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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.349 OF 2013

WITH
CIVIL APPLICATION NO.928 OF 2013
IN
SECOND APPEAL NO.349 OF 2013

Chitra Sachin Mapara)
Age : 33 Years, Occupation : Housewife,)
A-201, Silver Nest, Opp. Vijaya Bank,)
Manpada Road, Dombivli (East)) ...Appellant

….Versus....

Sachin Kumar Mapara)
Age 39 Years, Occupation : Service,)
R/o 3-B/62, Rustomjee Regency,)
Jayawant Sawant Road, Dahisar (W),)
Mumbai – 400 068) ...Respondent

Mr.Uday Warunjikar with Mr.Akshay Deshmukh for the Appellant.

Ms.Seema Sarnaik i/b Mr.Harshad Sathe & Sourabh Bhutada for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 27TH OCTOBER, 2016
PRONOUNCED ON : 20TH DECEMBER, 2016

JUDGMENT :-

1. Admit. Learned counsel for the respondent waives service.

By consent of parties, second appeal is heard finally forthwith.

2. By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant has impugned the judgment and decree dated 4th May, 2013 passed by the learned District Judge – 2, Kalyan, allowing Civil Appeal No.48 of 2012 filed by the respondent thereby setting aside the impugned judgment and decree dated 22nd December, 2011 in Marriage Petition No.260 of 2008, passed by the learned Civil Judge, Senior Division, Kalyan and allowing Marriage Petition No.260 of 2008 filed by the respondent *inter-alia* praying for dissolving the marriage between the appellant and the respondent solemnized on 7th December, 2002 and directing the respondent herein to pay monthly permanent alimony of Rs.15,000/- to the appellant herein and Rs.15,000/- to his daughter Komal regularly from the date of the said judgment and decree.

3. Following substantial questions of law are formulated :-

(I) Whether the Lower Appellate Court was justified in applying no default theory of divorce incorporated in irretrievable break down of marriage though it is not a ground for decree of divorce under the provisions of the Hindu Marriage Act ?

(II) Whether the Lower Appellate Court was justified in not framing the issue about section 23(i) (a) of the Hindu Marriage Act ?

(III) Whether the findings recorded by the Lower Appellate Court were without appreciating the evidence recorded by the parties and were perverse ?

Some of the relevant facts for the purpose of deciding this second appeal are as under :

4. The appellant herein was the respondent in the marriage petition before the learned Joint Civil Judge, Senior Division, Kalyan whereas the respondent herein was the original petitioner. The appellant and the respondent got married on 7th December, 2002 at Dombivli as per Hindu rites and customs. After their marriage, they started cohabiting at A/402, Silver Nest, Opposite to Vijaya Bank, Manpada Road, Dombivli (East). A daughter was born out of the said wedlock on 11th October, 2003, who has been now residing with the appellant (original respondent).

5. It was the case of the respondent that he had made it clear to the appellant that he being the only son of his parents, he would be staying with them. He purchased a flat on the second floor of the same building on 1st December, 2002, in which he was residing with his parents before his marriage, to the knowledge of the appellant. It was the case of the respondent that the appellant was however, not keen to stay with the parents of the respondent. The appellant and the respondent started residing together in A/402, Silver Nest, Opposite to Vijaya Bank, Manpada Road, Dombivli (East).

6. It was the case of the respondent that in the month of March, 2003, the appellant wanted to go to the house of her sister at Mulund. Since the festival of Holi was approaching, the respondent asked the appellant to go to her sister's place some other time. The appellant however, started abusing him and insisted on going to her sister's place. She stayed with her sister for about 4 days and once

again insisted to go to her sister's place after about a month. It was the case of the respondent that the appellant was trying to dominate him in their relationship and since the respondent did not want to displease her, he agreed to take her to her sister's place. When the respondent informed about adamant behavior of the appellant to the parents of the appellant, her parents told him that they used to ignore her behavior and the respondent also should ignore it.

7. It was the case of the respondent that the behavior of the appellant towards him and his parents was atrocious. The appellant used to pick up fight with him and his family members frequently. She wanted to invite her parents in the matrimonial house frequently. On 11th October, 2003, a baby girl was delivered by the appellant. The respondent was at that time in U.S. It was the case of the respondent that when the parents of the respondent went to see the child, the parents of the appellant humiliated and insulted them. According to the respondent, the respondent asked the appellant to come to U.S.A. in the month of May of 2004 with daughter. The appellant accordingly left for U.S.A. in the month of May, 2004 along with daughter.

8. The appellant did not want the parents of the respondent to visit and stay with the appellant and the respondent in U.S.A. The appellant did not co-operate with the respondent and made all the efforts not to call his parents. The parents of the respondent however, visited the respondent in U.S.A. on 13th August, 2004. The appellant however, abused the respondent in filthy language and had fight with the respondent in the month of October, 2004.

9. It is the case of the respondent that the appellant abused his father and even tried to raise hand on him and asked him to go back to India. The appellant was in habit of making issue on petty matters and did not want to adjust in the family. When the parents of the respondent were in U.S.A., the appellant was avoiding to do any household work. The mother of the respondent used to cook and clean utensils and his father used to help in household work. The appellant was loosing tamper upon the respondent and his parents and tried to separate him from his parents. She never wanted their daughter to spend the time with his parents and wanted to control her life. The appellant used to fight with his parents on petty matters and was using bad words in front of their daughter and made their life miserable. The parents of the respondent were to stay in U.S.A. for six months with the respondent but they were forced to go to India within four months due to harassing attitude of the appellant.

10. The respondent returned to India in January, 2006 with the appellant and daughter and started residing in the second floor flat at Dombivli with his parents. It was the case of the respondent that the appellant however, was not willing to stay with her parents and started demanding to take separate house somewhere outside Dombivli. The appellant become furious and abused him in filthy language. The appellant alleged to have assaulted him and threw photo frame on his person in present of his father. When the father of the respondent intervened, the appellant humiliated him also by using abusing language.

11. According to the respondent, the behaviour of the appellant was very uncultured and disgraceful to his family. It was the

case of the respondent that since the parents of the respondent did not want to break the marriage, they decided to shift their house to their 4th floor flat and started residing separately. The said flat was however, given on rent and therefore, they had shifted temporarily to the house of cousin brother of the respondent for about 15 days.

