

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

FAMILY COURT APPEAL NO. 55 OF 2016

APPELLANT :-
(On.R.A.) (Ori.Resp.)

Bharti W/o Anil Chauhan, Aged about 37,
R/o: C/o: Shri Chandan Ujjainwar, Plot
No.14, Behind Ranu School, Koradi Road,
Mankapur, Nagpur-440030.

...VERSUS...

RESPONDENT :-
(On R.A.)(Ori.Petitioner)

Anil S/o Chotelal Chauhan, Aged about 43
years, Occupation : Service, R/o Chauhan
Niwas, Near K. John Public School, Plot
No.122, New Vasundhara Society, Besa,
Nagpur-440034.

Mr.Vivek Awachat, counsel for the appellant.
Mr. P. R. Puri, counsel for the respondent.

CORAM : SMT. VASANTI A NAIK &
V.M.DESHPANDE, JJ.

DATED : 06.02.2017

ORAL JUDGMENT (Per Smt.Vasanti A Naik, J.)

By this family court appeal, the appellant challenges the judgment of the Family Court, Nagpur dated 29/02/2016 dissolving the marriage solemnized between the appellant and the respondent by a decree of divorce on the ground of desertion.

2. Few facts giving rise to the family court appeal are stated thus :-

The marriage of the appellant-husband (hereinafter referred to as the "husband" for the sake of convenience) and the respondent-wife (hereinafter referred to as the "wife") was performed at Nagpur according to Hindu rites and customs on 04/12/2005. It is the case of the husband in the petition filed by him for a divorce under section 13(1) (i-a), (i-b) and (iii) of the Hindu Marriage Act that the wife did not behave properly with the husband right from the inception of the marriage. It is pleaded that the husband and his family members noticed that the behaviour of the wife was not normal, that she used to stay alone in the house, laugh when she was all alone and was not bothered about what was going on in the house. It is pleaded that the respondent was not cautious about wearing clothes and did not behave prudently. It is pleaded that the wife was not mentally sound. It is pleaded that the wife did not take care of the family members and also the child that was born from the wedlock. It was pleaded that on 11/08/2008, when the wife was being treated for her mental illness at the hospital of Dr. Parsodkar, the wife left the matrimonial home along with her mother after her mother created a drama in the house. It is pleaded that despite the best efforts of the husband, the wife did not return to the matrimonial home. It is pleaded that the wife is residing in

the parental home since 11/08/2008. It is pleaded that the husband served two notices on the wife dated 07/06/2011 and 20/06/2011 that the marriage should be dissolved, if she is not willing to reside in the matrimonial home, but the wife did not reply to the said notices. It is pleaded that the wife was residing separately in the parental home for about five years and the husband was entitled to a decree of divorce on the grounds raised in the petition.

3. The wife filed the written statement and denied all the adverse facts pleaded in the petition filed by the husband. The wife denied that she suffered from a mental problem and further denied that she had deserted the husband. The wife admitted that she was residing separately from the husband since 11/08/2008. The wife, however, denied that there was any fight between the parties on 11/08/2008 and after her mother created a drama in the house of the husband, she had left the matrimonial home. The wife pleaded in her specific pleadings that since the husband wanted to create some false evidence against the wife in respect of her mental illness, her mother had objected to the same and taken her back to the parental home so that her health could be improved and she should not suffer from mental trauma. The wife pleaded that though she had asked the husband to take her back to the matrimonial home, the husband did not do so. The wife lastly pleaded

that she was ready for cohabitation and the petition filed by the husband was liable to be dismissed.

4. On the aforesaid pleadings, the Family Court framed the issues and on an appreciation of the evidence on record, dismissed the petition filed by the husband under section 13(1) (i-a), (i-b) and (iii) of the Hindu Marriage Act. The Family Court allowed the petition filed by the husband under section 13(1) (i-b) of the Hindu Marriage Act and granted a decree of divorce in favour of the husband on the ground of desertion. The judgment of the Family Court is challenged by the wife in this family court appeal.

