Reserved on:- 16.09.2019
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IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

First Appeal No. 134 of 2013

Sri Vineet Kumar Jain .....Appellant

Versus

Smt. Archana Garg ...…Respondent

Present: - Mr. I.P. Kohli, Advocate for the appellant.
Mr. Piyush Garg, Advocate for the respondent.

With

First Appeal No. 122 of 2013

Smt. Archana Garg .....Appellant

Versus

Sri Vineet Kumar Jain .....Respondent

Present: - Mr. Piyush Garg, Advocate for the appellant.
Mr. I.P. Kohli, Advocate for the respondent.

Coram: Hon'ble Alok Singh, J.
Hon'ble Ravindra Maithani, J.

Per: Hon'ble Ravindra Maithani, J.

In both these appeals, challenge is to the judgment and decree dated 06.08.2013 in Case No.238 of 2008, Vineet Kumar Jain Vs. Smt. Archana Garg (hereinafter referred to as 'the case'), passed by the court of Principal Judge, Family Court, Dehradun.

2. By the impugned judgment and decree, the petition filed by the husband was allowed and decree of judicial separation under Section 10 of the Hindu Marriage Act, 1955 (for short 'the Act') has been granted.

3. Counterclaim filed by the wife for custody of the children has also been decreed.

4. In this judgment, husband Vinod Kumar Jain will be referred to as the appellant and wife Smt. Archana Garg shall be referred to as the respondent.

5. Simple facts of this case have been given complexity by pleadings; long drawn affidavits and extremely lengthy cross-examinations. Married on 12.12.1993, two children were born, out from the wedlock, to the parties. Appellant Vinod Kumar Jain is employed with ONGC and has been posted in different parts of the country. Appellant filed a petition for divorce or in the alternate, for judicial separation, which is basis of the case.

6. According to the petition, since marriage, the respondent had dislike for the appellant. She used to taunt the appellant saying that she wanted to marry some other person, but she was forced to marry the appellant. Her conduct and behaviour became unbearable. The appellant filed a divorce suit no. 181 of 2006 (first divorce suit). Subsequently, parties entered into a compromise, but again the respondent turned to her old ways. Another divorce petition no.432 of 2007 was filed by the

appellant (second divorce suit). The respondent tendered apologies in both the divorce suits. The second divorce suit was also withdrawn by the appellant in view of the apologies as well as the welfare of children. But, again respondent became wild and offensive. She filed false complaint against the appellant; threatened to commit suicide, blaming the appellant for it. Under those conditions, the appellant was forced to leave his house on 22.04.2008 and started living in the guest house. He is in constant danger from the respondent. The appellant has no alternate, but to leave the respondent forever and live separately. These were initial assertions in the petition. Subsequent to it, some more acts were specified by adding a paragraph 11-A in the petition, which includes sending a false telegram to the senior officers of the appellant on 16.12.2003, when he was going to Sudan; engaging a detective eye of Gwalior; false complaint to National Commission for Women in November, 2004; a false Police complaint against the appellant on 03.05.2006 by the respondent; on 12.05.2008 giving a false complaint to the Police; having various SIM cards with the respondent for talking with her male friends in an intimate manner; cruel behaviour of the respondent etc.

7. The respondent wife filed written statement. According to her, soon after the marriage, she was harassed for the demand of dowry; she was treated badly like servants in the house. First divorce suit was filed by the appellant without any reason on the basis of false story so as to get ex-party divorce. The respondent moved an application for maintenance. To avoid payment of maintenance, the appellant tendered apologies and withdrew the first divorce suit. In the second divorce suit

also, the respondent moved an application for maintenance for her and her children and again to avoid payment of maintenance, the appellant withdrew the second divorce suit. According to the written statement of the respondent, it was the habit of the appellant to stay in the hotels and guest houses with other women and remain out from the house without informing her. Somehow the respondent was taking care of her children and in those days, she would contact at all the possible places where she could trace her husband. In sum and substance, the respondent denied the allegations leveled against her.

8. Based on the pleadings of the parties, eleven issues were framed by the learned court below.

9. In the evidence, the appellant examined himself. On behalf of the respondent, five witnesses were examined namely DW1 Smt. Archana Garg, DW2 Sharad Chandra Garg, DW3 Balveer Singh Jain, DW4 Nirmala Jain and DW5 Km Dhwani Jain. Documents have also been filed by the parties in support of their respective claims.

