fact, he requested the respondent to come back. But, she told him that she did not wish to stay with him. Therefore, he and his parents called a meeting on 14.10.2014 to resolve the issue. Syd. Iliyas, Musabhai, Abdul Latif and Sk.Usman attended the said meeting and the respondent was requested to resume

cohabitation. However, she refused. Moreover, on 16.10.2014 the petitioner personally went to respondent's parents house and requested her to resume cohabitation. However, she refused in clear language and said that if she is compelled to stay together, she would file cases against him. In the above circumstances, according to the petitioner, the respondent has left his company without any reason and kept him away from marital pleasure. Therefore, he filed petition for restitution of conjugal rights.

6. The respondent-wife resisted the petition by filing the written statement at Exh.8. She denied almost all the allegations made against her by the petitioner-husband. According to her, she was driven out of the house by the petitioner on 08.09.2014. Since the marriage, she was subjected to mental and physical cruelty by the petitioner and his parents. She was not provided with food. She was forced for starvation for several days. She was not provided soap and washing powder. She was also not allowed to have cool water. The family members of the petitioner believed in black magic and she was subjected to black magic by them by putting lemon and green chilly near her bed. Her sister-in-law used to visit the house of the petitioner every Sunday

and used to torture her mentally and physically. The ornaments and household articles given by her parents to the petitioner are still in custody of the petitioner. The petitioner harassed her for bringing Rs.2 lacs from her parents. The present petition is filed with a view to create a defence in criminal cases that would be filed against the petitioner. On the above grounds the respondent had prayed to dismiss the petition.

7. The learned Judge of the Family Court framed following two issues (Exh.10):

1. Whether the petitioner proved that, the respondent, without any lawful cause, has ceased to cohabit with him?
2. Whether the petitioner is entitled to the relief of restitution of conjugal rights?

8. The petitioner-husband in support of his contentions filed his affidavit in evidence and the respondent-wife has also filed her affidavit in support of her contentions. So also, both the parties have filed certain documents in support of their respective contentions.

9. On considering the evidence adduced by the parties, the learned Judge of the trial Court answered aforesaid both the issues in favour of the petitioner-husband and directed the respondent-wife to resume cohabitation with husband within one month from the date of order as per the impugned judgment and decree which is under challenge at the instance of the respondent-wife on several grounds mentioned in the memorandum of appeal.

10. Learned Advocate Mr. Nandedkar appointed through Legal Aid appearing for the respondent-wife has submitted that the petitioner and his parents caused mental as well as physical cruelty to the respondent. She was also subjected to black magic by them. The petitioner also made demand of Rs.2 lacs from the respondent and caused her cruelty to bring the said amount from her parents. As such she was driven out of the house on 08.09.2014 by the petitioner. Thus, according to the learned Advocate, when the petitioner caused cruelty to the respondent and forced her to live his house, the findings of the trial Court that the petitioner has proved that the respondent without any lawful cause, has ceased to cohabit with the petitioner-husband is not correct and therefore, the trial Court ought not to have passed the decree for restitution of conjugal rights against the respondent.

Further, it is submitted by the learned Advocate appearing for the respondent referring to provision under Section 281(2) of the Mohomedan Law that as per said provision a defence available to the respondent is of cruelty to her caused by the petitioner and said cruelty is proved by the respondent. Therefore, the trial Court was not justified in passing the impugned decree for restitution of conjugal rights and therefore, the said decree is liable to be set aside by allowing the appeal, as the Court cannot compel the wife to live with her husband in the circumstances present in the case. Moreover, the learned Advocate submitted that in the above circumstances it is impossible and dangerous to the respondent to live with her husband-petitioner. To support his submissions learned Advocate for the respondent has relied upon the decisions in the case of Raj Mohammad, Vs Saeed Amina Begum, AIR 1976 Karnataka 200 and in the case of Shakila Banu Vs Gulam Mustafa, AIR 1971 Bombay 166.

