

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JODHPUR.

JUDGMENT



Prakash

vs.

Smt. Kavita

D.B Civil Misc. Appeal No.911/06 under Section 19 of the Family Court Act, 1984 against the judgment dated 18.05.2006 passed by learned Judge, Family Court, Jodhpur in Civil Original Case Nos.162/2000 & 38/2001.

Date of Judgment:

April 30th,2008.

PRESENT

HON'BLE MR. PRAKASH TATIA, J.
HON'BLE MR. BHANWAROO KHAN, J.

Mr. Deepesh S.Beniwal for the appellant.
Mr. Haider Agha for the respondent.

REPORTABLE

BY THE COURT (Per Hon'ble Mr. Tatia, J.)

This misc. appeal has been preferred to challenge the judgment and decree dated 18.5.2006 by which the Judge, Family Court, Jodhpur decided two petitions, one filed by the appellant Prakash under Section 13 of the Hindu Marriage Act and another filed by respondent Smt. Kavita under Section 9 of the Hindu Marriage Act. The trial court dismissed the appellant's petition under Section 13 of the Hindu Marriage Act and granted decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act in favour of the respondent by the same judgment which is

impugned in this appeal.

Brief facts of the case are that the marriage of the appellant and respondent took place on 9.5.1997 at Jodhpur according to Hindu rites. According to the appellant, the respondent on the date of marriage itself, disclosed that she does not like appellant and she married appellant only because of the fact that her elder sister's marriage was already fixed and respondent's mother and father were willing to solemnized the marriage of both of their daughters together and, therefore, under pressure she agreed for marriage. She disclosed that she was interested in marrying with well educated person, whereas the appellant is not well educated. According to the appellant he tried to bear with all these comments of the respondent. On next day on 11.5.1997, the respondent went to her parents house and she did not return for 8 to 10 days then the appellant tried to bring the appellant back to the matrimonial house. At this time, the respondent put a condition that the appellant will have to live separate from the family and this condition was accepted by the appellant. According to the facts pleaded in the divorce petition, the respondent used to go to her parents house every second or third day. However, ultimately the respondent became pregnant but according to the appellant, the respondent was since not liking the appellant, therefore, she wanted to get rid of the unborn child by abortion



and she went to her parents house on 15.5.1998 so that she may get abortion with the help of her mother and father. It is not pleaded by the appellant that whether in fact, any abortion was performed upon the respondent but it is only stated that the child could not survive. It is stated that from 15.5.1998 the respondent did not come to the house of the appellant despite several efforts made by the appellant as well as his relation.



According to the appellant when all efforts failed, then respondent's father called *Panchayat* of their community on 16.3.1999 and several Panchas were made their efforts for reconciliation but on finding that the appellant and respondent cannot live together, it was decided that the marriage may be dissolved. On 17.3.1999, two deeds were executed on the stamp paper of Rs.100/- each wherein both the parties, appellant and respondent, agreed to separate from each other. The said deeds were authenticated by the Notary Public and it was decided that both the parties will go in the family court and will submit mutual consent divorce petition. The deed was kept with the Panchas of the Society Mangala Ram and Prithvi Singh. However, on 17.5.1999, the respondent did not turn up to submit the divorce petition in the Family Court. The appellant contacted respondent and her father and he tried to persuade the respondent and her father through Panchas but the defendant avoided to come in the Family

Court and ultimately, she started giving threats on telephone that she will ruin the family members of the appellant and she will see that the appellant and his family members will be put in jail. The

appellant also stated that the appellant wanted to separate peacefully and was ready to handover all the goods of the respondents but the respondent was not agreeable. On these grounds, divorce petition was submitted by the appellant in the Family Court under Section 13 of the Hindu Marriage Act.



The appellant submitted an application under Order 6 Rule 17, CPC in the trial court on 17.11.2000 and took another ground for divorce and that was on the ground of desertion by the respondent. That amendment application was allowed by the trial court and, therefore, divorce petition of the appellant is on two grounds, one on the ground of cruelty and another on the ground of desertion.

