

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.128 OF 2017

Prakash Deorao Thorwe,
Age 34 yrs., Occ. Nil,
R/o Mahasangvi, Tq. Patoda,
Dist. Beed.

... **Appellant.**

... **Versus** ...

Sow. Chitra Prakash Thorwe,
Age 29 yrs., Occ. Household,
R/o Mahasangvi, Tq. Patoda,
Dist. Beed.

... **Respondent.**

...

Mr. N.L. Jadhav, Advocate for the appellant

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 18th FEBRUARY, 2019

ORAL JUDGMENT :

1 Heard learned Advocate for the appellant. Though respondent is served she failed to appear. Taking into consideration the point involved in the case, the matter is heard finally at the stage of admission.

2 Present appellant is the original petitioner-husband, who had

filed Hindu Marriage Petition No.147/2013 before Civil Judge Senior Division, Beed for getting divorce under Section 13 of Hindu Marriage Act, 1955. It was pleaded by him that he got married to respondent on 10.04.2005 at village Mahasangvi, Tq. Patoda, Dist. Beed as per Hindu rites. There is no issue out of the said wedlock. After marriage the respondent cohabited with him till July, 2005, however, thereafter under the pretext to complete her education in Beed, she stayed with her parents. In spite of completion of the education, she did not return back to the husband and she refused to come under the pretext that she wants to do job. It is also stated that the petitioner and his relatives made several attempts to bring her back, however, she refused. The fact was so affected on the petitioner that he left the service and therefore, on the grounds of desertion he has prayed for dissolution of marriage.

3 Even though the notice was duly served, respondent failed to appear and therefore matter proceeded ex parte against her.

4 The petitioner had filed evidence in the form of affidavit-in-chief in support of his petition. Taking into consideration those allegations and the evidence in support, the learned Trial Court had allowed the petition and it was declared that the marriage between the petitioner and the respondent is dissolved.

5 The said Judgment and Decree was challenged by the respondent in R.C.A. No.19/2014 before District Court, Beed. The said appeal was heard by learned District Judge-7, Beed and after hearing both sides the appeal was allowed. The decree passed by the Trial Court has been set aside. Hence, this Second Appeal. As aforesaid, the respondent though duly served, failed to appear. The paper book before the learned First Appellate Court is made available and basically, in this case, except the affidavit in support of the petition, there is no other evidence at all. That affidavit-in-chief is also nothing but the reproduction of the contents of the petition.

6 The learned Advocate for the appellant submitted that merely because of the typographical mistake the First Appellate Court was not justified in framing point No.1 and having discussion on the same. The petition was filed seeking divorce only on the ground of desertion. Even the learned Trial Court restricted itself to the said ground. Under such circumstance, only on technical ground the learned First Appellate Court considered that petitioner wanted to canvass two grounds. One is under Section 13(1)(i) and 13(1)(ia), (ib). Whatever was stated by the petitioner, had gone unchallenged on record. It was the specific case of the petitioner that since 2005 the respondent has

deserted him and the petition was filed by him on 08.07.2013. When the contents of the petition as well as affidavit in support thereof when unchallenged, there was no reason for the First Appellate Court to go much into the aspect as to what amounts to desertion and arriving at a different interpretation on some statements made by the petitioner stating that he cannot live without the wife. Therefore, when the desertion was proved the Trial Court had rightly decreed the petition and therefore there was no necessity to interfere in the said Judgment and Decree.

7 The first and the foremost fact is that though there is a typographical mistake and wrong quoting of Section, the courts are required to see under which provisions the party is claiming right and/or relief. The petitioner had not pleaded nor made any statement in affidavit-in-chief alleging ground under Section 13(1)(i) of the Hindu Marriage Act, 1955. Now, as regards desertion is concerned, he wanted to say that the acts of the respondent amounted to cruelty, for the simple reasons that since 2005 she has not joined the company and therefore, he wanted to take help of that portion also, though separate ground is available in respect of desertion. However, that was an overlapping fact. Even if, for the sake of argument, we can say that strictly speaking

desertion may not amount to cruelty or act of cruelty or ill-treatment, yet the specific ground was available to the petitioner to seek divorce. Here, what had gone unchallenged on record, is that from 10.04.2005 till July, 2005 respondent was cohabiting with him, but thereafter she left the matrimonial home, under pretext that she want to take further education and thereafter continue to stay with her parents, though she is stated to have completed her education. If we peruse the appeal memo, which was filed before the First Appellate Court, it was tried to be contended that there is non compliance of principles of natural justice, since the matter has been decided ex parte against her. In fact, there was no reason mentioned by her as to why she failed to appear in the matter and there was also no prayer to remand the matter, so that she can contest the suit, though then she claimed that she never deserted him on her own. That means, taking into consideration the said appeal memo, in fact, the First Appellate Court was not justified in re-appreciating the evidence of the petitioner, which had gone unchallenged on record. A limited scope was available to the First Appellate Court to see whether there was any kind of error, basically now, under such circumstance, under law in arriving at a conclusion because there was no challenge in the fact, pleaded and supported by the petitioner. Non production of notice, which according to the petitioner, he had sent, calling upon the

respondent to resume cohabitation, cannot be said to be fatal for the simple reason that, that statement has also gone unchallenged on record. There was no other reason, which had come on record, justifying the respondent's stay with her parents, since 2005 till the filing of the petition. Under such circumstance, directly the conclusion ought to have been arrived at that she had withdrawn herself from the company of the petitioner and in fact, there was no evidence to prove that there was no any willful neglect on the part of the husband to maintain the wife.

8 Much has been harped upon by the learned First Appellate Court on the point that the petitioner has stated in his examination-in-chief that he cannot live without the wife and therefore he ought to have filed petition for restitution of conjugal rights. The fact that he had not filed any such suit/petition since 2005 till 2013-14, it has been taken against him, which cannot be said to be a proper approach on the part of the First Appellate Court. A specific statement was made by the petitioner that he as well as his relatives had made several attempts to bring the respondent's wife back for cohabitation, but she flatly refused it. This was sufficient to support the claim of the petitioner that without any reason respondent has deserted him. Under such circumstance, for the aforesaid reason it can be said that the First Appellate Court has

unnecessarily taken technical view and interpreted Section 13(1)(ib) of Hindu Marriage Act, 1955 in different way, which the law does not contemplate and therefore that substantial question of law was definitely involved in this case. There was absolutely no necessity to interfere in the decree passed by the learned Trial Court. Hence, following order.

ORDER

1 Second Appeal is hereby allowed.

2 The Judgment and Decree passed in Regular Civil Appeal No.19/2014 passed by learned District Judge-7, Beed on 20.07.2016 is hereby set aside and the Judgment and Decree passed in Hindu Marriage Petition No.147/2013 by learned Civil Judge Senior Division Beed dated 07.01.2014 is hereby restored.

3 Decree be drawn accordingly.

(Smt. Vibha Kankanwadi, J.)

agd