Bombay High Court
First Appeal No.308 Of 1998 vs Unknown on 6 January, 2014
Bench: B.P. Dharmadhikari, A.S. Chandurkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

FIRST APPEAL NO.308 OF 1998

APPELLANT: Smt. Uttara Praveen Thool, aged 28 years, C/o Manoharrao Bhavade, resident of Girad, Tq. Samudrapur, District Wardha.

-VERSUS-

RESPONDENT: Praveen S/o Bhanudas Thool, age 37 years, Occupation-Service, resident of House No.4/44. ig Raghuji Nagar, Nagpur.

Mrs. V. Thakre Advocate for the appellant.

Mrs. R. S. Sirpurkar Advocate for respondent.

CORAM: B.P.DHARMADHIKARI AND A.S. CHANDURKAR,JJ.

DATE OF RESERVING THE JUDGMENT: 20TH NOVEMBER 2013. DATE OF PRONOUNCING THE JUDGMENT: JANUARY,2014. ORAL JUDGMENT : (Per A. S. Chandurkar, J)

1. The appellant - wife has preferred the present appeal under Section 19 of the Family Courts Act 1984 being aggrieved by the judgment dated 8-6-1998 passed by the learned Judge, Family Court, Nagpur whereby the petition filed by the respondent - husband for grant of divorce has been allowed. Herein after the wife will be referred to as the appellant and the husband will be referred to as the respondent.

2. The marriage between the parties was solemnized on 2-12-1992. Out of said wedlock, the appellant gave birth to a son on 27-8-1993. According to the respondent, after the birth of said child the appellant did not return to her matrimonial home for no justifiable reason. Hence, on 22-12-1994, the respondent preferred Hindu Marriage Petition under Section 9 of the Hindu Marriage Act 1955 (hereinafter refer to as the said Act) bearing No.364 of 1994 for restitution of conjugal rights. During pendency of said proceedings, the respondent pleadings and in the alternate sought a decree for amended his divorce on the ground of mental cruelty on the basis of desertion by the appellant. The parties went to trial and on the basis of the material on record, the Family Court, Nagpur by judgment dated 8-6-1998 was pleased to allow the petition filed by the respondent and thereby passed a decree of divorce on the ground of cruelty.

3. Before considering the challenge to the aforesaid decree, it would be necessary to note the rival pleadings of the parties and also the other material on record on the basis of which the impugned decree has been passed. In the petition filed under Section 9 of the said Act, it was pleaded by the respondent that from the second month of the marriage itself, the appellant was requesting for grant of fa308.98.odt 3/52 divorce. It was stated that the appellant disliked the idea of a joint family and hence, the respondent started living separately from his mother and brother. It is further pleaded that after the birth of their son on 27-8-1993, the appellant's father took her to their native place and since then for no justifiable reason, the appellant had deprived the respondent of her company and had failed to fulfill her obligation as wife. It was further pleaded that on 23-12-1993, the appellant along with her father, her uncle and few other persons came in a Jeep to the respondent's place. After some talks, the appellant's father informed the respondent that it was not possible for the appellant to live with the respondent. Despite efforts through mediators, the appellant did not return to the matrimonial home and hence, on 22-12-1994 aforesaid petition seeking restitution of conjugal rights was filed by the respondent.

4. The appellant filed her written statement below Exh.14. She denied the averments made in the petition filed by the respondent. According to the appellant, the respondent used to treat her cruelly and keep her without food for 2 to 3 days. The respondent used to beat her and abuse her. It was further pleaded that in July, 1993, the respondent had called the appellant's mother and had demanded fa308.98.odt 4/52 Rs.4,000/- from her and threatened that if said demand was not met,

the mother should take back her daughter. It is stated that on 17/18-8-1993, despite intervention of Panchas, the respondent did not listen to them due to which the appellant was forced to return to her father's home. Despite a message being given about the birth of a child, the respondent did not accept the sweets that were sent in that regard. The respondent did not attend the ceremony that was held for naming the child.

Ultimately, on 23-12-1993 though the appellant had returned to the respondent's house along with their child, the appellant was not permitted to enter the house in the presence of various persons. It was further pleaded that on 2-3-1994, the appellant had filed proceedings for grant of maintenance under Section 125 of the Code of Criminal Procedure and with a view to defeat the appellant's right, the present proceedings for restitution of conjugal rights was filed. The appellant, therefore, prayed for dismissal of the proceedings.

5. During pendency of the proceedings before the Family Court, the respondent moved an application below Exh.16 to amend the petition by deleting the prayer for restitution of conjugal rights and substituting the same by the prayer for grant of divorce. The learned Judge of the Family Court by fa308.98.odt 5/52 order dated 20-5-1996 disposed of the aforesaid application by directing the respondent to file another application for seeking divorce as an alternate relief.

On 25-4-1996, the marriage Counselor submitted his report below Exh.24 in which he opined that amicable settlement between the parties was not possible.

Subsequently, the respondent moved another application below Exh.28 for amendment of the aforesaid ig petition. By said respondent made another prayer that in case it was application, the not possible to grant the relief of restitution of conjugal rights, a decree of divorce on the ground of mental cruelty be passed. The aforesaid application was filed on 13-6-1996. After considering the reply of the appellant filed below Exh.32, the learned Judge of the Family Court by order dated 19-10-1996 allowed the aforesaid application for amendment holding that the respondent was entitled to make an alternate prayer. Accordingly, the proceedings as filed stood amended in view of the aforesaid order. In view of addition of the prayer for grant of divorce, the proceedings were renumbered as Petition No.A/604/1996. The appellant amended her written statement and opposed the alternate relief sought by the respondent.

6. The respondent examined himself below Exh.60, his brother-in-law - Manishankar Patil below Exh.69 and another brother-in-law Vitan Borkar below Exh.70. The appellant examined herself below Exh.74, her father Manohar Shevde below Exh.83, Shiodas Betal, her maternal uncle and one Ashok Naranje below Exh.85. On the basis of the aforesaid pleadings and the evidence led by the respective parties, the learned Judge of the

Family Court recorded a finding that the appellant had treated the respondent with cruelty, that she had withdrawn from the respondent's society without any reasonable cause and hence, the respondent was entitled for a decree of divorce on the ground of cruelty. Thus, by judgment dated 8-6- 1998, the marriage between the parties was dissolved by a decree of divorce on the ground of cruelty.

