

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

FAMILY COURT APPEAL NO. 56 OF 2018

Dolly @ Amisha w/o Arvind Zodape
aged about 40 years, Occ. - Nil,
R/o. 196, Milind Nagar,
Behind N.I.T. office, Nagpur

.... APPELLANT

VERSUS

Arvind s/o Ganpatrao Zodape,
Aged about 46 years, Occ. Service,
R/o Plot No. 43, Milind Nagar,
Near Buddha Vihar, Nagpur

...RESPONDENT

Shri D.R. Upadhyay, Advocate for the appellant.
Shri M.S. Gupta, Advocate for the respondent.

**CORAM : A.S. CHANDURKAR AND
PUSHPA V. GANEDIWALA, JJ.**

DATED : MARCH 02, 2021.

JUDGMENT (Per Pushpa V. Ganediwala, J.) :

This is the wife's appeal under Section 19 of the Family Courts Act, 1984 against the judgment and decree dated 19/06/2018 in petition No. A-914/2013 passed by the Judge, Family Court No. 4, Nagpur by which a decree of divorce in

favour of the respondent/husband on the ground of the desertion under Section 13(1)(i-b) of the Hindu Marriage Act, 1955 (for short “Act of 1955”), is granted.

2. The necessary facts leading to the filing of the present appeal are as under :

i) The marriage between the parties was solemnized on 22/05/2002 at Nagpur. Out of this wedlock, they have one daughter by name Shreya, born on 15/06/2005, presently in the custody of the appellant/wife.

ii) The respondent/husband filed a petition for divorce on the ground of cruelty and desertion under Section 13(1)(i-a)(i-b) of the Act of 1955. The learned Judge, Family Court, Nagpur granted decree of divorce on the ground of desertion only. This judgment is impugned by the appellant/wife in the present appeal. As the decree of divorce on the ground of desertion is challenged, we restrict the facts of the case to this ground alone.

iii) It is the case of the respondent/husband that since 18/12/2008, the couple is residing separately as the appellant/wife left his company along with her belongings without his consent and without informing him. The respondent/husband further states that many a times, he tried to fetch her back, but all his attempts turned futile. He was not even allowed to talk with their daughter Shreya. He even sent a legal notice to fetch her back and also filed a petition for restitution of conjugal rights under Section 9 of the Act of 1955, however, the same got dismissed in default. The appellant/wife and her father filed a series of criminal complaints against him. As the appellant/wife was reluctant to resume cohabitation, the respondent/husband filed a petition for divorce on the ground of cruelty and desertion.

iv) The appellant/wife in her written statement below Exhibit 13 denied all adverse allegations with regard to cruelty and desertion. In her specific pleadings, she alleges some incidents of physical assaults. She also alleges one incident of miscarriage due to his beating. She justified her living separately from the respondent/husband on account of mental

and physical harassment by the respondent/husband and his family members. Lastly, she alleges that the respondent/husband himself willfully deserted her and is residing with one another lady.

v) The learned trial Court, on the basis of the pleadings of the parties, framed necessary issues and recorded evidence as led by the parties. Prior to that, the learned trial Court made abortive attempts to reconcile the dispute between the parties through the process of Alternative Dispute Resolution (ADR). The respondent/husband examined himself as PW-1 while the appellant/wife examined herself as DW-1, her father – Shri Ramesh s/o Govindrao Mate as DW-2 and her daughter – Ku. Shreya as DW-3. The parties have also brought on record certain documents. The learned trial Court considered the evidence on record and the submissions advanced on behalf of both the parties. The learned trial court found that the respondent/husband has proved the ground of desertion, therefore, he is entitled for a decree of divorce. The learned trial Court also recorded the finding that there is no

bar under Section 23 of the Act of 1955 in granting decree of divorce in favour of the respondent/husband.

3. We have heard Shri Upadhyay, learned counsel for the appellant and Shri Gupta, learned counsel for the respondent. We have also perused the record and proceedings with the assistance of both the learned counsel.

4. The following point arose for our consideration :

“Whether the respondent/husband has proved that the appellant/wife, without any reasonable cause and without the consent or against the wish of the respondent/husband, deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition?”