10. By the impugned judgment and decree, learned court below held that the respondent committed cruelty to the appellant, the husband. On the question of custody of the children, learned court below held that the daughter is major, whereas the son, who is mentally weak, may well grow with her mother, therefore, the custody of the Master Dhaval was given to the respondent mother. Having considered the statement of the daughter Km. Dhwani that she needs love and support of her parents, the

learned court below granted the decree of judicial separation. Aggrieved by it, the appellant preferred First Appeal No.134 of 2013 seeking divorce instead of judicial separation. Respondent wife challenged the decree of judicial separation in First Appeal No.122 of 2013.

11. Heard and perused the record.

12. Appellant has sought divorce or in the alternate judicial separation mainly on the ground of cruelty. The question is whether the respondent wife ever treated the appellant with cruelty and if so, as to whether the cruelty is of such a degree or nature that it may be a ground for divorce or judicial separation?

13. Cruelty, as such, has not been defined in the Act and perhaps, it cannot be defined. It depends on various factors and most particularly, it is something which relates to the sensitivity of the persons involved. An action may be treated by a person as a cruel act, but under similar circumstances, some might say that it is not cruel. What is the test? In the case of Samar Ghosh Vs. Jaya Ghosh, (2007) 4 SCC 511, Hon'ble Supreme Court has very lucidly explained this concept, which is as hereunder:-

> "99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position,

social status, customs, traditions, religious beliefs, human values and their value system."

14. It was further observed that the mental cruelty cannot remain static; it is bound to change with the passage of time. It would be apt to reproduce, what the Hon'ble Court held. It is as hereunder:-

"100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) 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.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) 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.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) 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.

(x) 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.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

15. Cruelty is dependable to various factors. It is not an abstract principle. Its applications may vary under different circumstances, therefore, it is imperative that first and foremost the facts may be visualized to understand the actions of the parties.

16. Appellant is an engineer and also an MBA, who works with ONGC. It has also been revealed that respondent is post-graduate in botany; married in the year 1993. They have two children out of the wedlock. The elder daughter was born on 04.11.1994. Today, she is more than 24 years of age and the younger one is a son, who was born on 05.01.2000. First divorce suit was filed on 04.05.2006. Was it a happy couple or has it been a very happy family? This is a case, where things were not normal. Insofar as the son Master Dhaval is concerned, he is an autistic child, who would behave in different ways. During the course of hearing, this Court tried to make endeavour, so as to get the child admitted in some school made for special child.

On 17.05.2010, the learned court below directed that the custody of the children shall remain with the appellant and on 05.06.2012, compromise 179-A was presented before the court but finally by the impugned judgment and decree, the custody of minor son was given to the respondent mother, while observing that the daughter is now major.

17. On 14.12.2018 while hearing these appeals, the court has recorded about the condition of the child. It is reproduced as hereunder:-

> "4. Meanwhile, the boy is also present before this Court. This Court has been informed that the boy is an 'autistic' child and hence needs special care. He needs a school where he can be properly taken care of. It has been brought to the notice of this Court that the respondent/wife presently does not have the finances to give any kind of special care to her son.
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> 5. Learned counsel for the appellant/husband submits that the appellant is ready to bear the expenses of the boy child in case he is put to any special school.
>
> 6. Learned counsel for the respondent/wife has also apprised this Court that this is also one of the findings of a Coordinate Bench of this Court, which has come in the order dated 09.10.2018, which reads as under:-
>
> > "Mr. I.P. Kohli, Advocate for the appellant.
> >
> > Mr. Piyush Garg, Advocate for the respondent.
> >
> > Heard learned Counsel for the parties.
> >
> > Earlier, this Court requested Mr. T.A. Khan, Senior Advocate & Mrs. Neetu Singh, Advocate to mediate in the matter.
> >
> > After mediation, Mrs. Neetu Singh, Advocate informed this Court that the only problem, which the appellant as well as respondent are facing, is the health problem of their son, who is about 18 years of age. It is informed by Mrs. Neetu Singh that their son is mentally infirm and since he is 18 years of age, it is not possible

for the respondent to take care of him, as he is unable to perform his daily routine activities and it is becoming difficult for her to control her son. She further submitted that the appellant is working in the O.N.G.C. and he has to go out of station invariably. She also submitted that the parties agreed that their son be sent to Rehabilitation Centre/Special School for such type of patients. She also submitted that Mr. Vineet Kumar Jain (appellant) is ready to bear the expenses which are going to be incurred on the same.

