

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

**Second Appeal No. 0329 of 2014**

District : Jalna

Ramesh s/o. Yadav Gaikwad,  
Age : 46 years,  
Occupation : Peon,  
R/o. Panchayat Samiti  
Quarter No.6, Old Jalna,  
Taluka & Dist. Jalna.

.. Appellant  
(Original  
petitioner)

**versus**

Sow. Narmadabai w/o. Ramesh  
Gaikwad,  
Age : 40 years,  
Occupation : Household,  
R/o. C/o. Yadav s/o. Namdeo  
Patole,  
Village : Shirala,  
Taluka Jafrabad,  
District Jalna.

.. Respondent.

.....

*Mr. S.N. Rodge, Advocate, holding for  
Mr. Avinash R. Shinde, Advocate, for the appellant.*

.....

**CORAM : SMT. VIBHA KANKANWADI, J.**

**DATE : 01ST MARCH 2019**

**ORDER :**

01. Present appeal has been filed by the original petitioner. He had filed Hindu Marriage Petition No. 132 of 2010 before Joint Civil Judge (Senior Division), Jalna, for dissolution of marriage

under Section 13(1)(i-a) of the Hindu Marriage Act, 1955.

02. What is not in dispute is, that the original petitioner and the respondent got married about 19 years prior to the presentation of the petition as per the Hindu customs and rites. They cohabited with each other and out of the said wedlock, they have five daughters and one son. Eldest daughter of the couple is married and others were taking education. At the time of petition, youngest daughter was aged 04 years and was in the custody of the respondent. It is also not in dispute, about a year prior to the petition, they both were happily cohabiting. (Parties are referred as per their nomenclature before the trial Court.)

03. With this background, the petitioner had come with a case, that a year prior to the petition, the respondent - wife had come with contact with driver by name, Bawaskar and thereafter she started quarrelling with the petitioner and insulting him. She used to say that she does not like the husband and his occupation as Peon. In the absence of husband, she used to talk to said driver on phone. Two months prior to the petition, the wife of said driver Bawaskar had informed the petitioner regarding behaviour of the respondent and till then, he was not aware about the same. It is stated that wife and

other relatives of driver Bawaskar approached the petitioner and then they had a quarrel with respondent. Thereafter, there was quarrel between petitioner and the respondent and, therefore, the respondent called her brother on 19-06-2008. The brother of the respondent had assaulted the petitioner and took respondent with him. It is stated that the respondent got custody of the youngest daughter by filing application under Section 97 of the Code of Criminal Procedure, 1973. It is stated that the act of the respondent amounts to mental cruelty and, therefore, he sought dissolution of marriage between him and the respondent.

04. Respondent - wife has contested the matter by filing written statement. She denied the allegations that she has developed any kind of relations with Bawaskar. She also denied that after she had come in contact with said driver, she had started quarrelling with the petitioner. It is rather stated that the petitioner himself has relations with one Gramsevika from the office of Panchayat Samiti, Jalna and, therefore, he intends to give divorce to her. Petitioner is not ready to cohabit with her and, therefore, he had taken away petitioner's daughter on 19-06-2008; but then, custody of the child has been taken by her through Court. It is stated that the petitioner never made attempt to take her back for cohabitation. It is

stated that the cause of action given by the petitioner is imaginary.

05. Taking into consideration rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, the petition was allowed. The marriage between petitioner and the respondent was dissolved by the said decree.

06. The wife approached District Court, Jalna, by filing Regular Civil Appeal No.19 of 2011. It was heard by the learned District Judge-3, Jalna and after hearing both sides, the appeal has been allowed on 07-09-2013, thereby setting aside the decree passed by the learned trial Court and dismissing the petition. Hence, the original petitioner is before this Court in this second appeal.

07. Heard learned Advocate Mr. S.N. Rodge holding for learned Advocate Mr. A.R. Shinde for the appellant. Taking into consideration the judgment and decree passed by both the Courts and the arguments advanced, it is not even necessary to issue notice to the respondent.

08. Learned Advocate appearing for the appellant vehemently submitted that the learned trial Court has considered the evidence led by the petitioner

properly and had correctly decreed the petition. However, on the same set of facts, learned first appellate Court has disbelieved the evidence led by the petitioner. Therefore, there is perversity. Learned first appellate Court has not considered the evidence of PW 02 who is the daughter of petitioner and respondent, who had actually seen the extra marital relations of the mother and, therefore, she stood by her father. Under such circumstance, weightage ought to have been given to her evidence. Learned first appellate Court has failed to consider that the respondent has admitted that she was acquainted with the driver and, therefore, that evidence was sufficient to hold that there is a ground for mental cruelty for the husband to seek decree for divorce. In fact, it ought to have been seen by the first appellate Court, that since last 05 years prior to the appeal, the wife is residing with the paramour. Yet, she has filed proceedings claiming maintenance under Section 125 of Cr.P.C. There was evidence adduced by the petitioner to prove the cruelty on the part of the respondent - wife which ought to have been sufficient for sustaining the decree that was granted by the trial Court. Therefore, substantial questions of law are arising in this matter requiring admission of the second appeal.