12. The father of the respondent addressed a letter to the father of the appellant informing him about the cruel behavior of the appellant and expressed their intention to settle their dispute amicably. By the said letter, the father of the appellant was informed that the appellant was interested in dissolving his marriage between the appellant and the respondent. The said letter was replied by the father of the appellant. According to the respondent, various false allegations were made by the father o the appellant in the said reply. The father of the appellant also addressed letter to the mother of the respondent making various allegations against the parents of the respondent.

13. It was the case of the respondent that since the appellant did not improve her behavior, the respondent moved to the 4th floor flat in the month of November / December, 2006 and started residing with his father. He however, used to visit his daughter Komal in the second floor flat, who was having love and affection towards him and his parents. It was the case of the respondent that whenever the daughter of the parties used to visit 4th floor flat to meet her grand-parents, the appellant would hit the daughter for no reason and was playing with emotions of daughter. The respondent has been paying since inception the maintenance charges, electricity bill, telephone bill, grocery bill and other household expenses of the second floor flat

which has been occupied by the appellant and the daughter Komal. The respondent was also paying certain amount every week to the daughter for miscellaneous expenses apart from her school and bus fees.

14. It was the case of the respondent that the appellant was not allowing the respondent to use electronic instruments and gadgets lying in the second floor flat where she now resides. He was not allowed to take daughter out of the house and to visit her grand-parents. It was the case of the respondent that the life of the respondent became extremely miserable in view of cruelty at the hands of the appellant which was not only serious but much higher than wear and tear of married life. It was the case of the respondent that there was reasonable apprehension in his mind that it would be extremely hardship and injurious for him to live with the appellant.

15. The respondent accordingly filed a petition under section 13(1)(ia) of the Hindu Marriage Act, 1955 against the appellant in the Court of learned Civil Judge, Senior Division, Kalyan *inter-alia* praying for dissolution of their marriage. He also prayed for custody of the daughter komal. The appellant resisted the said petition by filing the written statement and denied all the adverse averments made by the respondent in the said petition. It was the case of the appellant that the father of the appellant had given various amounts in cash as well by cheque to the father of the respondent at the time of engagement of the appellant with the respondent. The ornaments given by the parents of the appellant were given to the mother of the respondent in her custody. It was her case that her parents were not allowed to stay at the matrimonial house. She was not allowed to go to temple. She

was instructed by the parents of the respondent not to contract her parents on phone. She was not given any money and was not allowed to speak with any other person.

16. It was the case of the appellant that though the parents of the respondent were residing separately, they used to visit the flat on the second floor and used to instigate the respondent. It was the case of the appellant that the respondent and his parents were insisting for a male child when the appellant was pregnant in the month of February, 2002. The appellant was asked to go to her parental house for delivery.

17. It was the case of the appellant that when she visited U.S.A., she was taking proper care of the respondent and daughter. When the parents of the respondent visited U.S.A., she was also taking their care. The respondent never informed her about the monthly salary earned by the respondent and place of his working and concealed all these facts from the appellant. It was her case that in the month of May, 2008, she had been to Pune to her parents house with daughter and when she returned to the matrimonial house in the month of June, 2008, she found that the respondent was residing with his parents in the flat on the 4th floor and had taken all electronics instruments gadgets with him. It was her case that she did not have any source of income, whereas the respondent was working in Tata Consultancy Services as Assistant Consultant and was earning salary of more than Rs.75,000/- per month. The appellant also applied for maintenance for her and for her daughter in the said proceedings.

18. Learned trial Judge framed three issues. The respondent (original petitioner) examined himself and eight witnesses, including his parents, his sister and brother in law, his neighbour, his cousin and his another relative viz. Suhas Manohar Mehta and also led documentary evidence before the learned Civil Judge, Senior Division, Kalyan in the said Marriage Petition No.260 of 2008. The appellant examined herself and one witness viz. Anil Jaiswal and produced various documentary evidence, including greeting cards and photographs.

19. Learned trial Judge passed a judgment and decree on 22nd December, 2011 and dismissed the said Marriage Petition No.260 of 2008. Insofar as the issue as to "whether the petitioner proved that, after marriage, the respondent subjected him with cruelty, mental and physical ill-treatment" is concerned, the learned trial Judge answered the said issue in negative. It is held by the learned Civil Judge, Senior Division, Kalyan that the respondent herein was not entitled for dissolution of marriage.

20. Being aggrieved by the said judgment and decree dated 22nd Dec, 2011, passed by the learned Joint Civil Judge, Senior Division, Kalyan, the respondent herein preferred an appeal (Civil Appeal No.48 of 2012) in the Court of the learned District Judge – 2, Kalyan against the appellant herein. The learned District Judge – 2, Kalyan formulated four points for determination. By a judgment and decree dated 4th May, 2013, the learned District Judge – 2, Kalyan allowed the said Civil Appeal No.48 of 2012 filed by the respondent herein and has set aside the judgment and decree dated 22nd December, 2011, passed by the learned Joint Civil Judge, Senior

Division, Kalyan in Marriage Petition No.260 of 2008 and allowed the said marriage petition filed by the respondent herein and dissolved the marriage between the appellant and the respondent by passing a decree of divorce. Learned District Judge – 2, Kalyan however, directed the respondent herein to pay monthly permanently alimony of Rs.15,000/- per month to the appellant and Rs.15,000/-to the daughter of the parties regularly from the date of the said order. The respondent herein did not challenge the judgment and decree dated 4th May, 2013 directing the respondent to pay permanent alimony to the appellant and the daughter. The said judgment and decree dated 4th May, 2013 however, is impugned by the appellant in this second appeal filed under section 100 of the Code of Civil Procedure, 1908.

21. Mr.Warunjikar, learned counsel appearing for the appellant invited my attention to the pleadings in the Marriage Petition No.260 of 2008 and also various portion of the oral evidence led by both the parties. My attention is also invited to the findings rendered by the two Courts below. He submits that though the learned trial Judge had rightly appreciated the oral and documentary evidence led by both the parties and had rightly dismissed the suit filed by the respondent inter-alia praying for divorce, the first appellate Court has reversed the findings and the decree rendered by the learned trial Judge without appreciating oral and documentary evidence erroneously.

22. It is submitted by the learned counsel that the learned District Judge – 2, Kalyan has reversed the decree passed by the learned trial Judge and has passed a decree of divorce merely on the ground that there was irretrievable break down of marriage because of the alleged non-co-operation and the attitude of the appellant,

which could be termed as cruelty and within the meaning section 13(1)(ia) of the Hindu Marriage Act, 1955. It is submitted by the learned counsel for the appellant that divorce could not have been granted by the first appellate Court on the ground of the alleged irretrievable break down of marriage. He submits that no such ground of irretrievable break down of marriage is provided under section 13(1)(ia) of the Hindu Marriage Act, 1955. He submits that the entire decree of divorce thus passed by the first appellate Court is contrary to the provisions of Hindu Marriage Act, 1955 and contrary to the law laid down by the Supreme Court and thus deserves to be set aside on the said ground alone.