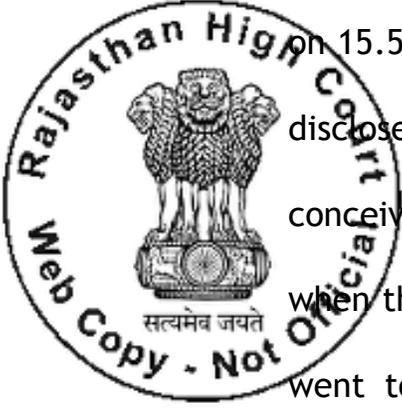
The respondent submitted written statement and in reply, she admitted that respondent's and appellant's marriage took place on 9.5.1997. The respondent denied the allegation of cruelty as well as of deserting the appellant by the respondent. The appellant also raised objection about the insufficient pleadings in the divorce petition about the most of the facts and stated that some of the facts stated by the appellant in the divorce petition are vague. So far as allegation of making effort by the respondent

of abortion of her child is concerned, the respondent merely stated that said allegation is absolutely false and, thereafter, pleaded that it has been stated by the appellant that the respondent left

on 15.5.1998 when she was in family way but the appellant did not disclose that by that time what time passed to respondent's conception. It is also pleaded that the appellant did not disclose when the respondent tried to get the abortion and why respondent went to her parents house from the hospital. According to the

respondent, the allegation against the respondent is indicative of cruelty caused by the appellant upon the respondent. For desertion, the respondent in para 11 stated that if respondent lived separate from the appellant during pendency of the divorce petition which was filed on the ground of cruelty then that act of the respondent does not amount to deserting by respondent to appellant. It is stated that during the pendency of the divorce petition, living of the parties separate, is natural and during this period, there cannot arise any question of living of husband wife together then divorce petition on the ground of desertion is not maintainable.

The notice of the divorce petition was served upon the respondent on 8.11.2000 and she put her appearance in the Family Court on 17.11.2000 and on the same day, she submitted a petition under Section 9 of the Hindu Marriage Act for restitution of



conjugal rights. It will be relevant to mention here that on the same day, i.e. 17.11.2000 the appellant submitted an application for amendment of divorce petition to include the ground of desertion. Before respondent's filing petition under Section 9 of the Hindu Marriage Act, the appellant-husband on 10.8.2000 offered respondent to take back her all goods and this request was sent by notice dated 10.8.2000. On 21.8.2000, the respondent submitted a complaint before the Superintendent of Police, Jodhpur for taking action against the appellant, his father, brother and mother. On said report of the respondent, a criminal case under Section 498A and 323, IPC was registered and ultimately, in Criminal Case No.1045/01, the appellant and his mother Tara Devi were convicted under Section 498A and 323 IPC and the appellant's father and brother Mool Singh and Bhagwan Singh were acquitted by the judgment of the court of Judicial Magistrate, Jodhpur dated 29.8.2002. The appellant and his mother preferred appeal against their said conviction which was allowed by the learned Sessions Judge, Jodhpur by judgment dated 27.7.2004 and the appellant and his mother both were acquitted from the charge under Sections 498A and 323, IPC.

In the petition filed by the respondent under Section 9 of the Hindu Marriage Act, she stated that in her marriage, her father spent about Rs.4,00,000/-, but that was not sufficient for the



appellant and his family members and, therefore, they started abusing the respondent and ultimately, she has to lodge criminal prosecution under Section 498A and 406 IPC against her husband and in-laws. It is also stated that after marriage, she was living with her husband and her husband demanded Rs.10,000/- and put pressure upon the respondent to bring this amount from her father so that the appellant may start his business. She also stated that her mother-in-law also used to demand the money. She stated that she gave Rs.10,000/- and some goods as demanded by the appellant and appellant's family members but their demands increased. After levelling some allegations including allegation of ill-treatment during pregnancy of the respondent and even beatings by appellant's mother-in-law, sister-in-law and appellant's brother's wife, the respondent stated that she was taken to the hospital on 22.5.2005 where the doctor opined that there may be possibility of some injury upon the child in the womb of the respondent and in that situation she delivered a pre-matured child, who according to the respondent, died because of the said beatings. In spite of above, according to the respondent, believing the assurance of the appellant and appellant's family members, respondent's father in hope that the daughter's house will be saved, he sent the respondent to the house of the appellant on 17.3.1998. But the appellant and his family members had no good



intention and, therefore, they took her to the court and purchased the two stamps of Rs.100/- and forced respondent to sign the above deed. According to the respondent, even threat of her life was given by knife and, therefore, she signed the deed on stamp paper of Rs.100/-. On the same day, i.e. 17.5.1999 itself, the respondent left for her parents house. With these allegations, the respondent stated that she wants direction from the court that the appellant should discharge his matrimonial obligations.



