

Bombay High Court

Sanjeev Vyankatesh Ranade vs Meghna Sanjeev Ranade on 21 July, 2011

Bench: A.M. Khanwilkar, R.Y. Ganoo

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1603

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION
FAMILY COURT APPEAL NO. 16 OF 2003

Sanjeev Vyankatesh Ranade,
Age 41 years, Occ:-Business,
Residing at 17/A/6, Vijay Bunglow,
Near Ashwamedh Hall, Erandwana,

Karve Road, Pune- 411 004.

...Appellant

Versus

Meghna Sanjeev Ranade,
Age 39 years, Occ:Housewife,

Residing at C/o.M.P.Sidhya (M.B.B.S.),
Survey No.10/3-A/1,
Near Kailash Jeevan Company,

Dhayari, Pune - 411 041.

...Respondent

WITH
FAMILY COURT APPEAL NO. 85 OF 2003
WITH

CIVIL APPLICATION NO.28 OF 2004
WITH

CIVIL APPLICATION NO.79 OF 2007
WITH
CIVIL APPLICATION NO.87 OF 2007

Meghana Sanjeev Ranade,
Age 39 years, Occ:Housewife,
R/o. C/o.M.P.Sidhya (M.B.B.S.),
Survey No.10/3-A/1,
Near Kailash Jeevan Company,

Dhayari, Pune - 411 004.

...Appellant

Versus

Sanjeev Vyankatesh Ranade
Age 41 years, Occ:-Business,
Residing at 17/A/6, Vijay Bungalow,
Near Ashwamedh Hall, Erandwana,
Karve Road, Pune- 411 004.

...Respondent

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WITH
CIVIL APPLICATION NO.262 OF 2008

IN
CIVIL APPLICATION NO.16 OF 2006
IN
FAMILY COURT APPEAL NO.85 OF 2003

Meghna Sanjeev Ranade

...Appellant

Versus

Sanjeev Venkatesh Ranade

...Respondent

And

Suvarna Sahakari Bank Ltd.

...Applicant

.....

Mr. A.V. Anturkar for Sanjeev Ranade-husband.

Mr. P.R Arjunwadkar for Meghna Ranade-wife.

Mr. R.V. Govilkar for the Applicant in Civil Application No. 262 of 2008.

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CORAM: A.M. KHANWILKAR AND
R.Y. GANOO, JJ.

RESERVED ON: JUNE 14, 2011 DELIVERED ON: JULY 21, 2011 JUDGMENT (Per A.M. Khanwilkar, J.):-

1. By this common judgment, we propose to dispose of both the appeals together. For the sake of convenience, we will refer to the parties as 'husband' and 'wife'.

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2. Family Court Appeal No. 16 of 2003 has been filed by the husband against the judgment and decree passed by the Judge, Family Court No. 3, Pune, dated 13th December, 2002, dismissing the

petition filed by him for divorce under Section 13 (1-A) (ii) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'HMA', for the sake of brevity), being Petition A-No. 28 of 2000. The companion Family Court Appeal No. 85 of 2003, has been filed by the wife against the judgment and decree passed by the Judge, Family Court, Pune, dated 13th December, 2002 for enhancement of maintenance amount under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as 'HAMA', for the sake of brevity), higher than the maintenance amount determined by the Family Court in petition filed by her, being Petition C - No. 55 of 2001. Besides these appeals, there are four civil applications filed during the pendency of Family Court Appeal No. 85 of 2003, being Civil Application No. 28 of 2004, 79 and 87 of 2007 filed by the wife and Civil Application No.262 of 2008 filed by a third party, Suvarna Sahakari Bank Ltd. Even the said applications will be disposed of by this common judgment.

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3. We shall first deal with the appeal filed by the husband.

The relevant facts for considering the said appeal are that, marriage was solemnised between the parties on 8th February, 1993. No issue is born out of the said wedlock. On account of some differences, the parties started staying separately. It is the case of the wife that she was sent to her parental house by her husband, and was not allowed to return to the matrimonial house and to cohabit with the husband. As a result, she filed petition for restitution of conjugal rights in the year 1998, being No. PA.813 of 1998. The said application was contested by the husband.

The husband filed cross petition for a decree of divorce. However, the Court decreed the petition for restitution of conjugal rights filed by the wife and rejected the cross petition filed by the husband for a decree of divorce, vide decision dated 26th November, 2000.

4. It is the case of the wife that, in spite of the abovesaid decree, the husband did not permit her to return to her matrimonial house and to cohabit with him. She had no source of income of her own, and was fully dependent on her father. For that reason, she filed Petition C-

No. 55 of 2001 for maintenance under Section 18 of HAMA on 29th May, 2001. While that petition was pending, the husband filed petition for divorce under Section 13 (1-A)(ii) of HMA before the Family Court on 5 1603 10th January, 2002, being Petition A No. 28 of 2002. The husband's petition came to be dismissed by the Family Court vide impugned judgment and decree dated 13th December, 2002. The Family Court negated the relief of divorce claimed by the husband on the finding that he has taken advantage of his own wrong. The Family Court exercised its discretion against the husband on recording the above satisfaction in terms of Section 23(1)(a) of HMA. For that, the Family Court noted two aspects: Firstly, that the husband did not allow the wife to enter his house for resuming cohabitation and frustrated all efforts made by the wife in that behalf. Secondly, he was in arrears of an amount of interim alimony of Rs.30,000/-. This decision is the subject-matter of challenge in the appeal filed by the husband.

5. We shall first revert to the pleadings of the parties. In the petition for divorce filed by the husband, he has stated that the wife, in spite of the decree of restitution of conjugal rights, or even prior to the filing of the said petition for such relief, had not cohabited together.

Further, the wife did not make any sincere effort for restitution, apart from sending letter to him for restitution. The wife never visited him after the decree of restitution of conjugal rights. That shows that the wife was not at all interested in cohabitation / restitution. The husband 6 1603 further asserted that no execution proceedings were filed by the wife after the decree in her favour for restitution of conjugal rights dated 26th November, 2000. Whereas, she chose to file petition for maintenance under Section 18 of HAMA. This conduct of the wife reveals her greedy attitude. The husband further alleged that, during the pendency of the application for restitution filed by the wife, she took away all her ornaments through Court Commissioner, which fact is also indicative of her intention that she did not want to reside with him. The husband asserted that there has been no restitution of conjugal rights between the parties to the marriage for a period of more than one year after the passing of decree for restitution of conjugal rights in a proceeding to which they were parties. In this backdrop, the husband prayed for a decree of divorce under Section 13 (1-A) (ii) of HMA. He further asserted that his business was running in heavy losses, and property belonging to him has been mortgaged to the bank. Further, the movables in the hotel premises have been attached by the Sales Tax Department for non-payment of dues. He has also received electricity bills from M.S.E.B. for Rs.5,04,000/-. Besides, he owes Rs.50,000/- to E.S.I., for which the E.S.I. Department has attached his bank account. He has further stated that, on account of these developments, he is under severe mental stress and is not in a position to take any further steps, which may 7 1603 cause some harm to his health. He has asserted that his marriage has been irretrievably broken down, and there are no chances of reconciliation.

6. The wife contested the said petition by filing Written Statement. In substance, she denied the allegations made in the petition.

Instead, consistent with her case stated in the Petition filed by her for maintenance which was earlier in point of time, she asserted that the husband has failed and neglected to maintain her, and refused her entry in the matrimonial house. It is her case that attempts made by her to resume cohabitation after the decree for restitution were frustrated by the husband. The husband refused her entry in the matrimonial house. She has given specific details of such unsuccessful attempts made by her to resume cohabitation with the husband. She has denied that she demanded money from the husband when she visited his house after the decree for restitution of conjugal rights in her favour. She has also denied that she was not interested in cohabitation and restitution. She has asserted that, under compelling circumstances, she was required to file petition for maintenance, and not out of greed for money, as is alleged by the husband. She has also denied the allegation that she has taken away all her belongings from the matrimonial home as alleged.

