

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

FAMILY COURT APPEAL [FCA] NO. 7/2021.

Sau. Sonal w/o Amit Chavan,
Aged 40 years, Occupation -
Student, resident of C/o. Shri
Babasaheb @ Dashrath Gawande,
Swamini Bungalow, Gorakshan Road,
Near Vaishnavi Complex,
In front of MSEB Office, Akola.
District Akola.

... **APPELLANT.**

VERSUS

Shri Amit s/o Prakash Chavan,
Age about 44 years, Occupation
Service, resident of 601, B-Wing,
Lalwani Wastu, Sakore Nagar,
Viman Nagar, Pune,
District Pune – 14.

... **RESPONDENT.**

Mr. A.A. Naik, Advocate for the Appellant.
Mr.A.Deshpande, Advocate h/f. Mr.U.J. Deshpande, Advocate
for the Respondent.

CORAM : VINAY JOSHI AND
BHARAT P. DESHPANDE, JJ.

DATE OF RESERVING THE JUDGMENT : APRIL 05, 2023.
DATE OF PRONOUNCEMENT : MAY 03, 2023.

JUDGMENT (PER VINAY JOSHI, J.) :

This is an appeal filed by the appellant/wife under Section 19 of the Family Courts Act, 1984 read with Section 28 of the Hindu Marriage Act, 1955, challenging the judgment and decree passed by the Family Court, Akola in Hindu Marriage Petition No.A-207/2017 dated 02.01.2021, whereby a decree of divorce was granted in favour of the respondent/husband on account of desertion, which is one of the ground under Section 13[1][i-b] of the Hindu Marriage Act, 1955.

2. It is a matrimonial dispute amongst a well educated couple. The parties got married on 16.06.2006 at Akola as per the customary rights prevailing in their religion. Soon after the marriage, the appellant/wife resumed co-habitation at Akola with her husband and in-laws. Out of the said wedlock, she remained pregnant and

delivered a baby boy on 07.07.2007 at her matrimonial house. The marriage some how did not work smoothly, hence wife started to reside separately with her parents from 21.04.2013 onwards. The respondent /husband has initially filed a petition for restitution of conjugal rights in terms of Section 9 of the Hindu Marriage Act, however, it came to be withdrawn. Later on, the husband has filed Hindu Marriage Petition No.A-207/2017 seeking decree of divorce on the ground of cruelty in terms of Section 13[1][i-a] and desertion under Section 13[1][i-b] of the Hindu Marriage Act. The husband has also sought custody of the minor son.

3. After recording the evidence, the learned Judge of Family Court [trial Court] held that the husband has failed to establish the ground of cruelty, however, succeeded in proving the ground of desertion, which resulted into passing of the decree of divorce dated 02.01.2021. The husband did not press the urge for custody, therefore, the trial Court has not decided the said issue. Being aggrieved and dissatisfied by the said decree of divorce, this appeal is filed by the appellant/wife.

4. Few facts are not in dispute in between the parties. The marriage took place on 16.06.2006; the parties started to cohabit at Akola with parents of husband. Soon after the marriage the couple shifted to Pune with parents of husband, since husband got employment at Pune. The wife delivered a baby boy on 07.07.2007. The husband went to Canada from 06.04.2013 to 05.05.2013 through his employer. During the absence of husband from the country, the appellant / wife returned to her parental house on 12.04.2013 and stayed there only. Moreover, it is not in dispute that initially husband has filed a petition for restitution of conjugal rights, which was withdrawn.

5. On aforesaid background, we have heard both sides exhaustively, as well as gone through the record and proceedings. It is husbands' case that since inception of marriage, the appellant/wife was fond of her parental relations. She always used to visit her parental house for no reason. She remained dissatisfied at her husbands house. During husbands' absence on 12.04.2013, without

informing her husband, she left for her parental house at Akola with her belongings. When her husband came to know that his wife has gone to her parental house at Akola, he had telephonically asked her to return back, but, she refused. After returning to India, the husband went to Akola with a request to join his company, however, the wife denied. The husband made repeated efforts by way of sending letters, whats-app messages/communications, e-mails and by approaching the Police Women's Cell at Pune for reunion, however, the wife did not responded. Though the husband has filed a petition for restitution of conjugal rights, for a period of 2 years there was no progress and when he realized that the wife is not interested in cohabitation, he withdrew the said petition and filed petition seeking divorce on the ground of cruelty and desertion.

6. The wife has resisted the petition by filing reply-affidavit at Exh.28. She has denied the allegations made by husband against her. It is her contention that after initial few days from marriage, she was subjected to harassment. The family members of husband used to humiliate and harass her on account of dowry. She was

made to do all household work by removing domestic servant. The husband was not looking after her daily needs which required her to take monetary help from her father. The husband was not taking her care during ailments, and she was not provided monetary aid for educational purposes. She denied that she has left the company of husband without sufficient cause. She has stated that though there was order of maintenance, however, the husband did not paid the same. With such grounds, she prayed for dismissal of the divorce petition.