Learned counsel for the parties requested that matter may be listed after Deepawali vacations.

List this matter on 15.11.2018."

7. The appellant before this Court is the husband who is presently working as a Deputy General Manager in Oil and Natural Gas Corporation (in short "ONGC"), and is presently earning a gross salary of Rs.3,87,804/- (Rupees Three Lakhs Eighty Seven Thousand Eight Hundred Four Only) per month, out of which, Rs.1,22,483/- (Rupees One Lakh Twenty Two Thousand Four Hundred Eighty Three Only) is being deducted and the net pay as admitted by the appellant/husband is Rs.2,65,321/- (Rupees Two Lakhs Sixty Five Thousand Three Hundred Twenty One Only). The appellant admittedly a very senior officer in ONGC. The salary statement of appellant/husband has been produced before this Court by the learned counsel for the appellant/husband, which is made a part of record.

8. Both the parties have apprised this Court that they shall meanwhile jointly move an application before the school authorities. The schools they have identified are Vasant Valley School at Delhi and Well Being School, at Ghaziabad where such special care can be given to the boy child. Both the parents shall visit these two schools, or any other school which is agreeable to them, and get their son admitted in the school, of which entire expenses shall be borne by the appellant/husband. Let this Court be informed by the next date of listing, which is fixed for 07.01.2019."

18. It has also been brought on record that the girl child has done her bachelor of engineering and she was supported by the appellant, her father. All the finances were borne by the appellant. She, in her statement, had deposed that she loves her father also. She wants to stay together with her father, mother and brother. Respondent wife also wants that the family should remain together. Although, she blames appellant for his misdeeds; for staying away from house without informing; for spending money on drinks and other wrong deeds; for ill treating the children and her; for beating her; but despite that as stated, she wants to stay with her husband. The appellant has categorically, in his cross-examination, stated that he cannot take the respondent with him. He can take the children with him, but during the course of arguments, it has been argued that husband may not be in a position, due to exigencies of his service, to well maintain children along with him. This is broad factual aspect of this case. In this context, arguments and evidences will be appreciated now.

19. On behalf of the appellant, it is argued that it has been proved that the respondent wife committed cruelty to the appellant. Appellant was treated with cruelty, therefore, according to learned counsel for the appellant, a decree of divorce ought to have been passed under section 13 of the Act; the learned court below committed an error in granting the decree of judicial separation instead of decree of divorce. There is no reason assigned by the learned court below. The only reason is that the daughter of the couple wants them together, which according to learned counsel, is not a valid ground for denying a decree of divorce.

20. On the other hand, learned counsel for the respondent wife would argue that after decree of judicial separation, the appellant did not make any effort for cohabitation, therefore, decree of divorce cannot be granted. It is also argued that the order for custody of child has not been challenged by the husband, therefore, the appeal filed by the appellant is not maintainable because by way of impugned decree, the custody of children has been given to the respondent wife. The first and second divorce suits were amicably settled, therefore, the earlier acts, which according to appellant are cruelty, gets condoned and on the basis of those acts again divorce petition cannot be entertained; the false charge of infidelity leveled by the appellant against his wife, the respondent also amounts cruelty. The allegations are not proved. Whatever actions were taken by the respondent wife, were taken not to panelize her husband, instead to save her marriage, to get proper care to her children. The communications made by the respondent wife cannot be treated as cruelty towards her husband, therefore, it is argued that no case, as such, has been made out, which may be a ground for either grant of decree of divorce or of judicial separation. Learned court below committed an error in granting the decree of judicial separation.

