

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

FAMILY COURT APPEAL NO.98 OF 2015

Megha w/o Ramdas Bhende  
Aged about 45 years, Occ. Service  
R/o 39 Sarvashree Nagar,  
Near Gurudeo Flour Mill, Umrer Road,  
Nagpur

... Appellant

-vs-

Ramdas s/o Nathhuji Bhende  
Aged about 50 years Occ. Private,  
R/o Balaji Nagar, Manewada Road,  
Nagpur

... Respondent

Shri P. S. Tiwari, Advocate for appellant.  
Respondent served.

CORAM : A. S. CHANDURKAR AND N. B. SURYAWANSHI, JJ.  
DATE : January 18, 2021

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

This appeal under Section 19 of the Family Courts Act, 1984 raises a challenge to the judgment of the Family Court dated 29/01/2014 in Petition No.A-1036/2010 by which that petition has been allowed and the marriage between the appellant and the respondent has been dissolved by a decree for divorce.

2. Facts relevant for adjudicating the appeal are that the petitioner and the respondent were married on 01/07/1990 at Nagpur. It is the case of

the respondent-husband that after marriage they started residing at the matrimonial house for a period of about one year. The appellant-wife went to her mother's house for delivery and a male child was born on 15/03/1992 after which the husband went to receive them back. The wife however refused to come back to matrimonial house. After some period the wife returned to the matrimonial house but she used to leave the same and reside with her parents without any reason. A meeting was held on 15/03/1995 between members of both the families in which the wife agreed to return to the house of the husband. They resided together only for about two months after which the wife again left the husband's house. Despite efforts by the husband and his relatives she did not return back. On the contrary the wife filed petition for grant of maintenance under Section 125 of the Code of Criminal Procedure, 1973. In those proceedings as advised by the counsellor the parties started living together and the proceedings for grant of maintenance were dismissed in default. The compromise however was not possible and the parties thereafter started living separately. The husband stated that his mother was blind and the wife stayed with her son at his father's house. It was alleged that the wife was treating the husband with cruelty as a result of which the husband started residing with his mother in a rented house. The wife was serving as an Anganwadi Sevika getting Rs.3000/- per month. The husband therefore filed Petition No.A-140/2008 against the wife seeking divorce on the ground of cruelty. The learned Judge

of the Family Court on 23/11/2009 refused the prayer for dissolution of marriage but instead passed a decree of judicial separation under Section 10 read with Section 13A of the Hindu Marriage Act, 1955 (for short, the said Act). Despite being aware of this adjudication the wife refused to perform her marital obligations. The husband tried his level best to continue the marital ties but the wife was not interested in doing so. On that premise the present proceedings for grant of divorce under Section 13(1-A)(i) of the said Act came to be filed on 24/12/2010.

3. In the written statement filed by the wife at Exhibit-13 the allegations as made were denied. It was pleaded that it was the husband who had been illtreating her and also neglecting to maintain her and their son. The husband was intending to drive out the wife and her son from the matrimonial house as well as the ancestral house where they were residing. Third party rights in the ancestral house were created by the husband as a result of which the matrimonial and ancestral house came to sold. The wife was required to reside with her sister. It was the husband who had deserted and neglected to maintain the wife and therefore there was no cause of action to institute the said proceedings.

4. Before the Family Court the husband examined himself at Exhibit-15 as well as other witnesses at Exhibits-21 and 22. The wife examined

herself at Exhibit-25. After considering the evidence on record the learned Judge of the Family Court held that there was no evidence led by the wife that after passing of the decree of judicial separation she had cohabited with her husband during the statutory period. On that count it was held that in absence of resumption of cohabitation by the wife for a period of one year after passing of the decree of judicial separation the marriage between the parties was liable to dissolved. Accordingly the petition for divorce filed by the husband came to be decreed. Being aggrieved the wife has filed this appeal.

5. Shri P. S. Tiwari, learned counsel for the appellant in support of the appeal submitted that it was a specific case of the wife as pleaded in the written statement that after passing of the decree for judicial separation she was residing in the ancestral house of her husband and had never deserted him. On the contrary by creating third party rights in the ancestral house and alienating the same the wife was compelled to start residing with her sister. In absence of any evidence to indicate that the wife had refused to cohabit with the husband after the decree for judicial separation was passed and the material on record indicating otherwise the husband was not entitled to take advantage of his own wrong. Relying upon the decision in *Hirachand Srinivas Managaonkar vs. Sunanda (2001) 4 SCC 125*, he submitted that even after the decree for judicial separation was passed it was first

necessary for the parties to try and save the marriage. There was no automatic dissolution of the marriage after passing of the decree for judicial separation and in a case where the husband was seeking to take advantage of his own wrong, he could not be permitted to succeed in getting the decree for divorce. He therefore submitted that on consideration of the entire evidence on record it was clear that the learned Judge of the Family Court committed an error in passing the decree for divorce without noticing the conduct of the husband that was brought on record. It was thus submitted that the impugned judgment was liable to be set aside and the petition for divorce filed by the husband ought to be dismissed.

Despite service there is no appearance on behalf of the respondent.

