

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

FAMILY COURT APPEAL NO.19 OF 2014

Babasaheb s/o Haribhau Mundhe
Age: 31 Yrs., occu. Service,
Government College of Arts and
Science, R/o N-4, F-113, CIDCO,
Aurangabad, Tq. And District
Aurangabad.

= **APPELLANT**
(ORIG.PETITIONER)

VERSUS

Mrs.Meena w/o Babasaheb Mundhe,
Age: 30 Yrs., occ. Household,
R/o C./o Bappasaheb Nagargoje
Bale Peer Amrai,
House No.M-279, Besides
Bhausahab Latpate, Nagar Road,
Beed, Tq. And Dist. Beed.

= **RESPONDENT**
(orig.Respondent)

Mr.VD Sapkal, Sr.Counsel h/for Mr. UB Bondar,
Advocate for Appellant;

Mr.SS Choudhari, Advocate for Respondent,

WITH

SECOND APPEAL NO. 753 OF 2018

Babasaheb s/o Haribhau Mundhe
Age: 40 Yrs., occu. Service,
R/o At present DSK Rohan,
Flat No.1, Model Colony,
Old Shivaji Nagar, Pune
Tq. and Dist. Pune-411016.

= **APPELLANT**
(Orig.Defendant)

VERSUS

Ms.Nirmala @ Minakshi w/o
Babasaheb Mundhe,
Age: 30 Yrs., occ. Household,
R/o Bale Peer Amrai,
Beed, Tq. And Dist. Beed.

= **RESPONDENT**

(2)

FC Appeal 19/2014 & Ors.

(orig.Plaintiff)

Mr.VD Sapkal, Sr.Counsel h/for Mr.VC Patil,
Advocate for Appellant;

Mr.SS Choudhari, Advocate for Respondent,

WITH

SECOND APPEAL NO. 336 of 2010

Babasaheb s/o Haribhau Mundhe
Age: 34 Yrs., occu. Service,
R/o N-4, F-113, CIDCO,
Aurangabad, Now at Pune.

**= APPELLANT
(orig. Defendant)**

VERSUS

Nirmala @ Minakshi w/o Babasaheb Mundhe,
Age: 28 Yrs., occ. Household,
R/o Balepeer Amrai,
Beed, Tq. And Dist. Beed.

= RESPONDENT

Mr.VD Sapkal, Sr.Counsel for Appellant;
Mr.MR Andhale, Advocate for Respondent,

**CORAM : SUNIL P.DESHMUKH &
SMT.VIBHA KANKANWADI,J.**
DATE : 26th NOVEMBER,2019.

JUDGMENT (Per:- SMT.VIBHA KANKANWADI,J.)

1. All these matters relate to the dispute between the same parties, i.e. husband and wife, wherein almost similar allegations have been made and different reliefs are asked in different matters.

2. First Appeal No.19/2014 has been filed by

the husband, challenging the dismissal of Petition No. A-303/2004 under section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 by the learned Judge, Family Court, Aurangabad.

. Second Appeal No.753/2018 is also filed by him challenging dismissal of his appeal bearing RCA No. 142/2014 by judgment and decree dated 31.8.2017 by learned District Judge-4, Beed and thereby confirming the judgment and decree passed by learned Civil Judge, Senior Division, Beed in Special Civil Suit No.137/2010 dated 18.4.2014 recording grant of maintenance to the wife.

3. Second Appeal No.336/2010 is also filed by the husband challenging the judgment and decree dated 10.2.2009 passed in RCA No.167/2006 by learned District Judge-2, Beed, thereby allowing the appeal and reversing the judgment and decree passed by Civil Judge, Senior Division, Beed in HMP No.55/2004 on 15.9.2006 and thereby passing a decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act in favour of the wife.

4. Before turning to the disputed facts between the parties, admitted facts need to be considered. The appellant is husband and respondent is his wife (henceforth, the parties are referred to as husband and wife). They got married on 7.6.2002, when in fact, it was the day of their engagement ceremony. By avoiding the expenditure the marriage was solemnized at the engagement ceremony itself.

5. The husband is physically handicapped person suffering from 45% of permanent physical disablement. He is a Government servant and they both were distantly related to each other even prior to the marriage. It is an admitted position that the husband is victim of polio and there is problem in his leg. He cannot walk without crutches. The husband has a step-mother and many times, she resides with the appellant-step-son-. Since 1.8.2002, husband and wife are not residing together.