8 1603 She has clarified that she has taken away some of her belongings. That, however, contends the wife, would not mean that she has no desire or intention to reside with the husband. She has asserted that the plea of financial difficulties and heavy business losses has sprung only after she filed application for restitution of conjugal rights. She has denied that the marriage has irretrievably

broken down as has been suggested by the husband. It is her case that the husband successively thwarted all her attempts to resume cohabitation. She has asserted that, in the first place, she tried to contact the husband on telephone. She also sent letters to the husband, which remained un-replied. Then she went along with her father to her matrimonial home on 30th December, 2000. The husband was present in the house, but did not allow her to enter the house on the pretext that he intends to file appeal against the decision of the Family Court granting decree for restitution of conjugal rights in her favour. She had to come back, totally dejected, and could not resume cohabitation with her husband, who has, in fact, deserted her. It is her case that the husband was not even providing any maintenance to her, in spite of the decree for restitution of conjugal rights in her favour. The cheques tendered by the husband for interim maintenance were dishonoured, and he remained in arrears, thereby compelling her to remain at the mercy of her father. According to the wife, the husband not only failed to abide by 9 1603 the decree for restitution of conjugal rights, but prevented her from resuming cohabitation and to discharge their marital obligations.

According to the wife, therefore, the husband has disentitled himself for a decree of divorce within the meaning of Section 23(1)(a) of HMA.

7. On the basis of the pleadings in the Petition for divorce filed by the husband, the Family Court framed two points:

(1) Does the respondent (wife) prove that the petitioner (husband) is taking advantage of his own wrong?

(2) What order?

8. The parties examined themselves on oath. The husband did not examine any other witness. The wife, in addition to herself, examined her father as her witness.

9. In the examination-in-chief, the husband reiterated his case made out in the petition. He stated that, after the marriage, he stayed with his wife together for about five years. On 13th December, 1998, the wife asked him to leave her parental house. He, accordingly, left her at her parents' place. The wife, thereafter, did not return to the matrimonial home. Later on, she filed application for restitution of 10 1603 conjugal rights, which was decreed on 26th November, 2000. After giving these details, he has stated that the wife did not file any execution petition for restitution of conjugal rights. She did not come to his house after passing the decree for restitution, and hence, he prayed for a decree of divorce in his favour. This is the gist of husband's examination-in-

chief.

10. The husband was extensively cross-examined by the wife.

He admitted that he did not file any appeal against the decree for restitution of conjugal rights. He denied having received any phone calls from the wife after the decree for restitution. He also denied that the wife had visited his house on 30th December, 2000 or that he refused her entry in the house

on the pretext that he wanted to prefer appeal against the decree for restitution. He, however, admitted that he received letter sent to him by the wife, whereby the wife had shown her willingness to resume cohabitation. He has clarified the assertion made by him in paragraph 3 of his petition that the wife continued demanding money.

He has said that it means that she demanded money of interim alimony granted to her. He has admitted that he did not deposit interim alimony regularly, but asserted that he could not do so because of his financial condition. He has admitted that, when the decree for restitution was 11 1603 passed, he was in arrears of interim alimony of Rs. 30,000/-. He has also admitted that he has not paid any amount to the wife after the decree for restitution was passed till she filed maintenance petition. He has stated that the outstanding amount against him with regard to his hotel business payable to Suvarna Sahakari Bank since November, 2000 to July, 2002 was Rs.1,85,00,000/-, and he did not deposit any amount to satisfy that loan. He has admitted that he did not execute the decree for restitution of conjugal rights. He has admitted that he had preferred writ petition against order of maintenance (interim) passed by the Family Court on the earlier occasion. That writ petition was dismissed. He has then stated about the reason for not filing appeal against the decree for restitution of conjugal rights, as he could not afford fees of the advocate. He has denied the suggestion that he had decided to wait for a period of one year after the decree for restitution and intentionally did not pay the interim maintenance regularly so as to harass the wife and weaken her financially.

11. The wife examined herself as witness No. 1 in support of her plea. In her evidence, she has stated that she tried to make a phone call to her husband to inform him that she was coming to cohabit with him, but the husband was not available on phone. She has then stated 12 1603 that on 25th December, 2000, she, along with her father, had visited her matrimonial house, but they found that the house was locked. The car belonging to her husband was however seen parked outside the house, for which reason, they waited near the house for almost one hour, but, since the husband did not arrive, they had to return back. She has then stated that, on 30th December, 2000, she, along with her father, once again, visited the matrimonial house when the husband was at home.

However, the husband stood at the door, and told her that he will not take her in the house, and she should not enter his house. She has stated that her husband further told her that he was intending to prefer appeal to the High Court against the decree for restitution, and hence, she should not enter his house. She has further stated that, thereafter, for about two to three months, she tried to make phone calls to her husband to request him to allow her to cohabit with him, but the husband did not give any reply.

She showed willingness to produce the telephone bills. She has stated that the husband used to tell her on phone that he would not cohabit with her and she should not speak to him. She has stated that she made phone call to her husband on 22nd December, 2000. Thereafter, she sent letter to her husband on 5th January, 2001, informing him that she wanted to come back to the matrimonial home. She produced copy of the said letter and Registered Post A/D. She has then stated that on 28th January, 2001, she 13 1603 had made phone call to the husband, but he did not reply. She has then deposed that her husband was not depositing amount of interim alimony regularly. She has

stated that her husband had not provided her any further maintenance. She has stated that on 6th February, 2001, she made phone call to her husband, but he did not respond. She has asserted in her evidence that she was not ready to give divorce to her husband. She has further stated that her husband never made any enquiry after the decree for restitution, though she made efforts for cohabitation with him.

She has stated that the financial condition of her husband is sound.

Notably, the cross-examination of the wife conducted by the husband is very cryptic and brief. It reads thus:-

"(Cross-Exam. on behalf of the petitioner by Shri. Ranade Advocate)

4. I had not filed an execution petition to execute the decree for restitution of conjugal rights. The contents of PE No. 6(d) of my written statement Exh. 5 are correct."

12. The wife examined her father in support of her case as Witness No. 2. Her father, Mukund Prabhakar Sidhaye, deposed that, after the decree by the Family Court for restitution of conjugal rights, he, along with his daughter, visited the residence of the husband on 25th December, 2000. At that time, nobody was present in the house. He 14 1603 visited, for the second time, along with his daughter, on 30th December, 2000 to the house of the husband. At that time, the husband did not allow them to enter his house. He has further stated that, after filing Darkhast for recovery of the amount by his daughter, he, along with his daughter, had gone to the residence of the husband. The nephew of the husband was present, who told him that the husband was not at home.

One hour after their arrival, the husband came to see them, and told them that he does not want the wife to enter his house.

13. This witness has been cross-examined by the husband. The cross-examination reads thus:-

"Cross Examn. on behalf of the petitioner by Shri. Ranade Advocate.

2. On 25.12.2000, when petitioner was not found in his house, we made his enquiry with his neighbours. We made his enquiry with one Mr. Walimbe. My daughter had gone at the house of Walimbe and I was standing outside. It is not true to say that we had not gone to the house of petitioner on 25.12.2000. After 30.12.2000, we did not give the notice to the petitioner. It is not true to say that on 30.12.2000, we had not gone at the place of petitioner. It is not true to say that I depose falsely upon the say of my daughter."

14. The Family Court analysed the above referred pleadings and evidence brought on record by both the parties. It accepted the plea of the wife that the husband did not allow her to enter the matrimonial 15 1603 house. Moreover, the husband did not respond to the letters sent by the wife or

attended her phone calls. The Court opined that the husband frustrated all the attempts of the wife to resume cohabitation. Besides, the husband did not deposit the amount of interim alimony awarded to the wife regularly in the earlier proceedings. The Court found that the husband has not even asserted that he himself made any effort or made a single attempt to cohabit with the wife after the decree for restitution of conjugal rights, which shows that he was not willing to cohabit with his wife. On the above findings, the Family Court proceeded to dismiss the petition on the ground that the husband disintitiled himself for a decree of divorce, as he had taken advantage of his own wrong.

15. The husband has challenged this decision on the argument that mere disinclination of the husband to respond to the letters or to attempt to cohabit with the wife after the decree for restitution of conjugal rights, ipso facto, would not amount to taking advantage of one's own wrong.