6. We have heard the learned counsel for the appellant and with his assistance we have also perused the records of the case. The following points arise for consideration :

- (i) *Whether the Family Court in the facts of the case was justified in passing the decree of divorce in favour of the respondent; or*
- (ii) *Whether it could be said that the respondent was disentitled for such relief in view of provisions of Section 23(1)(a) of the said Act ?*

7. The facts on record indicate that after the parties were married on 01/07/1990 a son was born on 15/03/1992. According to the husband the

wife was treating him with cruelty and had also deserted him since 14/07/2002. On that premise the husband had filed proceedings being Petition No.A-140/2008 for seeking divorce on the grounds of cruelty and desertion. These proceedings were decided on 23/11/2009 and instead of passing a decree of divorce, a decree of judicial separation under Section 10 read with Section 13A of the said Act was passed. After that decree was passed it is the case of the husband that the wife refused to restore conjugal relations and on that cause of action the present proceedings for grant of divorce were filed on 24/12/2010. The wife took the specific defence that it was the husband who was neglecting to maintain her and their son. The ancestral house where they were residing was got alienated with a view to evict the wife from those premises. In other words the wife sought to contend that the husband was taking disadvantage of the decree for judicial separation passed earlier.

8. It is seen that the husband examined himself at Exhibit-16 and in the affidavit filed on record he merely stated that he had tried his level best to continue the conjugal relationship. This was refused by the wife. However in the cross-examination it was admitted by the husband that pursuant to the compromise arrived at in the maintenance proceedings the husband and the wife started residing together in the ancestral house at plot No.39. He stated that the wife was residing in a separate compartment

therein. He then admitted that his mother had sold the said ancestral house and he had relinquished his rights therein. The sale-deed of that ancestral house dated 11/03/2010 was placed on record at Exhibit-19.

The wife examined herself at Exhibit-25 in which it is stated that when she and her son were residing in the ancestral house of her husband the same was sought to be sold without her consent. The purchaser of that property sought to evict her and hence she had filed Civil Suit No.3618/2012. As a consequence the wife was required to reside with her sister.

8. From the aforesaid material on record the question to be considered is whether on the husband obtaining a decree for judicial separation it was obligatory on his part to have restored the conjugal relationship with his wife and whether they ought to have made an attempt to continue the relationship. This very question was considered in ***Hirachand Srinivas Managaonkar*** (supra). While considering the provisions of Sections 13(1-A)(i), 10 and 23(1)(a) of the said Act it was observed that after a decree for judicial separation was passed it was the duty of both the spouses to do their part for cohabitation. While considering the aspect as to whether it was obligatory for the husband after obtaining the decree for judicial separation to cohabit with the wife, it was observed in paragraph 16 as under :

*“16. .... On a fair reading of sub-section (2) it is clear that the provisions applies to the petitioner on whose application the decree for judicial separation has been passed. Even assuming that the provision extends to both the petitioner as well as the respondent it does not vest any absolute right in the petitioner or the respondent not to make any attempt for cohabitation with the other party after the decree for judicial separation has been passed. As the provision clearly provides, the decree for judicial separation is not final in the sense that it is irreversible; power is vested in the court to rescind the decree if it considers it just and reasonable to do so on an application by either party. The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefore. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and readjustment. The decree may fall by a conciliation of the parties in which case the rights of the respective parties which float from the marriage and were suspended are restored. Therefore the impression that Section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of sch relationship.”*

From the aforesaid it becomes clear that mere passing of a decree for judicial separation by itself cannot result in passing of a decree for divorce on the ground of desertion subsequently in the absence of any attempt for cohabitation.

9. We find that ratio of the aforesaid decision can be made applicable to the facts of the present case. The decree for judicial separation was passed on 23/11/2009 after which the ancestral house where the wife and her son were residing was alienated by the husband and his family members on 11/03/2010. This was without consent of the wife. Shortly thereafter the present proceedings for grant of divorce under Section 13(1-A)(i) of the said Act came to be filed alleging that the wife was not interested in continuing with the marital ties. The conduct of the husband clearly indicates that he sought to take advantage of his own wrong by refusing to cohabit with the wife despite the fact that he was staying in his ancestral house. In view of provisions of Section 23(1)(a) of the said Act his conduct disentitled him to the relief of divorce sought in the present proceedings.

10. The learned Judge of the Family Court however without examining these aspects of the matter and only by cursorily observing that the wife had not led evidence to indicate that after passing of the decree of judicial separation she had cohabited with the husband between the statutory period, proceeded to pass the decree for divorce. In the cross-examination of the husband there were several admissions to indicate his conduct of not seeking to cohabit with the wife after the decree for judicial separation was passed. It was thus the husband who was at fault and not the wife. The impugned judgment passed by the Family Court is therefore liable

to be set aside. Point No.(i) is answered by holding that the Family Court was not justified in passing the decree for divorce. Point No.(ii) is answered by holding that the conduct of the husband disentitled him from grant of relief in the form of a decree for divorce in view of provisions of Section 23(1)(a) of the Act.

Accordingly the judgment dated 29/01/2014 in Petition No.A-1036/2010 passed by the learned Judge, Family Court No.4, Nagpur is set aside. The Family Court Appeal is allowed in aforesaid terms leaving the parties to bear their own costs.

**JUDGE**

**JUDGE**