6. With this case, the husband appears to have lodged the petition for divorce under Section

13 of the Hindu Marriage Act with the Family Court at Aurangabad on 19.10.2004. He had contended that since he is educated and is aware about his physical disablement, already preferred to have adjustment in every situation of the life. He accepted the proposal of the respondent wife which was brought by her father. But, his endeavour was that she ought to have given a free willingness to accept him with his physical disablement. At the time of settlement of the marriage itself, it was decided to avoid unwanted expenditure on marriage and, therefore, without distributing marriage invitation cards, the marriage itself took place on 7.6.2002 as per the Hindu rites. After the marriage, the wife joined him for cohabitation at Aurangabad. He was under impression that he had got adjustable life partner, who would understand him and would become his support of his life. However, his dream got shattered within 10-15 days itself of marriage. The respondent did not respond at the first night of the marriage, but he did not take it seriously taking into consideration the fact that the wife will take time to adjust herself. He had shown his patience and waited for

the response from the wife for her matrimonial obligations. The wife had gone to her parental house after the marriage as per the rituals and then after her arrival, she started keeping herself away from him. She did not allow him to touch her body during her stay with him. When he had tried to pacify her at that time in a very and specific unequivocal terms she told that she was not willing to marry with a person who is crippled and physically handicapped. She gave insulting treatment to him. When he asked as to why then she had married to him; she disclosed that it was against her wish and will. It was also told by her that the marriage was performed under tremendous pressure and threats by her parents as her father had told her that if she refuses to marry, then he would consume poison and it would be difficult for them for the marriages of her two brothers. Thereafter, the husband had called the parents of the wife and other close relatives for joint-meeting at Aurangabad on 27.6.2002. He narrated the entire situation to them. The relatives were also surprised with the attitude and approach of the wife. They tried to convince her and assured

that they would see that further marital life would go smoothly. The parents of the wife requested the husband to forgive her for her foolish behavior and then they took the wife to Beed, i.e. their place on 28.6.2002 and brought her back to Aurangabad on 21.7.2002. They had assured him that the wife will not create any problem and would lead happy married life with him. He asked the wife in presence of her parents to verify whether she was acting under any pressure and threats, but at that time, the wife begged for his pardon in presence of her parents. The husband expressed that he has no grievance in his mind about the behaviour of the wife and will take it as a new beginning in his life. Even after the said assurance, the wife did not change her behaviour. Whenever the husband tried to have closeness and company of the wife, she told him not to touch her body otherwise she would commit suicide. The husband did not lose hope but tried to show love towards his wife. But still once when he was trying to accept her company, the wife got annoyed and put kerosene on her body. The husband got shocked about the unexpected behaviour of the wife and thought that

such drastic action would lead to the end of his married life. The husband being physically handicapped would not have prevented the wife from any misdeeds in future and, therefore, he assured her that he will not come in her way and she is free to lead her life as per her own wish. But he was totally depressed and frustrated due to the behaviour and attitude of the wife. He was always under mental tension even at his working place, which had affected his performance. The husband has specifically stated that though he is handicapped, he needs company, love and affection of the wife, but the wife is reluctant. It is stated that the said incident had taken place on 29.7.2002 and then it was immediately informed by him to her father and brother on phone. The parents of the wife did not take any cognizance of the incident and were silent spectators. The husband had gone to his college to discharge the official duties on 1.8.2002. After his return, he found that the wife is not at home and, therefore, telephonically enquired with her sister at Jalna as well as to her parents at Beed about her whereabouts. The wife had gone to Beed without

informing him and since then she is staying there without any reasonable cause and justification. Every attempt has been made by the husband and his relatives to re-unite them, but those efforts have failed. The last attempt was made on 17.12.2003 when he had tried to convince her for resuming cohabitation, but she flatly refused to accept him and threatened him with dire consequences if he insists for re-union. Hence, he filed the petition for divorce.

7. The wife has filed written statement at Exhibit-9. She has stated that she has denied that in order to avoid unwanted expenditure, the marriage was performed on the date of the engagement itself. It is stated that all the marriage expenses were borne by her father. The husband has not spent anything. All the other averments and allegations against her have been denied by her specifically. The averments about touching to the body of the wife by the husband are stated to be wrongly made. It is stated that it is wrong that she had not allowed the husband to enjoy the marital life with her. She never uttered that

she was not ready to marry him as he is handicapped. She had given consent for the marriage with free will having every knowledge about the physical condition of the husband. It is denied that the marriage was performed against her will and wish. She has denied that there was an attempt to commit suicide by her when the husband has tried to touch her. It is denied that efforts were made by calling her parents and other relatives and she had left the matrimonial home without informing the husband on 1.8.2002. It is contended by way of special pleadings that she knew the husband since about 15-20 years as they were distant relatives even prior to the marriage. When her father and father of the respondent had consultations, her willingness was also taken into account and then the marriage was solemnized. After solemnization of the marriage, she came to Aurangabad for cohabitation where step-mother of the husband and others were residing. 3-4 days after her marriage, her co-sister (wife of elder brother of the husband) came to Aurangabad for delivery. She had greeted her as well as the step-mother and took blessings. At that time, mother-