7. Before the trial Court the husband led evidence at Exh.73 and produced several documents, most of them are in the nature of communication made by him to show that he was keen for re-union, but, the wife denied. As against this, the wife led evidence at Exh.87. On appreciation of entire material, the trial Court held that the husband failed to establish the ground of cruelty. In this appeal, the husband has not challenged the said adverse finding by filing cross-objection or counter appeal, therefore, the said issue need not be dealt with. However, the trial Court held that the husband

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succeeded in proving that the wife has deserted him for continuous period of not less than two years without sufficient cause and thus, it is a case of willful neglect in terms of Section 13[1][i-b] of the Hindu Marriage Act.

8. The learned Counsel appearing for the appellant would submit that the trial Court erred in appreciating the evidence on record. The trial Court has not considered that the wife was harassed, and thus, there was reasonable cause for her to reside at her parental house. The trial Court failed to consider that for educational purpose the wife went to Akola, but, did not returned. It is argued that the trial Court has considered the material which was not part of the pleadings.

9. Per contra, the learned Counsel appearing for husband would submit that the finding recorded by the trial Court on the ground of desertion is well reasoned. The trial Court has meticulously scanned the entire material, properly appreciated the admissions given in cross-examination and the finding of desertion is

most probable, logical which needs no interference.

10. The husband led evidence stating that soon after the marriage the couple shifted to Pune. While the husband was at Canada, on 12.04.2014 without seeking permission of husband or informing him, the wife returned to her parental house along with the belongings. Pertinent to note that it is not denied by the wife that she shifted to her parental house on 12.04.2014. There must be intentional permanent forsaking and abandonment of the company of other spouse. Certainly mere separate residence for a period of two years is no ground to construe the ground of desertion, but, leaving the spouse without reasonable cause, without consent amounts to willful neglect. The course of conduct and all relevant circumstances needs consideration for appreciating the ground of desertion.

11. The learned Counsel appearing for the wife would submit that according to the husband his wife ought to have pursued her Ph.D. at Nagpur, however, she has intentionally chosen to stay at

Akola for Ph.D. Course. It is submitted that the wife is presently staying at Nashik and doing her Ph.D. The other side argued that the submission of husband in that regard was without pleading and therefore, it cannot be considered. In support of said contention reliance is placed on the decision of Supreme Court in cases of - [1] **Shivaji Balaram Haibatti .vrs. Avihash Maruthi Pawar - [2018] 11 SCC 652** and [2] **Ram Sarup Gupta by L.Rs. .vrs. Bishun Narain Inter College and others – [1987] 2 SCC 555**. No doubt the Court cannot record a finding on the issue which is not part of the pleading, however, pleadings are to be liberally construed. The reason of Ph.D. is one of the ground which is not decisive. The husband has led evidence in categorical terms about the efforts made by him to bring his wife back. In this regard we have gone through the evidence on record. As per husbands case, he has issued two letters dated 15.07.2013 and 25.07.2013 to the wife calling her back, sent e-mail on 05.08.2013 and applied to the Police Womens' Cell on 11.02.2014, sent notice for restitution as well as, filed a petition for restitution. All these efforts made by the husband has not been denied by the wife, which is taken into account by the trial Court.

On the other hand, though wife stated about the cruel treatment as a ground for her to reside separately, however, her evidence falls short to establish the same. The wife nowhere stated that she was keen for re-union, but, the other did not respond. Admittedly, the wife never issued notice for restitution, nor any witness has been examined to show that genuine efforts were made to patch up the differences.

12. Pertinent to note that admittedly wife has returned to her paternal house on 12.04.2014, and thereafter, she never went at any point of time to the house of husband. It is not a case that she was driven out by the husband or she was compelled to go away from their house. The evidence discloses that during absence of her husband, she left her matrimonial house. Moreover, it is to be noted that the wife took out her child from the school of Pune, got admission at Akola school from 2015. She is now staying at Nashik, where she has admitted her child in the school. The said course of conduct indicates that she had no intention to cohabit with her husband, but, she choose to stay away permanently.

13. The learned Counsel for the wife by placing reliance on the decision of Supreme Court in case of **Malathi Ravi M.D. .vrs. B.V. Ravi, M.D. - [2014] 7 SCC 640**, would submit that in order to establish the ground of desertion two essential conditions i.e. factum of separation and intention to bring co-habitation permanently to an end, must be established. Obviously these are the essential requirements and *animus deserendi* is an important factum. Always inference is to be drawn from all attending circumstances of the case. The trial Court has noted several admissions of wife to indicate that she has admitted about the efforts made by husband, and her prolonged stay at Akola and Nashik from July 2015 onwards. Admittedly wife did not responded to the restitution notice issued by the husband. She has not provided access to the husband at Family Court at Nashik, though directed accordingly. It is apparent that wife did not made genuine efforts for re-union. As against this, husband has established by cogent evidence, that he has tried his best for re-union, but, she remained to be least interested. Since July 2015 wife has got employment at Nashik, admitted her son at Nashik

school and is staying there. The entire course of conduct of wife shows that she has no intention to return and thus, the finding recorded by the trial Court in respect of ground of desertion is well justified.

14. In view of above, we hold that the appellant / wife has not made out a case for interference with the findings recorded by the Family Court while passing the impugned judgment and decree. Appeal is accordingly dismissed. No costs.

JUDGE

JUDGE