23. Learned counsel for the appellant invited my attention to paragraph 27 of the judgment and decree passed by the learned trial Judge and would submit that after considering the oral and documentary evidence and also the pleadings filed by both the parties, learned trial Judge had rightly held that the allegations made by the respondent about the alleged misbehavior, quarrelsome and unpredictable behavior of the appellant was totally vague and baseless and without any evidence. He submits that the learned trial Judge rightly held that normally some ups and down, wear and tear are bound to be there in the matrimonial life and no spouse however, could make any capital of such petty issues. He submits that the learned trial Judge has rightly held that the instances alleged by the respondent against the appellant in respect of the alleged cruelty did not constitute the act of cruelty as envisaged under section 13(1) (ia) of the Hindu Marriage Act, 1955.

24. It is submitted by the learned counsel for the appellant that

the witnesses examined by the respondent were relatives and close friends of the respondent and thus were interested witnesses and their evidence thus could not have been relied upon by the first appellate Court in the impugned judgment and decree while setting aside the judgment and decree rendered by the learned trial Judge.

25. It is submitted by the learned counsel that admittedly till 2006, the parties were staying together. The marriage petition was filed by the respondent only in the month of May, 2008. He submits that the instances considered by the first appellate Court till January, 2006 in the impugned judgment and decree were already condoned by the respondent. He submits that the first appellate Court ought to have scrutinized the alleged acts of cruelty which were condoned by the respondent and which were not condoned before passing any decree of divorce. The first appellate Court however, did not carry out any such exercise. He submits that till the month of January, 2006, both the parties were staying together and were cohabiting.

26. It is submitted that even if the parties was staying separately after filing of the petition, the same cannot be a ground for granting divorce under the provisions of the Hindu Marriage Act. He submits that the first appellate Court did not consider the aspect of condonation of cruelty at all in the impugned judgment and decree. He submits that the allegations of the respondent that the daughter was not allowed to join a particular course by the appellant was neither proved nor amounted to cruelty on the part of the appellant. He submits that even after filing of the marriage petition by the respondent in the year 2008, the appellant and the respondent were staying in the second floor flat together with daughter till 2010. He

submits that the alleged cruelty on the part of the appellant was thus condoned till 2010. The first appellate Court thus could not have passed any decree of divorce on the ground of the alleged cruelty though such alleged cruelty, if any, was condoned by the respondent in view of the respondent staying with the appellant in the same house till 2010.

27. It is submitted by the learned counsel for the appellant that the alleged incident of Rakshabandhan day considered by the first appellate Court when the alleged fight took place between the appellant and the respondent in presence of the sister of the respondent was also neither proved, nor amounted to any cruelty. He submits that in any event even the said incident of cruelty was condoned by the respondent.

28. It is submitted by the learned counsel for the appellant that the respondent in his evidence had admitted that even till 2010, the respondent used to visit flat no.202 on the second floor to meet the daughter of the appellant and the respondent.

29. Insofar as the evidence led by the parents of the respondent and sister is concerned, it is submitted that by none of the witnesses examined by the respondent proved any incidence of cruelty on the part of the appellant. He submits that the other witnesses including the brother-in-law of the respondent and neighbour did not have any personal knowledge of what transpired in the matrimonial house of the appellant, which amounted to any cruelty on the part of the appellant. He submits that the evidence of the neighbour of the respondent and cousin was totally hearsay and

could not have been relied upon by the first appellate Court. Those witnesses were not regularly visiting the house of the parties. He submits that merely on the ground of wear and tear in the relationship of husband and wife which normally happens, a decree of divorce which is very drastic order, could not have been passed by the first appellate Court.

30. It is submitted by the learned counsel for the appellant that the respondent has removed himself from the company of the appellant wife deliberately. From 2008 onwards, the respondent is staying away from the appellant for which act he himself was responsible. He submits that the respondent thus could not be allowed to take advantage of his own wrong. The appellant was ready and willing to co-habit with the respondent. He submits that in his cross-examination, when he was asked whether he would cohabit with the appellant, he categorically refused to co-habit with the appellant. Learned counsel appearing for the appellant placed reliance on the Law Commission Report of the year 1970 and submits that though the Law Commission recommended the amendment and to include the ground of irretrievable break down of marriage in the Hindu Marriage Act, 1955, but the fact remains that no such amendment is carried out in the provisions of the said Act.

31. It is submitted that the Court has to find out the fault of the party who is responsible for the other party staying separately with that party. Learned counsel for the appellant placed reliance on the judgment of the Supreme Court in case of ***Samar Ghosh vs. Jaya Ghosh, (2007) 4 SCC 511*** on the issue of cruelty. He submits that the Supreme Court in the said judgment construed section 13(1)(ia)

of the Hindu Marriage Act and has held that to construe cruelty, the conduct complained of should be “grave and weighty” so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse.. It must be something more serious than “ordinary wear and tear of married life”. He submits that in this case the respondent had failed to prove that the alleged conduct of the appellant was more serious than ordinary wear and tear married life.

32. Learned counsel for the appellant placed reliance on the judgment of the Supreme Court in case of ***Anil Kumar Jain vs. Maya Jain, (2009) 10 SCC 415*** and in particular paragraph 27 to 31 and would submit that in the said judgment, the Supreme Court had invoked extraordinary powers under Article 142 of the Constitution of India and held that the fact that the marriage had broken down irretrievably, the same was not a ground for grant of divorce under section 14 or 13(B) of the Hindu Marriage Act, 1955. He submits that the judgment and decree passed by the first appellate Court is thus contrary to law laid down by the Supreme Court. He submits that in any event powers exercised by the Supreme Court under Article 142 of the Constitution of India could not have been exercised by the first appellate Court.

33. Learned counsel for the appellant placed reliance on the judgment of the Supreme Court in case of ***A. Jayachandra vs. Aneel Kaur, 2005(2) SCC 22*** in support of his submission that long absence of physical company cannot be a ground for divorce since the same was on account of the respondent. The second last paragraph of the said judgment was relied upon by the learned

counsel. Learned counsel for the appellant placed reliance on the judgment of the Supreme Court in case of ***Manish Goel vs. Rohini Goel,*** delivered on 5th February, 2010 and more particularly on paragraphs 11, 14 and 15 in support of his submission that even when the Supreme Court exercised powers under Article 142, the Supreme Court generally need not pass any order in contravention of or ignoring the statutory provisions nor exercised such powers merely on the ground of sympathy.

