

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FAMILY COURT APPEAL NO. 230 OF 2015

Mrs. Nutan Shankar Moily	]	
Age 45 years, Indian Inhabitant,	]	
Occ. Professional, having her office	]	
address at C/o. Sakhalkar's Leimare,	]	
Advocates, B-112, 1 st Floor, Urmila	]	
Co-operative Housing Society,	]	
Koldongari Road No.1, Andheri (East),	]	
Mumbai – 400 069.	]	
	]	
And also at	]	
C/o. Anand Bangera, 20/649,	]	
Vartak Nagar, Thane (West),	]	Appellant
Thane – 400 606.	]	(Org. Respondent)

V/s.

Mr. Shankar Ramanna Moily	]	
Aged about 52 years, Indian Inhabitant,	]	
Occ. Service, having Permanent Address at	]	
C/o. P. R. Moily, 8/213, Nandadeep, Roop	]	
Nagar, Bandra (East), Mumbai – 400 051.	]	
	]	
Presently residing at :	]	
6651 Maple Grove DR	]	Respondent
Indiapolis, IN46250, U.S.A.	]	(Org. Appellant)

- Mr.Vishal Kanade a/w. Mr.Sunil Karothe i/b. Mr.Swapnil A. Waradkar for the Appellant.
- Mr.Jaydev Trivedi a/w. Ms.Bhupali Vaze for the Respondent.

**CORAM : SMT. V.K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

DATE : 23rd AUGUST, 2017.

JUDGMENT : (PER :- DR. SHALINI PHANSALKAR-JOSHI, J.)

1] This appeal, preferred by Original Respondent-wife takes an exception to the judgment and order dated 23rd September, 2015 passed by Family Court No.3 Mumbai at Bandra, thereby dissolving the marriage of Appellant and Respondent by decree of divorce under Section 13(1-A) (ii) of the Hindu Marriage Act, 1955 (hereinafter referred to as “the Act”).

2] Brief facts of the appeal can be stated as follows;

Appellant and Respondent were married on 22nd August, 1996 at Powai, as per the rites and custom of Hindu Religion. After the marriage, they cohabited together for some years in USA where Respondent was and is serving since prior to their marriage. However, some years after the marriage, due to differences of opinion and incompatibility, Respondent had filed a petition for divorce bearing No.747 of 2006 under Section 13(1)(ia) & (ib) of the Act on ground

of cruelty and desertion. In the said petition, Appellant had preferred counter claim for Restitution of conjugal rights under Section 9 of the Act. By judgment and decree dated 15th September, 2009, the petition for divorce filed by Respondent-husband came to be dismissed. Whereas counter claim of Appellant-wife for Restitution of conjugal rights was allowed. As per the order passed therein, Respondent-husband was directed to join company of Appellant-wife.

3] As per the case of the Respondent, after the passing of this decree for Restitution of conjugal rights, he made genuine efforts of convincing the Appellant for resuming cohabitation with him. However all along she refused. He wrote letters to her from time to time and requested her to set up a mechanism for preparing documents like her Visa for her entry and stay in USA, where he is residing since last more than 10 years which was since prior to their marriage and also after the marriage. Appellant however, despite his various efforts did not resume the cohabitation, though the decree for Restitution of conjugal rights was in her favour. She did not show any interest or inclination by seeking execution of the said decree, though she filed execution proceedings for recovery of maintenance. Thus,

ultimately being convinced that the Appellant is no more interested in resuming cohabitation with him, Respondent filed the petition No.A-1010 of 2012 before the Family Court Mumbai at Bandra seeking dissolution of marriage on ground of non resumption of cohabitation for a period of more than one year, even after the passing of decree of Restitution of conjugal rights.

4] This petition came to be resisted by the Appellant contenting *inter-alia* that there is willful default on the part of Respondent himself in non compliance of the decree for Restitution of conjugal rights. It was submitted by her that the Respondent has visited India four times after the decree was passed, but he has never made any attempt to join her company or to resume cohabitation. According to her, Respondent had advanced only false promises and assurances, but all along he insisted on her to join cohabitation in USA. According to her, her cohabitation with him at USA is not possible and Respondent is fully knowing about the same. It was submitted that, as per the order passed by the Court, Respondent was directed to join her company, thereby implying that he has to resume cohabitation with her in India and it was not for her to resume

cohabitation with him at USA. On all these grounds, the Appellant prayed for dismissal of the petition.

5] In support of his case, the Respondent examined himself and his sister Jyoti to prove his efforts of resuming cohabitation. He has also placed reliance on the letters written by him to the Appellant from time to time. His sister Jyoti has also deposed about the efforts made by Respondent and she herself to convince the Appellant to resume the cohabitation.

6] As against it, the Appellant examined herself and relied upon certain documentary evidence.