5. At the outset, the essential ingredients for the decree of divorce on the ground of desertion are; (i) the fact of separation and; (ii) the intention to bring cohabitation permanently to an end, i.e., *animus deserendi*. With regard to the first ingredient, it is not disputed that the parties have been

separated for eight years at the time of filing of the petition and during this period, there was no reconciliation and restitution of conjugal rights between the parties. So, one of the essential elements for consideration of a decree of divorce on the ground of desertion, i.e., factum of separation is proved. Secondly, with regard to *animus deserendi*, i.e., intention on the part of the spouse to disassociate from the company of the other spouse without reasonable cause, we have to examine the evidence on record as led by the parties.

6. Both the parties in their affidavits in lieu of examination-in-chief reiterated their respective pleadings. A perusal of the cross-examination of the appellant/wife would reflect the following admissions on her part:

“16. We cohabited together till 10/12/2008 and thereafter we have been separated. It is correct to say that since about last 9 years we have been residing separately. It is correct to say that, since our separation I have not filed any petition for restitution of conjugal rights nor sent any legal notice for the same. It is correct to say that, the petitioner had issued a

legal notice to me and also had filed a petition for restitution of conjugal rights. It is correct to say that, I had not replied said legal notice. It is correct to say that, I had appeared in a petition for restitution of conjugal rights as a respondent.”

“17. It is correct to say that, I myself, and my parents have lodged reports to the Police Station against the petitioner on the basis of which criminal cases are registered against the petitioner. In some criminal cases against the petitioner, my evidence and evidence of my parents were also recorded. One private criminal complaint case filed by my father against the petitioner is also pending before the Court and in that case, I myself is one of the witness.....”

“21. It is correct to say that, I have not mentioned in my petition and evidence affidavit that I am ready and willing to cohabit with the petitioner. It is correct to say that, both parents of the petitioner are dead.....”

“23. We belong to Schedule caste community. It is correct to say that, our dispute was referred

to Mahila Cell, Panchpaoli police station, Nagpur. It is correct to say that, in the meeting before Mahila Cell the petitioner was ready to cohabit with me but I refused for justified reason. It is correct to say that, thereafter, offences were registered against the petitioner. It is correct to say that, in all criminal cases except a case under Section 498(A) of the Indian Penal Code my father was complainant.”

“26. It is correct to say that, I did inform about birth of our daughter to the petitioner. It is correct to say that, on receipt of information about the birth of our daughter the petitioner had come to the hospital to see newly born child.”

“27. It is correct to say that, we both reside in the same locality. There is one ground and Budha Vihar in between our houses. It is correct to say that, the house of petitioner is an ancestral house. It is correct to say that, in our locality people of our community reside. It is correct to say that, I am acquainted with the people residing in the vicinity of house of petitioner.”

“32. It is correct to say that, the petitioner was on duty when I had left the matrimonial home. It is correct to say that, I did not inform to the petitioner while leaving the matrimonial home..... It is correct to say that, in the beginning on one to two occasions the petitioner had tried for reunion. It is correct to say that, I had filed petition under Domestic Violence Act against the petitioner and also lodged report against the petitioner for the first time.”

“33. It is correct to say that, because of my allegations against the respondent in my written statement, it is not possible for me to cohabit with the petitioner.....”

7. A perusal of the aforesaid admissions by the appellant/wife would at once reveals her willful and deliberate intention not to resume cohabitation with the respondent/ husband. She has admitted that the respondent/ husband had tried for reunion during their counseling. He had also sent legal notice and filed petition for restitution of conjugal rights. She has further admitted that neither she replied the notice nor did she file any petition for restitution of conjugal rights. She

at her own, in the absence of respondent/husband left his company on 18/12/2008 and since then they are separated. She has admitted that many criminal cases have been lodged against the respondent/husband by herself and her father. She has admitted that she has not mentioned, either in her petition or in evidence on affidavit, that she is ready and willing to cohabit with the petitioner. She has admitted that before the Women Cell, the respondent/husband was ready to cohabit with her, but she refused for justified reasons. Even she did not inform the respondent/husband about the birth of the child and she has admitted that on receiving information, he had come to the hospital to see the new born baby. Lastly, she has admitted that because of her allegations against the respondent/husband in her written statement, it is not possible for her to cohabit with the respondent/husband.