The appellant denied all the allegations and reiterated the facts which he already asserted in his divorce petition. The rejoinders were also filed and the issues were framed in both the cases separately inspite of the fact that both the matters were pending in same court and the court could not have passed the decree in one case contrary to decree which could have been passed in another case. As last as after evidence of both the parties in two separate cases, the trial court passed the order in Case No.38/01 on 7.3.2006 to consolidate both the cases, one filed by the respondent under Section 9 of the Hindu Marriage Act and another filed by the appellant under Section 13 of the Hindu Marriage Act and decided both the cases by the same judgment dated 18.5.2000.

Before proceeding to decide the appeal, we may observe that whenever cross petitions are filed in the family courts then

those petitions should be consolidated as early as possible and both the petitions should be treated and should be heard together. In the Hindu Marriage Act, Section 21A provides for deciding two petitions, if filed by one party under Section 13 for divorce and filed by another party under Section 10 for judicial separation or vice versa then both the petitions are required to be tried and required to be heard together. The same principle is required to be followed when one party to marriage files petition under Section 13 and another files petition under Section 9 of the Hindu Marriage Act because of the simple reason that the two matters cannot be decided separately. Reason for it is that if the court will proceed to decide two matters separately then the court is bound to decide the two matters separately and on the basis of evidence available on record of each case and cannot consider the evidence recorded in one case in another case. In that situation, if one party successfully proves his/her case in one petition and failed to adduce evidence in another case then there will be two contradictory decrees. When there are cross petitions, one under Section 9 and another under Section 13, then either of the petition can be allowed and not both the petitions. The two petitions, one under Section 13 and another under Section 9 of the Hindu Marriage Act in fact are inseparable and, therefore, cannot be decided separately. In addition to above, there appears no reason for



multiplying the proceedings, as has been done in these cases. Both the parties led evidence in two matters in the same court for obtaining the decree against each other and the court could not have passed the decree in favour of both, though the petitions and evidence are separate.



Be it as it may be. On merit, the learned counsel for the appellant-husband vehemently submitted that the respondent never intended to live with the appellant-husband. She disliked appellant from day one of marriage. The appellant tried his best to keep his house intact and persuaded the respondent to live with appellant but the respondent was adamant and she had no grievance in living separate, rather say she wished to live separate from the appellant. When the appellant failed in his all efforts and even after efforts of his family members for reconciliation with respondent and even after efforts made by the Panchas of his community then he had no option but to ask for dissolution of the marriage. The respondent since was not willing to live with the respondent, therefore, she voluntarily in the presence of independent persons, executed the deed dated 17.3.1999 in the court premises. It is submitted that respondent failed to discharge her matrimonial obligations and that caused mental cruelty upon the appellant. She also deserted the appellant without and rhyme and reason and more than two years' time and by now morethan

eight years have already passed, therefore, the appellant is entitled to decree for divorce.

The learned counsel for the appellant further submitted that the action taken by the respondent is very relevant and that exposes the respondent fully. She already admitted that since the month of May, 1998 she is not living with the appellant. She also admitted that she signed the deed for dissolution of marriage on 17.3.1999. Had it been a case of ill-treatment by the appellant and his family members to respondent then she and her family members could not have waited for such a long period of years, till the respondent was served with the notice of divorce petition which was served upon the respondent on 8.11.2000. The respondent lodged criminal case against the appellant and his family members immediately after receipt of notice dated 10.8.2000 which was sent by the appellant to the respondent. The prosecution was launched in the month of August, 2000 and in the month of November, 2000 for the first time, the respondent claimed that she is entitled to decree for restitution of conjugal rights, as she filed the petition under Section 9 of the Hindu Marriage Act on 17.11.2000. It is submitted that there is virtually no averment in the petition in Section 9 of the Hindu Marriage Act so as to show that the respondent wants to live with the appellant to discharge her matrimonial obligation. The trial court committed



serious error of fact and law in allowing the respondent's petition for restitution of conjugal rights. The learned counsel for the appellant also referred the evidence produced by the parties.