To buttress this submission, reliance has been placed on the decision of the Apex Court in the case of Dharmendra Kumar v. Usha Kumar, reported in (1977) 4 SCC 12, and of this Court in the case of Sunita Rajendra Nikalje v. Rajendra Eknath Nikalje, reported in 1996 (1) 16 1603 Mh.L.J. 572, and Hari Dattatraya Shitole v. Meena Hari Shitole, reported in 2000(1) Mh.L.J. 398.

16. It is further argued on behalf of the husband that mere non-payment of maintenance, by itself, cannot be considered as a 'wrong' within the meaning of Section 23(1)(a) of HMA. Reliance is placed on the decision of the Supreme Court in the case of Hirachand Srinivas Managaonkar v. Sunanda, reported in (2001) 4 SCC 125.

According to the husband, out of maintenance amount of Rs.1,40,000/-, an amount of Rs.1,10,000/- has been paid. Even the amount of interim alimony, which was granted with effect from 29th May, 2001 at the rate of Rs.2,000/- per month, has been regularly paid. Further, the outstanding amount could not be paid due to financial stringency. Thus, it cannot be said that the husband was taking advantage of his own wrong. Further, even if the default was committed by the husband, that was much before the decree for restitution of conjugal rights was passed on 26th November, 2000. That default cannot be reckoned and held against the husband to refuse relief of divorce to him under Section 13 (1-A)(ii) of HMA.

Whereas, the relevant period during which the wrong committed by the husband could be taken into account is one year period from the date the 17 1603 decree for restitution of conjugal rights is passed, and not anterior thereto.

17. On the other hand, the counsel for the wife would argue that the act of the husband of not obeying the decree for restitution of conjugal rights is itself a "wrong". In any case, obstructing the wife's entry in the matrimonial house is a "serious wrong". It was argued that till today, the wife has not been allowed to resume cohabitation.

Moreover, there was no just reason to deprive the wife of the maintenance amount, which was awarded by the Court. The outstanding maintenance amount of Rs.30,000/- was in relation to the order of the Court which operated during the pendency of application for restitution of conjugal rights. During the pendency of the said application, the Family Court had granted interim

maintenance only in the sum of Rs.

1,000/- per month vide order dated 3rd August, 1999. The husband, however, chose to challenge that decision before the High Court by way of Writ Petition No. 5672 of 1999, which was eventually rejected. This Court, instead enhanced the interim maintenance amount to Rs.10,000/-

per month from October, 1999. The husband, no doubt, paid the amount at that rate for only 11 months, but remained in arrears for around three months when the application for restitution of conjugal rights came to be 18 1603 disposed of on 26th November, 2000. After disposal of the said application, the husband "intentionally" did not pay the balance amount to the wife.

18. Having considered the pleadings and the evidence produced by the parties, the first question is: Whether the finding of fact reached by the Family Court, that the husband has taken advantage of his own wrong, can be said to be manifestly wrong? From the evidence of the husband, there is nothing to indicate that he himself made any attempt to resume cohabitation with his wife after the decree for restitution of conjugal rights was passed by the Family Court. Indeed, such disinclination of the husband, by itself, may not be a wrong of such gravity so as to deny him decree of divorce. However, the wife, besides cross-examining the husband, has also examined herself and her father so as to establish the fact that, she repeatedly made attempts to return to her matrimonial house after the decree for restitution of conjugal rights was passed. However, each of those attempts were frustrated by the husband.

Significantly, on one occasion when the husband was present in the house on 30th December, 2000, he refused her entry in the house by standing at the door. He informed the wife and her father that he intends to prefer appeal against the decree for restitution of conjugal rights and 19 1603 rejection of his prayer for divorce. But, admittedly, such appeal was never filed. The only justification for not filing appeal is on account of unaffordable legal fees. This justification, to say the least, is a ruse and afterthought, nay, false to the knowledge of the husband. As is noticed from the cross-examination of the wife conducted by the husband, the only material question put to the wife was: Whether she attempted to execute the decree for restitution of conjugal rights? To which, the wife has answered that she did not file any execution proceedings. That does not mean that the case asserted by the wife has been challenged by the husband. Nor does it belie the claim of the wife that she had made all possible attempts to return to her matrimonial house so as to resume cohabitation after the decree for restitution of conjugal rights was passed by the Family Court; but the husband frustrated the same. Rather, that plea of the wife has gone unchallenged. Notably, the wife has proved that she had gone to her matrimonial house, accompanied by her father, but even after refusing entry, she kept on requesting the husband by her letters as well as phone calls to allow her to resume cohabitation. This version of the wife has been supported by her witness No.2, viz., her father. This evidence has remained unchallenged and unshaken. As a corollary, it follows that the husband, by his overt act and act of commission, succeeded in denying entry to the wife in her matrimonial 20 1603 house to enable her to resume cohabitation with him. This, in substance, is the finding of fact recorded by the Family Court. It is not a case of simpliciter disinclination of the husband to respond to the letters and phone calls, but a positive overt act by him of not allowing the wife to enter the matrimonial house to resume cohabitation with him. This conduct of the husband would be covered

by the expansive provision in Section 23(1)(a) of HMA. This finding recorded by the Family Court, in our opinion, needs no interference.

19. However, the argument of the counsel for the husband was that, even if the said finding of fact were to remain as it is, that was not sufficient to attract Section 23(1)(a) of HMA. To buttress this legal argument, reliance is heavily placed on the dictum of the Apex Court in the case of Dharmendra Kumar (*supra*). We have carefully gone through the said decision. In our opinion, the said decision is of no avail to the husband in the fact situation of the present case. In that case, the spouse (wife) in whose favour decree for restitution of conjugal rights was passed, failed and neglected to respond to the letters sent by the other spouse (husband) asking to resume cohabitation. Thus, the plea of the other spouse (husband), while opposing the petition for a decree of divorce filed by the wife, was that the petition must be dismissed as the 21 1603 wife had disentitled herself for a decree of divorce as she would get advantage of her own wrong within the meaning of Section 23(1)(a) of the Act. While rejecting this argument, the Apex Court observed that decree should not be denied to the spouse, who does not insist on compliance with the decree passed in his or her favour. Further, in order to be a 'wrong' within the meaning of Section 23(1)(a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, and must be misconduct serious enough to justify the denial of the relief to which the husband or the wife is otherwise entitled. Thus, merely because the spouse does not respond to the invitation by the other spouse to come and live with him, it would not disentitle the former to get a decree of divorce. Suffice it to note that, in that case, there was no allegation of obstruction caused by the other spouse. It was a *simpliciter* case of disinclination of the wife to respond to the letters sent by the husband calling upon her to resume cohabitation, which conduct of the wife was only akin to an act of omission. No positive act was done by the wife to create a situation so as to make it impossible for the husband to resume cohabitation.

20. It will be useful to refer to the decision of the Apex Court in Hirachand Srinivas Managaonkar (*supra*). The decision in 22 1603 Dharmendra Kumar's case has been explained in paragraph 15 therein.

It has been held that the said decision cannot be read to be laying down a general principle that a petitioner in an application for divorce is entitled to the relief merely on establishing the existence of the ground pleaded by him or her in support of the relief; nor that the decision lays down the principle that the Court has no discretion to decline relief to the petitioner in a case where the fulfillment of the ground pleaded by him or her is established.

The Court, while rejecting the argument that the right conferred by Section 13(1-A) is absolute and unqualified, proceeded to hold that the object of the amended provision of Section 13 (1-A) was merely to enlarge the right to apply for divorce and not to make it compulsive that a petition for divorce presented under that provision must be allowed on a mere proof that there was no cohabitation or restitution for the requisite period. The Court went on to observe that, on conjoint reading of Sections 13 (1-A) and 23(1)(a), it would appear that the petitioner does not have a vested right to get the relief of a decree of divorce. The Court ordained that, before granting the prayer to permanently snap the relationship between the parties to the marriage, every attempt should be

made to maintain the sanctity of the relationship which is of importance not only for the individuals or their children, but also for the society. The Court has expounded that the answer to the 23 1603 question depends on the facts and circumstances of the case and no general principle or straitjacket formula can be laid down. It has been noted that even after the decree for "judicial separation" is passed by the Court, it is expected of both the spouses to make sincere efforts for a conciliation and cohabitation with each other.

