

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

Second Appeal No. 0683 of 2014

District : Dhule

Nilesh Bhagwan Mahajan,
Age : 36 years,
Occupation : Nil,
R/o. Square Bungalow,
Behind State Bank,
Dudha Sagar Marg,
Station Road, Chalisgaon,
Taluka Chalisgaon,
Dist. Jalgaon.

.. Appellant
(Original
respondent)

versus

Shivpriya Nilesh Mahajan,
Age : 32 years,
Occupation : Household,
R/o. 14, Bhavsar Colony,
Jamnagiri Road, Dhule,
Taluka & Dist. Dhule.

.. Respondent
(Original
petitioner)

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Mr. Shailesh P. Brahme, Advocate, for the appellant.

*Mr. B.R. Warma & Mr. Mohan C. Jain, Advocates,
for the respondent.*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 12th March 2019.**

**Date of pronouncing
the judgment : 03rd May 2019.**

JUDGMENT :

01. Present appeal has been filed by the original respondent. Present respondent is the original petitioner, who had filed Hindu Marriage Petition No. 136 of 2010 before 02nd Joint Civil Judge (Senior Division), Dhule, under Section 09 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. (Parties are referred by their nomenclature before trial Court.)

02. Petitioner and respondent got married on 05-06-2006 at Dhule as per Hindu rites. Respondent was residing in joint family. It is also admitted that a settlement deed was executed between them on 10-07-2009 in presence of witnesses. It is also not in dispute, that the petitioner has filed complaint under Section 498A of I.P.C. against respondent and family members. It is also not in dispute, that present respondent has filed Hindu Marriage Petition No.112 of 2011 before Jalgaon Court for divorce.

03. The petitioner had come with a case that after she went for cohabitation, she had handed over her gold ornaments and other articles to the respondent. Her mother-in-law had shown dissatisfaction regarding the way in which ceremony of marriage was done as well as the gifts given. Thereafter, the petitioner was pressurized to bring gold ornaments. The greed of the respondent and his

family members went on increasing. Petitioner was prohibited from meeting with her relatives. The respondent who is an architect by profession, was also harassing the petitioner by giving abuses and mental torture on the ground that gifts have not been given properly and gold ornaments have not been brought at the time of Rakshabandhan festival. When the petitioner was ill due to less hemoglobin in her blood, at that time, respondent viewed her with suspicion and asked for divorce. His sister had also threatened her to kill. Her ornaments were taken on 04-03-2008 and she was driven out of the house. She was taken back after persuasion of her family members. Thereafter, she went to meet her brother when he had suffered an accident and when she returned on 28-06-2008, she was forced to go back to her parental house. In the compromise deed, many conditions were imposed upon her and after the deed, when she was cohabiting with him, respondent made demand of Rs. 5,00,000/- for opening office. It is also stated that the respondent got addicted to drink liquor and smoke. He was then physically assaulting her and keeping her starved. Therefore, she went to her parent's house on 13-04-2010. She had genuine desire to cohabit with the respondent, but the respondent has deserted her without any reason. Hence, the petition.

04. Respondent filed his written statement at

Exhibit 11. He denied the allegations made against him. It is stated that the petitioner's father had demanded him amount about two years ago and on that count, there was dispute between him and the petitioner. The petitioner was residing with her father. A cognizable offence was registered against him on the basis of complaint filed by the father of the petitioner. At that time, settlement deed took place. Petitioner was not behaving properly with him since then. She did not withdraw the cases as promised in the settlement deed. Petitioner and her relatives were unnecessarily harassing him. Petitioner had poured kerosene on her person on 07-02-2010 and tried to ablaze herself and, therefore, there was every possibility that she would do something to her life. Her father had demanded amount of Rs. 2,00,000/- to Rs. 3,00,000/- when her brother met with an accident. He refused to give amount to him and, therefore, her father got annoyed with him. She had deserted him without any reason from 13-04-2010 and went out of the matrimonial home under the pretext that she would go to beauty parlour. He prayed for dismissal of the petition on these grounds.

05. Taking into consideration rival contentions, issues came to be framed. Parties have led evidence. After considering the evidence on record, the learned trial Court dismissed the application on

16-10-2012.

06. The said judgment and decree was challenged by the petitioner in Regular Civil Appeal No. 291 of 2012 before District Court, Dhule. The said appeal was heard by the learned Ad hoc District Judge-2, Dhule and after hearing both sides, the said appeal came to be allowed. The judgment and decree passed by the learned trial Court was quashed and set aside. The original respondent was directed to take petitioner back for cohabitation within a month from the date of the order. Hence, the original respondent has filed the present appeal.

07. Heard learned Advocate Mr. S.P. Brahme appearing for the appellant. Heard learned Advocate Mr. B.R. Warma appearing for the respondent.