11. Mr. Tribhuwan, learned Advocate appearing for the petitioner-husband, on the other hand, supported the impugned judgment and decree. According to him, the case of the respondent that the petitioner caused cruelty to her is rightly not accepted by the trial Court and on

proper appreciation of the evidence adduced by the parties, the trial Court has rightly held that without any lawful cause the respondent ceased to cohabit with the petitioner and rightly passed the impugned decree and there is no ground to interfere with the same. Learned Advocate has also submitted that the respondent has filed divorce petition subsequent to the impugned decree and after dismissal of proceeding under the Domestic Violence Act, after thought and it would not affect on the impugned decree. Thus, he prayed to dismiss the appeal.

12. We have carefully considered the submissions made by the learned Advocates appearing for the parties and with their assistance we have perused the record and proceedings in the petition for restitution of conjugal rights and evidence adduced by the parties before the trial Court.

13. Considering the submissions made by the learned Advocates for the parties, the only point that arises for our consideration is; whether the Judge, Family Court, Aurangabad / trial Court was justified in passing the impugned decree for restitution of conjugal rights under section 281(1) of the Mohomedan Law?

14. Considering the nature of decree for restitution of conjugal rights, it is necessary to refer provisions under Section 281(1) and (2) of the Mohomedan Law to know what case petitioner has to prove and about the defence available to respondent-wife in such a matter. The said provisions read as under:

Section 281 : Suit for restitution of conjugal rights:

(1): Where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights.

(2): **Cruelty:** Cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit. "It may be, too, that gross failure by the husband of the performance of the obligation, which the marriage contract imposes on him for the benefit of the wife, might, if properly provide, afford good grounds for refusing to him the assistance of the Court."

15. Before considering the evidence of the parties in support of their respective contentions, it is necessary to refer few facts in respect of which there is no dispute. The said facts are that parties to this proceedings are Mohomedan. The respondent was married to the petitioner as per Muslim rites and ceremonies on 03.05.2014. Both are from Aurangabad. After the marriage respondent went to the house of the petitioner for cohabitation while the petitioner was residing in the

joint family consisting of his parents, brother and sister. It appears that since 08.09.2014 the respondent resides with her parents.

16. Now coming to the case of the petitioner that without any lawful cause the respondent has ceased to cohabit with him, to prove the same, the petitioner has mainly relied upon his evidence on affidavit at Exh.11 and office copy of his notice to respondent Exh.17 which was given prior to filing the petition. In his evidence, the petitioner has reiterated his almost all the contentions in the petition as referred earlier. More particularly in his evidence the petitioner has stated that after marriage for some days the respondent cohabit properly and then started quarreling with him and his other family members. He stated that she was insulting him and his family members and he used to tell the same to her parents. As he was residing in the joint family the respondent was not liking the same. Therefore, she used to call her parents and used to say them to take her with them and that they also used to take her to their house. However, as he was willing to cohabit with her, he used to bring her back. He stated that he tried to convince the respondent and her parents and it was told that she does not wish to stay with him and they insisted

for separate residence. Therefore, his father had given separate room for him and the respondent. But there was no change in the behavior of the respondent and she used to go to the parental house without informing him. His evidence further shows that finally on 08.09.2014 when he was out of the house for some work, the respondent without permission went to the parent's house alongwith her clothes and ornaments. Thereafter, he repeatedly requested her to come for cohabitation, but she flatly refused to cohabit with him. Therefore, there was meeting on 14.10.2014 in presence of four persons named earlier and request was made to the respondent and her parents to send the respondent for cohabitation but she flatly refused to cohabit with him. Therefore, on 16.10.2014 he gave a notice to the respondent calling upon her to come for cohabitation, but she did not respond to the said notice despite receipt of the same. Thereafter, also on 28.01.2015 he personally requested the respondent to come for cohabitation, but she had refused.

17. Although the petitioner has been cross-examined at length on behalf of the respondent nothing is found in her favour. Thus, as above referred evidence of the petitioner is consistent with his contentions in the petition there is no reason to disbelieve the said

evidence.

18. Apart from the above oral evidence of the petitioner, Exh.17 office copy of notice of the petitioner shows that said notice was sent by the petitioner to the respondent on 16.10.2014. The respondent has not denied receipt of the said notice in her written statement. By this notice also petitioner called upon the respondent to cohabit with him and showed his willingness to cohabit her. The contentions in this notice are also in consonance with the contentions of the petitioner in the petition. As such, this notice corroborates evidence of the petitioner that though all the times he has been willing to cohabit with the respondent, she avoided to cohabit with him.