21. It is also useful to recall the settled legal position that the approach of the Court of law in matrimonial matter is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered by Courts with human angle and sensitivity. Delicate issues affecting conjugal relations have to be handled carefully and legal provisions should be construed and interpreted without being oblivious or unmindful of human weakness. [See *Jagraj Singh v. Birpal Kaur*, (2007) 2 SCC 564.]

22. Even the decision relied by the counsel for the husband of Sunita Nikalje (*supra*) will be of no avail. In that case, the husband had filed petition for restitution of conjugal rights. After the decree was passed in the said petition, he filed another petition for divorce under Section 13 (1-A) (ii). The Family Court granted a decree of divorce, which was challenged by the wife before the High Court. The High 24 1603 Court, after analysing the oral evidence, found, as of fact, that there was no manner of doubt that the wife had gone to the house of the husband immediately after the decree for restitution of conjugal rights was passed, but the husband's mother drove her out. On this finding the High Court eventually held that the husband was not entitled for a decree of divorce, as he cannot be allowed to take advantage of his own wrong. This decision has considered the other reported cases, including the decision in *Dharmendra Kumar's* case. In paragraph 23 of this decision, it has been held that Section 23(1)(a) is couched in negative terms, and burden lay upon the petitioner, who prays for decree of divorce - to prove that he was not taking advantage of his own wrong. The Court restated the legal position that mere disinclination or reluctance to accept the other spouse is not sufficient. There should be attempt of making it impossible for a spouse to resume cohabitation after the decree for restitution of conjugal rights is passed. The Court should not grant the decree of divorce lightly or defeat it when the marriage is broken down completely. In the present case, the husband has failed to plead as well as prove that he was not taking advantage of his own wrong.

23. In the case of *Hari Dattatraya Shitole* (*supra*), the Court found, on facts, that the husband had merely shown disinclination to 25 1603 submit to a decree by not responding to the efforts made by the wife and her relatives. In the same case, however, the Court has noted that a wrong would be to drive an innocent party to a situation where it cannot fight back and then a person who has created such situation will try to take advantage. The decision in *Hari Dattatraya Shitole* was, therefore, on the facts of that case.

24. Considering the settled legal position, we have no hesitation in holding that, in the present case, the husband has disentitled himself for a decree of divorce, having taken advantage of his own wrong by obstructing the wife from entering her matrimonial house to resume cohabitation with him. He made it impossible for the wife to resume cohabitation after the decree for restitution. It is

not a case of mere disinclination or reluctance of the husband to resume cohabitation after the decree for restitution of conjugal rights was passed.

25. There is yet another aspect, to which the Family court has adverted to. It has held that the husband disintituled himself for a decree of divorce within the meaning of Section 23(1)(a) of HMA, as he intentionally failed and neglected to pay the arrears of interim maintenance to the wife and was waiting only for completion of statutory 26 1603 period to file a Petition for divorce. Even that finding of fact deserves no interference. In cases of intentional non-payment of interim maintenance amount, the Apex Court has dealt with similar argument in Hirachand Managaonkar's case (supra). It may be useful to reproduce paragraph 12 of the said decision, which reads thus:-

"The next contention that arises for consideration is whether the appellant by refusing to pay maintenance to the wife has committed a "wrong"

within the meaning of Section 23 and whether in seeking the relief of divorce he is taking advantage of his own "wrong". In Mulla's Hindu Law (17th Edn., at p.121) it is stated:

"Cohabitation means living together as husband and wife. It consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering house wifely duties to the husband and the husband supporting his wife as a husband should. Cohabitation does not necessarily depend on whether there is sexual intercourse between husband and wife. If there is sexual intercourse, it is very strong evidence - it may be conclusive evidence - that they are cohabiting, but it does not follow that because they do not have sexual intercourse they are not cohabiting. Cohabitation implies something different from mere residence. It must mean that the husband and wife have begun acting as such and have resumed their status and position as husband and wife."

After having extracted the quotations from Mulla's, the Court held that even after decree for judicial separation is passed, both the spouses were obliged to make sincere contribution for the purpose of successful cohabitation. And if the husband refuses to pay maintenance to the wife, he fails to act as a dutiful husband and thus, commits a "wrong" within the meaning of Section 23 of HMA. Later, in Paragraph 15 of the 27 1603 reported decision, the Court specifically dealt with the question as to what is a "wrong" withing the meaning of Section 23(1) of the HMA.

While considering the facts of that case, wherein the husband failed and neglected to pay the meagre amount of Rs.100/- as maintenance to the wife and he was found to be only marking time for expiry of the statutory period of one year after the decree so that he may easily get a decree of divorce. The Court held that such conduct of the husband results in committing matrimonial "wrong" in refusing to maintain his wife and also trying to take advantage of the said wrong. This decision applies on all fours to the case on hand.

26. In paragraph 14 of the same decision, the Court observed thus:-

" In this connection it is also necessary to clear an impression regarding the position that once a cause of action for getting a decree of divorce under Section 13(1-A) of the Act arises the right to get a divorce crystallises and the Court has to grant the relief of divorce sought by the applicant. This impression is based on a misinterpretation of the provision in Section 13(1-A). All that is provided in the said section is that either party to a marriage may present a petition for dissolution of the marriage by a decree of divorce on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or more after the passing of a decree for judicial separation in a proceeding to which they were parties or that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or more after the passing of a decree for restitution of conjugal rights in a proceeding to which both the spouses were parties. The section fairly read only enables either party to a marriage to file an application for dissolution of the marriage by a decree of divorce on any of the grounds stated therein. The section does not provide that once the applicant makes an application alleging fulfillment of one of the conditions specified therein the Court has no alternative but to grant a decree of divorce. Such an interpretation of the section will run counter to the provisions in Section 23(1)(a) or (b) of the Act."

.....

"If the provisions in Section 13(1-A) and Section 23(1)(a) are read together the position that emerges is that the petitioner does not have a vested right for getting the relief of a decree of divorce against the other party merely on showing that the ground in support of the relief sought as stated in the petition exists. It has to be kept in mind that relationship between the spouses is a matter concerning human life. Human life does not run on dotted lines or charted course laid down by statutes. It has also to be kept in mind that before granting the prayer of the petitioner to permanently snap the relationship between the parties to the marriage every attempt should be made to maintain the sanctity of the relationship which is of importance not only for the individuals or their children but also for the society. Whether the relief of dissolution of the marriage by a decree of divorce is to be granted or not depends on the facts and circumstances of the case. In such a matter it will be too hazardous to lay down a general principle of universal application. " (emphasis supplied)

27. The explanation offered by the husband is that, due to financial difficulties, he was not in a position to pay the arrears. This explanation is preposterous. The husband, pursuant to the order passed by this Court in Writ Petition No. 5672 of 1999, started paying the interim maintenance amount, as directed, in the sum of Rs.10,000/- per month from October, 1999. He paid such amount (except for three months) until the dismissal of petition for divorce. Once that petition was disposed of, as no other proceedings were pending between the parties before any Court, he,

therefore, did not pay the arrears of maintenance amount till now. The evidence on record is not enough, much less, substantiate the position that suddenly, after 26th November, 29 1603 2000, the financial position of the husband had changed so drastically that he could not pay the balance maintenance amount till date. Not to pay the arrears of maintenance for so long is nothing short of a recalcitrant and revengeful attitude of the husband. Suffice it to note that it is not possible to countenance that the husband was completely disabled to pay the arrears of maintenance, as is contended. Nay, there is no legal evidence to establish that fact. Understood thus, even this overt act or positive act of commission of the husband would disentitle him for a decree of divorce, as he cannot be allowed to take advantage of his own wrong within the meaning of Section 13(1-A) (ii) read with Section 23(1)(a) of HMA. Indeed, the husband has made a feeble attempt to bring on record that his financial position is still precarious by filing affidavit during the pendency of these appeals. The averments in the said affidavit cannot be the basis to reverse the finding of fact recorded by the Family Court, which, in our opinion, is unexceptionable for the reasons already stated by us hitherto.