7] On appreciation of this evidence, the learned Family Court was pleased to uphold the case of Respondent that he has made genuine efforts of resuming cohabitation but there was no response and total non cooperation on the part of the Appellant. The learned Family Court held that since beginning, the Appellant was very much aware that Respondent was residing at USA and she has to resume her cohabitation at USA, therefore there is no question of her now insisting that Respondent should resume cohabitation in India.

Accordingly, the learned Family Court allowed the petition filed by the Respondent and dissolved the marriage, by impugned judgment and decree, on the ground of non resumption of cohabitation, under Section 13(1-A)(ii) of the Act.

8] While challenging this judgment and decree of the Family Court, the submission of the learned counsel for the Appellant is that the learned Family Court has proceeded on a totally wrong presumption that it is for the wife to leave her paternal house and to join her husband's company at his house. It is submitted that, the Family Court has committed an error in observing that, wherever the husband is residing, the wife has to cohabit with him and she cannot insist or expect the husband to leave his job/carrier and to reside with her at the place of her whims and desire. According to learned counsel for the Appellant, just as it will be wrong on the part of the Appellant-wife to expect that her husband should leave his job and residence at USA and come and cohabit with her in India; similarly, it would be wrong to expect the Appellant-wife to leave her residence and practice in India and to resume cohabitation with Respondent at USA. According to learned counsel for the Appellant, when the Family

Court has while allowing the Appellant's petition for Restitution of conjugal rights specifically directed the Petitioner-husband to join the company of the Respondent-wife, the Family Court should not have held that as the Appellant is not ready to resume cohabitation in USA, she has no desire and therefore, it was necessary to pass the decree of dissolution of marriage. The sum and substance of the learned counsel for the Appellant is that as the Family Court has proceeded on totally wrong assumptions and presumptions, the impugned judgment and decree of the Family Court needs to be quashed and set aside.

9] Per contra, learned counsel for the Respondent has supported the said judgment and order by pointing out that there is ample evidence produced on record by the Respondent and which has remained mostly unchallenged, proving that the Respondent has made genuine efforts to resume cohabitation with the Appellant but her attitude remained totally non-cooperative and non responsive. The only reason offered by her for non-resumption of cohabitation is that, she cannot be insisted to resume cohabitation at USA. It is submitted that when the Appellant was very much aware since beginning that Respondent is residing in USA and if at all she wanted

to resume cohabitation, she had to go to USA, now she cannot contend that she will not do so. If she says so, then it is clear that she has no desire or interest in resuming cohabitation. Hence, according to learned counsel for the Respondent, there was no alternative before the Family Court but to dissolve the marriage. Hence, in his opinion, no interference is warranted in the impugned judgment and decree of the Family Court.

10] In the light of these rival submissions advanced by the learned counsel for both the parties and on perusal of the evidence and impugned judgment of the Family Court, we are of the considered opinion that the judgment and decree passed by the Family Court does not called for any interference. We record this finding for the following reasons.

11] In the first place, in this case, the decree for Restitution of conjugal rights was obtained by the Appellant by filing counter claim, but admittedly she has not made any efforts to resume cohabitation. It is pertinent to note that she had filed the proceedings for execution of the order of maintenance, which was passed in earlier proceedings but

she has not asked for the execution of the decree of Restitution of conjugal rights. Thus, from her side, the Appellant has not made any effort to resume cohabitation.

12] As against it, the evidence on record proves that she has not even responded to the efforts made by the Respondent for resumption of cohabitation. The evidence on record proves that the Respondent has made several efforts of resuming the cohabitation. The letters written by him to the Appellant on 25/12/2009 and 06/02/2010 produced at Exh.25, go to prove that he has tried to convince her to resume cohabitation at USA. Further there is letter written by him dated 30/04/2010, which is at Exh.27, proving that he has called upon the Appellant to send the documents for completing her Visa Process for her entry and stay in USA. The Appellant has admitted the receipt of the said letter. She has replied the said letter on 22/5/2010 vide Exh.45. In the said letter, the Respondent has mentioned in clear terms that he was ready to comply with the decree of Restitution of conjugal rights and she should therefore supply him necessary documents for preparing her Visa. However, in her reply, the Appellant has not specifically dealt with the Respondent's

readiness and willingness to resume cohabitation. She even did not express her desire to cohabit with the Respondent. Then there is e-mail dated 3/8/2010 (Exh.44) sent by Respondent to the Appellant, again asking her to cooperate for resuming the process of cohabitation. The Appellant has admitted the receipt of this e-mail but has not replied the same. The Appellant has also admitted the Respondent's letter dated 20/3/2010 (Exh.29), wherein the Respondent has disclosed intention of cohabiting with her in USA and has requested her to contact him. But the Appellant has not replied the said letter. Even in the notice Exh.41 issued by the Respondent to the Appellant before filing of this petition, he has stated the efforts made by him, proving his intention to resume cohabitation. However, in her reply to the said notice Exh.42, the Appellant has not expressed her intention or desire to cohabit with the Respondent.