19. Now coming to the case of the respondent-wife that the petitioner and his parents have caused cruelty to her and therefore petitioner is not entitled to restitution of conjugal right's decree, to prove the same she has mainly relied upon her evidence on affidavit Exh.20 (Exh.16). In her evidence the respondent-wife has stated in accordance with her contentions that the petitioner and his parents subjected her to mental and physical cruelty by not providing bathing soap, washing

powder for washing clothes, proper food and drinking cool water. So also, she stated about their practice of black magic and putting green chilly and lemon near her bed as per her case. So also, she stated that on 08.09.2014, she was driven out of the house saying her to bring Rs.2 lacs from her parents, else she should not come back. She also stated about filing of application under Section 12 of the Domestic Violence Act bearing No.280/2015 in the Court of JMFC, Aurangabad. Her evidence further shows that the petitioner threatened her as well as her father to withdraw the said case and therefore, she lodged the complaint in Jinci Police Station on 11.08.2015 and further lodged complaint against the petitioner and his father on 18.01.2016 for threatening her to bring Rs.2 lacs else the petitioner would perform second marriage.

20. In the cross-examination on behalf of the petitioner, the respondent has admitted that 8 to 9 meetings were held on the say of the petitioner and his parents, but after the said meetings she did not go to the petitioner for cohabitation. So also, she admitted that after filing the present petition she filed proceeding under the Domestic Violence Act against the petitioner. This evidence shows that after the respondent went to her parents house, 8 to 9 meetings were held but

she did not resume cohabitation with the petitioner. Moreover, her evidence shows that only after filing of the petition for restitution of conjugal rights against her by the petitioner she filed proceeding under the Domestic Violence Act, and two complaints referred to above to the police station about threatening her after thought. Moreover, though the respondent has stated that she lodged complaint in the police station regarding harassment suffered by her, she stated that she does not remember as to when said complaint was lodged. She stated that said complaint was lodged only against the petitioner. When it is the case of the respondent that the petitioner as well as his parents caused mental and physical cruelty to her, she would have lodged complaint against all of them and she would not have lodged the complaint only against the petitioner.

21. It is pertinent to note that in the cross-examination the respondent has further admitted that her affidavit was prepared by her Advocate and her father and on the say of her Advocate she signed on the said affidavit. She also admitted that at all the times whenever she has taken action against the petitioner her father was with her and further admitted that she does not wish to be with the petitioner. She also admitted

that she wants divorce from the petitioner and the same is also desire of her father. From this evidence of respondent, it appears that the evidence on affidavit Exh.20 (Exh.16) of the respondent-wife was prepared by her Advocate and her father and she has just signed the same on the say of her Advocate. Therefore, the evidence of respondent regarding cruelty to her by the petitioner and her parents is not believable. Another reason to arrive at this conclusion is that though the respondent claims that she lodged complaints on 11.08.2015 and 18.01.2016 in the Jinci Police Station respectively regarding threats given to her by the petitioner to withdraw proceeding against the Domestic Violence Act and regarding threats given to her on her failure to bring Rs.2 lacs from her father and she has further stated that the said complaints are produced with the affidavit Exh.20 (Exh.16) of her evidence and copies of said complaints are produced with list Exh.22, the said complaints are not proved and therefore, said complaints cannot be considered to state that there was cruelty to the respondent at the hands of the petitioner as well as his parents as alleged by the respondent. In fact, the respondent should have proved aforesaid complaints to corroborate her evidence regarding alleged cruelty caused to her by the petitioner and his parents, as alleged in

the said complaints.

22. Another aspect to be noted is that when it appears from the evidence of respondent as mentioned earlier that every time whenever she took action against the petitioner her father was with her, she should have examined her father. His evidence would have corroborated her evidence regarding cruelty caused to her by the petitioner and his parents. Admittedly, she has not examined her father. For the above reasons, the uncorroborated evidence of the respondent is not sufficient to infer that the petitioner and his parents or the petitioner individually caused cruelty to the respondent which is the defence available to the respondent-wife, in the proceeding for restitution of conjugal rights filed by the Mahomedan husband, as per Section 281(2) of the Mahomedan Law.