28. The next argument of the husband is that the said default had occurred prior to the date of decree for restitution of conjugal rights, and, for that reason, the same cannot be reckoned for deciding his petition under Section 13(1-A)(ii) of HMA. The argument, though attractive at 30 1603 the first blush, clearly overlooks that the act of intentional non-payment of arrears of maintenance is not a one-time act of commission, but it is a recurring one and would continue until the amount is fully paid. Even if the arrears pertain to period prior to 26th November, 2000, that would not absolve the husband of his liability to pay the outstanding amount after the decree for restitution of conjugal rights was passed. It would have been a different matter if the husband had taken initiative to resume cohabitation with the wife soon after the decree was passed. However, in the present case, the evidence points out to the contrary. It is the husband who refused to cohabit with the wife, and at the same time, intentionally continued to remain in arrears of maintenance merely because the application for restitution of conjugal rights was disposed of by the Court. Suffice it to observe that the fact that the maintenance amount was outstanding for the period prior to 26th November, 2000 would make no difference, as the liability of the husband to pay the said amount would not cease but continue until the amount was fully paid.

29. In view of the above, we have no hesitation in taking the view that the appeal filed by the husband challenging the decision of the Family Court rejecting his petition for divorce is devoid of merits, and the same deserves to be dismissed.

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30. That takes us to the appeal filed by the wife for enhancement of maintenance amount granted in Petition No. C-55 of 2001 under Section 18 of HAMA. This petition was filed on 29th May, 2001 after decree for restitution of conjugal rights was passed on 26th November, 2000, and after exhausting all possibilities of resuming cohabitation with the husband. More so, when the wife realised that the husband was not taking her back in the matrimonial house, and at the same time, providing no maintenance to her, which left her with no other choice but to depend upon the mercy of her father. In the petition, reference is made to the harassment caused to the wife at the

matrimonial home while she was staying there. It is not necessary to elaborate on those matters for the purpose of considering the present appeal. Suffice it to observe that it is her case that she was meted out cruel treatment not only by the husband but by her mother-in-law as well. Further, the husband was ignoring her and used to come home late. He did not even acknowledge or appreciate the sentiments of the wife that on his birth day, she wanted to celebrate.

But instead, she was humiliated by the husband. Later on, she was sent to her matrimonial home by the husband and, when she came back, she found the matrimonial home locked. Therefore, she could not enter the house. She tried to contact the husband several times at his restaurant, 32 1603 but of no avail. Eventually, her father and sister-in-law met the husband personally and pleaded him to take her back, but the husband was not in a mood to pay any heed to that request as well. The wife was, therefore, forced to stay in her father's house.

31. It is further alleged that in this backdrop, she had to file an application for restitution of conjugal rights. In the said application, the husband filed counterclaim praying for decree of divorce. The said proceedings were disposed of by the Family Court by allowing the application preferred by the wife. Thus, decree for restitution of conjugal rights was granted and the petition for divorce preferred by the husband was dismissed. She has then adverted to the efforts made by her to resume cohabitation by going to the matrimonial house, along with her father, as also by sending letters and making phone calls. It is her case that her husband thwarted all her efforts to resume cohabitation. Thus, the husband deserted her and was also not providing her maintenance even after decree for restitution of conjugal rights in her favour. Further, the husband was in arrears of interim maintenance to the extent of Rs.

30,000/- ordered to be paid by the Court, for which, she had to take out execution application. It is further stated that the husband offered maintenance amount by cheques, which were dishonoured. It is the case 33 1603 of the wife that she felt as if she was left high and dry and required to run from pillar to post to recover the amount towards maintenance. She has asserted that she has been abandoned by her husband without her consent and she was being willfully neglected by the husband. It is stated that the husband has sufficient means to pay maintenance. He has business establishments. Besides, he belongs to an affluent family. The family is conducting hotel business at Mahabaleshwar and is situated in sprawling premises. The husband has his own air-conditioned hotel with total capacity to accommodate about 150 persons at a time. The said hotel is situated at a strategic location and is doing roaring business. The wife also asserted that the husband is also engaged in transport business. The volume of business of the husband is so high that he enjoys huge credit facilities from banks, to the tune of almost over Rs. 1 crore. According to the wife, the income of the husband was not less than Rs.1,00,000/-

per month. The petition also gives details of other family properties. It is the case of the wife that the husband stays in a big bungalow and even his joint family has a palatial house at Mahabaleshwar. On this basis, the wife asserted that she is entitled to be provided with suitable comfortable house and also maintenance amount to include expenses for food, clothing, maintenance and other facilities suited to the lifestyle of 34 1603 the husband. The income of the wife, however, is very limited, of only Rs.600/- per month, as she was doing the job of honorary teacher.

32. It is then stated that, instead of providing for monthly maintenance amount towards accommodation and other expenses, it would be appropriate to provide her lump-sum amount, as she may not be then required to pursue for recovery of monthly maintenance from the husband, who is bent upon to harass her and has not paid the already ordered monthly maintenance amount regularly. Accordingly, the wife prayed for direction against the husband to pay Rs.15,00,000/- in lumpsum to the wife for purchasing a house and Rs.10,00,000/- in lieu of monthly maintenance by investing the said amount in Fixed Deposit.

33. The husband, by filing Written Statement, denied the allegations made by the wife.

34. Considering the rival pleadings, the Family Court framed three points: Firstly, does the petitioner (wife) prove that the respondent (husband) is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish or of 35 1603 willfully neglecting her? Secondly, what would be the quantum of maintenance to the petitioner (wife)? And, thirdly, what order?

35. The wife examined herself as Witness No. 1 and also examined her father as Witness No. 2. The husband examined himself in his defence.

36. The Family Court, on analysing the pleadings and evidence, while dealing with Point No.1, adverted to the outcome in the previous proceedings between the parties in Application No. PA.813 of 1998, which was filed by the wife for restitution of conjugal rights. It noted that, even in the said proceedings, the question whether the husband deserted the wife was specifically addressed and was answered in favour of the wife. In addition, the Family Court considered the oral evidence given by the wife and her father as well as the husband, and eventually concluded that it was clear that the husband was guilty of desertion, that is to say, of abandoning the wife without reasonable cause and without her consent or against her wish or of willfully neglecting her. The conclusion so reached by the Family Court, in our opinion, is unexceptionable. The fact whether the husband had deserted the wife was specifically put in issue in the proceedings before the Family Court 36 1603 for restitution of conjugal rights filed by the wife. That issue was answered in favour of the wife. That finding has been allowed to attain finality by the husband. For, no appeal against the decision of the Family Court granting decree for restitution of conjugal rights has been filed by him. In that sense, the circumstances which obtained prior to granting of decree for restitution of conjugal rights on 26th November, 2000 need not be re-considered in the present proceedings. The finding recorded by the Family Court in that regard will bind the parties.

37. The question is: Whether, after granting of decree for restitution of conjugal rights, there is any changed circumstance? For that, we will have to now examine the evidence regarding events unfolded thereafter.

That can be culled out from the evidence of the wife, wherein she has stated that, after the decree for restitution of conjugal rights was passed in her favour, she attempted to go and live at her matrimonial house. As a mater of fact, the evidence regarding events unfolded after 26th November, 2000 have already been adverted to while considering the petition / appeal filed by the husband for

decree of divorce. Be that as it may, even in the petition filed by the wife for maintenance under Section 18 of HAMA, she has asserted that, after the decree for restitution of conjugal rights was passed in her favour, she tried to go and live at her 37 1603 matrimonial house. On 22nd December, 2000, she made phone call to the husband, which was not attended by him. On 25th December, 2000, she had gone to her matrimonial house, but the house was found locked.

Again, on 30th December, 2000, she and her father had gone to her matrimonial house. The husband was at home, but he did not allow her to enter the house, and told her that he was intending to file appeal in the High Court against the decree for restitution of conjugal rights. She has stated that, thereafter also, she made phone calls, time and again, but the husband did not give any response. Thereafter, she sent letters to her husband, which were not replied.