7. On behalf of the appellant - wife, it was urged by her learned Counsel Mrs. V. Thakre that the Family Court erred in granting the decree for divorce on the ground of cruelty. It was submitted that though initially the petition was filed under Section 9 of the said Act for restitution of conjugal rights, no issue in that regard was framed while deciding the said proceedings. It was submitted that by seeking restitution of conjugal rights, the respondent had condoned all earlier incidents that had occurred and hence, on said count, a decree for divorce could not fa308.98.odt 7/52 have been passed. It was further submitted that in proceedings for restitution of conjugal rights, there could not be a prayer for grant of divorce on the ground of cruelty as such pleadings were mutually destructive and prayers were opposed to each other. It was further submitted that though the statutory period of two years as contemplated under Section 13 of said Act was not complete when the initial proceedings were filed, by permitting the petition to be amended for seeking the relief of divorce, the support respondent had got over aforesaid statutory bar. In of the aforesaid submission, the learned Counsel for the appellant relied upon the following judgments.

[1] AIR 2006 Himachal Pradesh 33, Baldev Raj v.

Smt. Bimla Sharma.

[2] AIR 212 Rajasthan 8, Reema Bajaj v. Sachin Bajaj.

[3] 2000(4) Mh.L.J. 244, Sanjay Chandrakant Mehta vs. Malaben Sanjay Mehta.

[4] (2005)9 Supreme Court Cases 600, Uma Parekh alias Pinku versus Ajeet Pareek Alias Govind Pareek and others.

[5] AIR 1988 Supreme Court 839, Tejinder Kaur v.

Gurmit Singh.

[6] AIR 1990 Bombay 84, Smt. Smita Dilip Rane v.

Dilip Dattaram Rane.

[7] AIR 1989 Supreme Court 1477, Smt. Lata K

v. Vilas.

[8] AIR 2009 Andhra Pradesh 54, Lakkaraju

Pradma Priya v. Lakkaraju Shyam Prasad. [9] AIR 1975, Supreme Court 1534(1) Dr. N. G.

Dastane v. Mrs. S. Dastane. Respondent.

On the other hand, Mrs. R. Sirpurkar, the learned Counsel appearing for the respondent -

husband supported the impugned judgment. It was sought submitted that though initially the respondent had restitution of conjugal rights by filing aforesaid proceedings under Section 9 of the said Act, in view of the stand of the appellant before the Marriage Counselor that she was not ready to reside with the respondent and in view of absence of any justifiable cause assigned by the wife for living separately from her husband, the respondent was compelled to seek divorce on the ground of cruelty. It was submitted that though various allegations were made by the appellant in her pleadings as regards ill-treatment and cruelty on the part of the respondent, the same were not substantiated by leading any cogent evidence. It was urged that failure to frame the issue as regards the restitution of conjugal rights did not have the effect of vitiating the impugned judgment. It was further submitted that the parties were living separately fa308.98.odt 9/52 since August 1993 i.e. after the birth of the child and hence, the Family Court was justified in passing the decree for divorce. It was further submitted that though the appellant had pleaded that there was a demand for dowry, no evidence in that regard was led by the appellant. On the contrary, it was the appellant who was guilty of deserting the respondent for no justifiable cause and the same, therefore, entitled the respondent for grant of divorce on account of desertion resulting in cruelty. It was further breakdown of igurged that there was an marriage and both parties having been irretrievable separated for almost 20 years, they could not be expected to live together as husband and wife. By filing an additional affidavit on record, it was submitted that the respondent had contracted the second marriage on 30th of November 1998. The learned Counsel for the respondent has relied upon the following judgments in support of her submissions: [1] AIR 1992 Madhya Pradesh 105, Smt. Bhavna Adwani v. Manohar Adwani.

[2] [1999 (2) Civil JJ 65] Smt. Shashi Shah V.

Kiran Kumar Shah.

[3] 1992 Mh.L.J. 997, Kishorilal Govindram Bihani vs. Dwarkabai Kishorilal Bihani. [4] II (1991) DMC 326 Sanyogta Verma versus Vinod Verma.

[5] II(1985) DMC 329, Suren Chandrakant Shah

versus Rita Suren Shah.

[6] 2012(7) ALL MR 282, Smt. Bhawna w/o

Vijaykumar Sakhare vs. Vijaykumar S/o Tarachand Sakhare.

[7] [2006(1) Mh.L.J., Durga Prasanna Tripathy vs. Arundhati Tripathy.

[8] II (2006) DMC 107 (DB)Iffath Jamalunnisa versus Mohd. Suleman Siddiqui.

[9] 2007(3) Mh.L.J. 1, Rishikesh Sharma vs. Saroj Sharma.

[10] (2007) 4 Supreme Court Cases 511, Samar Vs. Jaya Ghosh.

Ghosh [11] (2007) 4 Supreme Court Cases 548, Masooda Parveen Versus Union of India and others. She has, therefore, sought dismissal of the aforesaid appeal.

8. After hearing the respective Counsel and in view of the material on record, the following points arise for determination.

(1) Whether failure on the part of the Family Court to frame the issue pertaining to the claim for restitution of conjugal rights has resulted in vitiating the judgment? (2) Whether a decree for divorce could be sought as a relief in a petition filed under Section 9 of the said Act for restitution of conjugal rights?

fa308.98.odt 11/52 (3) Whether on an amendment permitting a prayer for grant of divorce in such proceedings being granted, the same relates back to the date of filing of the proceedings? (4) Whether decree for divorce needs to be granted on the ground that there has been an irretrievable breakdown of the marriage? (5) Whether the respondent is entitled for a decree of divorce on the ground of cruelty?

(6) What relief?

9. ig As to point no.1: The respondent had filed the present proceedings under Section 9 of the said Act seeking restitution of conjugal rights. In paragraph nos.6,9 & 10 of the petition, he had made various assertions in support of aforesaid relief. In reply thereto, the appellant had denied the claim as made by the respondent. This, therefore, gave rise to an issue pertaining to the claim of the respondent for restitution of conjugal rights. Such issue, however, was not framed by the learned Judge of the Family Court. It is, therefore, necessary to consider whether failure to frame said issue has resulted in vitiating the impugned judgment.

In this regard, the provisions of Section 99 of the Code of Civil Procedure may be noticed.