08. It will not be out of place to mention here, that in view of the order dated 31-10-2018 passed by this Court, the matter has been heard finally at the stage of admission itself.

09. It has been submitted on behalf of the appellant, that the respondent is resident of Chalisgaon, District Jalgaon. Parents of the wife reside at Dhule. She used to frequently visit her parent's house and was very much fond of her relatives. She was not performing her duties as

wife. It has come on record, that there was a settlement in writing between the parties on 10-07-2009, Exhibit 44, in which promises were made by the petitioner in respect of her behaviour. Thereafter, she cohabited with the respondent. However, thereafter again dispute arose. There was another settlement on 13-08-2009, Exhibit 45. Again, compromise was made. But thereafter, it appears, that the petitioner contends that she was harassed on the ground of demand of Rs. 5,00,000/- for office and the respondent addicted to liquor and smoking. There is no dispute, that she left the house on 13-04-2010. According to her, it was due to the forceful circumstances; whereas respondent says that it was a voluntary act. The Hindu Marriage Petition filed by the husband for divorce is still pending before the trial Court. The wife has filed proceedings under Section 125 of Cr.P.C., Protection of Women from Domestic Violence Act, 2005 and Section 498A of I.P.C.

10. Respondent has come with a case and clearly stated that the petitioner had tried to commit suicide on 07-02-2010 by giving threats. She was prosecuted for that and she has been convicted for the same. Now, the appeal is pending. When with these facts, parties went to trial, evidence has been led. Learned trial Court has held that the stand taken by the wife is unnatural. The contents

of settlement deeds Exhibit 44 and 45 were considered properly. But the learned appellate Court, which has reversed the finding, has not considered the appeal within the ambit of Section 96 read with Order XLI of the Code of Civil Procedure, 1908. The other evidence that has been scrutinized by the learned trial Court has not been considered by the first appellate Court. The first appellate Court had also no occasion to see the witnesses and thus observed the demeanor. The judgment of the trial Court was not at all either illegal or irregular which required interference by the first appellate Court. Appreciation of the evidence has not been done properly and in a cryptic way, the evidence led by the respondent has been brushed aside. Therefore, the substantial questions of law were arising in this matter and answers of the same should be in favour of the present appellant.

11. Per contra, learned Advocate for the respondent has submitted that the learned first appellate Court has considered the facts properly. In fact, the respondent had not filed any counter claim. His petition for divorce is separately pending. Therefore, the conduct on the part of the husband before this Court only is required to be considered. The husband had not shown readiness to take her back for cohabitation. However, after the settlement deed, the wife had gone for cohabitation.

It can be seen from the conduct of the respondent, that he had no bona fide intention to allow her to cohabit. Even after the compromise, she had resided with him for about 7 - 8 months. Therefore, it was for the appellant - respondent to explain as to what happened in between the said period which will lead him to demand divorce from the wife. He cannot come with a case of irretrievable break down of marriage. When there was compromise deed and in pursuance of the same, the wife had gone to reside with him. Therefore, the first appellate Court has rightly passed the decree in favour of the wife. No substantial question of law is arising in this matter.

12. Taking into consideration the rival submissions and the fact that there is no concurrent finding, rather the first appellate Court has reversed the findings given by the trial Court, definitely, substantial questions of law are arising in this case, as under :-

(I) Whether the first appellate Court has exercised its powers under Section 96 read with Order XLI of the Code of Civil Procedure, 1908, correctly ?

(II) Whether the first appellate Court was justified in reversing the finding given by the trial Court when it had no occasion to see the demeanor of the witnesses ?

(III) Whether the first appellate Court had missed the fact of two compromise deeds executed between the parties and its effect ?

(IV) When the judgment of the learned trial Court was not illegal or irregular, whether the first appellate Court was justified in reversing the decree only on the basis of re-appreciation of evidence ?

Since this matter is heard finally at the stage of admission, these substantial questions of law have been framed.

13. At the outset, if we consider the judgment passed by the learned first appellate Court, it can be seen that he went on to re-appreciate the evidence adduced by both the parties. In this case, the wife had examined herself and examined her father in support of her case; whereas the husband had examined himself and his father in support of his case. The settlement agreements exhibits 44 and 45 were, in fact, admitted to the wife. That means, execution of the same was admitted but then there was absolutely no whisper in detail regarding the same in her plaint. She does not say in clear words that those compromise deeds were got executed from her by pressurizing her. In fact, she states about only one compromise deed which had taken place on