in-law uttered that what blessings to be given as marriage is solemnized itself as a strange thing for them. She was surprised to hear the said statement and felt sorry. Even her co-sister made some remarks. She had defended her husband when remarks about his physical condition was made by them. It was stated that though she was doing the household work, but the mother-in-law and co-sister used to utter in filthy language and insulted her. They had insulted her on the ground of household work also. She tolerated those abuses and insults by the husband as well as his relatives for about four months. When she was left at her parental house, it was told there that since she is not doing household work properly nor she is keeping the house neat and clean, she should be taught about the same. Her father told that since she is a new-comer, she may require some time for adjustment. After her father had convinced the husband, she was left at the matrimonial home. She cohabited thereafter for about one month. Her father was called by giving phone call to him against her wish, but then in presence of her father, she was insulted on the same subject. She

was driven out of the house on that count by the husband and his family members. The husband has thereafter not taken care of her. After Deewali of 2002, her father and other respectable persons of her village went to Aurangabad for persuading the husband and accordingly she was left. Again her father was called in the month of April 2003. Some complaint about her behaviour was made that she was not doing any kind of work. The husband refused to allow her to cohabit and, therefore, her father brought her back to Beed. The last attempt was made by her father in the month of October 2004. However, the husband flatly refused. She had then filed the petition for restitution of conjugal rights in the court of Civil Judge, Senior Division, Beed. It has been denied that she has stayed with her parents without any reasonable cause and has not performed marital obligations. She, therefore, prayed for dismissal of the petition.

8. In HMP No.66/2004, which was filed by the wife before Civil Judge, Senior Division, Beed, same averments have been raised, which she had

taken in her written statement in the petition for divorce filed by the husband. Therefore, they are not repeated here. It was her further contention that as she has been driven out of the house, but she has desire to cohabit with the husband, the husband should be directed for resumption of cohabitation.

9. In the written statement to the petition for restitution of conjugal rights, i.e. HMP No. 66/2004, the husband has taken the same contentions, as are complained in the petition for divorce before the Family Court at Aurangabad. Therefore, those averments are not repeated here again. It was thus specific contention of the husband that since the wife has left his company without any reasonable cause, there is no question of giving him directions for resumption of cohabitation.

10. Special Civil Suit No.137/2010 was filed by the wife for getting maintenance under Section 18 of the Hindu Adoption and Maintenance Act. Same averments were raised, but it is to be noted that

it was filed on 29.11.2010. In the mean time, HMP No.66/2004 filed by her for restitution of conjugal rights, was dismissed by the trial court. But, then she had filed RCA No.167/2006 before the District court and it was decreed. It was also stated that the Second Appeal filed by the husband is pending before this court. Since the date of desertion, the husband has not made any arrangement for her maintenance, she prayed for maintenance.

11. The husband, by filing written statement, denied all the averments and raised same contentions.

12. In all the matters issues were framed and parties have led oral as well as documentary evidence.

13. Taking into consideration the evidence on record, the learned Principal Judge, Family Court, Aurangabad, dismissed Petition No.A-303/2004, which was filed by the husband for divorce. Hence, he has filed First Appeal No. 19/2014. As aforesaid, HMP No.66/2004 was dismissed by learned Civil

Judge, Senior Division, Beed on 15.9.2006, however, the appeal filed by the wife, i.e. RCA No. 167/2006, was allowed by learned District Judge-2, Beed on 10.2.2010, thereby the decree for restitution of conjugal rights came to be passed against the husband. The said decree has been under challenge in Second Appeal No.336/2010.

14. Special Civil Suit No.137/2010 was partly allowed and the husband has been directed to pay maintenance @ Rs.7,000/- per month from the date of the suit till actual realization of amount. Regular Civil Appeal No.142/2014 filed by the husband challenging the judgment and order granting aforesaid maintenance, was dismissed by the learned District Judge-4, Beed on 31.8.2017. Hence, he has filed Second Appeal No. 753/2018.

15. It will not be out of place to mention here that Second Appeal No.336/2010 has been admitted by learned Single Judge on 17th November, 2011 by framing substantial questions of law. Second Appeal No.753/2018 though pertains to Single Judge; yet after it was filed taking into

consideration Family court Appeal No.19/2014, was already clubbed with Second Appeal No.336/2010, Second Appeal No.753/2018 was also clubbed and ordered to placed before the Division Bench under the orders of the Senior-most Judge of this Bench. The Second Appeal is taken up for final hearing at the stage of admission itself and, therefore, substantial questions of law are then required to be framed now.

16. Following points arise for determination in FCA No.19/2014, -

(i) Whether husband has proved that the wife treated him with cruelty and there is no consummation of marriage?

(ii) Whether the husband proves that the wife has deserted him for continuous period of not less than two years immediately preceding the petition?

(iii) Whether the husband is entitled to decree of dissolution of marriage?

17. Following substantial questions of law arise in Second Appeal No.753/2018, -

(a) Whether the wife is entitled to get maintenance under Section 18 of the Hindu Adoption and Maintenance Act on the ground of desertion?

(b) Whether interference is required in the decree passed by the courts below.

18. Following substantial questions of law

have been framed in Second Appeal No.336/2010, -

“(1) Whether the learned Judge of the lower Appellate court is right in reversing the judgment of the trial court which is based upon realistic appreciation of the evidence ?

