

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****FAMILY COURT APPEAL NO.215 OF 2008**

Shri. Shailendra Madhukar Bhalerao .. Appellant
(Org. Petitioner)
V/s.
Sou. Suruchi Shailendra Bhalerao .. Respondent
(Org. Respondent)

....
Mr. Prashant Bhavake, for the Appellant.

Mr. Y.G. Thorat, i/b. A.B. Tajane, for the Respondent.

....
**CORAM: A.A. SAYED &
S.C. GUPTE, JJ.**

RESERVED ON : 6 SEPTEMBER, 2018.

PRONOUNCED ON : 26 NOVEMBER, 2018.

**JUDGMENT:
(PER S.C. GUPTE, J.)**

. This family Court appeal challenges a dismissal order passed by the Family Court at Pune on a divorce petition filed by the Appellant husband on the ground of desertion under Section 13(1)(b) of the Hindu Marriage Act.

2. The facts of the Appellant's case may be briefly stated as follows:

The Appellant and the Respondent were married on 20

December 1994. They have a son by the name of 'Shardul'. (The son, who was a minor on the date of the petition as well as on the date of the impugned order, is now a major, aged 23 years.) The Respondent left the matrimonial home and the parties have been living separately since February 1998. In 1999, the Appellant filed a divorce petition on the ground of cruelty. The petition was dismissed by the Family Court on 25 August 2000. The parties, however, continued to live separately ever since their original separation in February 1998. They have had no relations ever since. On 31 May 2008, when the Respondent preformed the thread ceremony of their son, Shardul, whilst living at her parental home, the Appellant and his immediate family members such as parents, brother, etc. were not invited. The only communication they had was through a few phone calls. This state of affairs continued till the filing of the petition, i.e. till 20 July, 2006. (It continues till date, i.e. till the date of this order.) On these facts, it is the submission of the Appellant that the Respondent has deserted him; the statutory period of separation has passed long by; and divorce ought to be granted.

3. The parties were sent to a marriage counsellor and even the Family Court explored the possibility of a mutual settlement, which did not come about. The trial thereafter commenced, when the parties led evidence before the Court. The Family Court, after hearing the parties, dismissed the petition on the ground that though the parties were admittedly living apart since the last over ten years, the separation was at the instance of the Appellant husband; the Respondent wife's evidence in this behalf was practically unchallenged or unrebutted.

4. Relying on the decisions of our Court in the cases of **Jaya Vijay Wavikar vs. Vijay @ Vijaykumar Shankar Wavikar**¹ and **X husband vs. Y wife**², learned Counsel for the Appellant submits that there has been effective desertion on the part of the Respondent wife; it is the wife who left the matrimonial home and for the last over twenty years (ten years before the impugned order and ten years thereafter, i.e. during the pendency of this appeal), there has been no attempt on her part of resuming cohabitation. Learned Counsel for the Respondent counters this by submitting that the wife's oral evidence that the husband had asked her to leave the matrimonial house was unchallenged in the cross-examination and hence, it has been proved as a matter of fact that the husband was responsible for the couple's separation.

5. As this Court explained in **X husband** (supra), the essential requisites of desertion have long been settled by the Supreme Court in **Bipinchandra Jaisinghbhai Shah vs. Prabhavati**³ by bringing out essential conditions in a case of desertion. Along with the factum of separation, an intention must be shown on the part of the deserting spouse to bring cohabitation permanently to an end (*animus deserendi*). Secondly, desertion is a matter of inference to be drawn from the facts and circumstances of each case. Thirdly, the offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. They, however, need not commence at the same time. It may be that the *de facto* separation may have commenced without the necessary animus, but at a later date, if there is animus, from that moment onwards they co-exist and if they so continue for the requisite length of time, the

1 2013 (3) Mh.L.J. 886

2 2014(4) Bom.C.R. 168

3 A.I.R. 1957 S.C. 176

matrimonial offence of desertion is complete and divorce may follow.

6. In **X husband** (supra), the facts before this Court were that the deserting spouse had physically stayed away from the matrimonial home; there was absence of consent for such stay from the deserted spouse; there was failure to substantiate any reason for such separate stay; and there was a clear omission to demonstrate readiness and willingness to discharge the continuing obligation to return to the matrimonial home. These circumstances, taken together, were sufficient, according to this Court, to draw a conclusion of existence of *animus deserendi*. The Court was of the view that once such separation with *animus* was established, there was no obligation on the part of the deserted spouse to actually take steps to effect reconciliation or bring the deserting spouse back to the matrimonial home.