38. The wife has then stated that, after the disposal of application for restitution of conjugal rights in her favour, the husband did not give her any maintenance. He failed and neglected to deposit the entire amount of interim maintenance awarded by the Court in the said proceedings. She has then given the description of the bungalow where she was staying with her husband, i.e., her matrimonial house. The same was on plot of 10,000 square feet. It has ten rooms. She has then stated that presently, she was staying with her father and was doing job of honorary teacher in a nursery school, drawing salary of only Rs.600/- per month. She produced her salary certificate before the Court. She has then stated that 38 1603 she was required to file petition for maintenance. She has further stated that her husband's financial position is sound and he owns restaurant in the name of Aram Fast Food, near Saraswatbaug, Pune. He has transport business by name Aram Roadline. Further, at Mahabaleshwar, there is lodging and boarding business of joint family of the husband, by name Aram Lodging And Boarding. Even at Mahabaleshwar, there is a big house of the joint family of the husband. She has stated that, as per her knowledge, the income of her husband was between Rs.1,00,000/- to Rs.2,00,000/- per month. She has denied the allegations made by her husband in the Written Statement. She has stated that a lumpsum amount of Rs.15,00,000/- be awarded to her to enable her to purchase a house and a lumpsum amount of Rs.10,00,000/- be granted by way of permanent maintenance. She has asserted that she has prayed for lumpsum permanent maintenance, as the husband does not pay the alimony regularly.

39. She has been cross-examined by the husband. Suggestions were put to her that she had not sent any letter or attempted to meet the husband, and that she was deposing falsely. In the cross-examination, in the context of facts stated by the wife, which had unfolded after passing 39 1603 of the decree for restitution of conjugal rights, an attempt was made to discredit the wife by putting following questions:-

"11. In P.A.No.813/98 the commissioner was appointed to assess the income of the hotel. I again say that the Commissioner was appointed only to see the hotel and articles of the hotel. Approximately I have stated the income of the respondent. It is correct that Vijay Bungalow is in the names of father of the respondent and the cousin of the respondent. After filing the petition by me, Aram Lodging and Boarding was transferred in the name of partnership firm in the father of the respondent, cousin of the respondent and brother of the respondent are the partners. I have not

produced documentary evidence to show that the property at Mahabaleshwar is the joint family property of the respondent.

40. The other cross-examination has no bearing on the facts which are required to be examined in the present appeal. The wife also examined her father, who deposed that, after the decree for restitution of conjugal rights was passed, he, along with his daughter, had visited the house of the husband. He tried to contact his son-in-law on phone, but he was not available. He then stated that, on 25th December, 2000, he and his daughter had gone to the house of his son-in-law in the afternoon. They waited for one hour in front of that house. His son-in-law, however, did not return. Therefore, they had to come back. He has then stated that, again, on 30th December, 2000, he had gone to the house of his son-in-

law. However, his son-in-law told them not to enter his house. He has then stated that, at the time of Darkhast for recovery of maintenance amount, he had gone to the house of his son-in-law, but he was not at 40 1603 home at that time. After half an hour, his son-in-law came and told him not to come to his house.

41. This witness has been cross-examined by the husband. The cross-examination is very brief if not cryptic. The same reads thus:-

"Cross-exam. on behalf of the respondent (husband) by Shri. Ranade, Adv.

5. I have neither good relations nor bad relations with the respondent."

42. The evidence of the wife and her father leaves no manner of doubt that, after the decree for restitution of conjugal rights was passed, the wife made all efforts to resume cohabitation, but she was prevented from doing so by her husband. Considering this evidence, the finding of fact recorded by the Family Court that the wife has proved that the husband abandoned her without reasonable cause, without her consent and against her wish and willfully neglected her is unexceptionable. As a matter of fact, the said finding of fact has not been challenged by the husband. We may assume that the husband is reeling under an impression that he is entitled to argue those matters in the companion appeal filed by him.

However, in the companion appeal, no serious attempt was made to assail the said finding which we have already alluded to earlier.

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43. In view of the above, the real controversy that remains to be considered in the appeal filed by the wife is: Whether the wife is entitled for enhanced maintenance amount. The Family Court has awarded a sum of only Rs.7,000/- per month to the wife towards her maintenance with effect from 29th May, 2001, i.e. the date of presentation of the petition. The Family Court has not at all dealt with the claim of the wife to provide for suitable residential accommodation to her; and, in lieu

thereof, Rs.15,00,000/- to enable her to purchase the house. Similarly, the Family Court has not granted the prayer for lumpsum permanent maintenance amount of Rs.10,00,000/-, instead granted only monthly maintenance of Rs.7,000/- per month to the wife.

44. We shall first deal with the prayer of the wife to grant suitable accommodation, and in lieu thereof, a sum of Rs.15,00,000/- to enable the wife to purchase a house. In view of the finding of fact already recorded against the husband that he has failed and neglected to maintain his wife; and, in fact, has deserted and abandoned her, in law, the wife is entitled for a suitable residential accommodation of her own choice, where she can stay. The relief claimed by the wife, however, is to provide her lump-sum amount of Rs.15,00,000/-, in lieu thereof, so that 42 1603 she can purchase a house of her own choice. The wife has asserted that the husband has sufficient means and is capable of providing her amount demanded by her for purchasing a house. The wife has asserted that the husband is running his own business of hotel at Saraswatbaug, Pune, and is also having transport business. In addition, the joint family of the husband is running hotel at Mahabaleshwar. The wife has further asserted that the joint family has huge immovable property at Mahabaleshwar. Even the husband has a big bungalow in Pune, having about ten rooms. Further, the husband's income is between Rs.1,00,000/- to Rs.2,00,000/- per month. The husband, in his examination-in-chief, however, has deposed very cryptically as follows:-

"Due to my unsound financial condition I could not pay the amount of interim alimony within time. My business is in loss. I have produced certificate from Sales Tax, order of payment receipt, Income Tax Returns, Balance-Sheet. I had obtained loan from Suwarna Sahakari Bank. I am in arrears of the amount of Rs.2,25,00,000/- or more than that, of the same Bank."

No documentary evidence is produced by the husband to substantiate the stand taken by him or, for that matter, to belie the assertion made by the wife about his financial capacity of his own and from the joint family businesses. The above evidence of the husband, to say the least, is to hood-wink the real issue.

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45. The fact that the wife is virtually dependent on her father has gone unchallenged. The fact that she has no sufficient means of her own to maintain herself has also gone unchallenged. The fact that she was staying at the mercy of her father is also not in dispute. At the same time, the assertions made by the wife in the petition as well as on oath before the Court have not been challenged by the husband at all. Further, he has not deposed anything about those assertions in his examination-in-

chief, nor produced any documentary evidence to belie the claim of the wife. The husband has been cross-examined elaborately by the wife with regard to issue of financial position of the husband and his involvement in different businesses, including his own. In the cross-examination, he has admitted that Aram Lodging And Boarding situate at Mahabaleshwar is managed by his brother and father; but he has stated that it is a partnership firm. No document to support that position is forthcoming.

What is significant to note is that he admits in the cross-examination that his mother and even wife of his brother are partners in the said firm.

Further, he does not know whether the said partnership was registered.

He has stated that the said business was started by his father in 1945 and now converted into partnership business. In the first place, the partnership deed has not been produced. Moreover, the father, mother, brother or wife of the brother of the husband has not been examined by 44 1603 the husband in support of his claim. Assuming that the business has been now converted into partnership business, the date on which it is converted assumes significance. That is not forthcoming. Further, it is not explained as to why the partnership is of all other family members including the daughter-in-law (wife of the other son), wife, son, but leaving out only the husband. That makes us infer that it has been done to defeat the claim of the wife or other creditors including to avoid paying even legitimate maintenance amount and accommodation for the wife.