The learned counsel for the appellant also vehemently submitted that the case of cruelty upon the appellant is fully proved as the respondent abused the appellant and shown her dislike for the appellant and that is mental cruelty of respondent against the appellant. She failed to discharge her matrimonial obligations, therefore, also she is guilty of committing mental cruelty. It is further submitted that in fact relations of both the parties reached to stage where the parties cannot unite particularly in view of the fact that false criminal case was lodged against the appellant and his family members by the respondent and she tried her best to put the appellant and his family members behind the bars on absolutely false and frivolous allegations levelled after years and the learned Sessions Judge in the judgment dated 27.7.2004 clearly held that the allegations levelled by the respondent were false. The respondent failed to take any lesson from the reasons given by the learned Sessions Judge in the judgment dated 22.7.2004 and she preferred criminal revision no.565/04 before this Court so that the respondent may harass the appellant and may take chance to put the appellant and his mother behind the bars. The revision petition no.565/04 was dismissed by

this Court by detail order.

The learned counsel for the appellant relied upon the judgments of the Hon'ble Supreme Court delivered in the cases of Samar Ghosh v. Jaya Ghosh ((2007) 4 SCC 511), Naveen Kohli v. Neeu Kohli ((2006) 4 SCC 558), Durga Prasanna Tripathy v. Arundhati Tripathy ((2005) 7 SCC 353) and, A. Jayachandra v. Annel Kaur ((2005) 2 SCC 22) and the judgments of this Court reported in the case of Rajesh Dodiwal vs. Smt. Sangeeta (2007(3) WLC (Raj.) 254 and Smt. Suman vs. Arvind Kumar (2007 WLC(Raj.) UC 278). The judgments have been relied upon to show what constitutes mental cruelty in the light of the decisions of the Hon'ble Supreme Court and what amounts to desertion and the court can grant decree for divorce on the ground of irretrievable break down of marriage inspite of fact that the said is not a statutory ground for divorce.

Contesting the issues seriously, the learned counsel for the respondent vehemently submitted that the trial court rightly decided all the issues in favour of the respondent and dismissed the petition for grant of decree and rightly decreed the respondent's petition under Section 9 of the Hindu Marriage Act. According to the learned counsel for the respondent, the appellant created a situation and because of that the respondent started living separate from the appellant. It is submitted that the plea of



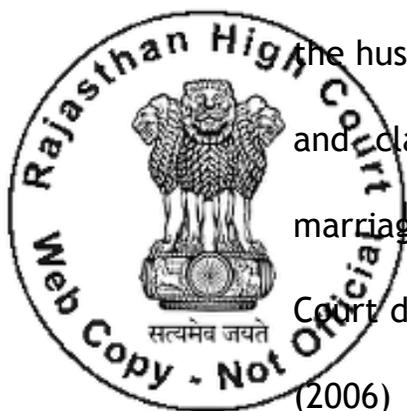
desertion is not tenable in view of the fact that according to the appellant himself, a deed was executed by both the parties with clear intention of the appellant to not to take respondent in his matrimonial relations.



The learned counsel for the respondent relied upon several judgments of this High Court and also other High Courts in support of his contention that institution of criminal case by themselves would not constitute cruelty even if it is assumed that the criminal case would end in acquittal and even if in fact it has been resulted into acquittal. The Punjab & Haryana High Court in the case of Radha Rani v. Har Bhagwan (2004(1) HLR 51) held that intention of legal proceedings for the redressal of the rights or for punishment to the wrong doer can not be said to be acts of cruelty and in the said judgment it has been held that the judgment of the criminal court is only relevant to the effect that the husband is acquitted but where acquittal is because of giving benefit of doubt, it cannot be termed as acts of cruelty by other party because of launching of the criminal case and the same view was taken by this Court in the case of Smt. Kallawati v. Liokhman Ram (1996 WLC(Raj.(UC).

With the support of the judgment, he submitted that the divorce on such ground could not be granted lightly especially when the party seeking divorce himself is erring spouse. (Harish

Chander Drall v. Suresh Wati : II (2007) DMC 450) and in view of the Division Bench judgment of this Court delivered in the case of Srikant Mathur v. Smt. Rajni ((2007) 2 Femi-Juris C.C. 143(Raj.),



the husband cannot be allowed to take advantage of his own wrong and claim divorce on ground of irretrievable break down of marriage and the same view was taken by the Andhra Pradesh High Court delivered in the case of Chiranjeevi v. Lavanya @ Sujatha (II (2006) DMC 553(DB). It is submitted that in fact the appellant-husband created situation because of which the respondent is living separate from the appellant. Hon'ble the Supreme Court in the case of Shyam Sunder Kohli v. Sushma Kohli @ Satya Devi (II (2004) DMC 586(SC), on finding that the appellant husband was at fault, refused to grant decree for divorce on the ground of irretrievable break down of the marriage. With the help of the decision delivered in the case of Sunita (Smt.) @ Devkanya v. Rajesh Kumar (2005(2) CDR 1222(Raj.), the learned counsel for the respondent submitted that the desertion must be form of separation as well as intention of the party to bring cohabitation permanently to an end "*animus deserendi*". In this case, the respondent's intention to bring an end of the matrimonial relation has not been established.