8. From all the aforesaid admissions by the appellant/wife on the material facts, in the opinion of this Court, an inference can be drawn that from the very inception, when she left the matrimonial house without the consent and knowledge

of the respondent/husband, she was having an intention not to resume cohabitation.

9. On the other hand, Shri Upadhyay, learned counsel for the appellant/wife could not point out any material admission by respondent/husband from his cross-examination so as to disprove his case based on desertion. He denied each and every suggestion put to him during his cross-examination. We noticed a very limited cross-examination of the respondent/husband on the allegations of cruelty as spelt out by the appellant/wife in her pleadings. With regard to her allegations that the respondent/husband was residing with one lady, however, on perusal of her pleadings, evidence and the cross-examination of the respondent/husband, we could not find any further details about the alleged lady. There is nothing on record to show that since when the respondent/husband is residing with one lady and what is the name of that lady. Not a single question was put to the respondent/husband about his alleged relationship with one lady. It is an admitted fact on record that her matrimonial house and her parents' house are in the same locality. The appellant/wife, despite

having residing in the same locality, failed to examine any witness to show that the respondent/husband is residing with one lady and, therefore, she has sufficient reason not to stay with him. Although, the appellant/wife examined her minor daughter and she deposed that on one occasion, when she had been in the house of the respondent/husband, she noticed one lady in his house. However, only on the basis of limited evidence available on record, we cannot draw an inference that the respondent/husband must be having an illicit relationship with that lady. These kinds of allegations, being of serious and grave in nature, we expect some greater proof for the alleged relationship.

10. The appellant/wife also examined her father, as DW-3, however, we do not find his testimony to be helpful to the appellant/wife to prove her case of cruelty against the respondent/husband.

11. In the pleadings and oral evidence of the parties, there are allegations and counter allegations of the parties on cruelty, however, in view of the material admissions by the

appellant/wife in her cross-examination, we record our satisfaction that the respondent/husband has proved that the appellant/wife has deserted him without any reasonable cause and without his consent since more than two years just prior to filing of the petition for divorce by him and the respondent/husband has not taken benefit of his own wrong. We see no other legal ground on which the decree of divorce cannot be granted. We answer the point in affirmative.

12. The learned counsel for the appellant/wife during his submissions placed reliance on the following judgments of the Hon'ble Apex Court and the High Courts.

- i) Shyam Sunder Kohli Vs. Sushma Kohli @ Satya Devi reported in 2005(5) ALL MR (S.C.) 59
- ii) Harjit Singh Vs. Harpreet Kaur reported in 2018 (2) ALL MR (J) 37
- iii) Anirban Ghosh Vs. Sanchita Ghosh reported in 2018(1) ALL MR (J) 100

13. We have carefully perused all the aforesaid judgments, and found that they are distinguishable on facts. In these judgments, the divorce was refused to the spouse on the ground of desertion, as the petitioner spouse could not prove

the *animus deserendi*. However, in the present case, we have already discussed the material admissions on behalf of the appellant/wife and we have reached to the conclusion that since inception she was having an intention not to resume cohabitation.

14. On the other hand, the learned counsel for the respondent/husband also relied on the following authorities to buttress his submission that since the parties have been staying separately for more than 10 years, there are several criminal complaints against the respondent/husband initiated at the instance of the appellant/wife and her father, the marriage between the parties have gone to the stage of irreparation and beyond the hope of the salvage.

- i) Naveen Kohli Vs. Neelu Kohli reported in AIR 2006 SC 1675
- ii) Sanghamitra Ghosh Vs. Kajal Kumar Ghosh reported in (2007) 2 SCC 220

In the instant case, undisputedly, the parties are residing separately for more than 10 years. There are series of criminal complaints lodged by the appellant/wife and her

father against the respondent/husband. There are serious allegations and counter allegations against each other. Considering the observations of the Hon'ble Apex Court in the aforesaid cases, we are of the view that apart from our discussion while answering point No. 1, this can be an additional circumstance that the relations between the parties have gone to the stage of irreparation and beyond the hope of the salvage.

15. In the ultimate analysis, we find that the learned Judge of the Family Court have properly dealt with each and every aspect for the grant of decree of divorce on the ground of desertion. We find that the appeal is bereft of any merits and deserves dismissal and accordingly the same is dismissed with no order as to costs. All the pending civil applications stand disposed of.

JUDGE

JUDGE