Under Section 99, no decree can be reversed or substantially varied on account of any defect or

irregularity in any proceedings not affecting

merits of the case of the jurisdiction of the Court. Though failure to frame a issue that arises on the basis of the pleadings of the rival parties would amount to an error being committed by the Trial Court, that by itself will not be a ground to reverse the impugned judgment. It is necessary to note here that during pendency of the proceedings, the respondent had made another prayer seeking grant of divorce on the ground of desertion. Such prayer was trial permitted to be added. The parties thereafter went to and contested the proceedings. While the respondent led evidence for grant of divorce, the appellant led evidence to demonstrate that the respondent was not entitled for said relief. Therefore, the prayer for divorce was, in fact, contested as being the main relief sought in said proceedings. Further, assuming that the issue pertaining to claim for restitution of conjugal rights was framed and answered against the respondent, the same would not have resulted in dismissal of petition in view of the other prayer in the proceedings. Similarly, the nature of evidence for seeking the relief of restitution of conjugal rights and for seeking divorce on the ground of desertion would naturally be of a distinct nature.

Such evidence could not be overlapping. In th

circumstances, therefore, it is clear that

parties have contested the proceedings with regard to the prayer for grant of divorce, mere failure on the part of the learned Judge of the Family Court in framing the issue as regards restitution of conjugal rights would not have the result of vitiating the impugned judgment. In any event, the appellant before commencement of the evidence did not raise any grievance before the Family Court that the issue pertaining to restitution of conjugal rights had not been framed. Hence, taking an overall view of the matter, we find that the failure on the part of the Family Court in framing the issue as regards the claim for restitution of conjugal rights has not resulted in vitiating the impugned judgment. Point no.1, therefore, stands answered accordingly.

10. As to Point No.2: This takes us to consider the next point as to whether a decree for divorce could be sought as an alternate relief in a petition filed for restitution of conjugal rights. While a petition for restitution of conjugal rights is required to be filed under Section 9 of the said Act, a petition seeking divorce is required to be filed on the grounds stipulated in Section 13 of the said Act. In the present case, initially, the proceedings were filed merely for restitution of conjugal rights. By subsequently amending the aforesaid proceedings, the relief for grant of fa308.98.odt 14/52 divorce on the ground of cruelty was sought to be made. As noted above, the requirements of Section 9 and Section 13(1)(i-b) of the said Act are distinct.

According to the learned Counsel for the appellant, the relief of restitution of conjugal rights cannot go hand in hand with the relief of divorce. Both reliefs were diametrically opposite. In support of the aforesaid submission, the learned Counsel for the appellant relied upon the decision of Himachal Pradesh High Court in Baldeoraj (Supra).

In said judgment, the alleged desertion took place on 19-2-1993. On 31-3-1993 the husband filed a petition for restitution of conjugal rights and in the alternate, sought a decree for divorce on the ground of desertion. In that context, it was observed that as the alleged desertion took place on 19-2-1993 and the petition was filed on 31-3-1993, no petition for divorce on the ground of desertion could have been entertained as the desertion itself was for a period of less than two years. In that context, it was observed that the prayer for grant of divorce itself was not tenable in law. The aforesaid judgment does not assist the appellant in view of its peculiar facts. In the present case, the prayer for grant of divorce has been made by way of amendment on the basis of prior desertion of two years. Hence, the ratio in the aforesaid case is not applicable to the case in hand.

fa308.98.odt 15/52 The learned Counsel for the appellant has then relied upon the decision of the Hon'ble Apex Court in the case of Uma Parekh (supra). Perusal of aforesaid decision reveals that though the proceedings were for restitution of conjugal rights, an alternate relief was being sought without there being any specific pleadings or without invoking the powers of the Court under Section 13 of the said Act.

The proceedings therein related to a claim fo
transfer
ig of the matrimonial

decision has no application to the case in hand.

case. The aforesaid

11. On the other hand, according to t

learned Counsel for the respondent, it w

permissible to seek the relief of divorce in

petition for restitution of conjugal rights. Reliance in this regard was placed on the decision of the Madhya Pradesh High Court in Bhavna Adwani (supra). In aforesaid decision, it was observed that there was no legal prohibition under the said Act for filing proceedings for restitution of conjugal rights or in the alternate, for a decree of divorce on the ground of desertion. It was held that if at the stage of filing of the proceedings, the petitioner had sought restitution of conjugal rights and in the alternate, if the other party continued to refuse to reside together, the marriage could be dissolved if a case fa308.98.odt 16/52 for desertion was made out. The ratio of the aforesaid decision, therefore, applies to the facts of the present case.

The decision of the Allahabad High Court in Binod Kumar (Supra) is also pressed into service. In the said case, the Family Court permitted conversion of proceedings for restitution of conjugal rights to a petition for divorce. It was Court held that such course was permissible by taking support of the provisions of Section 23A of the said Act.

The present
ig case being one for grant

relief and there being no question of conversion of of separate the proceedings as originally filed, the aforesaid judgment has no application to the case in hand.

In Kishorilal (supra) in proceedings for restitution of conjugal rights, an alternate plea for divorce on the ground of desertion was made. On this being objected in appeal, the Division Bench of this Court observed that it did not intend to go into the said technicalities and preferred to decide the actual issue on merits. Hence, said decision is also of no assistance to the respondent.

As held in Bhavna Adwani (supra), there is no legal bar to make a prayer for grant of divorce in proceedings for restitution of conjugal rights. Though the petitioner in a given case may seek restitution of conjugal rights initially, on account of the conduct of the other side, such petitioner fa308.98.odt 17/52 could urge that the other relief of divorce on the ground of desertion could, however, be granted. If in law separate proceedings for such a relief could be filed, there is no reason not to permit a party from seeking such reliefs in the same proceedings. Ultimately, even for succeeding in the grant of such relief, it would be necessary for such party to prove the claim made therein.

12. Similarly, we find that the appellant's objection ig to amendment and to

additional prayer seeking the relief of decree of insertion of an divorce on account of cruelty is also unsustainable. A civil suit to certain extent, is bound by the procedural laws and in province of amendment, by Order 2 Rule 2, Order 6 Rule 17 of CPC and the Limitation Act,1963. The Hindu Marriage Act,1955 does not prescribe any outer period to prove the desertion or cruelty, if the cause continues. The said Act only prohibits filing of premature proceedings and after expiry of said bar-period, the cause in most of the matrimonial disputes may be continuous accruing till the normal ties are not restored. Section 21 only makes CPC applicable as far as possible and not otherwise.

