

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

**FAMILY COURT APPEAL NO. 46 OF 2017.**

Rupali w/o Sachin Aute  
Age : 23 years, occu.: household  
R/o C/o Janardhan Ankush Hinge,  
6-11-22, Gut No.51, Banewadi,  
Near Aurangabad Railway  
Station, Aurangabad.

**Appellant.**

**Versus**

Sachin Sopan Aute  
Age : 34 years, occu.: mechanic  
R/o 02, Rajashri, Plot No.21,  
Survey No.349/21, Near Idea  
Tower, Datta Nagar, Behind  
Ganesh Market, Konark Nagar  
Area, Aadgaon Shivar,  
Nashik.

**Respondent.**

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Mr. V.M. Jaware, Advocate for the appellant.  
Respondent party-in-person.

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**CORAM : T.V. NALAWADE AND  
SUNIL K.KOTWAL, JJ.**

**Judgment reserved on : 21 February 2019.  
Judgment pronounced on : 27 February 2019.**

**JUDGMENT (Per Sunil K. Kotwal).**

1. This appeal is directed against judgment and decree passed by the Principal Judge, Family Court, Aurangabad in

Petition No.A-392/2016, whereby the decree for dissolution of marriage of the appellant/wife and respondent/husband is passed by the Court on 16.05.2017, on the ground of cruelty under Section 13 (1) (ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as the “Act”).

2. Respondent in the appeal is the husband. Hereinafter for clarity, the husband is referred as “petitioner” and the wife is referred as “respondent”, in accordance with their status in the divorce petition.

3. Undisputed facts in between the parties are that, the marriage of petitioner and respondent was solemnized on 14.02.2013 and they are issue-less. After the marriage respondent cohabited with petitioner at Nashik and that time she was pursuing her education in Bachelor of Arts (Second Year). It is also not disputed that even after the marriage respondent continued her education and for that purpose she used to stay at her parental home at Aurangabad during the period of examination.

4. Contention of the petitioner is that, the respondent used to quarrel with the parents of petitioner and her conduct

was arrogant. She did not cook and had rest by sleeping in the house. She insisted the petitioner to reside separate. Though the petitioner tried to convince the respondent, she did not improve her behaviour. Even she did not serve food to the petitioner at the time of lunch. Though the petitioner started living separate in a rented room, even then the respondent continued to frequently visit her parental home. On 21.07.2013 the parents of respondent quarreled with the petitioner and took the respondent to parental home. On 23.08.2013 petitioner fetched the respondent. Even thereafter on 22.09.2013 respondent went to her parental home with the consent of petitioner to appear for third year annual examination.

5.           Contention of the petitioner is that, the respondent terminated her pregnancy without the consent of petitioner. As the parents of respondent were not ready to send the respondent to her matrimonial home, on 18.11.2013 petitioner served notice to the respondent and thereafter she resumed cohabitation. On 08.12.2013 respondent sustained head injury when the petitioner was driving his motorcycle. On 25.01.2014, without any reason, the respondent abandoned the company of petitioner and went to

her parental home. Though the petitioner repeatedly requested the respondent to resume cohabitation, she did not pay any heed to it. On the other hand on 29.01.2014 the respondent issued notice to the petitioner making baseless allegations against the petitioner. That notice was replied by petitioner on 11.02.2014. Due to the conduct of respondent, petitioner had undergone mental torture. As the respondent was not ready to resume cohabitation, on 03.04.2014 the petitioner filed petition for restitution of conjugal rights bearing No.134/2014 in the Family Court, Nashik. On application moved by respondent, the said matter was transferred to the Family Court, Aurangabad and it was renumbered as A-436/2014. During pendency of this proceeding for restitution of conjugal rights, even the advocate for respondent threatened the petitioner on telephone, and therefore, the petitioner registered Non Cognizable Case No.132/2005 against the said advocate and informed the Court about that event under registered application. In the proceeding for restitution of conjugal rights, there was settlement in between the petitioner and respondent and on 30.09.2015 that proceeding was disposed of. However, on that date the respondent was not present in the Court, and therefore, petitioner could not take her

to his home. On 30.10.2015 respondent served notice to the petitioner and made allegation that though she went to matrimonial home, it was locked and the parents of petitioner did not allow her to enter in their house. Petitioner replied the notice of respondent on 02.11.2015 and sent money order of Rs.300/- to the respondent as travelling expenses for resumption of cohabitation. Respondent refused to accept that money order. Therefore, as the respondent was not ready to resume cohabitation, the petitioner was constrained to file this petition for divorce.