46. Suffice it to observe that the evidence of the husband does not inspire confidence that he has no share in the family business. As has been mentioned above, the assertion made by the wife in that behalf has gone unchallenged. Insofar as his own business at Saraswatbaug in the name and style of Aram Fast Food, he admits that he had invested around Rs.16,00,000/- to Rs.17,00,000/- in year 1992, when it was started. He further asserts that he had taken loan from bank to purchase the shed. In the cross-examination, however, it has come on record that he has employed 15 to 18 persons to work in the said hotel. The monthly salary of each worker is between Rs.1,000/- to Rs. 1,500/- approximately.

He has further admitted that the capacity of the said hotel is such that it 45 1603 can accommodate about 150 customers at a time. It is fully equipped and a running hotel. He has asserted that the electricity bill for two months of the said hotel is between Rs.10,000/- to Rs. 15,000/-. But then he has deposed that he had taken cash credit facility from Suvarna Sahakari Bank. Notably, the Cash Credit facility is for a substantial amount of as much as over Rs. 1.5 crores, which could not have been given to a small-

time hotel. He has also admitted that there is entry in the account book, which shows that Rs.2,25,000/- was paid to Aram Lodging And Boarding (i.e., family business at Mahabaleshwar). This evidence not only discloses the financial capability of the husband, but also his links with the family business at Mahabaleshwar, which, undoubtedly, is generating huge income for the family.

47. Indeed, in his evidence, he has deposed that his business at Saraswatbaug, Pune, has suffered huge losses and the said hotel has been attached. Assuming that the hotel is attached and even sold, the fact remains that the wife has asserted that, in addition, the husband is engaged in business of transport in the name of Aram Transport. The fact that he was engaged in the said business has been admitted in the cross-examination. Further affidavit now filed in the present appeals does mention that even that business has been closed. It is not the case 46 1603 of the husband that, after the sale of his hotel business, he has been declared insolvent or any such proceedings are started against him. It is not his case that he has been disowned by his joint family consisting of his father, mother

and brother. Merely saying that he has suffered losses in the businesses cannot absolve him of his liability to maintain his wife and to provide her accommodation. On analysing the evidence of the husband and the manner in which he has cross-examined the wife and her father the inescapable conclusion is that the husband has sufficient means to support his wife by paying maintenance and providing suitable accommodation. We are inclined to take the view that the husband has failed to substantiate that he has no share in the joint family business or properties at all. The husband has failed to produce the partnership deed or the Income Tax Returns or Balance Sheet of the joint family business or to examine any joint family members i.e. his father, mother, brother or sister-in-law.

48. Taking over all view of the matter, therefore, there is no manner of doubt that the husband has sufficient means and has sufficient income.

If it so, he is obliged to provide suitable accommodation to his wife, having deserted her without her consent or against her wish. In lieu of accommodation, the wife has asked for an amount of Rs.15,00,000/-.

47 1603 This amount was claimed by the wife as back as in year 2001. With passage of time and the spiraling rise in the real estate, in all probability the wife would not be able to procure even a decent residential accommodation of her own choice with that amount as of now. For that reason, we would be justified in moulding the relief claimed by the wife by awarding suitable interest on the lumpsum amount of Rs.15,00,000/-

to compensate the wife, which we intend to do, in view of prayer clause

(d) of her original petition. In our opinion, the wife is entitled to receive interest at the rate of at least 12% per annum on amount of Rs.

15,00,000/- with effect from the date of filing of the petition, i.e., 29th May, 2001, till the same is realized.

49. Thus, so far as prayer clause (b) is concerned, in the first place, we give option to the husband to provide suitable accommodation of not less than one BHK in the nearby vicinity where the matrimonial house is situated or in the location of the choice of the wife, if any. That shall be provided by the husband within three months from today. It will be open to the husband to provide such accommodation to the wife on ownership basis in the name of the wife, or, if it is on lease or leave and licence, that should be valid during the lifetime of the wife. In either case, the husband would be liable to pay all the outgoings therefor from time to 48 1603 time. Failure to provide suitable residential accommodation within three months from today, for whatever reason, the husband shall pay a lumpsum amount of Rs.15,00,000/- to the wife in lieu of accommodation, along with interest thereon at the rate of 12% per annum with effect from 29th May, 2001 till the entire amount is fully realised. Relief of interest, as aforesaid, is being granted by invoking prayer clause (d) to pass any other order in the interest of justice in favour of the wife.

50. With regard to relief (c) prayed by the wife to direct the husband to pay lumpsum amount of Rs.10,00,000/- for keeping it in Fixed Deposit, even this will have to be granted for the reasons already recorded while dealing with prayer clause (b). This relief has been prayed in the light of assertion made in paragraph 13 of the petition filed by the wife that by payment of lumpsum amount, she will be relieved from the agony of running after the husband to recover the monthly maintenance amount from time to time. The basis on which lump-sum amount of Rs.

10,00,000/- has been worked out has not been furnished by the wife.

However, it is common ground that, in the earlier round of proceedings, against the order of interim maintenance passed by the Family Court, when the matter was brought before this Court by way of Writ Petition No. 5672 of 1999 by the husband, the said petition was rejected, and the 49 1603 interim maintenance amount was fixed at Rs.10,000 per month to be paid by the husband to the wife. The total aggregate amount thereof per annum would work out to Rs.1,20,000/-. There is sufficient evidence on record to justify the claim of the wife that at the relevant time, she was entitled to receive at least Rs.10,000/- per month towards maintenance.

To earn equivalent amount by way of interest on the investment of Rs.10,00,000/-, the interest rate must be around 12% per annum.

51. Considering the above, the Family Court ought to have granted monthly maintenance amount to the wife of not less than Rs.

10,000/- per month. Instead, the Family court has awarded a sum of Rs.

7,000/- per month only. The Family Court has not assigned any reason of its own, but has merely followed the opinion in the earlier proceedings in Application P.A. No. 813 of 1998 that, if monthly maintenance is to be granted to the wife, it should be around Rs.7,000/- per month.

52. It appears that the Family Court has opted for monthly maintenance to be paid to the wife because the husband has suffered losses in his business. That view does not commend to us for the reason already recorded hitherto. On the contrary, we hold that the husband is capable of, and ought to have been directed to deposit a sum of 50 1603 Rs.10,00,000/- for keeping in Fixed Deposit, as prayed by the wife. In any case, if monthly maintenance is to be awarded, that amount should not have been anything less than Rs.10,000/- per month, which amount was already determined by way of interim maintenance in the earlier round of proceedings between the parties by this Court and which the husband had paid at least for eleven months during the relevant period.

Therefore, even if we were to follow the approach of the Family Court to direct the husband to pay the monthly maintenance amount to the wife, that ought not to be less than Rs.10,000/- per month, to be paid along with interest thereon at the rate of 12% per annum with effect from 29th May, 2001, i.e., the date of filing of the petition.

53. Accordingly, we direct the husband to pay a sum of Rs.10,00,000/- (Rupees Ten Lakhs) along with interest thereon at the rate of 12% per annum from 29th May, 2001 till it is realised, which amount be invested in the name of wife in appropriate Fixed Deposit Scheme in a bank of her choice, towards lumpsum permanent maintenance amount, in lieu of monthly maintenance. This liability of the husband is in addition to the liability to provide suitable residential accommodation or specified amount in lieu of accommodation. The appeal preferred by the wife would succeed on the above terms.

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54. It appears that the office is treating Civil Application No. 8 of 2004 in Family Court Appeal No. 85 of 2003 as pending. By the said application, the wife had prayed for creating charge for the decree of maintenance passed in favour of the wife in P.C. No. 55 of 2001 by the Family Court in respect of the property known as Aram Fast Food and Snack Bar, situated at Pune 9. By the order dated 8th July, 2004 passed in the said application, in our opinion, the application is worked out. No further relief is claimed in the said application. Hence, this application be treated as already disposed of.

55. The next application pending on the file is Civil Application No. 28 of 2004. This has been filed by the wife for interim relief during the pendency of the suit. The wife has prayed for direction against her husband to pay Rs.10,000/- per month from the date of the original petition, i.e., 29th May, 2001. In view of the disposal of the appeal, nothing survives for consideration in this application, which was ordered to be heard along with the main appeal.

