

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

FAMILY COURT APPEAL NO. 21 OF 2021

Govind s/o Vasant Rao Bagade,
Age : 35 years, Occu: Business,
R/o Samarthnagar, Near More Hospital,
Bhum, Tq. Bhum, Dist. Osmanabad

...Appellant
(Orig. Respondent)

Versus

Poonam w/o Govind Bagade,
Thru. (c/o.) Gowardhan Ramchandra Dkkhone
Age : 33 years, Occu. Household,
R/o 17/130, Pipeline Road,
HUDCO, Savedi, Ahmednagar,
Dist. Ahmednagar.

...Respondent
(Orig. Petitioner)

Mr D.R. Jayabhar, Advocate for Applicant
Mr R.S. Kasar, Advocate for Respondent/Sole

**WITH
FAMILY COURT APPEAL (ST.) NO. 34077 OF 2022**

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Age : 35 years, Occu: Business,
R/o Samarthnagar, Near More Hospital,
Bhum, Tq. Bhum, Dist. Osmanabad

...Appellant
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Versus

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...Respondent
(Orig. Respondent)

Mr D.R. Jayabhar, Advocate for Appellant
Mr R.S. Kasar, Advocate for Respondent/Sole

**CORAM : MANGESH S. PATIL AND
 S.G. CHAPALGAONKAR, JJ.**

**RESERVED ON : 07-01-2023
PRONOUNCED ON : 01-02-2023**

JUDGMENT : (PER S.G. CHAPALGAONKAR, J.)

1. The present appeals are filed under Section 19 of the Family Courts Act thereby taking exception to the common Judgment and decrees dated 30-03-2021 passed by family court Ahmednagar in Petition No. A-120 / 2018 and Petition No. A-22 / 2019. The appellant is the husband in both the appeals. (Hereafter husband is referred to as "the appellant" and the wife is referred to as "the respondent" for the sake of brevity).

2. The respondent / wife filed Petition No. A-120 / 2018 seeking decree of divorce u/s 13 (1) (i-a) & (i-b) of Hindu Marriage Act, 1955 whereas Appellant / Husband filed Petition No. A-22 / 2019 for grant of decree of restitution of conjugal rights u/s 9 of Hindu Marriage Act, 1955. The Family Court allowed petition granted the decree of divorce on both grounds of cruelty as well as desertion. However, petition for restitution of conjugal rights is dismissed.

3. The respondent pleaded in her petition that, marriage was solemnized on 19-02-2016 as per the Hindu rites and rituals. After marriage, the respondent started co-habitation with the appellant. However, the appellant and his family members began ill-treating her. She was insulted for the reason of not making proper arrangement in the marriage. The appellant doubted her character, tortured her mentally and physically. The family members of the appellant used to abuse and assault her.

4. The appellant had a job at Pune. He raised the demand of Rs.3,00,000/- from respondent under pretext of purchasing house at Pune. However, due to non-fulfillment of the demand, appellant abused, assaulted and gave insulting treatment to her. The respondent was driven out of matrimonial house within 15 days of the marriage. Since then, she has been residing at her maternal house.

5. The attempts were made to bring reconciliation by parents and relatives of respondent. However, all these attempts turned futile because of demand of Rs.3,00,000/- raised by appellant. It is also the case of the respondent that on 24-07-2016, the appellant along with two strangers had been to her maternal house and raised the demand of Rs. 3,00,000/-. He assaulted the respondent and hurled abusive language towards father and brother of the respondent.

6. It is further case of the respondent that she made a written complaint to the Police Station at Ahmednagar on 30-07-2016 against the appellant. Further Criminal Misc. Application No. 764/2016 was filed by her under the provisions of the Domestic Violence Act, 2005 (hereinafter referred to as "the D.V. Act") against him. The FIR was also lodged by her father with Police Station. However, all these proceedings were withdrawn on a compromise.

7. The appellant filed his written statement and denied adverse allegations. He stated that the respondent has deserted him without justifiable cause. The respondent is a BAMS doctor and better qualified than the him. She was never interested in co-habiting with him. He states

that she never resided with him. Her father was against their marriage and he would threaten the appellant of committing suicide if he attempted to take her with him. It is also the case of the appellant that he made attempts of conciliation and also issued notice for restitution of conjugal rights to her through an advocate. He submitted that he was always ready and willing to co-habit with the respondent.