6. By filing written statement (Exh.23), the respondent denied all allegations of misconduct on the part of respondent and the alleged mental cruelty to the petitioner. According to respondent, the petitioner and respondent never lived separate at Nashik. According to respondent, the incident of motor accident was intentional conduct of the petitioner. Respondent contended that on 25.01.2014 the petitioner left respondent to her parental home and since thereafter she is living separate from the petitioner. She contended that the petitioner never tried to fetch the respondent for cohabitation. On the other hand, petitioner

used to ill-treat the respondent for demand of money. Contention of the respondent is that, though the respondent filed affidavit in Proceeding No.A-436/2014 that she was ready to resume cohabitation, the petitioner did not take her for cohabitation. Therefore, on 18.07.2016 the respondent filed application against the petitioner to Women Redressal Forum expressing her willingness to resume cohabitation. However, the petitioner did not express his willingness to resume cohabitation with the respondent. Therefore, on 16.11.2016 respondent filed complaint in Police Station against the petitioner and his parents under Section 498-A of the Indian Penal Code. In brief, contention of the respondent is that the petitioner is levelling false allegations against the respondent to avoid payment of maintenance to the respondent.

7. On behalf of the petitioner he himself stepped into witness box as PW-1 and no other evidence is recorded on his behalf. Respondent Rupali (DW-1) entered in witness box and did not examine other witness in support of her contention. Considering this evidence on record, the learned Family Judge held that the decree for divorce on the ground of desertion cannot

be passed. However, the learned Judge held that the petitioner has proved mental cruelty to the petitioner at the hands of the respondent. In the result, decree for divorce was passed only on the ground of mental cruelty to the petitioner.

8. Heard Mr. V.M. Jaware, learned Counsel for the appellant and Mr. Sachin Auti - party in person.

9. Learned Counsel for the appellant submitted that the allegations of cruelty made by the petitioner in his petition and oral evidence are in the form of trifling household dispute in between the husband and wife and do not amount to mental cruelty. He submits that the petitioner made false allegation of abortion against the respondent which is proved as baseless allegation before the Family Court. He submits that overall conduct of the petitioner indicates that he is not ready to cohabit with the respondent, but only to avoid the liability to pay maintenance to the respondent, he filed petition for restitution of conjugal rights as well as petition for divorce.

10. The original petitioner argued in person. Some and substance of his argument is that the respondent is reluctant to resume cohabitation with the petitioner and conduct of

respondent itself amounts to mental cruelty to the petitioner. He submits that the respondent committed attempt of suicide during pendency of divorce petition.

11. During the course of arguments learned Counsel for the respondent/wife submitted before the Court that the wife is ready to cohabit with her husband. However, the husband, who was present before the Court as party-in-person, has not expressed willingness to resume cohabitation with his wife.

12. After hearing the arguments of respective parties, following points arise for our consideration and we have recorded our findings against those points for the reasons stated below.

- |   |                                                                                                                                              |                                                                                                                           |
|---|----------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|
| 1 | Does the petitioner prove that the respondent/wife treated the petitioner with cruelty within the meaning of Section 13 (1) (ia) of the Act? | No.                                                                                                                       |
| 2 | Whether the decree for dissolution of marriage passed by Principal Judge, Family Court, Aurangabad is correct and proper?                    | No.                                                                                                                       |
| 3 | What order?                                                                                                                                  | :- The appeal is allowed. Divorce Petition No.A-392/2016 is dismissed. Parties to bear their respective costs throughout. |

**REASONS****AS TO POINT NO.1 :-**

13. At the outset, we must make it clear that the petition for divorce was filed by the petitioner on 16.11.2015 and as per the contention of both the parties, they are living separate from each other since 25.01.2014. Therefore, as held by the learned Judge, Family Court, Aurangabad the decree for divorce on the ground of desertion cannot be passed, as the period of alleged desertion is less than two years immediately preceding the presentation of petition for divorce.

14. Therefore, we have to examine whether the petitioner can prove mental cruelty to him at the hands of the respondent. It is trite that the parties cannot prove their respective case beyond their pleadings. Therefore, so far as the allegation of cruelty against the respondent/wife is concerned, the petitioner must stick up with his pleadings in the divorce petition.

15. After going through the pleadings of the petitioner, it emerges that his allegations regarding mental cruelty are in the following form :-

- (i) Respondent used to quarrel with the parents of the petitioner.
- (ii) She was reluctant to perform her household duties as a wife, such as cooking.
- (iii) Respondent / wife insisted the petitioner to live separate from his parents.
- (iv) Respondent frequently visited her parental home.
- (v) Due to false allegations made by respondent in her notice dated 29.01.2014 through her Advocate, the petitioner had undergone mental torture.

16. It is to be noted that though the petitioner contended that his wife used to quarrel with his parents, to substantiate this contention, except bare word of the petitioner, no corroborative evidence has been placed on record by the petitioner. Parents of the petitioner are the best witnesses to prove the said allegation. But they are not examined. Therefore, only on the basis of bare allegation of the petitioner in his deposition, the petitioner cannot prove that the respondent used to quarrel with the petitioner.

17. Though the petitioner contended that the respondent was reluctant to perform her household duties as wife, such as cooking, in his cross-examination Sachin (PW-1) has admitted

that at some occasions the respondent used to cook. Thus, this allegation does not appear to be proper.