(2) Whether the learned Judge of the Lower Appellate court has considered the provisions of Section 9 of the Hindu Marriage Act and further has drawn conclusion in accordance with said provision?

(3) Whether judgment of the lower Appellate court is sustainable in law and warrants interference at the hands of this Hon’ble Court?”

19. Though the evidence that has been led in all the matters is different; yet at the cost of repetitions, it will have to be said that the basic story put-forward by both the parties was same. In fact, they ought to have been advised by the concerned advocates representing them to club all their proceedings in one court, which would have been in the interest of the parties and it would have avoided the possibility of contradictory findings. However, since this did not happen, the evidence led by the parties in all the proceedings

is considered now.

20. Heard learned Advocates for the respective parties.

21. It has been submitted on behalf of the husband that though the marriage had taken place between the husband and wife on 7.6.2002, the husband had come with a specific case that there is non-consummation of marriage. The parties are admittedly residing separately since 1.8.2002, i.e. within a period of two months of the marriage. The husband is 45% permanently disabled as he had suffered polio attack. He is unable to walk without crutches. He had every hope when the marriage was fixed that his wife would be having good understanding and would give him moral as well as physical support throughout his life. However, almost within a week of the marriage, he realized that the marriage was against wish of the wife. All the details have been given by the husband in his petition as well as written-statement and the evidence. He has also specifically stated that what was his expectation from the wife. The wife

had gone to her father's house on her own. Though in the written statement, she alleges harassment on the ground that she was not able to do household work; yet vital admissions given by her have not been considered by the courts below. She has specifically admitted that the husband had engaged maid-servant for almost each and every work. Then question arises as to what kind of work she was asked and she was not able to do. The learned Civil Judge, Senior Division, while writing judgment in HMP No.66/2004 has reproduced the admissions those were given. She had admitted that, -

“माझेकडे घरातील स्वयंपाक या खेरीज दुसरे कोणतेही काम नव्हते. लग्नापुर्वी स्वयंपाक करण्याची सवय होती. बाबासाहेबाचे घरी टेलीफोन, टी.व्ही. व मिक्सर या वस्तु होत्या. त्या ज्या माझे माहेरी नव्हत्या. या व्यतिरिक्त ईतर राहणीमान सारखे होते. औरंगाबाद येथे मी माझे सासु व बाबासाहेब अशी तिनच लोक रहात होतो. घरात तिनच माणसे असल्यामुळे फारसे काम नव्हते.....

औरंगाबाद येथे घरातील फरशी पुसण्यासाठी व भांड्यांना बाई होती.”

Therefore, whatever contentions she raised, which according to her amounted to harassment, appear to be false contentions. The learned Judge of the Family court erred in holding that the husband has failed to prove non-consummation of marriage and

that the wife is living on her own accord at her father's place. Perusal of the impugned judgment would show that unnecessarily every kind of concession is given to the wife on the count that the marriage was new and it would have required the wife to adjust herself to the new environment. In fact, this ground was never raised by the wife. It was the husband, who has all the times taken initiatives to bring the wife back for cohabitation even during the said period of two months. When the husband is positively making a statement that there is no consummation of marriage, then it ought to have been accepted as there is no contrary statement made by the wife in any of her proceedings. As regards the witnesses examined on behalf of both the parties are concerned, they are words against words. But the admissions of the witnesses examined on behalf of the wife are required to be considered. The observations by the learned Judge of the Family Court that there is no proof by the husband to support his statement that the wife had left the matrimonial home on 1.8.2002 without informing anybody and without anybody's permission. When he himself is saying that the

said fact was not informed to him what else was required. Even if for the sake of arguments it is accepted that the wife had cohabited with the husband till April 2003, as has been accepted by the learned Judge of the Family Court; yet thereafter there was no initiative taken by the wife to resume cohabitation. The wife has tried to encash a fact that the sister-in-law of the husband had come to Aurangabad for delivery. However, the wife has intentionally not stated that the parental house of her co-sister (i.e. wife of brother of husband) is at Aurangabad and co-sister had gone to her parental house for delivery and not at the house of the husband in this case. Her casual visits could not have been only for the sake of harassing the wife. The husband has suffered a lot in all these years and there is absolutely no possibility of the husband and wife coming together. The husband has lost hope that the wife will not accept him with his disability. Under such circumstance, when there is non-consummation of marriage, which amounts to cruelty, the decree ought to have been granted. The learned Appellate Court, while dealing with RCA No. 167/2006, which

was filed by the wife, challenging the dismissal of her suit for restitution of conjugal rights, went wrong in re-appreciating the evidence, which was based on realistic appreciation of evidence by the trial court. When the husband had specifically told about non-consummation of marriage, it has been unnecessarily disbelieved by the Appellate court by stating that within a period of nine months of cohabitation, it would have been unimaginable that there would have been sexual intercourse between the husband and the wife. Much stress has been led about the relationship of step mother and step brother and his wife by the wife in this case, when in fact, there was no distance in the relationship and the husband had accepted the step-mother as his real mother and the relationship between the brothers was good. There was no occasion for the wife to raise any question about their relationship. The Appellate court, therefore, went wrong in reversing the decree passed by the learned Civil Judge, Senior Division, refusing the decree of restitution of conjugal rights. When the wife had deserted the husband without any reason, she was not entitled for the

maintenance and, therefore, the learned Civil Judge, Senior Division, while deciding the Special Civil Suit No. 137/2010, went wrong in passing the order of maintenance @ Rs.7,000/- per month to the wife.