21. In support of his contention, learned counsel for the respondent placed reliance on the principles of law, as laid down in the case of Hirachand Srinivas Managaonkar, (2001) 4 SCC 125, S. Hanumantha Rao Vs. S. Ramani, (1999) 3 SCC 620, Ravi Kumar Vs. Julmidevi, (2010) 4 SCC 476, Chandra Mohini Srivastava Vs. Avinash Prasad Srivastava and another, (1967) 1 SCR 864, R. Balasubramanian

Vs.Vijayalakshmi Balasubramanian, (1999) 7 SCC 311, Sri Gangai Vinayagar Temple and another Vs. Meenakshi Ammal and Others, (2015) 3 SCC 624 and Ravinder Kaur Vs. Manjeet Singh (Dead), 2019 SCC OnLine SC 1069.

22. In the case of Hirachand Srinivas Managaonkar (*supra*), Hon'ble Supreme Court interpreted the principles of section 23 of the Act. It was held that "the object of sub-section 1-A of Section 13 of the Act was merely to enlarge the right to apply for divorce and not to make it complexive that a petition for divorce presented under sub-section 1-A must be allowed on a mere proof that there was no cohabitation for the requisite period." It was further held that "the very language of section 23 shows that it governs every proceedings under the Act and the duty is cast on the court to decree the relief sought only if condition mentioned in section should satisfy and not otherwise."

23. In the instant case, there is no question of divorce under section 13 (1-A) of the Act. It is not the question that one year after the decree of judicial separation, the decree of divorce may be granted under section 13 (1-A) of the Act. The issue is not about applicability of section 13 (1-A) of the Act. The question involved is as to whether divorce or judicial separation should be granted or the petition for this purpose should be dismissed. Therefore, the applicability of section 23 of the Act has no relevance in the instant case.

24. In the case of Hanumantha Rao (supra), the wife had lodged a complaint with the Women's Protection Cell, through her uncle and as a result of which the appellant and the members of his family had to seek anticipatory bail. On this aspect, the Hon'ble Court held that "out of panic, if the appellant and all the members of her family sought anticipatory bail, the respondent cannot be blamed for that."

25. In the case of Ravinder Kaur (*supra*), the Hon'ble Court, *interalia*, held that bald allegations of illegitimate relationship made by husband against the wife amounts to mental cruelty.

26. In the cases of Ravi Kumar, Chandra Mohini Srivasta and R. Bala Subramanian (*supra*), it was, *interalia*, held that if after the allegations were leveled, parties stayed together, it may amount condonation of the earlier acts.

27. In the case of Sri Gangai Vinayagar Temple (supra), the facts were unlike the facts of this case. In a dispute between tenant and landlord, separate suits were tried together. Separate decrees were passed. Some of the decrees were challenged, but some of the decrees had not been challenged. Under those circumstances, the Hon'ble Court held that decrees which were not challenged had gained finality and became former suit, which invites rigors of *res judicata*. Instant is not the case like it. In the instant case, there are no two decrees. There is only one decree. Different issues have been decided. The respondent has not challenged the

findings on custody of the minor son, but it does not make the appeal non-entertainable.

28. Is it a case of condonation of earlier acts? What is the effect of decree passed in first and second divorce suits? Arguments have been advanced that earlier acts got condoned. Interestingly issue no.3 was framed in the case to the effect as to whether the case is barred by section 11 to the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') and while deciding this issue, the learned court below, on 02.02.2011, took note that desertion and cruelty are continuous wrongs. Therefore, each day would give a cause of action to the wronged spouse and held that the case was not barred by section 11 of the Code. This order dated 02.11.2011 of the learned court below was challenged in Appeal from Order No. 53 of 2011, Smt. Archana Garg Vs. V.K. Jain and this Court on 24.02.2011 dismissed the appeal. While dismissing the appeal, this Court held that "the condonation is conditional, as the condoned spouse, thereafter, has to fulfill the obligation of marriage so that if act of matrimonial offence is afterwards committed by him or her, the condonation would cease to have effect."

29. In the case of Dr. N.G. Dastane Vs. Mrs. S. Dastane, (1975) 2 SCC 326, the Hon'ble Supreme Court had occasion to consider the concept of condonation of the acts and the court held as hereunder:-

> "57. But condonation of a matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always

subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety. "No matrimonial offence is erased by condonation. It is obscured but not obliterated[1]". Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be *ejusdem generis* with the original offence[2]. Condoned cruelty can therefore be revived, say, by desertion or adultery."

