

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

FAMILY COURT APPEAL NO.48/2016

Smt. Shobha w/o Fakiraji Amnerkar,
Aged about 46 years, Occ- Household,
R/o. Plot No.75, Sai Nagar, Shanti Nagar Road,
Nagpur, District Nagpur.

... Appellant

-vs-

Fakira s/o Chirkutrao Amnerkar,
Aged about 50 years, Occ. Business,
R/o. Takalghat, Tah. Hingna, District Nagpur.

..Respondent

....

Shri D.C.Chahande, Advocate for the appellant.
None for the respondent.

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CORAM : A. S. CHANDURKAR AND N. B. SURYAWANSHI JJ.

DATED : FEBRUARY 03, 2021.

Judgment : (Per A.S.Chandurkar, J.)

This appeal under Section 19 of the Family Courts Act, 1984 raises challenge to the judgment of the Family Court, Nagpur, dated 18.02.2016 in Petition No.A-645/2016. By the said order, the petition for dissolution of marriage filed by the respondent-husband has been partly allowed and the marriage between the parties has been dissolved by passing a decree of divorce on the ground of desertion.

2. The marriage between the appellant and the respondent was solemnized on 06.05.1983. From the said wedlock the couple had three

children. It is the case of the husband that he was taking good care of the family but the behaviour of his wife was not good. She used to abuse the husband on various occasions. She was not interested in doing household duties and was interested only in the income of the husband. It is the case of the husband that the wife drove him away from his house and since 12.01.2011 he was required to reside in a rented house. On these counts the husband filed the present proceedings on 03.07.2013 seeking dissolution of the marriage.

3. The wife filed her written statement at Exhibit 20 and opposed the prayers as made therein. It was denied that the wife was in any manner ill-treating the husband. It was denied that the wife had driven away the husband from the matrimonial house. Reference was made to the orders passed in other proceedings by which the husband was required to pay maintenance to the wife but these orders were not complied with. It was prayed that the proceedings were liable to be dismissed.

4. The parties led evidence before the Family Court and after considering the same it was held that the husband had failed to prove that the wife was treating him with cruelty. The Family Court further held that the husband had proved that the wife had deserted him for a period of not less than two years prior to filing of the petition. Hence, on 18.02.2016

the Family Court allowed the petition filed by the husband partly and granted a decree of divorce under Section 13(1)(i-b) of the Hindu Marriage Act, 1955 (for short, the said Act). Being aggrieved the wife has challenged the aforesaid judgment.

5. Shri D.C.Chahande, learned counsel for the appellant-wife submitted that it was the case of the husband that on 12.01.2011 the wife did not permit the husband to enter the matrimonial house and drove him away. Since that date the husband was not residing with the wife. According to the learned counsel this act would not constitute desertion as contemplated by Section 13(1)(i-b) of the said Act. In fact, it was the husband who had himself left the matrimonial house and had refused to return back. The ingredients of desertion that are required to be proved before passing a decree for dissolution of marriage on that count were not satisfied. Merely because the wife could not lead evidence on account of her ill-health the same could not be a ground to hold that the husband's case had been duly proved. In fact, the evidence led by him was insufficient to grant such decree. It was further submitted that despite various orders for paying the amount of maintenance, the husband had failed to comply with the same thereby causing prejudice to the rights of the wife. It was thus submitted that the impugned judgment was liable to be set aside.

6. On 02.02.2021 the learned counsel for the respondent was absent. To grant an opportunity we had kept the appeal today. Today also there is not appearance on behalf of the respondent.

7. We have heard the learned counsel for the appellant and we have perused the records of the case. The following point arises for adjudication :

Whether the Family Court was legally correct in holding that the husband had proved that the wife had deserted him so as to pass a decree of divorce on that ground ?

8. As stated earlier, in the petition filed by the husband dissolution of marriage was sought on two counts namely under Section 13(1)(i-a) on the ground of cruelty and Section 13(1)(i-b) on the ground of desertion. The Family Court held that the husband had failed to prove cruelty on the part of the wife and no decree on that ground was passed. The decree has been passed only on the ground of desertion. Perusal of the petition filed by the husband and especially the averments in paragraph 10 indicate that it was the case of the husband that the wife drove away the husband from his house on 12.01.2011 and since that date the husband was living in a rented house. Except these averments, there are no pleadings to indicate that it was the wife who had deserted the

husband. In the evidence led by the husband the same aspects are reiterated. In his evidence, the husband did not substantiate his stand that the wife had deserted him. Except for stating that on 12.01.2011 the wife had driven him away, there are no further pleadings. We find that these pleadings in the petition and thereafter the evidence led by the husband are wholly insufficient to enable the Court to conclude that it was the wife who had deserted the husband.

9. At this stage, it would be necessary to refer to the explanation to Section 13(1) of the said Act in the context of the expression “desertion”. The explanation reads as under :

“Explanation – In this sub-section, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.”

As held in ***Rohini Kumari Vs. Narendra Singh AIR 1972 SC 459*** there must be a determination on the part of a party to put an end to the marital relation. Without animus deserendi, there can be no desertion. We find that none of the ingredients to constitute desertion as contemplated by Section 13(1) (i-b) of the said Act have been brought on record by the husband. The learned Judge of the Family Court in paragraph 21 has merely observed that as the parties were residing separately for about four

years and the wife had driven away the husband, this was sufficient to constitute desertion. We are not in a position to sustain this finding since the ingredients of desertion as contemplated by Section 13(1)(i-b) of the said Act are neither pleaded nor proved by the husband.

10. It is to be noted that the learned Judge of the Family Court has given much importance to the fact that the wife had failed to lead evidence before the Family Court. The wife in her adjournment application stated that she was unwell on account of her ailment of cancer and hence she could not attend the Court. Though the learned Judge of the Family Court granted adjournment on two occasions, the case proceeded further without her evidence. Be that as it may, the burden to prove the allegation of desertion was on the husband and he has failed to lead any evidence in that regard. Hence absence of evidence of the wife cannot be a ground to accept the case of the husband.

11. It was urged by the learned counsel for the appellant that the husband was not regularly paying the amount of maintenance. We find that it is open for the wife to execute the orders of grant of maintenance and that matter can be independently pursued. The point as framed is answered by holding that the Family Court was not legally justified in granting divorce on the ground of desertion.

12. As a result of the aforesaid discussion, we pass the following order :

(i) The judgment dated 18.02.2016 in Petition No.A-645/2013 is set aside. Petition No.A-645/2013 stands dismissed with costs. Family Court Appeal No.48/2016 is allowed and the respondent shall pay the costs to the appellant.

JUDGE

JUDGE

Andurkar.