34. It is submitted by the learned counsel that the impugned judgment and decree was passed by the first appellate Court granting divorce in the year 2013. He submits that the respondent has totally withdrawn from the building in which the appellant and the respondent were staying by vacating the flat even from the 4th floor where he had shifted to stay with his parents. He submits that the present whereabouts of the respondent is not known to the appellant. He submits that inspite of the order passed by the trial Court granting access to the daughter of the respondent, for quite some time, the respondent does not come for access of daughter and is creating such a situation.

35. Learned counsel for the appellant place reliance on section 23(1)(a) of the Hindu Marriage Act and submits that since the respondent has withdrawn from the matrimonial home and his whereabouts are not known, the respondent cannot be allowed to take advantage of his own wrong and thus no divorce on that ground can be granted to the respondent who has been taking advantage of his own wrong. He submits that the first appellate Court ought to have framed specific issue based on the provisions of section 23(1)(a) of

the Hindu Marriage Act, 1955, which the first appellate Court failed to frame. He submits that the first appellate Court has also failed to appreciate that the respondent had condoned the alleged cruelty meted by the appellant to the respondent. Learned counsel for the appellant placed reliance on the judgment of the Supreme Court in case of ***Santosh Hazari vs. Purushottam Tiwari, (2001) 3 SCC 179*** and more particularly paragraphs 10, 11 and 12 in support of his submission that since by the impugned judgment and decree passed by the first appellate Court, the rights of the appellant are affected, substantial question of law has arisen from the judgment and judgment of the first appellate Court and thus such substantial question of law has to be adjudicated upon by this Court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908.

36. Learned counsel for the appellant placed reliance on the judgment of the Supreme Court in case of ***State Bank of India & Ors. vs. S.N. Goyal, (2008) 8 SCC 92*** and more particularly paragraphs 12 to 15 in support of his submission that the Court has to ensure that the cases involving substantial question of law are not rejected by stating that no substantial question of law arisen

37. It is submitted by the learned counsel for the appellant that the first appellate Court ought to have appreciated that the decree of divorce granted by the first appellate Court would seriously prejudice the career and life of not only the appellant but also the grown up daughter of the appellant and the respondent.

38. It is lastly submitted by the learned counsel for the

appellant that the respondent had committed default in making payments of maintenance awarded by the first appellate Court. He submits that the amount of maintenance awarded by the first appellate Court is not sufficient for the maintenance of the appellant and her daughter and also considering the income of the respondents.

39. Ms.Sarnaik, learned counsel appearing for the respondent on the other hand invited my attention to the issues framed by the learned trial Judge and also by the first appellate Court and also the points formulated by the first appellate Court and submits that the learned trial Judge has not rejected the petition for divorce filed by the respondent on the ground that the respondent had taken any advantage of any nature whatsoever under section 23(1)(a) of the Hindu Marriage Act, 1955. She invited my attention to some of the paragraphs of the judgment and decree passed by the learned trial Judge in support of her submission that though the learned trial Judge had rendered various findings on various instances on the part of the appellant which amounted to cruelty, has however, had dismissed the petition for divorce on the ground that those instances were reflected wear and tear of the matrimonial life and no decree of divorce could e passed by the learned trial Judge. She submits that the learned trial Judge was not deciding the criminal matter and ought to have decided the instance of cruelty on the basis of preponderance of probabilities.

40. It is submitted by the learned counsel for the respondent that the respondent had issued the cheque of Rs.1,50,000/- and Rs.90,000/- respectively and had sent the said cheques along with

letter of the advocate representing the respondent to the appellant on 5th November, 2014. The said cheques however, were returned by the appellant. My attention is invited to the order dated 12th October, 2015 passed by K.K. Tated, J. permitting the respondent to deposit the amount in the account of the appellant. It is submitted that the respondent has not not committed any default in making payment of maintenance amount for the appellant and the daughter.

41. It is submitted by the learned counsel that the appellant never filed any application for restitution of conjugal rights and thus cannot make any grievance that the respondent had been staying separately since 2008 of 2010.

42. Learned counsel for the respondent invited my attention to paragraphs 26 onwards of the judgment and decree passed by the first appellate Court and would submit that the first appellate Court has not passed a decree of divorce only on the ground of irretrievable break up of marriage but on various grounds. The first appellate Court has rendered a finding that there was cruelty on the part of the appellant upon the respondent as well as upon the parents of the respondent which had made the life of the respondent miserable. She submits that the findings of fact rendered by the first appellate Court are rendered after considering the oral and documentary evidence and the findings being not perverse, cannot interfere with by this Court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908.

43. It is submitted by the learned counsel that the trial Court as well as appellate Court has held that the cruelty was committed by

the appellant. She submits that no advantage of any nature whatsoever nature was taken by the respondent. The appellant did not file any cross-objection before the first appellate Court contending that the decree for divorce could not have been passed also on the ground that the respondent had taken advantage under section 23(1)(a) of the Hindu Marriage Act. She submits that the respondent has paid the maintenance in compliance with the order passed by the first appellate Court and was also paying separate amount through out for maintaining the flat which is occupied by the appellant and the daughter of the parties and was incurring expenses and was paying the amount separately for the maintenance of daughter in addition to the maintenance awarded by the first appellate Court.

44. Insofar as the submission of the learned counsel for the appellant that there was condonation of the alleged cruelty committed by the appellant upon the respondent and his family members is concerned, it is submitted that admittedly the parties had returned from U.S. in the month of January, 2006. The respondent had left the company of the appellant in the month of November / December, 2006 and started staying with his parents on 4th floor flat. It is submitted that on the Rakshabandhan day in the month of August, 2006, the appellant had driven up the sister and the parents of the respondent from the house. She submits that the first appellate Court has rightly appreciated the evidence of sister, brother-in-law of the respondent and the parents, who were eye witnesses to various incidences of cruelty committed by the appellant. She submits that the respondent was tolerating the appellant and that would not amount to condonation of cruelty. She submits that if the parties were staying happily without the company of each other, that could amount

to condonation of cruelty and not otherwise.

45. Learned counsel for the respondent also placed reliance on the correspondence exchanged between the parents of the parties and more particularly the allegations made by the parents of the appellant. She submits that the parents of the appellant had made various frivolous and harsh allegations against the parents of the respondent.