30. It is now clear that even once acts are condoned, it does not wipe out the entire past. What it does is, it hibernates or puts the consequences of the earlier act in abeyance, which may definitely be revived if after condonation, such acts are repeated in the same degree or in any aggravated nature. Has it been done in the case? Learned court below held that sending of telegram by father of the respondent on 16.12.2003 to the superior officer of the appellant and complaint to DIG Police amounted cruelty; allegations of infidelity leveled by the wife against husband also amounts cruelty; abusing the husband by wife on various occasions also amounts to cruelty and based on it, decree of judicial separation has been granted.

31. In his affidavit, appellant has stated about it. Facts remains that the first divorce suit was ended in compromise on 06.11.2006 and the second divorce suit also ended in an amicable settlement on 13.02.2008. What the respondent did after 13.02.2008? Has she revived the cruel attitude? This as well as also as to whether the earlier acts of the respondent amount to cruelty? It has to be seen.

1. See Words and Phrases: Legally Defined (Butterworths) 1969 Ed., Vol. 1, p. 305 (“Condonation”).

2.See Halsbury’s Laws of England, 3rd Ed., Vol. 12, p. 306

32. What is important is that in the first divorce suit, in paragraph 4, the appellant himself leveled the allegations of infidelity against the respondent wife. He has written that his wife, the respondent had relationship with some person in Jodhpur and she used to talk to him on telephone. The second divorce suit was filed more or less on the same grounds, on which the first divorce suit was filed. The allegations of infidelity was repeated by the appellant in the second divorce suit. A few more things have been written in the petition of the second divorce suit after paragraph 38 onwards to show as to what gave further occasion to file the suit for dissolution of marriage.

33. According to the petition, after February, 2008 when the second divorce suit was settled, the respondent again harassed him. In his cross-examination, the appellant has admitted that after settlement in the second divorce suit, they stayed together and established physical relationship as well. It means that after 13.02.2008, the parties started living together. What is the occasion to file the fresh suit for divorce? It may be noted here that it is the case of the appellant himself that he left his house last time on 22.04.2008. It means that after settlement in the second divorce suit on 13.02.2008 till the appellant left the company of respondent and his children on 22.04.2008, they were together. What happened in between? At page 22 of his cross-examination, PW1, the appellant has elaborated those incidents. The first incident according to him, happened in March, 2008 in a Holi Milan Programme in the colony. His food spilled over the saaree of the respondent and at this, according to the appellant, the respondent abused him.

34. The second incident is after the Holi, according to the appellant, on that day, the respondent was going out on her scooter for a walk, he requested her to take the minor child Master Dhaval along with her, but she abused him.

35. The third incident (stated in page 24 of his cross-examination), according to the appellant, occurred on 20-21/04.2008 when they had gone out for dinner in Naveen Hotel, Chakrata Road, where on a small issue, again a quarrel ensued. When they came back home, respondent bolted her room from inside. Somehow the appellant entered there, he saw that she had some tablets in her hand. A letter addressed to District Magistrate, Senior Superintendant of Police was written by her. She was threatening that she would commit suicide and blame him. According to PW1 the appellant, next date he left the house without informing the respondent, but he informed his in-laws.

36. There is one more incident of 12.05.2008. It is the day when according to appellant, his farewell was being organized. At the venue, the respondent reached along with her children. The respondent insulted him there. (para 18 of the cross-examination of PW1). On that day again, at the gate of Navin Hotel, they had a quarrel, which reached up to Police. According to the appellant, on 12.05.2008, he noticed that respondent was with a S.K. Nandal in an indecent manner, outside the hotel.

37. Respondent denied all these allegations in her statement. In his statement, her father Sharad Chandra Garg had supported her statement. The respondent produced father and mother of the appellant namely Balveer Singh Jain and Nirmala Jain in evidence. DW5 is the daughter of the couple.

38. According to DW5 Dhwani Jain, she is an engineering graduate. She loves her family. She does not want them to be separated. She blames appellant for the entire things. According to her, it is the appellant who ill-treated the respondent. The appellant did not fulfill the responsibility and role of the elder in the family. The appellant used to beat the respondent.