The legislative intent to attempt to put an end to the matrimonial dispute in one proceeding and to avoid multiplicity is also perceived in fa308.98.odt 18/52 Section 23 and Section 23A of the said Act. Duty of Court to attempt to reconciliate or divorce by mutual consent or then an irretrievable breakdown of marriage are some of the features peculiar to this jurisdiction. Thus, primacy is given to restoration of normal marital ties and ,if not possible, to grant other appropriate relief of separation or divorce. There is no principle that husband, having failed to secure the relief of restitution, can thereafter, never, file the proceedings for divorce on the available grounds. Non execution of a decree for the restitution of conjugal rights may also lead to grant of divorce. Hence, the concept like changing the nature of suit etc. may be inherently foreign to and not applicable in matrimonial matters. Perspective that due to change in nature of suit the defense may receive severe set back may not be available at all in matrimonial jurisdiction. However, not much arguments are advanced on these lines before us and hence, we leave this aspect open for its due consideration in

an appropriate case. But, on the date on which the respondent husband sought the leave to amend in present matter, it was also open to him, to institute fresh proceedings for grant of divorce on the ground of cruelty and continuous desertion. As institution of the fresh case was not prohibited, he could have very well sought leave to amend and add an additional relief in fa308.98.odt 19/52 the alternative in very same proceeding.

13. Husband-original petitioner was attempting to show unwarranted withdrawal from society by his wife i.e. appellant. Even while amending, he placed his unequivocal desire to have restitution and hence, qualified the amended prayer clause by employing the words "if not possible". The respondent wife in said proceeding can not object to such prayers as mutually destructive prayers. She can not be heard to say that she will not cohabit and will not permit the husband to pray for dissolution of the marriage.

She can not turn a Nelson's eye to the forgiveness offered by husband by filing a case for restitution against her and at the same time, frown upon the request for putting an end to matrimonial relationship because of her wrong offered to be condoned. Appellant can not approbate and reprobate at the same time. We find that the respondent husband has also continued with his bonafides while seeking the amendment and it is not open to appellant to urge any prejudice, though factually none is caused to her. The admitted date on which appellant left the matrimonial house is 23.8.1993 and the parties have not resided together thereafter. Child is born to the couple on 27.8.1993 and the proceedings for restitution are instituted on 22.12.1994. After filing of a written statement by wife turning down fa308.98.odt 20/52 his forgiveness and failure before the Marriage Counselor, leave to amend was sought and granted. In amended plea also, desire to condone is expressed and divorce is sought, if the condonation does not evoke required response. On that day, it was open to husband to file fresh proceedings for divorce on the strength of desertion and cruelty. Hence, by amendment, the time spent in litigation in seeking response to conditional forgiveness between 22.12.1994 till October, 1996 is thus sought to be put to use permitted by law. Appellant wife can not on one hand refuse to cohabit and on other hand, insist for institution of fresh case on the ground of desertion and cruelty. Encouraging such a defence will be to put a premium on party at fault and an injustice to a bonafide spouse who desires to resume cohabitation. It will be defeating the very scheme of jurisdiction with the Court under the said Act. We therefore express reservations on relevance/correctness of view reported at AIR 2012 Raj 8 (Reema Bajaj v. Sachin Bajaj) relied upon by the learned counsel for the appellant which considers Sections 9,13 and 13A of the said Act with Order 6 Rule 17, Order 7 Rule 7 of Civil Procedure Code and holds that an application for restitution of conjugal rights cannot be converted into application for divorce by way of amendment since prayer for restitution of conjugal rights and divorce are fa308.98.odt 21/52 diametrically opposite prayers. It is concluded by the learned Single Judge there that allowing such an amendment results into change in nature of matrimonial application. Moreover, in present matter, the learned Judge of the Family Court by order dated 20-5-1996 disposed of the earlier application for amendment filed by respondent husband by directing him to file another application for seeking divorce as an alternate relief. This order or liberty has remained unchallenged.

ig Hence, we hold that in the proceedings for restitution of conjugal rights under Section 9 of the said Act, the relief of divorce could be sought by the petitioner. Point No.2 stands answered

accordingly.

14. As to Point No.3: According to the learned Counsel for the appellant, the learned Judge of the Family Court erred in permitting the proceedings to be amended so as to incorporate the alternate prayer for grant of divorce. According to the learned Counsel in view of the provisions of Section 13(1) (i-b) of the said Act for constituting desertion as a ground for divorce, one of the parties has to desert the other for a continuous period of not less than two years immediately preceding the presentation of the petition. It was submitted that though the original proceedings were filed on 22-12-1994, by fa308.98.odt 22/52 permitting the respondent to amend the proceedings by adding the prayer for divorce on the ground of desertion, the Family Court has permitted the respondent to agitate a ground of divorce that was not permissible in law to be relied upon when such proceedings were filed. In other words, there was no desertion for period not less than two years immediately preceding the filing of the petition i.e. on 22-12-1994.

The argument though attractive, on further consideration the same does not merit its acceptance. The case of the respondent is that the appellant had left the matrimonial home in the last week of December 1993. The respondent thereafter filed application for amendment on 13-6-1996 and same was allowed on 19-10-1996. By said amendment the respondent was permitted to raise the ground of divorce on account of desertion under Section 13(1) (i-b) of the said Act. The effect of allowing the amendment on 19-10-1996 would be that it would be necessary for the respondent to prove that for a continuous period of two years prior thereto, the appellant had deserted the respondent. The amendment, therefore, would necessarily be required to have taken effect from the date it was allowed i.e. on 19-10-1996 and the same would not relate to the date of filing of the petition. The learned Judge of the Family Court while considering this issue has fa308.98.odt 23/52 observed that said ground of divorce was available to the respondent for seeking divorce. The aspect of avoiding multiplicity of proceedings has also been taken into account while allowing the amendment.