46. It is submitted that merely because the respondent was visiting the daughter in the flat on the second floor, that would not amount to condonation of cruelty on the part of the appellant by the respondent. The visit by the respondent in the school on the day of school function of the daughter for the welfare of the daughter also did not amount to condonation of cruelty. She submits that after 2006, the appellant and the respondent never stayed together, however, the respondent has been paying the society bills, electricity bills and various other payments in respect of the said flat which cannot amount to condonation of cruelty. She submits that the payment is being made by the respondent in respect of the said flat though the respondent does not stay therein. She submits that the good gesture on the part of the respondent in allowing the appellant to stay in the said flat and in making payment of maintenance and other charges does not amount to condonation of cruelty. She submits that no such ground has been admittedly raised by the appellant at any stage before the two Courts below and thus cannot be allowed to raise this ground for the first time across the bar.

47. Learned counsel for the respondent invited my attention to

various paragraphs of the oral evidence led by both the parties in support of her submission that 8 witnesses examined by the respondent had proved beyond reasonable doubt the cruelty on the part of the appellant upon the respondent and his parents. Learned counsel submitted a chart in support of this submission pointing out the relevant portion of the oral evidence led by both the parties.

48. It is submitted by the learned counsel for the respondent that since the appellant was initially working and even if not working as on today as alleged by the appellant, since the appellant could have continued her job, she is not entitled to be awarded any maintenance or in any event enhancement of maintenance. She submits that in any case, the appellant has not made any application for enhancement of maintenance. She submits that since the appellant has capacity to earn, she is not entitled to seek any maintenance. She submits that without prejudice to the rights and contentions of the respondent, the respondent is ready and willing to pay additional amount of Rs.10,000/- per month to the daughter from the date as may be ordered by this Court for the welfare of the daughter. She submits that till the month of October, 2016, the respondent has already paid maintenance to the appellant and the daughter. She submits that the respondent is ready and willing to accept the custody of daughter also.

49. Learned counsel for the respondent placed reliance on the following judgments :

1) The Supreme Court in case of ***Narendra vs. K. Meena,*** delivered on 6th October, 2016 in Civil Appeal No.3253 of 2008.

2) The Supreme Court in case of ***Samar Ghosh vs. Jaya Ghosh, (2007) 4 SCC 511***.

3) This Court in case of ***Chitra Sachin Mapara vs. Sachin Kumar Mapara***, delivered on 22nd July, 2013 in Civil Application No.928 of 2013 in Second Appeal No.349 of 2013.

4) The Supreme Court in case of ***K. Srinivas vs. K. Sunita***, delivered on 19th November, 2014 in Civil Appeal No.1213 of 2006.

5) The Karnataka High Court in case of ***Dr.E. Shanthi vs. Dr.H.K. Vasudeo, AIR 2005 Karnataka, 417***, and

6) The Rajasthan High Court in case of ***Govind Singh vs. Smt.Vid, AIR 1999 Rajasthan 304,***

in support of her submission that the spouse is capable of earning and his livelihood but not earning is not entitled to claim maintenance and in support of various submissions made aforesaid. She also distinguished the judgments relied upon the learned counsel for the appellant.

50. Mr.Warunjikar, learned counsel for the appellant in rejoinder distinguished the judgments relied upon by the learned counsel for the respondent and would submit that the judgments relied upon by the respondent on the issue of maintenance are under section 24 of the Hindu Marriage Act which provides for interim maintenance, whereas in this case the first appellate Court has awarded permanent alimony. He submits that the respondent has admittedly not challenged the order of maintenance passed by the

first appellate Court. He submits that though the appellant was employed before marriage, after her marriage with the respondent, she was rendering the services to family and was looking after the child and is unemployed. He submits that the allegations of the respondent that the appellant was working has been disbelieved by both the Courts below. Therefore the respondent has not come forward to contribute any amount for the welfare of daughter.

51. It is submitted that Article 142 of the Constitution of India is not applicable to this Court or was not applicable to the first appellate Court and thus the decree for divorce could not have been passed on the ground of irretrievable break down of marriage. The judgments relied upon by the learned counsel for the respondent are distinguished on the ground that none of those documents were applicable to the facts of this case.

52. It is submitted that it was the duty of the first appellate Court to frame additional issue under section 23(1)(a) of the Hindu Marriage Act and after framing that issue, ought to have rendered a finding that since the respondent had taken advantage of the situation, no decree for divorce could be granted. He submits that after the evidence is led, if the Court comes to the conclusion that the respondent had taken advantage, the Court was bound to consider the issue even at that stage. He submits that the first appellate Court could have remanded the matter back to the learned trial Judge for framing additional issue under section 23(1)(a) of the Hindu Marriage Act and ought to have directed the learned trial Judge to render a finding on that issue also.

53. Learned counsel for the appellant placed reliance on section 107(2) of the Code of Civil Procedure, 1908 in support of his submission that the powers of the first appellate Court are very wide and the matter ought to have been remanded back to the learned trial Judge for framing additional issues and for adjudication thereon.

REASONS AND CONCLUSIONS :

54. Insofar as the submission of the learned counsel for the appellant that the learned trial judge as well as the first appellate Court ought to have framed additional issues under section 23(1)(A) of the Hindu Marriage Act, 1955 and ought to have rendered a finding that the respondent had taken advantage of the situation by keeping himself away from the company of the applicant since 2006 or that the matter ought to have been remanded to the trial Court for framing additional issue and to adjudicate upon the said additional issue is concerned, it is not in dispute that no such issue was raised by the appellant either before the trial Court or before the first appellate Court. Though the appellant had succeeded before the learned trial Court and the divorce petition filed by the respondent came to be dismissed on various grounds, no cross objection was filed by the appellant before the first appellate Court contending that the petition for divorce filed by the respondent ought to have rejected also on the ground of alleged advantage taken by the respondent by relying upon section 23(1)(a) of the Hindu Marriage Act, 1955.

55. A perusal of the record indicates that no such issue was raised by the respondent even during the course of arguments before the first appellate Court. Be that as it may, on perusal of the record indicates that the appellant was responsible for the respondent keeping himself away from the company of the appellant and not

cohabiting with the appellant for last several years.