09. At the outset, it is required to be

considered that whether in this second appeal, the appellant is making ground for any substantial question of law. There is definitely difference between '*question of fact*' or '*question of law*' with '*substantial question of law*' under Section 100 of the Code of Civil Procedure, 1908. When framing of substantial question of law is a *sine qua non* for any second appeal to be entertained under Section 100 of C.P.C., it is mandatory for the appellant to show that it exists. Here, in this case, the husband has come with a case, that wife has developed illicit relations with a person and that is causing him mental cruelty. He has also come with a case, that because of that relationship, the wife is not behaving properly with him. She is harassing him by saying that she does not like his profession as Peon and, therefore, he has sought divorce. The fact, as aforesaid, is definitely required to be borne in mind that about 18 years prior to the petition, the couple had happily resided together. They have five daughters and one son out of the wedlock. Since beginning i.e. when respondent got married to petitioner, he was a Peon and thus the matrimonial life of 18 years all the way the wife was cohabiting happily with the said Peon. Now, all of a sudden, what happened a year prior to the petition, as alleged in the petition, is required to be tested. No doubt, the eldest daughter of the couple is now supporting the father. Her testimony is also

required to be considered.

10. It appears that the learned trial Court was very much swayed away with the fact that the daughter is supporting the father and speaking against the mother and, therefore, it was held to be a ground of cruelty. But then, it is required to be tested as to whether any such fact really exists. The said testing has been properly done by the first appellate Court. The husband has not come with a case, that he had ever seen the wife talking to the said driver prior to two months of the petition. Though according to the petitioner, since one year prior to the petition, wife has started quarrelling with him and insulting him on the point that she does not like his service as Peon; but till then i.e. from the year prior to the petition till two months prior to the petition i.e. for about 10 months, the ground was that she was not liking service of petitioner as Peon. When in fact, since beginning i.e. inception of marriage, he was Peon and the couple had five daughters and one son, where is the question of objecting to the occupation of the petitioner after such a long period. This reason appears to be very much absurd. Though the husband says that wife had come in contact with the driver about a year prior to the petition, but then he says that he came to know about only two months prior to the petition, that too, through the wife of the driver. In his

evidence, he has not uttered a single word that he had ever seen his wife with the said driver or talking to him. Then on what basis he was making those allegations. Leveling false allegations is, in fact, mental cruelty for respondent - wife.

11. Much stress has been given to the evidence of the daughter PW 02. However, it is to be noted that she got married much earlier and she ought to have been residing with her husband. However, it has come on record that her husband had abandoned her and, therefore, she was residing with the petitioner and the respondent. Learned first appellate Court has rightly observed that obviously she was dependent upon her father after desertion by her husband and, therefore, she has supported the father after the mother had left the house. Even if for the sake of arguments we take her evidence as it is, yet, it can be seen that except the fact that she had seen her mother talking to driver, she has not stated anything more. Mere talking of a man with married woman (not married with each other) will not amount to their extra marital relation. The best witness in the case would have been the wife of said driver who had given information to the petitioner and who had allegedly raised hue and cry against the respondent in the house of petitioner. She has not been examined by the petitioner nor any other neighbour who had seen the scene on that day.

12. In order to establish the mental cruelty, the person who is making allegations should lead evidence of such a nature that the alleged acts on the part of the person against whom the allegations are made would make his / her life miserable. Further, when it comes to leveling allegations of mental cruelty by the wife on the ground of her extra marital relationship, then the burden was more on the husband to put cogent and material evidence. Here, in this case, the husband has not come with a case that the wife is leading to adulterous life. Rather he has come with a case, that the wife is residing with her brother. Therefore, whatever evidence has been adduced by the petitioner, does not amount to mental cruelty as contemplated under Section 13(1)(i-a) of the Hindu Marriage Act and, therefore, learned first appellate Court has rightly reversed the judgment and decree passed by the trial Court. No substantial question of law arise in this case.

13. In the light of above, the second appeal is disposed of as '**not admitted**'.

( Smt. Vibha Kankanwadi )  
JUDGE

.....