8. The appellant in his petition filed under section 9 of the Hindu Marriage Act for restitution of conjugal rights against the respondent stated that the respondent refused to co-habitation without reasonable excuse. In spite of his attempts to bring her for co-habitation, she refused. He stated that while respondent was prosecuting her B.A.M.S. course in Ayurveda College, both of them had decided to marry. After completion of B.A.M.S. course, they performed the marriage. Her family members were not present at the marriage. It is also stated that the false complaint was filed against him by father of the respondent similarly on his insistence Criminal Misc Application No. 764/2016 was filed by her under the provisions of D.V. Act. However, the proceedings were withdrawn by respondent after amicable settlement. She had agreed to resume co-habitation with the appellant, however, she failed to do so.

9. The Family Court at Ahmednagar had clubbed both the petitions for hearing and disposal vide office order dated 25-06-2019. Common evidence was recorded in both the petitions. The issues were framed below Exh.19 and Exh. 85 in respective petitions. The evidence of parties was recorded and after hearing the parties, the Family Court refused restitution and granted divorce.

10. The learned advocate for the appellant would submit that the Family Court has failed to appreciate evidence on record in its proper perspective. The respondent has failed to make out the case of cruelty or desertion in terms of section 13 (1-a) and (1-b) of Hindu Marriage Act, 1955. He would submit that the respondent never co-habited with the appellant. He would submit that on 19-02-2016, the marriage was performed at Pune. Family members of the respondent were absent, since they were against such marriage. The allegations regarding the ill-treatment are false and imaginary. The learned advocate for the appellant would also submit that the allegation made by the respondent regarding demand of Rs.3,00,000/- for purchasing flat at Pune is absolutely false. The appellant was never in service at Pune. He would submit that the respondent being better qualified than the appellant, she refused to co-habit with him. She has left the company of the appellant without any reason.

11. The learned counsel for the appellant would further submit that the respondent and her father had filed false complaints against the appellant at Police Station, Ahmednagar. Similarly, the respondent had instituted the proceeding vide Criminal Misc. Application No. 764/2016 under D.V. Act at Ahmednagar. All those proceedings are withdrawn by respondent after amicable settlement. Even after settlement of disputes, the respondent did not resume company of the appellant. He would submit that there is no material to make out a case of cruelty. He would submit that appellant has made sincere efforts to bring back the respondent for

co-habitation. As such, the decree for restitution for conjugal rights ought to have been passed. The learned advocate for the appellant would submit that in the light of section 23 of the Hindu Marriage Act, 1955, the respondent cannot claim benefit of her own wrong.

12. The learned advocate for the appellant would further submit that no material is brought on record to make out ground of desertion as contemplated under section 13 (1) (i-b) against him. Since continuous desertion for the period of not less than two years immediately preceding the filing of the petition for dissolution of marriage is not proved, the decree could not have been passed on the ground of desertion. The learned advocate for the appellant would submit that the decree passed in Petition No. A/120/2018 is liable to be quashed and set aside and Petition No. A-22/2019 filed by appellant seeking decree of restitution of conjugal right ought to be allowed.

13. On the other hand, the learned advocate for the respondent justified the Judgment and decree in both the matters. He would submit that the respondent has established cruelty as well as desertion on the part of the appellant by leading cogent and reliable evidence. The Family Court has passed the well-reasoned order. He would further submit that Petition No. A-22/2019 was filed by appellant as a counter-blast to the divorce petition. It is an attempt to create false evidence to defend the action of respondent.

14. We have heard the learned advocates for the parties and perused the common Judgment passed by the Family Court. We have

also considered the oral and documentary evidence. Before we delve into the factual aspect of the matter, it is necessary to find out meaning of “cruelty” in terms of section 13 (1) (i-a). The Supreme Court of India in the matter of ***Shobha Rani versus Madhukar Reddy reported in (1988)1 SCC 105*** while explaining the term cruelty observed thus –

4. [Section 13\(1\)\(i-a\)](#) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse.

15. Keeping in mind these guidelines, the facts of the case need to be appreciated. It is not in dispute that the appellant and respondent have solemnized the marriage at Pune on 19-02-2016 as per Hindu rites and rituals. It is admitted by the respondent that her parents were not present at the time of marriage. The respondent took leave for marriage during the period from 18-02-2016 to 24-02-2016 while she was doing her internship. She resumed her internship after end of the leave. It is therefore, evident that the respondent continued her stay at the hostel even after the marriage.