56. A perusal of the section 23(1)(a) of the Hindu Marriage Act, 1955 clearly indicates that if the Court is satisfied that if any of the grounds for granting relief exists and the petitioner is in any way taking advantage of his or her own wrong or disability for the purpose of such relief except the reliefs set out in the said provisions, the Court cannot grant such relief in favour of such party who has taken advantage of his/her wrong. In my view no such case was made out by the appellant before the learned trial judge as well as before the first appellate Court that the respondent had taken advantage of his own alleged wrong or disability for the purpose of granting relief of divorce in his favour. No such material was available before the two Courts below to refuse reliefs in favour of the respondent for granting divorce in favour of the respondent on the ground of the respondent allegedly taking advantage of his own alleged wrong. I am thus not inclined to accept the submission of the learned counsel for the appellant that two Courts below ought to have framed additional issues on the ground that the first appellate Court ought to have refused to grant relief of divorce in favour of the respondent on the ground of the respondent allegedly taking advantage of his alleged wrong or to remand the matter to the trial Court for framing such issue and to adjudicate upon the same. There is thus no merit in this submission of the learned counsel for the appellant.

57. Insofar as submission of the learned counsel for the appellant that though the respondent had been permitted to have access to the daughter of the parties, since last several years, the respondent has not been visiting the daughter for the purpose of

access which shows that the respondent has deliberately kept himself away from the appellant and the daughter and has created such a situation which would prevent the appellant from reconciling the situation is concerned, there is no dispute that the appellant did not file any application at any point of time for seeking relief of restitution of conjugal rights before the learned trial judge. A perusal of the evidence recorded by both the parties indicates that the appellant herself was responsible for this situation and not the respondent. In my view there is thus no substance in this submission of the learned counsel for the appellant.

58. Insofar as issue of alleged non-payment of permanent alimony ordered by the first appellate Court in the sum of Rs.15,000/- per month to the appellant and Rs.15,000/- to the daughter of the parties regularly is concerned, a perusal of the record indicates that though the respondent had offered the payment to the appellant, the appellant had refused to accept the payment for some period. This Court therefore passed an order dated 12th October, 2015 permitting the respondent to deposit the amount in the account of the respondent. Learned counsel for the respondent invited my attention to the letters addressed by the learned advocate representing the respondent forwarding the cheques of Rs.1,50,000/- and Rs.19,000/- respectively to the learned advocate representing the appellant which cheques were however returned by the appellant. It is not in dispute that pursuant to the order passed by this Court on 12th October,2015, the respondent has paid the entire arrears of the permanent alimony to the appellant and their daughter.

59. Insofar as submission of the learned counsel for the appellant that the amount of Rs.15,000/- towards permanent alimony

to the appellant and Rs.15,000/- to the daughter is not sufficient to maintain the appellant and the daughter and that considering the income of the respondent, more amount ought to have been awarded by the first appellate Court is concerned, it is urged by the learned counsel for the respondent that though the appellant is capable of earning herself, she claims to be unemployed and thus no order of maintenance ought to have been passed by the first appellate Court is concerned, in my view since the respondent has not challenged the judgment and decree of the first appellate Court directing the respondent to pay permanent alimony to the appellant, the respondent cannot be allowed to urge this submission before this Court. Insofar as permanent alimony awarded to the daughter is concerned, learned counsel for the respondent has made a statement before this Court that maintenance of the daughter is the responsibility of the respondent. Without prejudice to his rights and contentions, the respondent showed his readiness and willingness to pay additional amount of Rs.10,000/- to the daughter from such date as may be ordered by this Court for the welfare of the daughter. In my view the daughter deserves be provided an additional permanent alimony in the sum of Rs.10,000/- per month in view of the statement made by the learned counsel for the respondent from the date of filing this appeal.

60. Insofar as the submission of the learned counsel for the appellant that though there is no ground of 'irretrievable break down of marriage' under the provisions of Hindu Marriage Act, 1955, the first appellate Court has granted decree of divorce on that ground which is contrary to the provisions of the Hindu Marriage Act, 1955 and contrary to the law laid down by the Supreme Court is concerned,

there is no dispute that there is no ground of 'irretrievable break down of marriage' available under the provisions of Hindu Marriage Act, 1955. Supreme Court in case of ***Anil Kumar Jain*** (supra) has held that the Supreme Court in special circumstances can pass appropriate orders to do justice to the parties in a given fact situation by invoking its powers under Article 142 of the Constitution, but in normal circumstances the provisions of the statute have to be given effect to. It is held that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. It is held that this doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. The principles laid down by the Supreme Court in case of ***Anil Kumar Jain*** (supra) are binding on this Court.

61. The question however that arises for consideration of this Court is whether the first appellate Court has passed a decree for divorce in favour of the respondent only on the ground of irretrievable break down of marriage or not. A perusal of the judgment and decree passed by the first appellate Court on 4th May, 2013 and more particularly paragraph (41) indicates that the first appellate Court has observed that the evidence discloses that the marriage has broken down beyond repairs and it was harmful and injurious for the respondent herein to stay with his wife due to day to day quarrels, arrogance, indecent behaviour and nagging attitude and the marriage between the parties was dead for all practical purposes and it could

be said that there was irretrievable break down between the parties.

62. In other paragraphs of the said judgment and decree, the first appellate Court however has appreciated the oral evidence led by both the parties and has rendered a categorical finding that the evidence discloses that the appellant was snatching his collar and was abusing him on several occasions and the life of the respondent became miserable. The first appellate Court held that the evidence discloses that the appellant was abusing the father of the respondent and was raising hand on him which fact totally disturbed the peace of the house. She used to pick up quarrels with the respondent and threw photo frame on him and when his father tried to resolve the matter, she insulted him and humiliated him by using abusive language. The first appellate Court also rendered various findings on cruelty meted out by the petitioner to the respondent and has described various such instances of cruelty on the part of the appellant in the impugned order. The findings of the first appellate Court would be highlighted in the later part of the judgment in detail.

63. In my view, learned counsel for the respondent is thus right in her submission that the first appellate Court has passed a decree not only on the ground of irretrievable break down of marriage but mainly on the ground of cruelty meted out by the appellant upon the respondent and his parents which is duly proved by the respondent.

64. A perusal of the oral evidence led by the respondent indicates that in the month of January 2006, the respondent had returned to India along with the appellant and their daughter and started residing in flat no.201 with the parents of the respondent. The

evidence further indicates that the parents of the respondent were ousted by the respondent from the flat no.201 by the appellant and therefore they started residing in the house of the cousin of the respondent, Mr.Milind Mapara since flat no.204 on the 4th floor was given on rent and was not available at that point of time. After two years, the respondent and his parents left flat no.402 and shifted to some other place. The respondent had examined 8 witnesses including himself, his father, his sister, husband of his sister, his mother, a cousin and a neighbour. The appellant examined herself and one cycle owner in support of her case.

