

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.189 OF 2024
WITH
INTERIM APPLICATION NO.7246 OF 2024
IN
SECOND APPEAL NO.189 OF 2024
WITH
INTERIM APPLICATION NO.7925 OF 2024
IN
SECOND APPEAL NO.189 OF 2024**

Sheetal Vitthal Kshirsagar
V/S

....Appellant/Applicant

Vitthal Nagesh Kshirsagar

....Respondent

Mr. Vaibhav R. Gargade *for the Appellant/Applicant.*
Mr. Rahul S. Kadam *for Respondent.*

CORAM: SANDEEP V. MARNE, J.
DATE : 03 MAY 2024.

P.C.:

1 The Appellant has filed this Appeal challenging the decree dated 8 February 2024 passed by District Judge-1, Malshiras in Regular Civil Appeal No.7 of 2023 by which the First Appellate Court has allowed the Appeal filed by Respondent-husband and has set aside the judgment and decree dated 9 January 2023 passed by the Civil Judge Senior Division, Malshiras in Hindu Marriage Petition No.136 of 2017. The First Appellate Court has allowed the Respondent-husband's application and has dissolved the marriage solemnized

between the Appellant and the Respondent. The First Appellate Court has dismissed the Counter-Claim filed by the Appellant-wife and has directed the Respondent-husband to pay permanent alimony of Rs.8,000/- per month to the Appellant-wife from 5 April 2018.

2 I have heard Mr. Gargade, the learned counsel appearing for the Appellant and Mr. Kadam, the learned counsel appearing for the Respondent.

3 On 2 April 2024 when Appeal was extensively argued by Mr. Gargade, he made vehement appeal before this Court that parties be relegated to the process of mediation and that such mediation is likely to result in success. Despite resistance shown by Mr. Kadam, this Court referred the parties to mediation. The learned Mediator has submitted a report stating that the mediation proceedings have failed. Consequently the hearing of the Appeal has progressed.

4 Mr. Gargade, would draw my attention to the findings recorded by the Trial Court in paragraph 13 of its judgment under which various incidents pertaining to the year 2013 are discussed when the Appellant-wife was not taken back in the house of the Respondent-husband. He would submit that the Trial Court had rightly recorded a finding that the Respondent-husband has actually responsible for cruelty towards the Appellant-wife by not taking her back in the house since the year 2013. He would therefore submit that the

First Appellate Court has erroneously assumed and answered the issue of desertion against Appellant-wife. He would submit that there is evidence on record to indicate that Appellant-wife resided with Respondent-husband right till the year 2016 and the ground of desertion was thus completely disproved. He would also submit that there is no question of desertion by Appellant-wife in view of the fact that she filed a counter-claim seeking a decree for restitution of conjugal rights and actually desired to reside alongwith the Respondent-husband. He would therefore submit that the First Appellate Court has erroneously reversed the decree of the Trial Court.

5 After going through the findings recorded by the Trial Court and the First Appellate Court it is seen that the Respondent-husband initially approached the Trial Court with a complaint that the Appellant-wife deserted him on 24 March 2013. A lot of debate has taken place between the parties about whether there was desertion in the year 2013 or not. Even if contention of Mr. Gargade about non-desertion in the year 2013 is to be accepted, it appears that the First Appellate Court has held there is desertion atleast from the year 2014. The said finding is recorded by the First Appellate Court on the basis of one of the questions asked on behalf of the Appellant-wife to the Respondent-husband during his cross-examination where a suggestion was given that wife was residing with the husband during 29 January 2012 to 17 January 2014. If Appellant-wife indeed resided with her Respondent-husband till the year 2016, it is incomprehensible as to why the above suggestion was given to the Respondent-husband during the course of his cross-examination.

Though Mr. Gargade has attempted mitigate the situation by inviting my attention to another suggestion given in further cross-examination of Respondent-husband about Appellant-wife's residence till December 2016, in my view, such question does not explain in any manner as to why the suggestion was earlier given that she resided with her husband only till 17 January 2014.

6 There is another interesting aspect in the present case. After receiving summons in the Marriage Petition filed by the Respondent-husband, Appellant-wife filed counter-claim on 12 May 2018. In the entire counter-claim, there is no positive assertion by the Appellant-wife that she continued residing with her husband till a particular date. The counter-claim is completely vague. More interestingly, in paragraph 6 of the counter-claim the Appellant-wife averred that the cause of action for filing the counter-claim for restitution of conjugal rights arose on 27 October 2017 when the Respondent-husband filed Marriage Petition for divorce. Thus there is a clear admission that before 27 October 2017, there was no cause for the Appellant-wife to seek a decree for restitution of conjugal rights. She thought of seeking restitution of conjugal rights only after receipt of summons in Marriage Petition. In my view, if Appellant-wife wanted to prove that she resided with her husband till the year 2016, there ought to have been specific assertion to that effect in the counter-claim. Therefore, no serious flaw can be found in the inference drawn by the First Appellate Court about desertion after 17 January 2014.

7 It must also be noted here that the marriage between the parties was solemnized on 29 January 2012 and husband approached the Trial Court seeking decree of divorce by contending that Appellant-wife left him on 24 March 2013. Even if the date of desertion on 17 January 2014 is taken into consideration, the parties cohabited with each other only for a period of about two years. In this connection reliance by Mr. Kadam on the judgment of the Apex Court in **Naveen Kohli vs. Neelu Kohli**, 2006 (4) SCC 558 appears to be apposite, wherein the Apex Court has held that irretrievable breakdown of marriage can also be a good ground for granting the decree of divorce. In the present case, the Appellant-wife appears to have deserted the Respondent-husband after 17 January 2014 and is also ensuring that he does not secure a decree of divorce. In my view, such conduct has rightly been considered by the First Appellate Court for grant decree of divorce in favour of the Respondent-husband. Interests of the Applicant-wife are duly taken care by awarding permanent alimony in the form of maintenance of Rs.8,000/- per month from 5 April 2018. It is only when the order was pronounced that Mr. Gargade would request for enhancement of amount of maintenance. However upon being enquired whether Appellant was willing to withdraw proceedings under section 498-A of the Indian Penal Code and under Protection of Women from Domestic Violence Act, 2005, his response is in the negative. Appellant cannot seek enhancement of maintenance amount in the Second Appeal while continuing with the above proceedings.

8 In my view therefore, no substantial question of law is involved in the Appeal. Second Appeal is accordingly **dismissed**. No costs.

9 In view of dismissal of the Second Appeal, nothing would survive in the Interim Applications and the same are disposed of.

(SANDEEP V. MARNE, J.)

SUDARSHAN
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KATKAM

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