In this regard, the learned Counsel for the respondent has relied upon a judgment of the learned Single Judge of this Court in Suren (supra). It was held by the learned Single Judge that granting such an amendment would not relate back to the date of filing of the petition and the ground sought to be raised would become available only from the date of grant of such amendment. In the said case also, the ground of desertion was added by way of amendment during pendency of the matrimonial proceedings. It was observed that the ground that was initially not available could be permitted to be added on the basis of subsequent conduct of the parties and the same would not relate back to the date of filing of the petition but, said ground would become available from the date of grant of the amendment. In our view, the aforesaid observations of the learned Single Judge are correct and we respectfully affirm the same. The aforesaid decision of the learned Single Judge has been also followed by the Delhi High Court in Sanyogta (supra).

Therefore, the amendment permitting raising of a ground of divorce during pendency of the proceedings would not relate back to the date of fa308.98.odt 24/52 filing of the proceedings, but would become available from the date it is granted. Hence, Point No.3 stands answered accordingly.

15. As to Point No.4: According to the learned Counsel for the respondent, the present is a case where there has been an irretrievable breakdown of the marriage between the parties and hence, on said count itself, a decree for divorce needs to be passed. It is submitted that the parties have been living separately for last almost considering their conduct, the only inference that 20 years and can be drawn is that the marriage between the parties has broken down. In this regard, the learned Counsel placed reliance upon the decisions of the Hon'ble Apex Court in Durga (supra)and Rishikesh (supra)as well as the judgment of Andhra Pradesh High Court in Iffath (supra).

Irretrievable breakdown of marriage is not a ground envisaged by Section 13 of the said Act for grant of divorce. Separation of the parties for a long period of time without any justifiable cause amounting to desertion could be a ground for passing a decree of divorce under Section 13(1) (i-b) of the said Act. As observed by the Hon'ble Apex Court in Chetandass Vs. Kamladevi, AIR 2001 SC 1709, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a strait jacket fa308.98.odt 25/52 formula for grant of divorce. Thus, it is clear that mere submission that the marriage has irretrievably broken down cannot lead this Court to pass a decree for divorce without examining if any ground for divorce has been made out or not. Such view is already taken by Division Bench of this Court in Bajrang Revdekar Vs. Pooja Revdekar AIR 2010 Bom 8. We would, therefore, prefer to examine whether the respondent has made out a case for divorce on the ground of desertion. Point No.4, therefore, stands answered accordingly.

16. As to Point No.5: The respondent has sought divorce on the ground of desertion in terms of provisions of Section 13(1)(i-b) of the said Act. The provision contemplates desertion for a continuous period of not less than two years immediately preceding the presentation of the petition. The explanation to the expression "desertion" means the desertion of the petitioner by the other party without reasonable cause and without the consent or against wish of such party. As held hereinabove, by order dated 19-10-1996, the respondent was permitted to make a prayer for grant of divorce by allowing the amendment. Hence, the aspect of desertion will have to be considered for a period commencing two years prior thereto i.e. from 19-10-1994 onwards. In other fa308.98.odt 26/52 words, the respondent would be required to prove that the appellant had deserted him from 19-10-1994 onwards without reasonable cause and without his consent or against his wish.

Before examining the aspect of cruelty, it would be necessary to consider the observations of the Hon'ble Apex Court made in N. G. Dastane (Supra). In the aforesaid decision, it has been held that firstly the burden to prove the grounds on which relief is sought in a matrimonial proceeding rests on the petitioner. It has been further held that normal rule that governs civil proceedings namely that a fact can be said to be established if it is proved by a preponderance of probabilities is also applicable in such cases. There is no need to expect the petitioner to establish a particular ground "beyond reasonable doubt", but the Court must be satisfied on a preponderance of probabilities that a case for relief has been made out. These aspects, therefore, are required to be considered while examining the matter on merits.

17. Though the proceedings as

initially filed were for restitution of

conjugal rights, the respondent has also sought divorce on the ground of mental cruelty arising out of the appellant's conduct and behaviour as well as by the fact of desertion. In reply to the aforesaid pleadings, the appellant has denied that the respondent is entitled to claim divorce on aforesaid grounds. In her specific pleadings, the appellant has stated that she was being illtreated by the respondent. It has been pleaded that the respondent and his mother used to beat the appellant, the respondent used to drive out the appellant from the house when it was raining. There was also a threat given by the respondent of throwing acid on the appellant. There are also pleadings regarding demand of dowry by the respondent. It is stated that the respondent had called the mother of the appellant and had demanded Rs.4,000/-. It is thereafter pleaded that a demand of Rs.4,000/- towards the expenses of delivery were also made to the appellant's father. It is then specifically pleaded that on 23-12-1993 when the appellant's father and uncle along with other Panchas had come to fa308.98.odt 28/52 the house of the respondent, the appellant who was accompanying the aforesaid persons was beaten in presence of said persons.

The respondent in his evidence has stated that he was ready to take the appellant back, but it was her father who was not ready to send the appellant back. He has further deposed that he had issued notices on 28-1-1994 (Exh.61) and 18-2-1994 (Exh.64) calling upon the appellant to resume ig cohabitation. In examination, he has denied suggestions made the cross regarding demand of Rs.4,000/- to the appellant's mother. There are, however, no suggestions given to him with regard to the case of the appellant on the point of illtreatment namely driving her out from the house in the rains, throwing of acid or beating her in the presence of all on 23-12-1993. The appellant in the course of her examination-in-chief has referred to the threat given by the respondent of throwing acid, demanding Rs.4,000/- from the appellant's father and also her father being driven out when he had gone to invite the respondent for naming ceremony. In the cross examination, she has stated that fa308.98.odt 29/52 though she received the notices (Exh 61 &

64) from the respondent, she did not return to the matrimonial house though the said notices were not for divorce. She has further admitted that she had not sent any letter to her parents informing them about ill-treatment or that she had requested them to take her back. She has stated that she was employed in the year 1996 as a teacher and even after marriage she had continued service record.

using her maiden name in the

The appellant's father was

examined and in his cross examination he admitted that after the marriage, his daughter lived with the respondent only for 10 months. He further admitted that he did not lodge any report regarding illtreatment of his daughter or regarding demanding of dowry. Similarly, Shiodas (Exh.84) and Ashok (Exh.85) who had accompanied the appellant's father during talks to the respondent were also examined. In their examination-in-chief, however, there is no reference to the appellant being beaten in the presence of Panchas on 23-12-1993.