56. The next civil application pending on the file is Civil Application No. 79 of 2007, again filed by the wife, for direction against 52 1603 the husband to strike off his defence. This application is filed on the assertion that the husband has failed to comply with the order passed by the Family Court of paying Rs. 7,000/- per month towards maintenance amount to the wife. Besides this application, there is one more application, filed by the wife, being Civil Application No. 87 of 2007, praying for direction to arrest the husband and commit him to civil prison for non-compliance of the maintenance order. Both these applications will have to be treated as worked out, in view of the order passed in Civil Application No. 87 of 2007 dated 25th April, 2007. That order was taken to the Supreme Court by the husband being Civil Appeal No.6914 of 2007. That appeal was disposed of by the Supreme Court on December 1, 2008 with the following order:-

"Leave granted.

Heard learned counsel for the parties.

By the impugned order, the appellant has been directed to be put up in civil prison for non-payment of amount of maintenance.

Learned counsel appearing on behalf of the appellant submitted that property belonging to him has been auction sold and sale proceeds are lying in deposit in the

Family Court and, out of the same, amount of maintenance may be paid to the wife.

In view of this stand taken on behalf of the husband, the impugned order passed by the High Court is set aside and the Family Court will see that the entire outstanding amount of maintenance is paid to the wife out of the sale proceeds.

The civil appeal is, accordingly, disposed of."

53 1603 The above order has been modified by the Supreme Court on July 24, 2009, which reads as under :

"In the order dated 1st December, 2008, in the third paragraph, the words "Family Court" be read as "Shree Suvarna Sahakari Bank Ltd.".

Ordered accordingly."

In other words, the amount payable by the husband is now recoverable from the sale-proceeds of the hotel business. In that view of the matter, the reliefs claimed in the above stated two applications will not survive for consideration.

57. The last application pending on the file is Civil Application No. 262 of 2008. This has been filed by the third party, Suvarna Sahakari Bank Ltd., praying that the bank be permitted to complete and finalise the auction sale of the hotel premises of the husband and the sum of Rs.

1,51,00,000/- be permitted to be deposited in this Court. In the alternative, if the husband is able to get a better offer than the said amount, he be directed to get a positive conclusive offer with the Demand Draft for the higher offer in the name of the Registrar General of this Court within the specified time.

54 1603

58. We may point out that, when the appeals came up for hearing before the Court on 14th June, 2010, it was pointed out to the Court that the sale-proceeds of the hotel property have been deposited in the Bank over and above other amounts in Court. As no appearance was made by the Bank, therefore, notice was issued to the Bank in the context of pending Application No. 262 of 2008. Pursuant to the said notice, the advocate for the Liquidator appeared and informed the Court on 2nd July, 2010 that the statement recorded in order dated 14th June, 2010 that the Bank has been taken over is incorrect, and asked for time to take instructions from the Liquidator, as the Bank was under liquidation. The matters were thereafter listed on July 7, 2010, when it was pointed out by the advocate for the Bank that the Division Bench of this Court, by order dated 15th January, 2008 on Civil Application No. 16 of 2006 filed by the Bank, has noted that all interim orders that may have been passed by the Court are vacated. That extricated the Bank from its obligation to deposit the amount of sale-proceeds of the auctioned property in Court.

The counsel for the husband, however, invited our attention to the subsequent order passed by the Apex Court dated 1st December, 2008 in Civil Appeal No. 6914 of 2008, read with order dated 24th July, 2009, which obliges the Bank to ensure that the entire outstanding amount of maintenance payable to the wife out of the sale-proceeds is released at 55 1603 the earliest. In view of this development, the limited relief claimed in the application filed by the Bank under consideration does not survive. The Bank will have to abide by the directions of the Apex Court contained in orders dated 1st December, 2008 and 24th July, 2009 passed in Civil Appeal No. 6914 of 2008. Grievance was made before us by the Bank that the said orders have been passed by the Supreme Court without notice to the Bank, and, therefore, the Bank has no legal obligation to release any amount payable by the husband to the wife, from and out of the sale-proceeds. In that, the sale proceeds is subject to preferential rights on which the Bank will have precedence. In view of this submission on behalf of the Bank, in the subsequent order dated 2nd August, 2010, this Court noted that it would be open to the Bank to seek appropriate directions from the Apex Court as may be advised. Suffice it to observe that the limited relief claimed in the application filed by the Bank is worked out on the basis of the order of the Apex Court. In any case, this application cannot be the basis to keep the main proceedings between the husband and wife pending. The application filed by the Bank, therefore, is disposed of, without prejudice to the rights and contentions of the Bank, which the Bank is free to pursue before the appropriate forum, if so advised.

56 1603

59. Accordingly, we proceed to pass the following order:-

ORDER

(a) Family Court Appeal No. 16 of 2003 filed by the husband against the judgment and decree passed by the Judge, Family Court, Pune, dated 13th December, 2002 in Petition A-No. 28 of 2000 is dismissed. As a result, the decision of the Family Court is upheld, and consequently, the petition for divorce filed by the husband stands rejected.

(b) Family Court Appeal No. 85 of 2003 filed by the wife for enhancement of amount towards maintenance under Section 18 of HAMA is allowed. The impugned judgment and decree of the Judge, Family Court, Pune, dated 13th December, 2002 in Petition C-No.55 of 2001 is modified in the following terms:-

57 1603

(i) The husband shall within three months from today provide "suitable" residential accommodation to the wife consisting of not less than one BHK in the nearby vicinity where the matrimonial house is situated or in such other locality "as may be agreed upon by the wife". Further, the said accommodation shall be provided on ownership basis in the name of the wife, and if on lease or leave and licence basis it must be so provided during the lifetime of the wife. In either case, all the outgoings with regard

to the accommodation / premises to be provided to the wife, shall be borne by the husband during her lifetime.

(ii) Failure to comply with the direction in clause (i) above within the time as specified, for whatever reasons, the husband shall pay within four months from today, lumpsum amount of Rs.15,00,000/- (Rupees Fifteen Lakhs) in lieu of accommodation, along with 58 1603 interest thereon at the rate of 12% per annum with effect from 29th May, 2001 till the entire amount is fully realized.

(iii) Insofar as prayer clause (c) of the original Petition, the husband shall pay to the wife within three months from today a sum of Rs.10,00,000/- (Rupees Ten Lakhs) along with interest thereon at the rate of 12% per annum with effect from 29th May, 2001 till the date of its realization, which amount shall be invested by the wife in her name in appropriate Fixed Deposit Scheme in a bank of her choice, towards permanent maintenance amount under Section 18 of HAMA. The wife would be free to avail of the interest earned on the said investment during her life time.

(c) Civil Application No. 8 of 2004 in Family Court Appeal No. 85 of 2003 is already disposed of in 59 1603 terms of order dated 8th July, 2004. The same be consigned to the record.

(d) In view of the dismissal of Family Court Appeal No. 85 of 2003, Civil Application No. 28 of 2004 in Family Court Appeal No. 85 of 2003 is disposed of.

(e) Regarding Civil Applications No. 79 and 87 of 2007 in Family Court Appeal No. 85 of 2003, nothing survives for consideration in these applications in view of order dated 6th September, 2007 passed by this Court in Civil Application No. 16 of 2006 in Family Court Appeal No. 85 of 2003 and orders dated 1st December, 2008 and 24th July, 2009 passed by the Supreme Court of India in Civil Appeal No. 6914 of 2008.

(f) Civil Application No. 262 of 2008 in Civil Application No. 16 of 2006 in Family Court Appeal No. 85 of 2003 is disposed of in view of orders dated 1st December, 2008 and 24th July, 2009 passed 60 1603 by the Supreme Court of India in Civil Appeal No. 6914 of 2008.

(g) The husband shall pay costs of these proceedings to the wife quantified at Rs.15,000/-

(Rupees Fifteen Thousand) to be paid within four weeks from today.

60. At this stage, Counsel for the husband prays that the operation of the impugned Judgment be stayed. We see no reason to accede to this request, as, in terms of the Judgment, the husband has been given sufficient time of three months to comply with the directions contained therein. Hence, request for stay of operation is rejected.

R.Y. GANOO, J.

A.M. KHANWILKAR, J.