65. With the assistance of the learned counsel for the appellant and the respondent, I perused the oral evidence led by the witnesses examined by both the parties in detail. The witnesses examined by the respondent have deposed about the quarrels, attitude of the appellant and on the issue of cruelty meted out by the appellant on the respondent and his parents. The appellant used to pick up fight on petty issues with the respondent and his parents. The appellant had also picked up the quarrel with the respondent for not permitting the appellant to visit her sister's house and for permitting the parents of the appellant to stay with the respondent and his parents in the matrimonial house. Several such continuous incident of quarrel picked up by the appellant with the respondent, and his parents and his sister were brought on record by the witnesses examined by the respondent. The appellant was also not permitting the respondent to stay with the parents of the respondent on one or the other ground and used to humiliate the parents of the respondent on several occasions. The appellant was quite often abusing the respondent and has also thrown photo-frame on the respondent. The

appellant had also created a quarrel on the Rakshabandhan day in the month of August 2006 and ousted the sister of the respondent from the house. She had humiliated and ill treated the parents of the respondent and had forced them to leave the house and to stay in the house of their relatives.

66. A perusal of the record further indicates that the parents of the appellant also addressed various letters to the parents of the respondent and made various allegations against them. As a result of continuous harassment and cruelty on the part of the appellant, the respondent had to leave the flat on the 2nd floor where he was staying with the appellant and was required to move in the flat no.402 in the month of November 2006. The evidence on record clearly indicates that since November 2006, the appellant and the respondent are not staying together. A perusal of the record further indicates that the appellant was not allowing the daughter of the parties to be in company of the parents of the respondent and was trying to keep some distance though the parents of the respondent had lot of love and affection for the grand daughter. The appellant was also insisting to have a separate house away from the place of residence of the parents and wanted the respondent to stay away from his parents.

67. A perusal of the order passed by the learned trial judge indicates that though the learned trial judge took cognizance of some of such incidents amounting to cruelty on the part of the appellant upon the respondent, the learned trial judge however took a casual approach in the matter by considering such continuous incidents of cruelty as normal wear and tear of the matrimonial relations between the husband and wife.

68. A perusal of the impugned judgment and decree passed by the first appellate Court however indicates that the first appellate Court has considered the entire oral evidence led by both the parties and have rightly appreciated the oral evidence in correct perspective. In my view though some of the incidents of cruelty alleged by the respondent against the appellant were trivial in nature, the Court has to consider the overall behaviour and treatment of the one spouse on the other spouse and has to consider the cumulative effect of such continuous act of cruelty while considering a petition for divorce. In my view, the first appellate Court was right in considering the cumulative effect of all such incidents forming part of the cruelty meted out by the appellant upon the respondent and his parents while passing a decree of divorce in favour of the respondent and against the appellant.

69. If the cumulative effect of the acts of the cruelty on the part of one spouse on the other spouse makes the life of the other spouse miserable and it is not possible for other spouse to stay with the such spouse happily, a decree of divorce can be granted by the Court on the ground of cruelty. I do not find any infirmity in the order passed by the first appellate Court granting divorce on the ground of cruelty meted out by the appellant upon the respondent and his parents. In my view, the findings of fact rendered by the first appellate Court while granting decree of divorce in favour of the respondent being not perverse, cannot be interfered with by this Court under section 100 of the Code of Civil Procedure.

70. Insofar as submission of the learned counsel for the

appellant that most of the witnesses examined by the respondent were his relatives and they were interested persons and their evidence could not have considered by the first appellate Court is concerned, a perusal of the record indicates that the decree of divorce granted by the first appellate Court is not merely on the basis of the evidence of the close relatives but also based on evidence of others. Be that as it may, in my view in case of matrimonial dispute, the family members and close relatives who have witnessed the behaviour and cruelty on the part of the appellant, their evidence cannot be discarded on the ground that they were relatives and interested witnesses in the matter and could not have told the truth though were subjected to cross examination.

71. Insofar as submission of the learned counsel for the appellant that the respondent was visiting the flat on the 2nd floor for having access of the daughter even after November 2006 for quiet sometime and that would amount to the respondent staying with the appellant and in view of the respondent paying the maintenance of the said flat and paying some amount to the daughter would amount to condonation of the alleged cruelty is concerned, in my view there is no substance in this submission of the learned counsel for the appellant. Merely because the respondent was having access to the daughter pursuant to the permission granted by the Court periodically, such visit to have access of the daughter cannot be construed as condonation of cruelty on the part of the appellant. Similarly the payment of maintenance and other outgoings in respect of the said flat including the electricity bills and the payment if any made for the welfare of the daughter after the respondent started staying separately also cannot amount to condonation of cruelty.

72. The dispute between the parties continued at least since November 2006 who had been staying separately. I am not inclined to accept the submission of the learned counsel for the appellant that the appellant and the respondent were staying together even after November 2006 till 2008 or 2010. It is not in dispute that the appellant never applied for restitution of conjugal rights in the divorce proceedings filed by the respondent.

73. In my view, the prior acts of cruelty can be considered as condoned only if the parties would have stayed together happily and the past acts of cruelty on the part of one spouse would have been pardoned by the affected spouse so as to continue their life peacefully and happily and the spouses would have restored their matrimonial life as was before the commencement of acts of cruelty by one spouse on the another.

74. In my view the submission of the learned counsel for the appellant that since November 2006, the respondent has been avoiding to stay with the appellant and on the another hand his submission that the respondent had been staying with the appellant and her daughter by visiting the matrimonial home is inconsistent and contradictory with each other.

75. Supreme Court in case of ***Samar Ghosh*** (supra) has set out several illustrations and instance which can amount to cruelty. It is held that sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse, the treatment complained of and the resultant danger or apprehension

must be very grave, substantial and weighty will amount to cruelty. The another illustration given in the said judgment is on consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty. It is held that mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty. The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty. In my view, the evidence on record clearly indicates that the cruelty meted out by the appellant upon the respondent would fall under some of such instances and the illustration set out by the Supreme Court in case of ***Samar Ghosh*** (supra).