13] In addition to these letters and the e-mail sent by Respondent requesting the Appellant to resume cohabitation, his oral evidence goes to prove that in the month of April 2010 when he visited India, he tried to approach and convince the Appellant for cohabitation. He has even visited her office on 20th April, 2010 for

seeking her cohabitation. But there was no change in her attitude and she was reluctant to talk about stay with him. There is no suggestion in his cross examination that he has not made any such efforts at the relevant time.

14] Further, there is also the evidence of Respondent's sister Jyoti, who has also deposed about the efforts made by her to convince the Appellant to resume cohabitation. She has also stated that in the year 2010 she approached the Appellant several times and tried to talk with her but she never responded. She has specifically stated about visiting the Appellant's office in the month of June-July 2011 to convince the Appellant but it was of no use.

15] Appellant has admitted that she has not provided the necessary documents to the Respondent for preparing Visa. She has also admitted that though the Respondent has given her his mother's mobile number, she did not contact his mother to complete the formalities of her visiting to USA. Thus, there is absolutely no iota of evidence on record to show that she has ever exhibited any interest or willingness to join the Respondent for cohabitation. She has neither

taken any steps on her own to resume cohabitation nor responded to the various steps taken by the Respondent for resumption of cohabitation.

16] The only excuse offered by the Appellant for not resuming cohabitation is that she cannot be expected to join the Respondent at USA. However, this excuse cannot be accepted for the simple reason that, since beginning, even prior to his marriage with the Appellant, the Respondent is residing in USA and accordingly after the marriage, the Appellant has joined his company in USA. In written statement cum counter claim filed by the Appellant to the petition for divorce filed earlier, the Appellant has categorically admitted in paragraph No.2(b) that, after the marriage she had joined the Respondent in USA and she was very happy and comfortable during her stay in USA. The Respondent was treating her with love, care and affection. He provided her with all the basic necessities required for her and also used to take her along with him to various functions, parties, movies etc. It is also a matter of record that even when Appellant filed counter claim for Restitution of conjugal rights, she was aware that Respondent is residing at USA, as he is doing the job there. In the said

petition, the address of Respondent was given as resident of USA. She has sought maintenance from him claiming that he is serving in USA and getting substantial salary. Therefore, it is not a case, as rightly observed by the Family Court, that the Respondent has intentionally left India after the decree of Restitution of conjugal rights was passed and settled in USA in order to avoid the execution of such decree.

17] In view of this undisputed fact that Respondent is residing in USA since last more than 10 years and even after the marriage, the Appellant has cohabited with him at USA and at the time of her counter claim for Restitution of conjugal rights also she was aware about his residence in USA, then it necessarily follows that when the Respondent has expressed desire and shown her willingness and interest in resuming cohabitation, by filing counter claim for restitution, she was aware that she will have to resume cohabitation with Respondent in USA. There was absolutely no question of Respondent coming to India and resuming cohabitation with her at India. There was no such condition put up by her also in her counter claim, nor there is any discussion or evidence led on that aspect in the earlier petition for divorce in which counter claim for restitution was

filed by the Appellant.

18] Therefore, in our considered opinion, the Family Court has rightly held that the Appellant was since beginning knowing that if she had desire to resume cohabitation then it was to be at USA. Hence, now the contention advanced by learned counsel for the Appellant, that if the Respondent cannot be expected to come to India leaving his job and residence in USA, Appellant also cannot be expected to leave her residence and job in India and to go to USA cannot be accepted. She had married with the Respondent knowing well that she has to cohabit him at USA and she has actively cohabited with him in USA only. It was her counter claim for Restitution of conjugal rights expressing desire to resume cohabitation, knowing fully that the Respondent was very much residing and doing job in USA and hence now she cannot be permitted to back track by saying that she is not ready to comply with the Restitution of conjugal rights as the Respondent is residing in USA. If she says so, then it has to be inferred that she has no desire or interest in resuming cohabitation and her counter claim for Restitution was merely to defeat the petition for divorce filed by the Respondent.

19] In such situation, as the resumption of cohabitation between the parties has not taken place, even after the decree of Restitution of conjugal rights was passed and that too, only on account of non cooperation on the part of the Appellant, the learned Family Court has rightly passed the decree of dissolution of marriage on that ground.

20] Even if the contention of the Appellant is accepted that she cannot be expected to leave her job and residence in India and to join the Respondent in USA, it was necessary on her part to find out some solution, by showing interest and giving response to the efforts made by the Respondent. Both of them could have found out some amicable solution to this problem but as she has never shown any interest or desire to resume cohabitation and merely put up a lame excuse for not doing so, on ground that she cannot be expected to go to USA, the learned Family Court was perfectly justified in holding her responsible for non resumption of cohabitation and therefore, granting the decree of dissolution of marriage on that ground.

21] The Appeal, therefore, holds no merits, hence stands dismissed with no order as to costs.

(DR. SHALINI PHANSALKAR-JOSHI, J.) (SMT. V.K. TAHILRAMANI, J.)