

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

FAMILY COURT APPEAL NO.19 OF 2020

1. Himanshu Pradeep Patil,
Age 27 years, Occu. Private Service,
R/o A-12/502, Shankeshwar Nagar,
Manpada Road, Near Shani Mandir,
Dombiwali, District Thane
2. Smt. Aparna Himanshu Patil,
Age 23 years, Occu. Private Service,
R/o Gat No.52, Plot No.754,
Near Mahalaxmi Provisions, Shiv Colony,
Jalgaon, District Jalgaon, at present
residing at : Survey No.80/2,
Chinchwad Colony No.2, Valhekar Wadi,
Chinchwad, Pune. ... **APPELLANTS**

.....
Shri Satyajit S. Bora, Advocate for appellants
.....

**CORAM: SUNIL P. DESHMUKH AND
R.G. AVACHAT, JJ.**

DATED : 24th September, 2020

JUDGMENT (PER R.G. AVACHAT, J.)

This appeal is directed against the judgment and decree dated 25/2/2020, passed by learned Judge, Family Court, Jalgaon in the petition, described as F-145/2019. By the impugned judgment and decree, the petition moved for

dissolution of marriage by mutual consent, came to be dismissed. The appellants are, therefore, before this Court.

2. Facts giving rise to the appeal are as follows :-

The appellants are the spouses inter-se. Marriage between them took place on 6/4/2018. On marriage, both the appellants started residing together as husband and wife. Within a few days of marriage, the appellants realised to have not been compatible with each other on many a front. The same gave rise to frequent matrimonial bickering. Both the appellants tried to reconcile the differences, but to no avail. Both of them, therefore, started living separately from each other since 13/1/2019. A crime for offences punishable under Sections 498A, 323, 504, 506 and 507 of the Indian Penal Code has been registered against the husband (appellant No.1) at the instance of the wife (appellant No.2). With the intervention of elders in the family, it was ultimately decided to go for a divorce by mutual consent. The appellants, therefore, filed the petition under Section 13-B of the Hindu Marriage Act (hereinafter referred to as the Act for short).

3. It appears that, the appellants had appeared before the Judge of the Family Court and made a joint motion for grant

of a decree of divorce by mutual consent. The learned Judge was, however, pleased to dismiss the petition on the ground that the parties had not been living separately for a period of one year next before the presentation of the petition.

4. Heard Shri Satyajit S. Bora, learned Advocate for the appellants. Perused the petition and the impugned judgment as well.

Section 13-B of the Hindu Marriage Act, 1955 reads :

“13-B. Divorce by mutual consent :-

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties

and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.”

5. It needs to be referred to that, Sections 23(1)(bb) and (c) of the Act mandate, when a decree is sought on the ground of mutual consent, the Court has to satisfy itself that such consent has not been obtained by force, fraud or undue influence and the petition is not presented or prosecuted in collusion of the parties.

6. The marriage of the appellants took place on 6/4/2018. They started residing separately (physically) from each other since 13/1/2019. The petition was filed on 14/8/2019.

7. The Hon’ble Supreme Court of India, in case of Sureshta Devi Vs. Om Prakash reported in (AIR 1992 SC 1904), observed :-

8. The ‘living separately’ for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding

the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different house and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that 'they have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved."

This judgment was relied on before the learned Judge of the Family Court. He was, however, pleased to observe :-

"On perusal of the observations of the Hon'ble Apex Court, it clearly appears that, living separately connotes to not living like husband and wife. It means the intention of the parties is to cut down their relations as a spouse though residing under same roof by force of circumstances. In the case in hand, the petitioners in their pleadings invariably submitted that, there were no relations between them as husband and wife since last one year. However, they mentioned the date

of their separate as 13/01/2019. On perusal of the pleadings, it nowhere depicts that the parties were intent to live separate by ending their matrimonial relations and live under same roof by force of circumstances. Mere absence of physical relations between the spouse for one year itself does not mean that, they are intent to end their matrimonial relations. There must be specific intention to end the matrimonial relations and by force of circumstances they are compelled to reside under same roof. It is for the first time, they take a call to get separated on 13/01/2019. Thus, it nowhere appears in the instant case that the parties were intentionally get separated as husband and wife and were residing under same roof by force of circumstances. Hence, the observations of the case of Sureshtha Devi, Supra, are not applicable as they were different from the facts of the case in hand.”

We are not in agreement with the reasons given by the Family Court to dismiss the petition. The appellants had appeared before the Family Court and moved a joint motion for a decree of divorce, reiterating the averments in the petition. The observations of the learned Judge of the Family Court to dismiss the petition run counter to the pleadings and oral evidence of the parties in support thereto. The observations appear to us to be hairsplitting. The learned Judge ought to have relied upon the

pleadings that there had not been consummation of marriage for a period of little over one year next before the presentation of the petition.

8. In compliance of mandate of Section 23(1)(bb) and (c) of the Act, both the appellants appeared before us Online. They have reiterated the averments in the petition. We examined both of them and have found that the petition has been moved with their free consent and there is no collusion inter-se. Thus, we are satisfied that :-

- (i) The appellants have been living separately for a period of one year next before the presentation of the petition,
- (ii) They have not been able to live together, and
- (iii) They have mutually agreed that their marriage should be dissolved.

We have, therefore, no option but to set aside the impugned decree and allow the petition. The appeal thus succeeds. The same is allowed in following terms :-

- (i) The judgment and decree dated 25/2/2020, passed by learned Judge, Family Court, Jalgaon in the Petition F-145/2019 is hereby set aside. The said petition is

allowed.

- (ii) The marriage between the appellants stands dissolved by decree of divorce with effect from the date of the decree i.e. 24th September 2020.

(R.G. AVACHAT)
JUDGE

(SUNIL P. DESHMUKH)
JUDGE

fmp/-