16. It is also an admitted fact that within six months of marriage the respondent had filed the proceedings under D.V. Act vide Criminal Misc. Application No. 764/2016 before JMFC at Ahmednagar. Her father had filed the NC against the appellant. However, both these proceedings were withdrawn after amicable settlement. Though the respondent claims that she resumed co-habitation after the compromise, she admits during the cross-examination that she never resumed the company of appellant even after withdrawal of the case.

17. The Family Court, after scrutiny of the evidence, recorded specific findings in para nos. 10 to 13 of Judgment that the respondent has failed to prove her allegations regarding ill-treatment by in-laws on account of alleged improper arrangement in the marriage, or mental and physical cruelty by the husband doubting her character. The categorical finding is recorded by Family Court that the respondent could not prove her case regarding alleged demand of Rs.3,00,000/- by in-laws for purchase of a flat at Pune. Even allegations made by the respondent that she was driven out of house after 15 days of her marriage is discarded by the family court. Though Family Court recorded the aforesaid findings, it accepted the case of the respondent that she was subjected to cruelty. Such conclusion is not supported by the cogent material that would attract the cruelty. It appears that the Family Court has made the decision on the point of cruelty relying upon the fact that a complaint was filed by the respondent with Police Station against the appellant and the fact that she had instituted the proceeding against the appellant invoking provisions of D.V. Act.

18. Perusal of the contents of the Criminal Misc. Application at Exh. 61 filed under D.V. Act would show that the allegations are replica of the contents made out in the present petition. Similarly, Exh. 63 is the copy NCR. 1572/2016 dated 1-12-2016 filed by father of the respondent. We have considered the aforesaid evidence and find that there is nothing to make out the case of cruelty. The copy of written application dated 30-07-16 addressed by respondent to Police Station Officer Ahmednagar is placed on record along with list of documents at Exh. 38. However its contents are not proved by the respondent. The document is not exhibited or admitted in evidence. It is also evident that the proceeding under D.V. Act as well as the complaint given to Police Station has been withdrawn by the appellant.

19. The appellant has made a reference to incident dated 24-07-2016 in pleading as well as oral evidence. She states that her in-laws along with two unknown persons had arrived at maternal home and threatened her with demand of Rs. 3,00,000. It also refers to the abuses hurled by the appellant's parents towards parents and brother of the respondent. However, in her cross-examination respondent admits that she has not filed any complaint regarding incident dated 24-07-2016. There is no supporting evidence to prove the alleged incident dated 24-07-2017. The evidence of the respondent appears inconsistent on material particulars. The respondent has withdrawn her application filed under D.V Act as well as the complaint dated 30-07-2016. As such there is no reason to bank upon the contents of those document while deciding the issue of

cruelty. It is admitted by respondent during her cross-examination that even after compromise she did not resume the company of the appellant though she has stated so in her petition. The overall scrutiny of the evidence would show that the appellant and respondent never co-habited after the marriage.

20. At this stage, the reference can be made to the provisions of Section 23 of the Hindu Marriage Act. The relevant part of section 23 states as under :-

23 Decree in proceedings .—

(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty,....

21. Section 23 is an impediment to grant divorce on the ground of cruelty. If the respondent has condoned the cruelty in any manner or if the respondent on her own accord withdrew the proceedings filed under the D.V. Act so also the complaint lodged with the Police Station, she cannot use that material to prove the cruelty against the appellant. Even otherwise, the allegations which were levelled against the appellant in the

complaint filed before the Police or proceedings under the D.V. Act, do not inspire confidence. The allegations contained in those documents are not proved by leading independent or reliable evidence. No specific instances are brought on record to substantiate allegations of cruelty on the part of the appellant. In this background the case of the respondent cannot be accepted for grant of decree under section 13 (1) (i-a). Therefore, the findings recorded by the Family Court against issue No. 3 is liable to be quashed and set aside.

