

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

FAMILY COURT APPEAL No. 9/2020

Shriram Jotiram Wankhade,
Aged about 68 years, Occ. Retired,
r/o Gajanan Nagar, Near Garoba Mandir Dabki
Road, Akola, Tq, and Distt. Akola.

APPELLANT

.....VERSUS.....

Shaila @ Shakila @ Sushila Shriram Wankhede,
(New Name Sushila Wd/o Bapurao Wankhade)
Aged about 61 years, Occ. Labourer,
C/o Bhausaheb Pundlik Khandare,
R/o Bharatpura, Tq. Balapur, Distt. Akola.

RESPONDENT

Shri C.A. Joshi, counsel for the appellant.
Shri A.J. Thakkar, counsel for the respondent.

CORAM : A.S. CHANDURKAR AND N.B. SURYAWANSHI, JJ.
DATE : 22ND JANUARY, 2021.

ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)

ADMIT. Heard finally with consent of the counsel for the parties considering the short issue involved.

2. The appellant and the respondent were married on 20.05.1978. From that wedlock, a son was born. After a period of about four years, the parties agreed to separate from each other and therefore on 31.03.1982 they executed a document and separated from each other. It is further case of the appellant that after such separation the wife married one Bapurao Wankhade on 04.04.1991 and from that wedlock

they had three children. On the ground that since 31.03.1982 the parties were living separately and the respondent had deserted the appellant, the proceedings for grant of divorce on the ground of cruelty and desertion came to be filed. Despite service the wife did not appear. The husband filed his affidavit but he was not cross-examined. After considering the evidence on record, the learned Judge of the trial Court held that the separation of the parties was not legal and the subsequent marriage of the respondent was also not in accordance with law. It was further held that the husband had tried to take benefit of his own wrong and in view of provisions of Section 23 of the Hindu Marriage Act, 1955 (for short, the said Act') this was not permissible. On that account, the proceedings came to be dismissed. Being aggrieved, the husband has filed the present appeal.

3. Shri C.A. Joshi, learned counsel for the appellant submitted that the fact that the respondent had deserted the appellant since 31.03.1982 was undisputed. The husband after waiting for a considerable period and despite attempts to reconcile with the respondent which were not successful had filed the present proceedings. The fact that the respondent had remarried itself indicated that she did not desire to return to the matrimonial home. Merely because the subsequent marriage was illegal the fact of desertion could not be

ignored. He thus submitted that as the parties were living separately from 1982, the Family Court ought to have decreed the proceedings for divorce.

4. Shri A.J. Thakkar, learned counsel for the respondent submitted that it was a fact that on 31.03.1982 a divorce-deed was executed between the parties and it was a customary divorce between them. The respondent had thereafter remarried and was now living with her husband. He did not dispute the fact that since 31.03.1982 the respondent did not return to the appellant's matrimonial home. He referred to the affidavit dated 29.12.2020 filed by the respondent in that regard.

5. The following point arises for determination:-

Whether the appellant is entitled for grant of divorce as prayed for?

6. We have perused the records of the case and after giving due consideration to the respective submissions, the material on record indicates that after marital life of about four years the parties executed a divorce-deed on 31.03.1982. This divorce was stated to be customary in nature and it is a fact that since that date the parties started residing

separately. In other words, the respondent left the matrimonial home and thereafter contracted another marriage. Since 31.03.1982, the respondent did not return to her matrimonial home which indicates her conduct of deserting her husband forever. It is not in dispute that since that date the parties have been living separately. In these peculiar facts which were also noted by the learned Judge of the trial Court, we find that the appellant has succeeded in proving that the respondent deserted him without any reasonable cause. The intention of the respondent is clear in view of the fact that she has remarried. Hence in these peculiar facts, we find that the appellant is entitled to divorce on the ground of desertion under Section 13(1)(i-b) of the said Act. The provisions of Section 23(1)(d) of the said Act would not preclude the appellant from seeking divorce in these facts. In view of the aforesaid, the judgment in A-218/2018 passed by the learned Judge Akola on 23.09.2019 is set aside. The divorce petition is partly allowed and it is held that the original petitioner is entitled for a decree of divorce on the ground of desertion. The Family Court Appeal is allowed in aforesaid terms leaving the parties to bear their own costs.

(N.B. SURYAWANSHI, J.)

(A.S. CHANDURKAR, J.)

APTE

**Rohit
Apte**Digitally signed by
Rohit Apte
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