fa308.98.odt 30/

18. In so far as the aspect of ill-

treatment of the appellant by the respondent is concerned except the bare

statement of the appellant, there is no material on record to come to the conclusion that the appellant was, in fact, ill-treated by the respondent. Though it was alleged that the appellant was driven out of the matrimonial home and she was required to go out when it was raining, no neighbour ig has been examined aforesaid plea. In so far as the allegation to support that on 23-12-1993, the appellant was threatened and beaten in presence of panchas, the two witnesses examined by the appellant namely Shiodas (Exh.84) and Ashok (Exh.85) do not refer to aforesaid threats or beating of the appellant in their deposition. Even the appellant's father Manohar (Exh.83) does not say anything in this regard. In fact, no suggestions are given to the respondent that on said date, he threatened or ill treated the appellant in presence of the Panchas. Therefore, there is no material on record to hold that the respondent had ill treated or beaten the appellant on 23-12-1993. The appellant's father in his cross examination fa308.98.odt 31/52 has categorically admitted that he did not lodge any report regarding either demand of dowry or ill-treatment at the hands of the respondent. It may be noted that it was the case of the appellant that she had left the matrimonial home on account of the ill-

treatment at the hands of the respondent.

In so far as the demand of the amount of Rs.4000/- by the respondent is concerned, the appellant has pleaded that in July 1993, the respondent had called the mother of the appellant and had demanded Rs.4000/-. It is further pleaded that similarly demand was thereafter made from the appellant's father as expenses for delivery. The mother of the appellant to whom the first demand of Rs.4000/- was made has not been examined. Except the statement of the appellant's father, there is no other material on record to hold that there was any such demand made by the respondent

especially when the appellant's father did not lodge any report in that regard. Hence, except bare statements on the part of the appellant and her father, the same having been denied by the respondent in his cross examination, there is no other material on fa308.98.odt 32/52 record to hold that such demand of Rs.4000/- was made by the respondent. Thus, it has to be held that the appellant has failed to prove the plea of illtreatment by the respondent or the demand of an amount of Rs.4000/- by the respondent.

The Division Bench of this Court in Bhawna (supra) has held that making false and unsubstantiated charges against other party as regards demand of dowry would amount to cruelty.

19. Having held that the appellant had failed to prove either illtreatment or demand of the amount of Rs.4000/- by the respondent, it would now be necessary to consider whether the appellant had deserted the respondent without reasonable cause and without his consent or against his wish in terms of the Explanation to the provisions of Section 13(1)(i-b) of said Act. The reasons assigned by the appellant for leaving matrimonial home are on account of the illtreatment and demand of Rs.4000/- by the respondent. Other than the aforesaid two reasons, no other reason has been assigned for leaving matrimonial home. The fa308.98.odt 33/52 respondent in his cross examination has stated that on the day the appellant left the matrimonial home, they were living separately from his mother and brother and hence, when he returned home, he did not find anybody at home. It is also necessary to note that the respondent by sending two notices (Exh.61 & Exh.64) had called upon the appellant to rejoin his company. There was, however, no positive response from the appellant.

the

proceedings

Thereafter, during pendency of

when the parties were

referred to the Marriage Counselor, the

appellant stated before him that she was not desirous of returning to the matrimonial home and that she would do so only after her son completed the age of 18 years. The appellant, therefore, has failed to place any justifiable reason on record or to assign any reasonable cause to desert the respondent. The reasons given for leaving the matrimonial home have not been proved by the appellant and hence, it has to be held that the appellant has deserted the respondent "without reasonable cause" in terms of the Explanation to Section 13(1)(i-b) of said Act. It is, therefore, clear that though the appellant left the fa308.98.odt 34/52 matrimonial home before the birth of her son on 27-8-1993, as stated above, considering the desertion for the period from 19-10-1994 onwards, it is clear that the appellant has left the matrimonial home and deserted the respondent "without reasonable cause".

20. It is not in dispute that appellant did not agree to resume cohabitation even on trial basis and expressed that she would consider going to her husband's house only after her son became major i.e.

on or after 27.8.2011. She has left the matrimonial house behind her husband on 23.8.1993 and hence, burden was upon her to bring on record the justification therefor. Not only this, if she had any desire to resume matrimonial relationship, steps taken by her in that direction should have been pleaded and proved. Her readiness to cohabit pleaded in written statement is subject to the undertaking of husband and circumstances justifying that need are not proved by her. Effort to reunite alleged by her on 23.12.1993 does not substantiate any need of undertaking and that effort also is not brought on record with proper evidence. On the contrary, it militates with her other plea of demand of money and cruelty which again is not proved. Why she could not fa308.98.odt 35/52 agree to temporary joint stay on trial basis or required time till her son attained 18 years of age even to think of returning to her matrimonial house or wanted an unreasonably long time to even consider its pros and cons is not clarified. She appears not interested in cohabitation sand also in dissolving the marriage. It is obvious that this is nothing but cruelty as also desertion. Even before the Family Court or then before this Court, she never expressed her design to revive the relationship. She is only or opposing every move of her husband without any rhyme reason. Marriage in question has lost its propriety and there is no point in continuing the relationship. It will, therefore, have to be held that the appellant having failed to assign any reasonable cause for desertion, the respondent is entitled for a decree of divorce on the ground of cruelty on account of said desertion.

21. At this stage, it is necessary to refer to the contention raised by the appellant regarding the aspect of condonation of acts by the respondent. In view of the provisions of Section 23(1)(b) of the said Act, the Court is required to be satisfied that the party seeking divorce fa308.98.odt 36/52 on the ground of cruelty has not in any manner condoned the cruelty. The expression "or condoned the act or acts complained of"

as appearing in Section 23(1)(b) of the said Act is required to be considered.

Law on the point of condonation is laid down by the Division Bench of this Court in 2000 (1) Mh.L.J. 429 (Harvinder Singh Marwah Vs. Charanjit Kaur). There the cruelty was found established in Divorce Petition filed by husband on the ground of cruelty. Till the respondent wife left the marital home, they were co-habiting together and were having physical relations. Question involved was whether the order of learned Principal Judge dismissing the petition on the ground of condonation of cruelty needed to be set aside? While answering the question in affirmative, this Court held in para 11 that "For two young persons to have physical relations is quite common. But that itself would not lead to an inference of condonation. Even that case is not put forth by the other side. She has left the marital home since 24.4.1992 and has stayed away since then."