22. In order to buttress his submissions, learned Advocate for the appellant has relied on the decision in Malathi Ravi, M.D. (Dr.) Vs. B.V.Ravi MD (Dr.) – AIR 2014 SC 2881, wherein, it has been held, - “Wife also referred to few authorities to indicate what concept of mental cruelty means, mental cruelty and its effect cannot be stated with arithmetic exactitude. It varies from individual to individual; from society to society and also depends on the status of the person. What would be the mental cruelty in the life of two individuals belonging to particular strata of the society, may not amount to mental cruelty in respect of another couple belonging to a different stratum of society. The agonized feeling or for that matter, sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn

from attending circumstances."

23. It has been argued on behalf of the wife that in the petition for divorce, the husband has examined only himself; whereas the wife has examined in all three witnesses. It had come on record that in all stay of the wife was for one month and 25 days only which was definitely a short marital life. For section 13(ia) and (ib) of Hindu Marriage Act, this period will have to be considered too short. When section 13(ia) of the Hindu Marriage Act contemplates two years as minimum period, then the observations by the Judge of the Family Court that the husband ought to have waited for adjustment of the wife, is correct. The wife has denied all the allegations, especially the fact that the marriage had taken place against her wish. She has specifically stated that when there was marriage proposal of the husband and her father had asked her, by knowing all those physical limitations of the husband, she had accepted him. Father has also stated that the marriage was performed after the daughter had given her consent, knowing fully well what is the physical condition

of the bride-groom. It has also come on record that in the evidence of RW-3 that, at the time of settlement of marriage, interaction had taken place between the husband and the wife and, therefore, the wife was well aware that the husband was physically handicapped. Now, the husband, in order to seek sympathy, cannot put-forward the story that after the marriage, the wife had refused to accept him and told him that the marriage has been performed due to the pressure from her father and it was against her wish. The wife has denied that there is non-consummation of marriage. Under such circumstance, there was absolutely no cruelty. Though the learned Civil Judge, Senior Division had refused to grant decree for restitution of conjugal rights, the learned Appellate Court had appreciated the evidence properly. It has been rightly taken note of the fact that two brothers of the wife were yet to marry and under such circumstance, the wife would not have left the house of the husband on her own. The wife had clearly stated and had led evidence to the fact that the step-mother and co-sister had given taunts to her, insulted her and she was harassed on the count that she is unable to

cook food. She was asked to go to her father's house forcibly to learn cooking, which, in fact, she was already knowing. It has been rightly observed by the Appellate court that the incidents those were quoted by the husband do not infer that the wife had no intention to cohabit with the husband. When she has been deserted by the husband, she was entitled to get decree for restitution of conjugal rights and the maintenance has been rightly awarded to her taking into consideration the income of the husband.

REASONS :

24. AS TO POINT NO.(i)

(i) Whether husband has proved that the wife treated him with cruelty and there is no consummation of marriage?

25. As aforesaid, the husband has filed the petition for divorce on two grounds, viz. 1) he has been subjected to cruelty by non-consummation of marriage; and 2) his desertion. Now, dealing with the point as regards non-consummation of marriage, thereby amounting to cruelty is concerned, the husband, in specific words, has deposed about the same. It is stated on oath that since first night, when he had tried to establish sexual relationship,

the wife had refused and she had disclosed to him that, as her father had threatened her and thereby compelled her to marry with the husband, she has performed the marriage. That means, it was disclosed by her that she has not voluntarily married with the husband. It is to be noted that there is a denial in respect of the same by the wife in plain words. It is not the case that the husband has only pleaded as regards what had happened on the first night; but it is his statement on oath that, by keeping patience, he was waiting for the wife's positive response. Further, he has categorically stated that a meeting was held on 27.6.2002 in which, apart from the husband and wife, his brother and parents of the wife were present. He had disclosed about non-consummation of marriage. But, then taking into consideration the attitude of the wife, her father assured that the wife will not do it in future and took her to Beed for giving advice with permission of the husband on 28.6.2002. Here, we are required to consider that since childhood, the husband is handicapped, naturally, there would have been hopes in his mind when he had performed the marriage with