We may need not to refer more judgments though cited by the learned counsel for the respondent because of the reason that

it is almost settled legal position that irretrievable break down of marriage is not a ground for grant of divorce under Section 13 of the Hindu Marriage Act inspite of the fact that Hon'ble the Apex

Court in one of the judgments expected that the irretrievable break down of marriage may be included as ground for divorce.

There is no quarrel that any one has right to protect his rights and also has right to see that punishment be awarded to the person

who commits criminal offences and particularly matrimonial

offences. It depends upon facts of each case in which case the

launching of criminal case may amount to cruelty upon the party to

the marriage. When other spouse launches criminal case against

spouse and his family members then merely because of that fact

and in isolation to other facts it cannot be held that mere

launching of criminal case by one party to the litigation amounts to

cruelty against the accused of that case . The desertion also must

be conscious and if desertion is because of the guilty person then

that guilty person cannot take benefit of his own wrong.

After considering the entire facts of the case and particularly

after going through the pleadings and the specific pleas as pleaded

by the appellant-husband in his divorce petition as originally set

up, we find lack of pleadings about the cruelty. Mere some

altercation between the parties to the marriage and normal wear

and tear because of lack of understanding and immaturity,



normally is not cruelty. The situation turns round totally when the appellant-husband submitted divorce petition in the court of law and in counter blast to this divorce petition, the respondent-wife exceeds her limits and launches false criminal case against husband and tries her best to see that her husband and her in-laws be put behind the bar. The learned counsel for the appellant rightly submitted that in this case the counter blast act of the respondent clearly demonstrates that the allegations have been levelled not for her rights and to prosecute guilty offenders but has been launched only to frustrate the divorce petition and to see that they may be harassed and be put behind bar and in that situation, the acts of the respondent cannot be considered to be a bonafide act of prosecuting the victims to see that offenders should be punished. No explanation has been given by the respondent that that if the respondent had such a grave grievance against the appellant, then why she did not take the action till she got the knowledge of filing of divorce petition by the appellant. Therefore, filing of criminal case which was after filing of the divorce petition by the appellant-husband is a subsequent event, fact of which is should have been taken note of by the court below and even if there was originally lack of pleadings about the cruelty by the respondent-wife even then the matter of divorce should have been examined in the light of the facts which were in existence



and which were in existence when the case was pending before the trial court and particularly when the trial court allowed the amendment of divorce petition by which the appellant was allowed

to plead facts about the launching of false criminal case wherein the appellant and his mother and father and elder brothers were arrested and the appellant remained in jail for three days.

In the background of above, if the statement of wife is looked into then she stated that she signed the document of divorce in the court premises at Jodhpur itself in presence of advocate who also gave statement in the trial court and the signatures of the respondent were obtained. If respondent's signatures were obtained by undue pressure or force then admittedly, she was left to her house immediately after her signing of the divorce document, then she did not take any steps against the appellant-husband and his family members particularly when she in fact prosecuted them after notice of filing of the divorce petition by the appellant. The conduct of the party is relevant when it is alleged that some documents have been got executed from him/her by force or undue pressure and that conduct is of the time immediately after removal of undue pressure and force. In this case, as stated above, the respondent failed to establish that the alleged deed of divorce was got executed by the appellant by any illegal means, making the document illegal on the ground of



undue influence, force or coercion. However, it may be not relevant what is the effect of the execution of the document because admittedly, by that document the divorce has not effected between the party nor it could have been. But this document is relevant to assess the intention of both the parties including respondent's intention. This only demonstrates the intention of both the parties that they were not willing to live together and this also demonstrates the mental decision of the respondent that she wanted to separate. The contention of the learned counsel for the respondent that when the appellant got the divorce documents executed from the respondent then he himself created a situation where the respondent could not have lived with the appellant as his wife in his house and, therefore, the appellant cannot claim benefit out of his own wrong. The contention must be attractive but is misplaced and has no application to the fact of the case in hand. Even if the appellant wanted to get rid of respondent then the respondent's contention that she obeyed the dictate of the appellant and did not join the house of the appellant, then it appears that on any flimsy ground and if the respondent would have been given an opportunity to live separate from her husband, she would have readily accepted it and in this case she did so and that is just contrary to the matrimonial relations. Despite giving statutory rights to the women in India yet