39. All the witnesses have been extensively cross-examined in all the aspects. In fact, DW1 the respondent cross-examination was quite detailed. She has been categorical that she did not ever ill-treated her husband.

40. The incident which have been attributed by the appellant post 13.02.2008, namely after settlement in the second divorce suit have been already delineated, as hereinbefore. First incident is spilling of food in the saaree of the respondent in the Holi-Milan programme and what happened thereafter. Second incident is about abuses given by the respondent, when the appellant requested her to take the minor son also along with her for a walk. A compact disc has been filed. It has not been proved. It cannot be read into evidence. The third incident is a quarrel at a hotel while having

the meals with the family. These are small issues which are arising not due to fault of any of the parties, but due to the circumstances, under which both the parties were in. None could be blamed for it. The last incident is of 12.05.2008. Appellant has admitted that he was staying in the hotels in different names. He did not call his family for the official farewell programme. The respondent along with children reached there. According to the appellant, the respondent wanted to create scene. Husband of the respondent was transferred and was being given an official farewell. The appellant had left the respondent and her children on 22.04.2008. The appellant says that to avoid his wife, he was staying in different names in the hotels and guest houses, but the wife was desperate to find him out and why not? She was with her children, one of whom was autistic child, who is growing now. If she reaches at the farewell venue, it cannot be said that her conduct was cruel. What happened there is, as such, not pleaded before the court. Had the appellant stopped the respondent entering the farewell programme? Nothing is clear.

41. Thereafter, on 12.05.2008 i.e. the same evening, the respondent was having meals with her children, father and cousin at Naveen Hotel. The appellant came there and quarrelled with her. (statement of DW1, page 28 bottom para). According to the appellant, he noticed respondent with one of his colleague Mr. Nandal in an indecent manner. He tried to take photographs, but then a scene was created by the respondent. He came back. It is simply not believable. The appellant himself has stated that on 12.05.2008 when he reached at Naveen Hotel, he saw respondent along with her aunt and children, in the hotel. While having

meals with her children and aunt, can it be believed that the respondent would be in an indecent manner and in intimate talk with some person at the gate of the hotel? Who is this Mr. Nandal? Appellant says that he is his colleague. This is unsubstantiated allegation leveled by the appellant against the respondent his wife. An allegation of infidelity.

42. Not only in the instant petition, it is the appellant who has been leveling the allegations of infidelity against his wife since 2006. As stated in the first divorce suit and in the second divorce suit, the similar kinds of allegations were leveled by the appellant against his wife. In first and second divorce, the appellant leveled allegations against the respondent that she had relations with a person of Jodhpur. Now, he leveled allegations of infidelity against his wife saying that she was in an indecent manner standing with Mr. Nandal at the hotel gate. It is also true that the respondent has also leveled such allegations of infidelity against her husband and categorically stated that she was told about it by some persons. She has not proved it but the respondent was second to level such allegations. It is the husband who first leveled such allegations against his wife. Allegations of infidelity were leveled firstly by the husband against the wife. It amounts to cruelty. It is not the respondent wife who initiated this game. It is the appellant husband who started it. The cruelty was initially committed by the appellant. It is not the respondent wife who may be blamed on this account, instead it is the appellant who has committed the cruelty upon the respondent wife by leveling unsubstantiated allegations of infidelity, repeatedly.

43. As discussed hereinbefore, whatever allegations, post 13.02.2008 have been leveled by the appellant against the respondent cannot be termed as cruelty. It is a family in struggle. The mother is staying with an autistic child and a young daughter. She is struggling to save her family. The acts which have been attributed to her, even if taken in its face value does not amount to cruelty. Earlier acts of the cruelty were condoned. When parties entered into a compromise in the second divorce suit on 13.02.2008, nothing revived thereafter. No cruelty was committed by the respondent. Therefore, one part to conclude is that after condonation of earlier acts after 13.02.2008, the acts did not revive. The respondent did not treat the appellant with cruelty. Despite holding it, this Court would like to venture to assess the effect of the earlier acts, which have been considered by the learned court below as the acts of cruelty.