the wife that she would support him in his life. But, then the entire testimony of the husband, which is believable and appealing, as he is a very much consistent, that he had adjusted and expected the wife to respond positively till they separated. It will not be out of place to mention here that in view of the fact that since childhood, when he was handicapped, it can be foreseen that he would have been making adjustments in life at many levels and, therefore, when question was in respect of his life partner and the life partner was behaving in such a way, then definitely, there appears to be substance and truth in his statement that he was shocked at her attitude. As regards wife side is concerned, it is to be noted that she is simply denying the non-consummation of marriage. Definitely it is very private affair between the husband and wife regarding consummation or non-consummation of marriage. But, then if there would have been consummation of marriage, the husband would not have taken to make it publicly that there is non-consummation. A careful perusal of the written statement would show that there is denial and it is stated that those averments are after-thought. As

regards the allegations levelled by the wife, they would be considered at a later stage; however, at this stage itself, observation can be made that those allegations levelled by her appear to be very trifling in nature, which would not have caused desertion. It is, in fact, usual wear and tear of marital life between the husband and wife, for which, nobody would take such a drastic step. Therefore, as regards his petition, which was before the Family Court, the evidence led by the husband in respect of non-consummation of marriage and thereby amounting to cruelty is concerned, it is believable. We do not agree with the reason given by the learned Judge of the Family Court that the husband ought to have given much more time to the wife to adjust herself. According to the reasons given by the learned Judge of the Family Court, the wife resided with the husband for one month and 25 days and, therefore, it is observed that as the wife was new-comer in her matrimonial home, was trying to adjust and accommodate with the husband and his relatives. Therefore, the period of one month and 25 days is apparently too short period to jump to the conclusion that the wife

deprived the husband since then. Here, it is to be noted that in her written statement, the wife says that she had resided for about four months with the husband and not one month and 25 days. Therefore, the court cannot infer in favour of a party by taking into consideration the case put-forward by the other party. If the period of matrimonial home for adjustment and fulfillment of marital obligation for the wife was required to be considered, then it ought to have been four months period, as contended in the written statement and there is no such specific averments on behalf of the wife that during the said period of four months, the marriage was consummated. Therefore, when non-consummation of marriage amounts to cruelty, a decree for divorce deserves to be passed.

26. The husband has also contended that since the wife was talking him in insulting language, as he is physically handicapped, and then gave threats to commit suicide by pouring kerosene, if he tries to establish sexual relationship with her and also threatened to implicate him in a false case, it

also amounted to cruelty. The learned trial court has given much stress on the fact that the husband has not examined any other witness, for example, his brother, who was residing with him for certain period, or his mother, who is also stated to have resided for certain period. In respect of this point, it can be said that if the testimony of the husband is believable and there is nothing contrary coming from his cross-examination, then there is absolutely no necessity to have corroboration to the facts, which have been stated by the husband in his examination-in-chief. It is the statement on oath by the husband that most of the dialogues or conversations, that had taken place between him and the wife, were amongst them only. Under such circumstance, how there could have been a direct evidence on the point. Even if for the sake of argument it is accepted that, he ought to have examined his brother, but then the major part of the testimony of the brother would have been hearsay as he would have said that such and such fact was told to him by the husband. Such quality of evidence is not expected. In this case, the wife has examined her father and brother, which is in

respect of her contention that the husband and his relatives had asked them to take the wife back as she was not able to do the household work. It is to be noted that the wife or her father have not come with a case that there was any illegal demand of dowry or money for any other purpose by the husband and/or by his relatives. Only on the count that she was not able to do the household work (it is unbelievable) that the wife would have been deserted. The father of the wife is an advocate and, therefore, it can be said that he is well-versed in law; yet it appears that at no point of time any notice was issued to be husband. Therefore, when we compare the evidence, that has been adduced from both the sides, then testimony of the husband appears to be believable. His stand appears to be cogent and, therefore, the aforesaid point is answered partly in the affirmative.

27. As to Point No.(ii) in FA No.19/2014 and as to Point Nos.(1) to (3) in SA No.336/2010, which read thus, -

(ii) Whether the husband proves that the wife has deserted him for continuous period of not less than two years

immediately preceding the petition?

AND

“(1) Whether the learned Judge of the lower Appellate court is right in reversing the judgment of the trial court which is based upon realistic appreciation of the evidence ?

(2) Whether the learned Judge of the Lower Appellate court has considered the provisions of Section 9 of the Hindu Marriage Act and further has drawn conclusion in accordance with said provision?

(3) Whether judgment of the lower Appellate court is sustainable in law and warrants interference at the hands of this Hon’ble Court?”

28. Since the aforementioned points are inter-related, they are taken up together for discussion.

29. The first and foremost fact that is required to be considered is that, the learned Trial Court, dealing with the petition, bearing HMP No.66/2004 for restitution of conjugal rights, i.e. learned Civil Judge, Senior Division, had, by

elaborate discussion and appreciation of evidence, dismissed the petition. The learned First Appellate court had then re-appreciated the evidence and allowed the appeal that was filed by the wife. Therefore, first of all, we are required to see as to how the first Appellate court should approach the matter in respect of appreciation of evidence.