23. For the forgoing reasons, on considering the evidence of either sides, we hold that the petitioner husband has proved that without any lawful cause the respondent-wife has ceased to cohabit with him. The trial Court on considering the evidence adduced by the petitioner as well as respondent rightly observed that, "as the respondent has not mentioned any specific

instances of cruelty and as she did not file any complaint against him it appears that the allegations of respondent are normal wear and tear of matrimonial life and further rightly held that the respondent has failed to show that she was being subjected to cruelty". So also, the trial Court has observed that she has not proved any reason to stay separate from the petitioner. Thus, the trial Court rightly recorded affirmative finding on issue No.1.

24. At the cost of repetition the learned Advocate appearing for the respondent-wife submitted that it would be inequitable to compel the wife to live with her husband and wife cannot be compelled to live with husband if she has a reasonable apprehension that her life with her husband is impossible or dangerous to her. Reliance is placed on the decisions in the case of *Raj Mohammad* (supra) wherein it was held thus:

"There is no absolute right in a husband to claim restitution of conjugal rights against his wife. Gross failure by the husband of the performance of the obligation which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. It has to be borne in mind that the decision in a suit, for restitution of conjugal rights does not entirely depend upon the right of the husband. The Court should also consider whether it would make it inequitable for it to compel the wife to live with

her husband. There is no such rule which compels the Court always to pass a decree in a suit for restitution of conjugal rights in favour of the husband. As long as there is no such rule, it would be just and reasonable for the Court to deny the said relief to the plaintiff if the surrounding circumstances show that it would be inequitable to do so.

In a suit for restitution of conjugal rights by a Muslim husband against the first wife filed after she had called upon him to pay her and her children maintenance and he and he had taken a second wife during the pendency of the suit, it would be just and reasonable for the Court to deny the said relief to him on consideration of facts and circumstances revealing that the husband has been guilty of such conduct which leads to the conclusion that he has disintitiled himself to a decree for restitution of conjugal rights.”

. So also, learned Advocate placed reliance on the case of *Shakila Bano* (supra) wherein in paragraph 12 it was observed as under:

“Whatever may be the ancient law, it is now, difficult to appreciate this compulsion on an Indian wife when she has a reasonable apprehension that her life with her husband is impossible or dangerous to her. The Courts must be slow and cautious in these matters.”

25. In the present case, as discussed earlier, it is held that the petitioner husband has proved that without any lawful cause respondent-wife has ceased to cohabit with him and respondent has failed to prove that the petitioner and/or his parents have caused cruelty to her. So also, there is nothing on record to show that

respondent has reasonable apprehension that her life with her husband is impossible or dangerous, so as to say that she cannot be compelled to live with her husband. Moreover, here it is not the case of the respondent that the petitioner-husband has performed second marriage, so as to disentitle him to decree for restitution of conjugal rights as per facts in the case of Raj Mohammad (supra). Thus, as the facts of the present case are different from the facts in the aforesaid both the decisions relied upon by the learned Advocate appearing for the respondent-wife, said decisions are of no help to the case of the respondent-wife to state that she cannot be compelled to live with her husband the petitioner by the decree of restitution of conjugal rights. Therefore, argument advanced by the learned Advocate appearing for the respondent-wife based on the said decisions is not accepted.

26. For all the reasons discussed above, we hold that the learned Judge of the Family Court has rightly passed the impugned judgment and decree of restitution of conjugal rights in favour of the petitioner husband. There is absolutely no reason to interfere with the said decree. Therefore, the appeal being devoid of merits, the same is liable to be dismissed. Accordingly we dismiss

the same. The parties shall bear their own costs.

27. Learned Advocate Mr. D.Y. Nandedkar, was appointed through Legal Aid to represent the respondent-wife (appellant herein), who sincerely conducted the matter. His fees is quantified at Rs.5000/- (Rupees Five Thousand Only).

28. In view of disposal of the appeal, the Civil Application No.136 of 2017 does not survive and the same is disposed of.

[S.M.GAVHANE, J.]

[PRASANNA B. VARALE, J.]