22. The Family Court has accepted the case of the respondent for grant of decree in terms of Section 13 (1) (i-b) on the ground of desertion without reasonable cause for more than two years. It is a matter of record that the respondent had never cohabited with appellant after the marriage. The respondent continued her education and stayed at the hostel immediately after the marriage and thereafter she continued to reside along with her parents. The evidence on record would show that the appellant has failed to take steps to bring back her for co-habitation. It is the matter of record that on 18-02-2016 a love marriage was performed at Pune in absence of family members. The appellant candidly admits that after re-conciliation in the year 2016 till February 2018 he made no attempt to bring respondent for co-habitation. It is therefore evident that from the date of marriage i.e. 18-02-2016, the appellant has not made any attempts to establish the matrimonial relationship.

23. The appellant has failed to bring on record evidence of independent witness to show that he was interested in restoration of

matrimonial relations with the respondent from the date of marriage. Even in his evidence before Family court he has not given particulars of any such attempt. For reasons best known to him he deserted the respondent continuously for more than two years. It appears that the appellant has instituted proceeding for restitution of conjugal rights only after getting knowledge of the proceeding instituted by the respondent seeking divorce.

24. Another important aspect of the matter is that under section 13 (1) (i-b) the decree can be granted only when there is continuous desertion for the period not less than two years immediately preceding the presentation of the petition. In present case though, respondent herself stated that on 30-09-2016 the couple arrived at the compromise in the proceeding under D.V. Act and she resumed the company of the husband, she states during her evidence before Court that she never resumed the company of the appellant even after the so-called compromise. The marriage took place on 19-02-2016. The petition seeking the divorce is filed on 08-03-2018. As such there is continuous desertion of the respondent for the period of more than two years preceding the presentation of petition without justifiable reason. Therefore, the finding recorded by the Family court against issue no. 2 is just and proper. The result of the aforesaid discussion leads us to the conclusion that the respondent is entitle for decree of divorce in terms of section 13 (1) (i-b).

25. The Family Court Appeal (St.) No. 34077/2022 has been filed by the appellant / husband thereby raising challenge to the judgment and decree in PA No. 22/2019 by which the claim under section 9 of the Hindu

Marriage Act, 1955 has been rejected. It is contended by appellant that the decree for restitution of conjugal right ought to have been passed in his favour, as the respondent has withdrawn from the society of the husband without reasonable excuse. However, in light of findings recorded in foregoing paragraphs while dealing with the challenge raised by appellant to the decree of divorce in terms of section 13 (1) (i-b), the conclusion is recorded that the appellant has never taken positive steps to establish matrimonial relations with the respondent right from the date of marriage. It can be observed that present proceeding is instituted by appellant resorting to the provisions of section 9 of Hindu Marriage Act, 1955, only after getting knowledge of institution of the proceeding for divorce. Apparently, such proceeding is instituted by appellant with intention to create evidence to defend the claim of divorce. The appellant cannot assert that the respondent is guilty of withdrawal from his society without reasonable excuse, particularly when he failed to establish existence of matrimonial relations. It doesn't lie in the mouth of appellant to say that respondent wife has withdrawn from his society.

26. The evidence on record indicates that the respondent is residing at her maternal home after completing her education and the appellant has never attempted to establish matrimonial relationship since the date of marriage. The stray meetings somewhere in hotels or occasional journey taken together would not constitute co-habitation. The term co-habitation brings within its sweep the sincere attempts of the husband to accept her as life partner and the same treatment is expected from the wife towards husband. In present case, the marriage between the

appellant and respondent appears to be result of infatuation during the college days without understanding the duties owing to the marriage. It is expected that both the spouses will make sincere efforts for co-habitation. The husband should behave as a dutiful husband and wife should behave as a devoted wife. In present case there is complete failure of observance of such duties on the part of the appellant. Taking overall survey of the pleadings, evidence and material before us it leads us to conclude that the appellant has failed to establish the claim for restitution of conjugal rights. Hence no interference is called for in the judgment and decree passed by Family Court thereby dismissing the P.A.No.A-22/2019.

27. Upshot of the aforesaid discussion, though we have set aside the finding of Family Court against issue No.1 regarding cruelty by husband in terms of Section 13 (1) (i-a), we affirm finding on point of desertion by husband and consequential decree of divorce in terms of Section 13 (1) (i-b), hence the final result remains unchanged.

28. In the result, both appeals fail. The Family Court Appeal No. 21/2021 as well as Family Court Appeal (ST.) No. 34077/2022 are dismissed with cost.

[S.G. CHAPALGAONKAR, J.]

[MANGESH S. PATIL, J.]

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