76. Insofar as judgment of the Supreme Court in case of ***A. Jayachandra*** (supra) relied upon by the learned counsel for the appellant is concerned, the trial Court has rendered a finding that the material on record was not sufficient to prove any mental cruelty. It is held by the Supreme Court that the question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. It is held that long absence of physical company cannot be a ground for divorce if the same was on account of the conduct of the husband. In this case the evidence on record

clearly indicates that the respondent was required to leave the company of the appellant due to her continuous acts of cruelty upon the respondent and his parents. The appellant was solely responsible for the respondent staying separately and away from the appellant. The judgment of Supreme Court in case of ***A. Jayachandra*** (supra) thus would not assist the case of the appellant.

77. The Supreme Court in the judgment delivered on 6th October, 2016 in case of ***Narendra vs. K. Meena*** in Civil Appeal No.3253 of 2008 has held that in normal circumstances, a wife is expected to be with the family of the husband after the marriage and she becomes integral to and forms part of the family of the husband and normally without any justifiable strong reason, she would never insist that her husband should get separated from the family and live only with her. It is held that a son maintaining his parents is absolutely normal in Indian culture and ethos. It is held that in a Hindu society, it is a pious obligation of the son to maintain the parents. If a wife makes an attempt to deviate from the normal practice and normal custom of the society, she must have some justifiable reason for that. It is held by the Supreme Court that no husband would tolerate this and no son would like to be separated from his old parents and other family members, who are also dependent upon his income. The persistent effort of the wife to constrain the husband to be separated from the family would be torturous for the husband and this constitutes an act of cruelty.

78. A perusal of the record indicates that the appellant never wanted the respondent to stay with his parents in the matrimonial house. Because of the cruelty meted out by the appellant to the

respondent and because of the ill treatment and misbehaviour of the appellant with the respondent and his parents, the parents of the respondent were required to leave the house on the 2nd floor and had to stay with the cousin of the respondent for quiet sometime. In my view the principles laid down by the Supreme Court in case of ***Narendra*** (supra) squarely applies to the facts of this case. I am respectfully bound by the judgment of the Supreme Court in case of ***Narendra*** (supra). In my view any pressure on the part of wife on the husband to stay away from his parents without any justifiable cause amounts to cruelty.

79. The Supreme Court in the judgment delivered on 19th November, 2014 in case of ***K. Srinivas vs. K. Sunita*** in Civil Appeal No.1213 of 2006 has observed that the powers under Article 142 of the Constitution are plenary powers and are bestowed by the Constitution of India only on the Supreme Court and not on any other Court. It is held that the Law Commission of India in its Reports in 1978 as well as in 2009 has recommended the introduction of irretrievable breakdown of marriage as a ground for dissolution of marriage; the Marriage Laws (Amendment) Bill of 2013 incorporating the ground has even received the assent of the Rajya Sabha. It is, however, highly debatable whether, in the Indian situation, where there is rampant oppression of women, such a ground would at all be expedient. But that controversy would be considered by the Lok Sabha.

80. The Supreme Court in the judgment delivered on 18th April, 2011 in Civil Appeal No.6288 of 2008 in case of ***Hitesh Bhatnagar vs. Deepa Bhatnagar*** has held that the Supreme Court has

extraordinary power to dissolve a marriage on the ground of irretrievably break down of marriage only when it is impossible to save the marriage and all efforts made in that regard would, to the mind of the Court, be counter-productive.

81. Insofar as submission of the learned counsel for the appellant that since the rights of the appellant are affected in view of the judgment and decree passed by the first appellate Court is concerned and thus substantial question of law arises from the said judgment and it has to be adjudicated upon by this Court under section 100 of the Code of Civil Procedure, 1908 is concerned, by consent of parties this Court has already heard the second appeal finally by formulating some of the substantial questions of law after hearing both parties. The judgment of Supreme Court in case of ***Santosh Hazari*** (supra) and in case of ***State Bank of India & Ors.*** (supra) thus would not assist the case of the appellant.

82. Insofar as the issue as to whether the carrier and life of the appellant and the daughter would be seriously affected if the decree of divorce is not set aside is concerned, insofar as the appellant is concerned, the appellant is responsible for the decree of divorce granted by the first appellate Court in view of she having meted out the respondent with cruelty.

83. Insofar as the daughter of the parties is concerned, learned counsel for the respondent has voluntarily made a statement that additional amount of Rs.10,000/- would be paid to the daughter from such date as this Court may deem fit. The respondent has also made a statement through his counsel that he is even ready and

willing to take custody of the daughter of the parties. I am thus not inclined to accept the submission of the learned counsel for the appellant that the carrier and life of the daughter would be affected in the facts and circumstances of this case when the respondent is ready and willing to take custody of the daughter and to maintain her.

84. For the reasons recorded aforesaid, insofar as substantial question of law no. (I) is concerned, in my view, the first appellate Court has not granted decree of divorce only on the ground of irretrievable break down of marriage which is not the ground provided under the provisions of Hindu Marriage Act, 1955 but mainly on the ground of cruelty meted out by the appellant upon the respondent. The said question is answered accordingly. Insofar as substantial question of law no.(II) is concerned, for the reasons recorded aforesaid, the said question is answered in affirmative. Insofar as substantial question of law no.(III) is concerned, for the reasons recorded aforesaid, the said question is answered in negative.

85. In my view, the second appeal is totally devoid of merits. I, therefore, pass the following order :-

> (a) Respondent no.1 is directed to pay additional permanent alimony amount of Rupees Ten Thousand per month from the date of filing this second appeal to the daughter of the parties Komal. Arrears of the additional amount shall be paid within six weeks from today. Additional amount of alimony allowed in favour of the daughter with effect from January, 2017 shall be paid along with the alimony allowed by the

first appellate Court. The impugned judgment and decree dated 4th May, 2013 passed by the first appellate Court is modified partly. Rest of the judgment and decree dated 4th May, 2013 is upheld.

(b) Second Appeal No.349 of 2013 is disposed of in aforesaid terms.

(c) In view of the disposal of the Second Appeal No.349 of 2013, Civil Application No.928 of 2013 does not survive and is accordingly disposed of. No order as to costs.

(R.D. DHANUKA, J.)

86. The matter is on board for pronouncement of judgment today. Before the judgment could be pronounced, Mr.Warunjikar, learned counsel for the appellant has tendered a copy of the letter dated 16th December, 2016 and states that his client has instructed him to make an application before this Court to call for the records and proceedings of the first appellate Court at this stage and if he is unable to get that order from this Court, she would engage another advocate for making such application.

87 I am not inclined to accept this request made at this stage by the learned counsel for the appellant. The oral application made by the learned counsel based on the instructions received from his client is rejected.

(R.D. DHANUKA, J.)