10-07-2009. Her testimony as well as pleadings are silent on settlement deed dated 13-08-2009, Exhibit 45. It is to be noted that her examination in chief is nothing but the replica of her petition and in the cross examination, in clear words, she has stated that husband never demanded divorce from her. In fact, as per her pleadings and examination in chief, she has stated that initially there were demands for various articles and when that demand was fulfilled each time, the greed of husband and her relatives went on increase. According to her, mother and sister of husband used to give pinching words to her and instigate husband against her. These are, in fact, vague allegations. No specific incident has been quoted by her. According to her, it amounted to mental harassment. Mere use of the words '*mental harassment*' is not sufficient. The incident is required to be quoted so as to judge it as to whether it would have created mental harassment, or not. She has stated that she became ill and the percentage of hemoglobin from her blood came down. On that point, husband used to raise suspicion. Except bare words, there is nothing. How she came to know that the percentage of hemoglobin had gone down, was never tried to be searched by the first appellate Court. She had not produced test result of her blood. She has not come with a case, when she became ill, she was not given proper treatment. Therefore, vagueness in the

allegations cannot give advantage to the wife.

14. In her cross examination, the petitioner was unable to say since when the respondent - husband was demanding divorce from her and then, as aforesaid, the categorical statement that husband never demanded divorce from her. If he had never demanded divorce, there is no question of mental cruelty to her on that count. It appears that the first appellate Court has brushed aside those admissions on the ground that they do not conclusively infer that she has no desire to resume cohabitation. If allegations are made just to defend the action, then the real intention behind such allegations are required to be considered. Some of the statements in the cross are taken against the husband but what the learned first appellate court failed to consider is that the evidence is required to be considered as a whole.

15. The father of the petitioner supported her contention but in his cross examination, he has also admitted that he has lodged various criminal complaints against husband and/or his relatives. At the time of evidence, it appears that the petitioner and her father tried to rescue themselves from the settlement deeds on the ground that since it was a condition precedent to execute it for cohabitation, they have been executed. No doubt, many times it

may happen that in order to save the marriage, the parties would enter into compromise or settle for certain terms. But that does not mean that it would be a condition precedent or it would have been an unpleasant act for them. Unless the settlement would have been voluntary, the wife would not have gone for cohabitation. When she accepts the execution and says that she went for cohabitation, then it is pre-supposed that she had condoned the act of the husband in the past and wanted to establish the marital tie afresh. Therefore, when she has come before the Court, then it was for her to further explain as to what happened and under which circumstance she was required to leave the matrimonial home. According to her, amount of Rs. 5,00,000/- was demanded by her husband for establishing office and on that count, she was harassed. So also, he got addicted to liquor and smoking. Except bare words, there is nothing to support the contention that the husband got addicted to liquor and smoking after the settlement.

16. Petitioner has also not placed anything on record to show that prior to the marriage or immediately after the marriage, the husband had no office of his own. It is admitted that he is an architect by profession and since beginning i.e. since prior to the marriage, he was in the profession. According to the learned Advocate for

the respondent, the appellant ought to have explained as to what happened between 7 - 8 months after the compromise. It is to be noted that we cannot forget that there was a settlement on 13-08-2009 which is, in fact, suppressed by the wife; but in that, she had agreed to withdraw the proceedings. It was for her to show that she has accordingly acted upon and in spite of that, she was harassed. It appears from the evidence that she did not withdrew those proceedings. If we consider the proceedings which have been filed by the wife, then there is a complaint under Section 498A of I.P.C., Section 125 of Cr.P.C., proceedings under Protection of Women from Domestic Violence Act and the present petition. According to the petitioner, because of the cases also, the husband and his relatives were harassing her. Those cases were, in fact, instituted even much prior to the first compromise deed.

17. In the light of above, the observations from the decision in *Sameersingh Sureshsingh Suryawanshi Vs. Savita Sameersingh Suryawanshi* [2008(3) Bom.C.R. 241] will have to be considered. No doubt, the said decision is of coequal Bench and it is based on facts, but when the facts are similar, then definitely help can be taken regarding the observations. In that case, it was observed thus :-

" The trial Court had lightly appreciated the material evidence on record to hold that the wife was dis-entitled to seek a decree for restitution of conjugal rights. The first Appellate Court, however, without considering or even referring to the material evidence on record, merely relied on a stray admission of the appellant to hold that the trial Court ought to have granted a decree for restitution of conjugal rights in favour of the respondent. The first appellate Court gave undue weightage to the solitary admission, which clearly appears to be inadvertent, to grant a decree for restitution of conjugal rights. The number of cases filed by the respondent against the appellant clearly show that the respondent did not have any confidence or trust in her husband and she was not desirous of cohabiting with him. Where a party is desirous of cohabiting with the spouse, it is not expected of that party to institute proceedings for partition and separate possession of the property, proceedings for an offence punishable under Section 406 of the Indian Penal Code and take steps to initiate proceedings for an offence punishable under Section 498A of the Indian Penal Code. It is not expected of a wife to launch all these proceedings against her husband and still desire to stay with him."