In Ravi Kumar v. Julmidevi, (2010) 4 SCC

476, at page 478 Hon. Apex Court has observed that:

"9. Several questions cropped up in the course of hearing before the High Court. One of them being whether in view of filing of a proceeding for restitution of conjugal rights, the appellant had condoned all alleged prior acts of cruelty of the wife.

10. The High Court after considering some decisions came to a finding that by filing a petition under Section 9 of the Act, the appellant had condoned the earlier alleged acts of cruelty of the respondent wife. Condonation is basically a question of fact. This Court finds that the reasoning of the High Court on condonation in the facts of this case is correct."

In Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558, at page 568, Hon. Apex Court observed in para 42 that " In England, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in Blyth v. Blyth5 (All ER at p. 536 H-I) the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case, like any civil case, may be proved by a preponderance of probability".

fa308.98.odt 38/52 In N.G. Dastane (Dr) (supra), in para 55 to 58, Hon. Apex Court observes:-

"55. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things: forgiveness and restoration. The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty.

But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued cohabitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws.

56. The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and fa308.98.odt 39/52 restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during cohabitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well imagine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that

cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual fa308.98.odt 40/52 requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part.

57. But condonation of a matrimonial offence is not to be likened to a full Presidential pardon under Article 72 of the Constitution which,once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety. "No matrimonial offence is erased by condonation. It is obscured but not obliterated". Since the condition of .forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence. Condoned cruelty can therefore be revived, say, by desertion or adultery.

58. Section 23(1)(b) of the Act, it may be urged, speaks of condonation but not of its revival and therefore the English doctrine of revival should not be imported into matters arising under the Act. Apparently, this argument may seem to receive some support from me circumstance that under the English fa308.98.odt 41/52 law, until the passing of the Divorce Reform Act, 1969 which while abolishing the traditional bars to relief introduces defences in the nature of bars, at least one matrimonial offence, namely, adultery could not be revived if once condoned. But a closer examination of such an argument would reveal its weakness. The doctrine of condonation was established by the old ecclesiastical courts in Great Britain and was adopted by the English courts from the canon law.

"Condonation" is a technical word which means and implies a conditional waiver of the right of the injured spouse to take matrimonial proceedings. It is not "forgiveness" as commonly understood. In England condoned adultery could not be revived because of the express provision contained in Section 3 of the Matrimonial Causes Act, 1963 which was later incorporated into Section 42(3) of the Matrimonial Causes Act, 1965. In the absence of any such provision in the Act governing the charge of cruelty, the word "condonation" must receive the meaning which it has borne for centuries in the world of law. "Condonation" under Section 23(1)(b) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed."

The Division Bench of the Delhi High Court in Mat. App. (FC) No. 3/2013 and CM 7056 and 7057/2013-Pushpa Rajai Vs. Jai fa308.98.odt 42/52 Prakash Lalwani recently accepted the same meaning by following N. G. Dastane (supra). In AIR 2013 Chh 88 (Smt. Mamta Namdeo Vs. Ghanshyam Bihari Namdeo), the Chhattisgarh High Court also adopted the same view.

22. Thus, to constitute condonation in terms of Section 23(1)(b) of the said Act, there must be forgiveness and restoration. The question, however, is whether for constituting condonation, the conduct of only one of the parties is to be considered or whether the conduct of both parties is to be

taken into account. In other words, whether the unilateral act of one of the parties is to be considered or whether the bilateral acts of both parties are to be considered. If for constituting condonation, there must be forgiveness and restoration, it is obvious that bilateral acts of both parties will be required to be taken into account while considering the aspect of condonation. Forgiveness and restoration cannot be unilateral and for it to be effective and fruitful, it has to be bilateral. One party to the marital tie may be ready to forgive and restore the same.

fa308.98.odt 43/52

One of the modes could be by filing

proceedings for restitution of conjugal

rights. The other party may, however, not be ready to forgive and restore said tie. The proceedings filed by one party for restitution could be opposed by the other by refusing to rejoin the marital tie. The same would not result in condonation in as much as there would be no consensus between the parties for the purposes of forgiveness and sided.

restoration.

Hence, the
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will have to be adjudicated after taking into account the bilateral acts of both parties. The offer made by one party and the reciprocal conduct of the other will have to be viewed together while determining codonation in terms of Section 23(1)(b) of the said Act.

What we can gather from the above precedents is that condonation implies knowledge to the husband of being wronged by wife, conscious election by him not to exercise the legal right flowing therefrom,to forgive the wife conditionally and the same resulting in the resumption of normal relationship between the couple.

fa308.98.odt 44/52 Thus, it is resumption of normal marital ties with mutual understanding which assumes significance. In matter like one at hand, where the desertion continues without even a day's break, the conditional forgiveness offered by the husband is not reciprocated by the respondent wife. On the contrary, she refuses to take advantage of the opportunity available and persists in desertion. As such, condonation which technically is a bilateral act or decision, never occurred and insistence upon the said aspect by the appellant wife is misconceived and ill advised.

In Baldev Raj (supra), the parties were married on 7-8-1998. After about seven months, the wife left the matrimonial home, but returned back in May 1989. Thereafter, she again left her husband after a week and later on rejoined him. On 19-2-1993, she again deserted him. The husband made efforts from 20-2-1993 to 28-2-1993 to bring her back, but was not successful. On 23-3-1993, the husband went to his wife's place to get her back but was not unsuccessful. He, therefore, filed proceedings for restitution of conjugal rights on 31-3-1993 with an alternate fa308.98.odt 45/52 prayer for dissolving the marriage by a decree of divorce. In that context, relying upon the Division Bench judgment of said High Court in Nirmala Devi Vs. Ved Prakash AIR 1993 HP 1 , it was held in Baldev Raj (supra) that filing of petition for restitution of conjugal rights implied condonation of all earlier acts of cruelty. Similar view has been taken in Reema Bajaj (supra), where amendment was sought to convert conjugal ig proceedings rights into for restitution proceedings of for divorce on the ground of desertion. The learned Single Judge of the Rajasthan High Court observed that filing of proceedings for restitution of conjugal rights amounted to condonation or forgiveness of the alleged act of cruelty till the date of filing of the amendment application. With utmost respect, we are unable to agree with aforesaid views. The unilateral act of filing petition for restitution of conjugal rights ignoring the response of the other side by itself would not amount to condonation for the purposes of Section 23(1)(b) of the said Act. When satisfaction in terms of said provision is to be arrived at by the Court, the approach fa308.98.odt 46/52 and response of both parties will have to be taken into account.