18. Regarding contention of the petitioner that the respondent insisted him to live separate, the available evidence is the only evidence of petitioner. Respondent has denied this allegation in her written statement as well as in her oral evidence. Despite lengthy cross-examination of Rupali (DW-1), nothing could not elicited in her cross-examination which indicates that she insisted her husband to live separate from his parents. In absence of the evidence of parents of petitioner, who would have been the best witnesses to substantiate this contention, only the word of the petitioner on oath is not acceptable to hold that the respondent/wife insisted the petitioner to live separate from his parents.

19. Even contention of the petitioner is accepted as it is that the respondent used to visit her parents frequently, even then such conduct of a wife does not amount to cruelty to the husband. Otherwise also, from the contention of petitioner himself it has come on record that the respondent used to stay at the house of her parents during the examination period and that

is with the consent of petitioner. Therefore, this allegation regarding mental cruelty to the petitioner is not established.

20. Two notices of the respondent through her advocate are placed on record. The first notice is dated 29.01.2014 (Exh.65) issued by Advocate of respondent to the Advocate of the petitioner. In this notice the contentions of petitioner made in his notice to the respondent are denied. No doubt, in this notice it is alleged by Advocate for the respondent that the petitioner used to beat the respondent under the influence of liquor. Respondent Rupali (DW-1) has admitted in her cross-examination that the petitioner is not addict to liquor and he does not drink liquor. She has also admitted that contention in the notice regarding ill-treatment under the influence of liquor is incorrect. However, in her voluntary statement she has made it clear that the petitioner used to beat her.

21. Even in the second notice dated 27.10.2015 issued to the petitioner, no serious allegations are made against the petitioner. Contention of the respondent in this notice is that, after compromise in petition for restitution of conjugal rights when the respondent went to the residence of petitioner, that

time it was locked and when she went to the house of parents of petitioner, she was not allowed to enter that house. Making such contention against the husband by wife in matrimonial proceeding does not amount to mental cruelty. On the other hand, the conduct of the petitioner is not the conduct of a gentleman or good husband. In his petition and oral evidence he has made allegation that without his consent the respondent terminated her pregnancy. However, to prove this contention he could not bring on record any reliable evidence. Even no doctor is examined by the petitioner who is alleged to have terminated the pregnancy of respondent. In fact, no evidence is placed by petitioner that after his marriage at any time respondent was pregnant. Thus, obviously the allegation of termination of pregnancy by respondent without consent of the petitioner is proved to be a baseless allegation. Therefore, if in defence in the petitioner for divorce any general allegations are made by wife against the husband, it does not amount to mental cruelty to the husband.

20. It must be noted that in the entire proceeding respondent has not made any allegation of adulterous life or

illicit relation of the petitioner with another lady. If such irresponsible, false allegation would have made against the petitioner, certainly that can be treated as mental cruelty to the petitioner. However, in written statement as well as in reply notices, no serious allegations are made by the respondent/wife against the petitioner/husband, which amount to mental cruelty to the petitioner.

21. Even in the complaint lodged by respondent against the petitioner under Section 498-A of the Indian Penal Code and which is subjudice before the the Court, it cannot be said that false allegations were made in the said complaint to the police.

22. Therefore, after going through the pleadings of the petitioner and evidence placed on record, it emerges that the allegation made by the petitioner against his wife regarding her misconduct is only in the form of routine wear and tear dispute in between the husband and wife. Such dispute cannot be considered as cruelty to the husband within the meaning of Section 13 (1) (ia) of the Act.

23. Though the petitioner contended regarding the attempt of suicide by his wife-respondent by cutting her wrist, to

substantiate this contention, no police officer or medical officer is examined by the petitioner. Thus, it cannot be said that the conduct of respondent / wife is so abnormal that it is impossible for the petitioner to cohabit with the respondent. On the other hand, in the last para of his cross-examination, the petitioner Sachin (PW-1) has admitted that he is not ready to resume cohabitation even if the respondent / wife is ready to resume it. This indicates that the petitioner himself is not ready to cohabit with his wife. Filing of petition for restitution of conjugal rights and issuance of notices to the respondent is nothing but a part of defence evidence created by the petitioner to avoid the future payment of maintenance to the respondent.

24. In the result, we have no hesitation to hold that the petitioner miserably failed to prove that his wife treated the petitioner with cruelty within the meaning of Section 13 (1) (ia) of the Act. We answer point No.1 in the negative.

**AS TO POINT NOS. 2 AND 3 :-**

25. As the petitioner cannot prove that his wife treated the petitioner with cruelty and as the decree for divorce cannot be passed on the ground of desertion, the petition for divorce filed by

the petitioner deserves to be dismissed by allowing this appeal. We hold that the decree for divorce passed by Principal Judge, Family Court, Aurangabad under Section 13 (1) (ia) of the Act is not proper and deserves to be set aside. We answer point No.2 in negative and point no.3 as follows.

26. Family Court Appeal No.46 of 2017 is allowed. The decree for divorce passed by the Principal Judge, Family Court, Aurangabad in Divorce Petition No.A-392/2016 is set aside. Petition No.A. 392/2016 for divorce is dismissed.

27. Parties to bear their respective costs throughout.

**( SUNIL K. KOTWAL )**  
**JUDGE**

**(T.V. NALAWADE)**  
**JUDGE**

vdd/