7. In the light of this law, let us test the facts of the present case. The Respondent wife evidently was living in the matrimonial home on 15 February 1998. On that day, she left the matrimonial home. Why she left is a matter of debate, both parties having their own different versions of the same. It is the case of the Appellant that on that day, the Respondent started quarreling without any reason and left the house with the parties' young son, Shardul, asking the Appellant to make his face dark and never returned thereafter, and, on the other hand, made his life miserable by visiting his office on some occasions and insulting him. On the other hand, the Respondent wife's case is that on that day (i.e. 15 February 1998), the Appellant asked her to leave the house and she left at his instance, and that she was always ready to cohabit with him. These are

words against words. Though it is possible to believe the wife, in the light, however, of what actually followed and has been the continuous state of affairs for the last many years, twenty long years at the current count, this initial separation and the identity of the spouse responsible for it hardly matters. The parties have stayed separately for each day of the last twenty years. There is nothing concrete to suggest that the wife made any single attempt to recommence cohabitation or even harboured any intention to do so. There is at least no outwardly sign to demonstrate that. There is no proceeding filed by the Respondent wife for restitution of conjugal rights. The parties have gone about living their separate lives all these years and the only communication, if ever, they have had during this period was over phone on a few occasions before the filing of the present petition, i.e. more than twelve years back. In the premises, can it reasonably be said as at this date (or, for that matter, even at the date of the impugned order) that there is (or had been) actually absence of an intention on the part of the Respondent wife to bring cohabitation permanently to an end or does this conduct and state of affairs suggest the contrary, namely, her intention to bring cohabitation permanently to an end. We are sure any reasonable person duly instructed in law would return the latter verdict rather than the former.

8. The Family Court appears to have laid much emphasis on the fact that the Respondent was not effectively cross-examined on her oral evidence that she was asked by the Appellant to leave the house. No doubt this is by itself a possible conclusion and in ordinary course this Court would not have interfered with that conclusion. But then the Family Court seems to have lost sight of the fact that the wife's conduct

thereafter suggests that there was absolutely no intention on her part to resume cohabitation at any time thereafter. A reasonable conclusion to draw was that there was *animus deserendi* on her part at least with reference to this subsequent period. *Animus deserendi* or intention to bring cohabitation permanently to an end is nothing but the opposite of intention to resume cohabitation. If there is no intention at all to resume cohabitation for a reasonably long period, there could be said to be intention to bring cohabitation on a end. How much long a reasonably long period would be, as the Supreme Court said in **Bipinchandra Jaisinghbhai Shah** (supra), is a matter of inference to be drawn from the facts and circumstances of each case. But surely twenty years is in any event a reasonably long period. If there is no attempt on the part of the deserting spouse to resume cohabitation for twenty years after the initial separation, even if one were to grant that the original separation did not have the element of *animus deserendi*, there could be said to be presence of such animus afterwards. No doubt it is difficult to pinpoint any particular moment from when such animus can be said to have commenced and co-existed with the factum of separation. But then in this case it can be certainly said to have commenced since long before the statutory period of two years.

9. So far as the deserted spouse, namely, the Appellant, is concerned, one of course cannot say that there was absence of consent on his part for the separation which is one of the conditions to be shown for the deserted spouse, though there is nothing to suggest that there was any conduct on his part giving reasonable cause to the Respondent to form the requisite *animus deserendi* at any time. But simply for that one element,

there is no reasonable basis for perpetuating the matrimony which has wholly and hopelessly lost its *raison d'etre*. There has been such inordinately long period of separation, where the initial cause of separation can now be said to be hardly relevant, that the marriage between the parties can be said to be nothing but a fiction. There is practically no hope for any revival or survival. The matrimonial bond exists, if at all, only in form and not one bit in substance. One would do well to recall here the following words of the Supreme Court in **Naveen Kohli vs. Neelu Kohli**⁴ :

“74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised 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.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.”

No doubt these eloquent remarks were made in the context of the Court's recommendation to the legislature to consider the ground of

4 (2006) 4 S.C.C. 558

irrevocable breakdown of marriage as an additional ground of divorce. Yet their importance as a guiding spirit even in a case of desertion such as this cannot be lost sight of altogether. The marriage between the parties here took place in 1994. In 1998, within 3 years of their only child's birth, the couple separated. Both parties have lived separately ever since. The only contact they have had so far was through a few phone calls made before 2006. We are today in 2018; twenty years have elapsed since their separation during which there was no single attempt to resume cohabitation. Their only son is now 23 years and has lived apart from his father for over twenty years. Is there any sanctity or, for that matter, even semblance of a purpose left in continuing this legal tie? Is there any stake of either party or, for that matter, of the society in preserving this broken marriage? To our mind the answer seems to be clear. It would be unjust not to sever the marital tie in the facts of the case. Justice, consistent with good conscience, demands that the marriage be dissolved.

10. In the premises, the impugned order of the Family Court is quashed and set aside and the petition is allowed by granting a decree of divorce on the ground of separation. There shall, however, in the facts of the case, be no order as to costs.

(S.C. GUPTE,J.)

(A.A. SAYED,J.)