

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

FAMILY COURT APPEAL (FCA) NO.23/2015

Kishore S/o Prabhakar Loyakpure

Vs.

Mrs. Pushpa W/o Kishore Loyakpure

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri V.G. Palshikar, Advocate for appellant

CORAM : N.W. SAMBRE AND
N.B. SURYAWANSHI, JJ.
DATED : 11.03.2020

Heard Shri Palshikar, learned counsel for the appellant/husband, though served. None appeared for the respondent/wife.

On 15.04.2015, the present first appeal against the judgment of Family Court refusing to grant decree for dissolution of marriage came to be admitted.

After the appeal was admitted, respondent though served, remained absent. As such, this Court passed an order thereby directing fresh service on respondent no.5.

It appears that though the respondent thereafter again was served, she further has chosen to remain absent.

Appeal is on final hearing board. It is the case of the appellant that the appellant and respondent got married on 12.03.2000 at Amravati. After the matrimonial discord H.M.P No.277/2000 was initiated for divorce which was renumbered as H.M.P No.44/2004. The respondent wife initiated proceedings for restitution of conjugal rights.

The petitioner's proceedings for divorce came to be dismissed resulting into filing of Second Appeal in this Court.

Whereas the decree for restitution of conjugal rights in favour of the respondent/wife has attained finality before this Court.

Based on the decree for restitution of conjugal rights, the appellant claimed to have issued notice on 11.04.2009 by Registered Post Acknowledgment Due calling the respondent-wife to resume cohabitation.

The respondent/wife has not claimed the said notice rather refused to accept the same.

It is in this background, the petitioner initiated proceedings being Petition No. A-380/2014 for dissolution of marriage.

In addition to above, the fact remains that there are following proceedings which were already pending between the parties:

List of cases filed by respondent/wife against the petitioner/husband

- (1) *Hindu Marriage Petition No.110 of 2002*
- (2) *Misc. Civil Application No.91 of 2003*
- (3) *Misc. Criminal Application No.56 of 2004*
- (4) *Criminal Complaint No.205 of 2004*
- (5) *Misc. Criminal Application No.286 of 2004*
- (6) *Petition Under Section 18 and 20 of the Hindu Adoption and Maintenance Act*
- (7) *Regular Civil Appeal No.184 of 2007*

List of cases filed by petitioner/husband against respondent/wife

- (1) *Hindu Marriage Petition No.277/2002 (New No.44 of 2004)*
- (2) *Misc. Civil Application No.157 of 2003*
- (3) *Regular Civil Appeal No.129 of 2007*
- (4) *Second Appeal No.267 of 2009*
- (5) *Second Appeal No.268 of 2009*

Based on a decree for restitution of conjugal rights passed in proceedings initiated by wife, under Section 9 of the Hindu Marriage Act, the appellant-husband initiated

proceedings for divorce which came to be rejected vide judgment dated 28.11.2014 passed by the Family Court, Nagpur. As such this appeal is filed.

Submissions of Shri Palshikar is that after the matrimonial discord, the marriage dated 12.03.2000 was never materialized as both the appellant and respondent are residing away from each other for about more than 18 years. Thus, the parties herein are at an advanced stage of life. The call given by the appellant-husband in compliance with the decree for restitution of conjugal rights to the respondent/wife by virtue of notice dated 11.04.2009 was not accepted. The appellant has issued notices dated 11.04.2009 and 27.01.2014 as is reflected in his evidence in chief recorded by the family Court. The service of said notice is not denied by respondent no.5. Neither the appellant was subjected to cross-examination nor the respondent has led any evidence in the matter. That being so, the appeal is liable to be allowed thereby declaring dissolution of the marriage between the parties.

As observed hereinabove, though served repeatedly, respondent has chosen not to attend the proceedings and resist the claim.

Perused the judgment impugned, in paragraph no.9 of the impugned judgment, learned Judge, Family Court has observed, while considering aforesaid notice issued by the appellant to the respondent calling upon her for co-habitation, which was at Exhibit 13, thus at the relevant time the second appeal preferred by the appellant against the dismissal of decree proceedings for grant of divorce was pending and that being so, according to the Family Court, the appellant is trying to blow hot and cold at the same time.

After the order impugned was passed, based on the aforesaid observations by the Family Court, we are

informed that the appellant has already withdrawn his second appeal wherein the decree for refusal to order dissolution of marriage was in question. It is also appropriate to observe here that merely because at the relevant time, the second appeal preferred by the appellant was pending wherein the issue of divorce was subjudice, that by itself will not preclude the appellant by issuing notice calling upon the parties to start residing with him. Had it been that the notice issued vide Exhibit 13 would have been honoured by the respondent, that would have rendered the second appeal preferred by the appellant automatically infructuous.

In the aforesaid background, considering the fact that the appellant has already tried to honour the decree for restitution of conjugal rights which was passed in favour of the respondent/wife in R.C.A. No.184/2007 and has complied with the necessary requisite of issuing notice to the respondent wife that the said decree can be honoured, to which the respondent wife has not responded to, in our opinion, the case for dissolution of marriage pursuant to the provisions of Section 13 (1A) (ii) of the Hindu Marriage Act, is made out. As such the judgment impugned passed by the Family Court on 28.11.2014 in Petition No. A-380/2014 is hereby quashed and set aside.

The Petition No. A-380/2014 hereby stands allowed. The marriage solemnized in between the parties to the appeal on 12.03.2000 stands dissolved as was prayed in Petition No. A-380/2014.

The appeal stands allowed in above terms.

JUDGE

JUDGE