5. Shri Awachat, the learned counsel for the wife, submitted that the Family Court has committed a serious error in not considering whether the factum of *animus deserendi* was proved by the husband while granting a decree of divorce on the ground of desertion. It is submitted that the Family Court ought to have necessarily recorded a finding that the wife was not intending to return to the matrimonial home before passing a decree of divorce on the ground of desertion. It is submitted that the admission of the husband in his cross-examination that the wife was ready to reside with him was not considered by the Family Court in the right perspective. It is submitted that the wife did

not have an opportunity to tender evidence as the court was on leave on some of the dates of hearing and when the wife did not appear before the court on one of the dates of hearing, the Family Court closed the evidence on the side of the wife. The learned counsel for the wife relied on the judgments, reported in 2010 (1) Mh.L.J. 735 (Mrs. X v Mr. Y) and 2007 (6) Mh.L.J. 277 (Parbhat s/o Shekuba Pawar v. Swati @ Pushpa w/o Parbhat Pawar) to substantiate his submission that both the factum of separation and *animus deserendi* must be proved to establish desertion.

6. Shri Puri, the learned counsel for the husband, supported the judgment of the Family Court. It is submitted that the wife was residing away from the matrimonial home from 11/08/2008 for nearly five years till the husband filed a petition for divorce on the ground of cruelty, desertion and the unsoundness of mind of the wife. It is submitted that though the husband had issued two notices to the wife, dated 07/06/2011 and 20/06/2011 at exhibits-25 and 26 informing the wife that she should agree for the decree of divorce by consent, as she was not ready to join his company despite his best efforts, the wife did not reply to the said notices and also did not join the company of the husband. It is submitted that the husband has proved by his evidence that he had made serious efforts through his family members and also

personal efforts to ensure that the wife returns to the matrimonial home. It is stated that when the husband went to the parental house of the wife for bringing her back, the mother of the wife insulted the husband, ill-treated him and sent him back. It is submitted that in the circumstances of the case, the Family Court has rightly granted the decree of divorce in favour of the husband.

7. On a perusal of the record and proceedings and after hearing the parties, it appears that the following points arise for determination in this family court appeal:-

(I) Whether the husband has proved that the wife had deserted him without any just or reasonable excuse?

(II) Whether the husband is entitled to a decree of divorce on the ground of desertion?

(III) What order?

8. Firstly, it would be necessary to consider whether the matter is liable to be remanded to the Family Court for granting an opportunity to the wife to tender the evidence. It appears from the record and proceedings that on 16/04/2015, the evidence on the side of

the husband was closed. The matter was adjourned to 23/04/2015, when the wife filed an adjournment application. In the said adjournment application at exhibit-48, the wife requested the court that the case be adjourned, as she desired to change the counsel. It was stated in the application that the counsel for the wife was a little too busy and therefore, she wanted some time to change the counsel. Time was granted and the matter was fixed on 09/06/2015. The matter was adjourned from time to time because the court was vacant. But neither the wife nor her counsel remained present in the court on the dates of hearing. On 18/09/2015, the Family Court directed that the matter be proceeded without the evidence of the wife. Despite this order, neither the wife nor her counsel remained present in the court when the matter was listed for hearing. It is necessary to note that since the wife was continuously remaining absent on almost every date of hearing after 09/06/2015, the Family Court issued a notice, dated 16/01/2016 at exhibit-49 to the wife, asking her to remain present in the court or else the judgment would be rendered in the petition filed by the husband in the absence of the wife. We have perused the record. The said notice at exhibit-49 was received by the wife but still the wife remained absent on 06/02/2016. Neither the wife nor her Counsel remained present in the court on 06/02/2016 despite the service of the notice at exhibit-49 on the wife. The failure on the part of the wife and her counsel to remain present on 06/02/2016 and even thereafter rightly made the

court believe that the wife was not interested in defending the petition filed by the husband. The Family Court then passed the judgment on 29/02/2016. It cannot be said in the aforesaid set of facts that the wife was not granted an opportunity to tender the evidence in the case. Ample opportunity was granted to the wife by the Family Court to remain present in the court and tender the evidence but the wife did not avail of the opportunity and the wife and her counsel remained absent on several dates of hearing before the Family Court. Despite the service of notice at exhibit-49, the wife failed to remain present. The Family Court was left with no other alternative but to decide the case in the absence of the evidence of the wife. Though an order was passed against the wife on 09/06/2015 to proceed without her evidence, no efforts whatsoever were made by the wife till the petition was decided by the judgment dated 29/02/2016. In the circumstances of the case, the matter cannot be remanded to the Family Court for granting an opportunity to the wife to tender the evidence. The family courts are heavily burdened with several matrimonial matters. The matters cannot be remanded to the family court on the mere asking of the parties and only because the parties are negligent and fail to avail the opportunity, despite the grant of the same.