30. The Hon'ble Supreme Court has in various cases, reiterated the principle that the appellate court is the final court of fact ordinarily and, therefore, a litigant is entitled to full, fair and independent consideration of the evidence at the appellate stage. In Santosh Hajari Vs. Purshottam Tiwari (Deceased by L.rs.) - 2001 3 SCC 179.

. Further, same view was followed by a three-judge Bench decision of the Apex court in Madhukar and Ors. Vs. Sangram - 2001 4 SC 756. It was reiterated that, "sitting a court as first appellate, it is duty of the court to deal with all the issues and evidence led by the parties before recording its findings." Here, in this case, no doubt, the learned First Appellate court has re-

appreciated the evidence, as contemplated, by hearing both parties. However, it is to be noted that some such inferences have been recorded, which were not appealing to the Judge. On his own understanding, he has made observations that, such intention might not have been in the mind of the wife or the contention raised by the husband is not believable. On his own belief, the learned First Appellate Court has drawn inferences that it is unbelievable that in the period of nine months, in which the husband and wife had cohabited, she would not have given physical satisfaction to the husband. As aforesaid, the period of cohabitation in the written statement filed by the wife before the Family Court, is for about four months; whereas the learned Judge of the Family court considers it as one month and 25 days, and now, the First Appellate Court, i.e. learned District Judge-2, Beed, was considering the cohabitation alleged to be for nine months. The contention of the wife, who had filed the petition for restitution of conjugal rights, was required to be considered, so also, the evidence that was adduced by her in that case. Though she had come with the same case that

she was subjected to harassment by the husband, his step-mother and sister-in-law that the wife was not able to do household work properly and she was not cultured; in her cross, she has admitted that, except cooking, there was no other work which was left to her. She was in habit of cooking food prior to marriage also. The husband was having telephone, TV and mixer facilities at his house, which facilities were not available at her parental house. Only three persons were residing in the house at Aurangabad, i.e. wife herself, husband and mother-in-law. In categorical terms, she has admitted that there was maid servant for doing the work of cleaning the utensils, washing clothes and cleaning the floor. She has also stated that since there were only three persons at Aurangabad, there was no much work to do. If there was no much work to do and only cooking, which she was doing even prior to marriage, she was asked to do once again after the marriage, then where was the question for her harassment. If we consider her examination-in-chief, she intended to say that, though she was doing the household work, the husband, his mother and sister-in-law used to insult her and on that

count the brother of the husband left her at Beed and it was told to her parents that as she is unable to do work properly and keep the house clean, she should be taught. Merely on the basis of alleged taunts or verbal exchange of dialogues, it is hard to believe that she would have been left at her parental house and her father, who is an advocate, would have kept quite for such a long period. Important point to be noted is that, after she was allegedly left by her brother-in-law; in her examination-in-chief itself, she says that, the husband had given a phone call to her father after about 10-12 days, stating that he should leave the wife at his home. If there would have been a fact that, with intention she should learn the work, she would have been left at her parental house, then within 10-12 days, there was no reason for the husband to give phone call to her father. She then says that her father left her to her matrimonial home and then she was allowed to cohabit. She then says that after a month again, the husband asked her as to whether her father should be called by giving a phone call. She does not say that within said period of one month, the husband had seen her

working and was not satisfied with the work and, therefore, the husband made such statement. With this background, she gave the examination-in-chief and, as aforesaid, in her cross, she had given those vital admissions that there was no much work to do at her matrimonial home since there were only three persons residing at Aurangabad.

31. In the cross-examination of the husband, it has come on record that his father has two wives. He is the son, begotten from first wife and step-mother was residing with him for certain period at Aurangabad. But, then he says that normally, the step-mother used to stay at Pune with her son. Definitely, the wife would have been knowing this fact and she ought to have been sure that the step-mother would go to stay with her son at Pune. At the cost of repetitions, it can be said that since the husband is handicapped person, he was expecting support from the wife. The parties have come with a case that there was approval of the husband and wife in a meeting and then the marriage was performed. Definitely, the step-mother would have been knowledge or would have

experienced the difficulties in finding bride for the present petitioner-husband, might have said that it is more than enough that the husband has married. The intention of the mother would not have been to insult the wife. Even if the sister-in-law of the husband would have asked the wife as to what was the reason or what was going in her mind when she gave approval for the marriage. These all questions appear to have been asked because of the physical condition of the husband. It cannot be inferred that there was any ill-intention on the part of either the step-mother or sister-in-law of the husband. No doubt, in his testimony in HMP No. 66/2004, the husband has stated that the wife had not denied to cohabit with him; yet it is to be noted that the said answer was on the background of his contention that the wife has not performed the marriage voluntarily or with her wish.