23. In the present case, in view of filing of the petition for restitution of conjugal rights by the respondent, the appellant has submitted that the same amounts to the respondent condoning the alleged act of desertion and cruelty.

In the proceedings for restitution of conjugal rights, the appellant filed her written statement and opposed the relief sought by the respondent. The offer made by the respondent for restituting conjugal rights by filing petition under Section 9 of the said Act was not accepted by the appellant who replied that the respondent was not entitled for said relief. Prior thereto, the response of the appellant to the two notices sent by respondent (Exh.61 & 64) was also not positive. In her cross-examination, the appellant stated that it was suggested to the parties to live together on trial basis and inform the Court. She has also admitted that she had stated before the Marriage Counsellor that she would consider going back to her husband after her son would complete the fa308.98.odt 47/52 age of 18 years. Thus, neither the pleadings of the parties nor the evidence of the appellant indicate any bilateral act or conduct so as to record a finding that there was forgiveness and restoration between the parties and the same amounted to condonation of the act of desertion on the part of the appellant.

24. Further, the appellant has opposed the petition ig for divorce on the ground

It was, therefore, necessary for her to have pleaded of cruelty.

and proved the fact that the respondent had in any manner condoned the alleged cruelty. There is, however, no evidence whatsoever on record to hold that the respondent had in any manner condoned the desertion by the appellant. The appellant has not placed any material on record to indicate that the respondent had condoned the aforesaid desertion on the part of the appellant. As stated herein above, the ground of cruelty on account of desertion having been permitted to be raised on 19-10-1996, the act of condoning such desertion should be from 19-10-1994 onwards on the part of the respondent. In other words, the appellant was required to show that after 19-10-1994, the respondent had in any manner condoned the unwarranted desertion of the appellant. However, there is hardly any material on record to come to fa308.98.odt 48/52 such a conclusion. We, therefore, record our satisfaction in terms of Section 23(1)(b) of the said Act that the respondent has not in any manner condoned the desertion on the part of the appellant from 19-10-1994 onwards in any manner whatsoever.

25. In Samar Ghosh (Supra) relied upon by the learned Counsel for the respondent, it has been observed in para 101 that where there has been a long period of continuous separation, it could be fairly concluded that the matrimonial bond is beyond repair. In such situation by refusing to sever that tie, the same could lead to mental cruelty. From the evidence on record, it is clear that after being married on 2-12-1992 the parties lived together only for a period of 10 months. They have resided separately since then, now almost for 20 years. We have found that the material on record is sufficient to hold the respondent entitled for a decree of divorce on the ground of desertion. The learned Judge of the Family Court has found that the appellant had failed to prove various allegations made by her which were reasons for deserting the fa308.98.odt 49/52 respondent. We find that the aforesaid conclusion has been arrived at on the basis of the material on record and we find no reason whatsoever to strike a discordant note. Accordingly, we affirm the conclusion arrived at by the Family Court and hold the respondent entitled for a decree of divorce.

26. ig The last grievance on behalf of the appellant namely re-marriage by the respondent during pendency of the appellant is now required to be noticed. According to the learned Counsel for the appellant, though the present appeal was pending, the respondent remarried on 30-11-1998. According to the learned Counsel, the aforesaid conduct of the respondent was required to be taken note of. Relying upon the decisions of the Hon'ble Apex Court in Tejinder Kaur (Supra), Lata Kamat (Supra), and of the Division Bench of this Court in Smita Rane (Supra), it was submitted that the appeal preferred by the appellant would not be rendered infructuous. On the other hand, it was submitted by the learned Counsel for the respondent that while fa308.98.odt 50/52 admitting the

present appeal, Rule on stay was issued by this Court on 3-8-1998. Said Rule on stay came to be discharged after hearing both sides on 11-9-1998. It was submitted that it was open for the appellant to have sought review of aforesaid order, but the same was not done. It was, therefore, submitted that in these circumstances, as interim stay was not granted during pendency of the appeal, the respondent had remarried on 30-11-1998.

The Hon'ble Apex Court in Tejinder Kaur (Supra), Lata Kamat (Supra) as well as this Court in Smita Rane (Supra) have held that the appeal as filed under Section 28 of said Act would not become infructuous only on account of the remarriage during pendency of said appeal. In view of the aforesaid law as laid down, we have considered the challenge to the decree passed by the Family Court on merits and we have not treated the appeal as filed to have become infructuous. We have thereafter found that the decree passed by the Family Court granting divorce to the respondent is legal and proper. We, accordingly, answer point No.5 as above and hold that the fa308.98.odt 51/52 respondent is entitled for a decree of divorce on the ground of cruelty.

27. In view of our aforesaid findings, we find no merit in the challenge to the decree passed by the Family Court. Both the parties have filed affidavits on record on the aspect of amount of maintenance. From the material on record, it is clear that the appellant was serving as an Anganwadi Sevika at Samudrapur and is getting Rs.4000/- per month. The son born on 27-8-1993 has now attained the age of majority. The respondent in his affidavit has stated that he is paying an amount of Rs.1500/- towards maintenance to the appellant and her son in addition to an amount of Rs.896/- that is being deducted from his salary. This arrangement is in force since 8-12-2003 as per orders passed on the pursis signed by both sides. Said arrangement can, therefore, be directed to be continued till it is modified in accordance with law. Hence, while dismissing the appeal, it is directed that the arrangement as jointly arrived at by the parties and as ordered by this Court on fa308.98.odt 52/52 8-12-2003 shall continue to operate till it is modified in accordance with law. Point No.6 stands answered accordingly.

28. In the result, the following order is passed:

[i] The appeal challenging the judgment dated 8-6-1998 passed by the Family Court, Nagpur in igPetition dismissed No.A-604/1996 with parties stands left to bear their own costs.

[ii] The respondent shall continue to pay a sum of Rs.1500/- per month in addition to the deduction of Rs.896/- per month from his salary to the appellant in terms of joint pursis dated 8-12-2003 till said arrangement is duly modified in accordance with law.

[iii] Appeal stands disposed of accordingly.

JUDGE JUDGE

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