9. The pleadings in regard to the desertion are very brief. The husband has pleaded in the petition that while the wife was

undergoing the treatment in the clinic of Dr. Parsodkar for her mental ailment, the mother of the wife created a great scene and drama in the matrimonial home and took the wife to the parental home on 11/08/2008. It is pleaded that the husband and his family members attempted on several occasions to bring back the wife to the matrimonial home. There is reference in the pleadings about the service of the two notices on the wife dated 07/06/2011 and 20/06/2011 and that the notices were not replied by the wife. It is pleaded that the wife was not desirous of living in the matrimonial home and hence the husband was entitled to a decree of divorce on the ground of desertion. It is pleaded that the wife had deserted the husband without any just or reasonable excuse and she was residing separately in the parental home from 11/08/2008. The wife has denied the allegations levelled by the husband against her in respect of desertion, in her written statement. It is pleaded that the mother of the wife had taken her to her parental home so that her health should improve. It is pleaded that the mother of the wife had objected to the preparation of false documents by the husband in respect of her medical ailment and, therefore, she was taken back to the parental home. The wife admitted that she was residing separately from 11/08/2008. The wife pleaded that she was ready for cohabitation and the husband may be directed to take her to the matrimonial home.

10. The husband entered into the witness box and reiterated the facts stated by him in his examination-in-chief. The husband was cross-examined on behalf of the wife. The husband denied in his cross-examination that because of the abnormal behaviour of the wife, he had deserted her. The husband admitted that after he had issued the notice dated 05/06/2013, he had received the reply of the wife to the notice. The husband admitted that he had not gone to the wife's house to fetch her back. The husband admitted that the wife was ready to cohabit with him. The husband denied that after levelling allegations against the wife about her abnormal behaviour, he had driven her out of the matrimonial house. The husband had not examined any other witness and the wife had not entered into the witness box. The Family court, rightly appreciated the evidence tendered by the husband on record to hold that the husband was successful in proving that the wife had deserted him without any just or reasonable excuse. The Family Court found that admittedly the wife was residing in her parental home from 11/08/2008. The Family Court found that there was no cohabitation between the parties after 11/08/2008. Though the wife had claimed that the husband and his family members were demanding dowry and money from her and were ill-treating her for non-fulfillment of the said demands, the wife did not enter the witness box to prove her case. There is no complaint or any other document on record to show that the husband and his family members indeed demanded dowry from the

parents of the wife. The Family Court found that there was nothing on record to show that there was reasonable and justifiable cause for the wife to stay away from the matrimonial home for five years. The Family Court observed that the wife had pleaded in her written statement that she was ready to cohabit with the husband, however, she had not filed any counter claim to show that she really intended to reside with the husband. It was found that the wife had never filed any proceedings during the period of five years for the restitution of conjugal rights. The husband had admittedly served notices on the wife dated 07/06/2011 and 20/06/2011 informing her that despite the best efforts made by him and his family members, the wife was not ready to join his company and, therefore, it was necessary for the wife to agree for a decree of divorce by consent. The wife, for the reasons best known to her, did not reply to the said notices. Several facts are stated in these notices to show that the husband had made genuine efforts to ensure that the wife returns to the matrimonial home. The wife, however did not reply to the notices served by the husband in the year 2011 and also did not make any efforts to join his company. There is nothing in the written statement of the wife to show that the wife had made any concrete efforts to join the company of the husband during the period of five years, after she left the matrimonial home on 11/08/2008. It is not the case of the wife that though she went to the matrimonial home after 11/08/2008, she was not permitted to enter the same. The Family

Court, therefore, rightly came to the conclusion that the husband had made sufficient efforts to ensure that the wife returns to the matrimonial home but there was no positive response from the wife. The Family Court, therefore, rightly held that there was no just or reasonable excuse for the wife to leave the company of the husband. The Family Court, therefore, recorded a finding that the wife had deserted the husband without any just or reasonable excuse. In the circumstances of th case, it cannot be said that the Family Court has considered only the factum of desertion and not the factum of *animus deserendi*, as is submitted on behalf of the wife. The finding recorded by the Family Court on the issue of desertion is just and proper and does not call for any interference. The judgments reported in 2010 (1) Mh.L.J. 735 and 2007 (6) Mh.L.J. 277 and relied on by the learned counsel for the wife cannot be made applicable to the case in hand.

11. Since the Family Court was justified in the circumstances of the case, in granting a decree of divorce on the ground of desertion, the judgment of the Family Court cannot be interfered with. The family court appeal is dismissed with no order as to costs.

JUDGE

JUDGE

KHUNTE/WADKAR