The facts of this case are almost similar.

18. Here, in this case also, the trial Court had considered the entire evidence properly. It had the advantage of looking at the witnesses, note down the demeanor and, therefore, only from the record, the first appellate Court, that too on a stray admission or stray question which ought not to have been asked against the interest of the client by the learned Advocate, it cannot be stated that case was made out for grant of decree for restitution of conjugal rights.

19. The Full Bench of the Hon'ble Apex Court in *Santosh Hazari Vs. Purushottam Tiwari (Deceased) by L.Rs.* [(2001) 3 SCC 179], has laid down what are the powers and duty of first appellate Court. It has been observed thus :-

" While reversing a finding of fact, the Appellate Court must come into close quarters with the reasoning assigned by the Trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first Appellate Court had discharged the duty expected of it. It is not necessary that the first Appellate Court should re-state the effect of the evidence or reiterate the reasons given by the Trial Court. The expression of

general agreement with reasons given by the Court, decision of which is under Appeal, would ordinarily suffice in such case. "

The said decision in *Santosh Hazari's case (supra)* has been re-affirmed by the Hon'ble Apex Court in further pronouncements, wherein it has been held that *"The first appeal is a valuable right of the parties and, therefore, the judgment of the first appellate Court must reflect its conscious application of mind. It should record the findings supported by the reasons on all the issues raised along with the contentions put-forth and pressed by the parties for decision of the appeal."* No doubt, all the pronouncements i.e. *Santosh Hazari's case (supra)* and those pronouncements re-affirming said decision have categorically stated that the first appellate Court is entitled to re-appreciate the evidence and then come to its own conclusion. If we consider the judgment of the first appellate Court in the case in hand, it can be seen that the evidence adduced by both the parties has been considered in a cryptic way.

20. No doubt, the husband is also expected to take steps for resuming cohabitation and it appears from this case, that twice the settlement had taken place. Who had initiated the talks each time, has not come on record but when the criminal proceedings still going on, but at the same time, wife resuming the cohabitation will definitely thereby a hitch in

the mind of husband as well as his relatives. Under such circumstance, if he negatives the proposal for resumption of cohabitation, in a mediation process, in the matter under Protection of Women from Domestic Violence Act, it ought not to have been considered against him. It is not only the duty of the husband to make effort for resumption of cohabitation, it is equally for the wife to take steps. When settlement had taken place on 13-08-2009 and it was not acted upon by the wife, it was for her to show that thereafter there was demand of Rs. 5,00,000/- and husband is addicted to liquor and smoking. She has not come with a case, that under the influence of liquor, husband used to assault her. That means, she has not come with a case of physical assault or harassment by the husband after second settlement. Learned first appellate Court has used the words that, "*Petitioner rescued herself from continued ill-treatment and left the matrimonial home on 13-04-2010*", appears to be out of context and out of proof.

21. We also cannot forget the fact that the wife was convicted for attempt to commit suicide and then the appeal is still pending. If she had acted in such a manner and has not given the reasons as to why she had attempted to commit suicide, then we can understand the mental condition of the husband and relatives. Under such circumstance, if the father

of the husband, who has been examined in this case, says that they will not take petitioner for cohabitation, then it cannot be taken against the interest of the husband. Therefore, in this case, the first appellate Court has not performed its duty under the provisions of Section 96 and Order XLI of the Code of Civil Procedure, 1908. The settlement agreements have not been considered by the learned first appellate Court in proper perspective. So also, while reversing the finding given by the learned trial Court, who had the occasion to see demeanor of the witnesses, weightage ought to have been given to those conclusions drawn by the first appellate Court. Merely on the basis of some different and own conclusion, the learned first appellate Court ought not to have been branded the judgment of the learned trial Court as illegal or erroneous in order to reverse the same. Hence, the substantial questions are answered : (I) *in the negative*, (II) *in the negative*, (III) *in the affirmative* and (IV) *in the affirmative*.

22. In the result, the second appeal is hereby allowed.

(a) The judgment and decree passed by the learned Ad hoc District Judge-2, Dhule, in Regular Civil Appeal No. 291 of 2012, dated 31-10-2014, is hereby quashed and set aside. The judgment and decree passed by

the learned 02nd Joint Civil Judge (Senior Division), Dhule, in Hindu Marriage Petition No. 136 of 2010, dated 16-10-2012, is hereby restored.

(b) Parties shall bear their own costs of this proceedings.

(c) Decree be drawn accordingly.

(Smt. Vibha Kankanwadi)
JUDGE

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