32. The learned Trial Judge, deciding the HMP No.66/2004, had rightly appreciated the evidence and, therefore, the learned First Appellate court ought not to have reversed those inferences and appreciation of evidence on the basis of his own

surmises. We uphold the reasons given by the learned Trial Court holding that the wife had failed to prove that the husband has deserted her without any reasonable cause since April 2003. She was not subjected to any mental cruelty by the husband and his relatives. She was not entitled to get the decree for restitution of conjugal rights. The learned First Appellate court erred in reversing the judgment of the trial court which was passed on realistic appreciation of evidence. The learned First Appellate Court has not considered the provisions of Section 9 of the Hindu Marriage Act and the further inferences or conclusions drawn are wrong. The judgment of the first Appellate court is not sustainable in the eyes of law and, therefore, warrants interference at the hands of this Court. The further consequence of the same is that the husband has proved that the wife has deserted him for the continuous period. It is to be noted that the learned Judge of the Family court has considered that the period of desertion, as stated by the husband, is not that of two years immediately preceding the petition; however, this has to be considered from the point that the

marriage took place on 7.6.2002 and the desertion that has been proved by the husband is from 1.8.2002 and the petition was filed on 19.10.2004. There is not cogent proof by the wife that the desertion is after 1.8.2002 or it was from April 2003. We do not find any substance in the reasoning given by the learned Judge of the Family court that the period of cohabitation was one month and 25 days and it was short which was tried to be now supported by the learned Advocate for the respondent-wife herein for substantiating the argument that since two years minimum period, as contemplated under Section 13(ib), is not adhered to, the decree cannot be passed. As aforesaid, the desertion is from 1.8.2002 and the petition has been filed on 19.10.2004.

33. AS TO POINT NO.(iii) in FA No. 19/2014 -

In view of our findings to Point Nos.(i) and (ii) of the First Appeal No.19/2014 and Point Nos.(1) to (3) in the Second Appeal No.336/2010, on the ground of desertion by the wife and non-consummation of marriage, the husband is entitled to get a decree for dissolution of marriage. The

decree passed by the learned Judge of the Family Court, therefore, deserves to be set aside.

34. AS TO POINT NOS.(a) & (b) in SA No.753,
as referred to above, -

. Now, in view of the fact that the husband has proved that the wife has deserted him, the wife may not be entitled to get maintenance under Section 18 of the Hindu Adoption and Maintenance Act and thereby interference might be required in the decree passed by the courts below; yet it is to be noted that both the courts, which were dealing with the maintenance petition, appear to have not taken into consideration pendency of the appeals of the respective petitions filed for restitution of conjugal rights as well as for divorce. The decree passed in the petition for restitution of conjugal rights, in appeal or before the Trial court, so also by the Judge of the Family Court, had not achieved the finality. Therefore, independent assessment of evidence ought to have been required. There is no proper appreciation of evidence by both the courts. So also, merely on the ground that the husband has not made any arrangement for

maintenance of the wife, the decree for maintenance cannot be granted. The reason to stay separately is required to be considered. Therefore, though strictly speaking, the wife may not be able to claim maintenance; yet we take this as a special case and consider that ends of justice can be met with while the husband agrees to shell out certain amount to provide for maintenance to the wife, and specific statement was made to that effect by the learned Advocate for the respondent, we consider it appropriate that an amount of Rs.5,00,000/- (Rupees five lacs) in lump sum (or amount for the future life) be given to the wife. The points, referred to above, are answered in negative and affirmative respectively.

35. Taking into consideration the discussion stated above, following order is passed, -

ORDER

i. First Court Appeal No.19/2014 is hereby allowed.

ii. The judgment and decree dated 12.5.2008 passed by learned Judge of Family Court, Aurangabad in Petition No.A-303/2004, is hereby set aside.

The said petition stands decreed.

iii. It is declared that the marriage between the petitioner – Mr.Babasaheb s/o Haribhau Mundhe and respondent – Mrs. Meena w/o Babasaheb Mundhe, is hereby dissolved.

iv. The judgment and decree dated 31.8.2017 passed by the learned District Judge-4, Beed in RCA No.142/2014 and the judgment and decree dated 18.4.2014 passed by Civil Judge, Senior Division, Beed in Special Civil Suit No.137/2010, are hereby set aside. The said Special Civil Suit stands dismissed. The respondent-husband is directed to pay a lump sum amount of Rs.5,00,000/- (Rupees five lacs) (amount for future life) to the wife on or before 1st April, 2020.

v. The judgment and decree dated 10.2.2009 passed in RCS No.167/2006 by the learned District Judge-2, Beed, is hereby set aside and the judgment and decree dated 15.9.2006 passed by the Civil Judge, Senior Division, Beed in HMP No. 55/2004, is hereby restored.

vi. The parties shall bear their own costs of the proceedings. Decree be drawn up accordingly in respective matters.

vii. The Family Court Appeal as well as the Second Appeals stand disposed of in the aforesaid terms. Pending Civil Application/s, if any, stand disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

(SUNIL P.DESHMUKH)
JUDGE

BDV