it is projected in judicial proceedings by the woman side that as though it is the sole responsibility of man to maintain the house and persuade the female to live with the male in matrimonial home and, therefore, every time it is questioned that when wife left the house of the husband, what efforts have been made by the husband and his family members, ignoring the fact that it was also the duty of the wife to maintain the relations and persuade her husband to keep house united. The lame excuse of the respondent that because of obtaining the deed of divorce signed by the respondent, the appellant created a situation wherein the respondent could not have lived with the appellant-husband, cannot be accepted as a valid ground for living away from the husband. As per Explanation to Section 9 of the Hindu Marriage Act, it is the duty of the person to explain and satisfy the court about the reason for his living separate and away from the matrimonial home and that duty in the present case was of the respondent.

In the present case, admittedly, the appellant and respondent were not living together since 1998 and the divorce petition on the ground of desertion was submitted by the appellant on 16.8.2000 and by the time 17.11.2000 when the desertion was taken as a ground for divorce by the appellant, the required statutory period already passed and the respondent failed to show



any just cause for deserting the appellant, therefore, the trial court committed error of law by not granting decree for divorce on the ground of desertion.



The filing of the application under Section 9 of the Hindu Marriage Act for restitution of conjugal rights in the facts of the case (prosecution of the appellant and his family members), cannot be accepted to be a bonafide demand of restitution of conjugal relations by the respondent. At this stage, it will be worthwhile to mention here that the allegations of the respondent-wife in her application under Section 9 of the Hindu Marriage Act clearly suggest that there was no serious dispute when the respondent left the house of the appellant which could have constituted any cause for her living separate from her husband. We look into the evidence of both the parties, that respondent in her petition under Section 9 of the Hindu Marriage Act gave her own statement and produced witnesses PW-2 Munni Devi, PW-3 Mangala Ram and PW-4 Hari Prakash and in rebuttal the appellant gave her statement whereas in the divorce case filed by the appellant (162/2000), the appellant gave his statement and produced PW-2 Mool Singh, PW-3 Mangala Ram, PW-4 Sugan Mal Parihar, Advocate, PW-5 Luna Ram, PW-6 Bhagwan Singn and PW-7 Jethu Singh and in rebuttal the respondent gave her statement. There was no reason for the trial court to disbelieve the statement

of the appellant's witnesses particularly PW-4 Sugan Mal Parihar, Advocate. The trial court gave more emphasis to the some part of the statement of the appellant and his witnesses with respect to

the certain allegations and counter allegations irrespective of the fact whether those allegations were pleaded or not and what is effect of those statements on relevant fact of the case in hand.

In view of the above discussion, we are of the view that the trial court committed serious error of law in decreeing the petition of the respondent under Section 9 of the Hindu Marriage Act and by refusing decree of divorce in favour of the appellant by ignoring the material evidence, facts and circumstances on the basis of which the civil cases are decided which is preponderance of the probabilities. The trial court should have taken note of subsequent events at which the appellant and his family members were subjected to criminal prosecution and their arrest and filing of petition under Section 9 of the Hindu Marriage Act by the respondent inspite of the fact that she sent the appellant and appellant's family members to go behind bars and thereafter their acquittal and then asking the court to pass the decree in her favour so as to live in the house of the appellant and her not showing any willingness to live with the husband on flimsy ground of executing deed of divorce. It appears that in case the appellant would not have filed the divorce petition, the respondent wife may



not have filed the petition under Section 9 of the Hindu Marriage Act and even the criminal case against the appellant and his family members.



In view of the above, the appeal of the appellant is allowed and the judgment and decree of the trial court are set aside in both the petitions. The application for restitution of conjugal rights filed by the respondent under Section 9 of the Hindu Marriage Act is dismissed. The divorce decree in favour of the appellant is granted under Section 13 of the Hindu Marriage Act on the ground of desertion and on the ground of cruelty. The marriage of the appellant and respondent shall stand dissolved from the date of the judgment. No order as to costs.

(BHANWAROO KHAN),J.

(PRAKASH TATIA),J.

mlt.