44. One of such acts is sending of a telegram. DW2 Sharad Chandra Garg, father of respondent admitted that he had sent a telegram (para 21 of his affidavit), but according to him, since the appellant was ill-treating the respondent, so sensing the danger, he requested the superior officers not to allow the appellant to go abroad. The intention was to save the marriage, not to lower the reputation of the appellant. The fact remains that parties had estranged relationship, under those circumstances, if father of a girl writes to the superior officers that the husband of the daughter may not be allowed to go abroad, as it may endanger the life of his daughter, it also does not amount to cruelty. It is also not established that merely because of such telegram, the appellant was stopped from

going abroad. So, the effect of telegram is insignificant in terms of cruelty.

45. The other instance, which learned court below has taken is a letter written to DIG, Garhwal. It is on the record. The entire tone and tenor of this letter is not for taking action against the appellant, her husband. In paragraph 35 of her affidavit in examination-in-chief, respondent had stated about it. It reveals that, in fact, the respondent was requesting that her husband may be advised to join their company, so that her family may be saved. The last line of it reveals that it was a request made on humanitarian ground for saving the family of the respondent. Sending of this letter by the respondent does not amount to cruelty.

46. Insofar as allegations of infidelity is concerned, this Court has already held that allegations of infidelity were firstly leveled by the appellant himself, which amounted to cruelty, therefore, whatever followed thereafter, the respondent cannot be held liable for that.

47. Insofar as cruelty on the ground of abuses is concerned, it is not established, as such.

48. In the instant case, there is one very sensible and important witness who is the daughter of the parties namely DW5 Km. Dhwani Jain. She categorically states that it is the appellant who has been ill-treating her mother. She has stated in detail. This witness is much believable and wholly reliable. She is a bridge, in fact, between the appellant and

respondent. Who knows tomorrow, she would be able to make the family happy again. She is categorical in saying that her father has sponsored her education and given her ATM card also (para 18 to her statement). She has admitted that her father discusses with her about her education (para 20 of her statement). It is the very emotional statement given by her that she does not want her parents to be separated because her brother needs both of them. He is not mentally well. It is the appellant, her father who could get the best treatment for him. The last four lines of her affidavit are really revealing that she loves her parents and brother. She wants that their family may be resettled and if the appellant makes some initiative, according to her, it is possible.

49. Having considered all the aspects of the matter, this Court is of the view that, in fact, the appellant could not establish that the respondent ever committed cruelty on him.

50. On the other hand, the allegations of infidelity, which have consistently been leveled by the appellant, amounts to cruelty to the respondent wife. Parties have autistic child. They have no reason to live apart. There is no reason to grant judicial separation or divorce. No ground made, as such, therefore, this Court is of the view that insofar as petition of the appellant for dissolution of marriage or judicial separation is concerned, it ought to have been dismissed by the learned court below. Learned court below did commit an error in granting the decree of judicial separation.

51. There is another issue with regard to the custody of child. The elder daughter is major. Learned court below made an order for custody of boy child to the respondent wife. During the course of argument, it is argued on behalf of respondent that she on her own cannot maintain her son, because he is autistic child and requires care round the clock. Though, in the counterclaim, the respondent has sought the custody of her children, it has been granted to her, but now perhaps looking to the future of her children and her inability to grow her children all alone, it is argued that custody of the children should be joint with the parents. Since, this Court had held that there is no ground to grant either divorce or judicial separation, the question of custody of children loses significance.

52. In view of the foregoing discussion, this Court is of the view that the appeal filed by the appellant Vineet Kumar Jain deserves to be dismissed and the appeal filed by Smt. Archana Garg deserves to be allowed.

53. First Appeal No.134 of 2013 filed by Vineet Kumar Jain is dismissed.

54. First Appeal No.122 of 2013 filed by Smt. Archana Garg is allowed. The impugned judgment and decree dated 06.08.2013 passed in petition no.238 of 2008 filed by Vineet Kumar Jain is set aside. The petition filed by Vineet Kumar Jain under Section 10 or 13 of the Hindu Marriage Act, 1955 is dismissed.

55. No orders as to costs.

56. Let a copy of the judgment along with lower court record be sent to the court below for compliance.

(Ravindra Maithani, J.) (Alok Singh, J.)

Ujjwal