**S. Vs. Y.**

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**Court** : Mumbai

**Decided On :** Aug-23-2013

**Judge** : A.S. Oka &Amp; G.S. Patel

**Appeal No.** : Family Court Appeal No.29 of 2003

**Appellant** : S.

**Respondent** : Y.

**Judgement** :

G.S. Patel, J.

1. This is an appeal by the original Respondent before the Family Court, the wife, against the original Petitioner, the husband. The order under challenge is dated 31st October 2002 in Petition No.A-40 of 2000 filed by the husband for a decree of divorce on the grounds of cruelty and desertion, and for custody of their son, then a minor. Before the Family Court, there was also a counter-claim by the wife for restitution of conjugal rights.

2. We have consciously masked the parties names from the title of this judgment. During the course of hearings, we asked Learned Counsel for the parties whether there was any possibility of an amicable settlement. We were told that the wife did not wish to take a divorce, even by mutual consent; she saw this as a stigma. This is unfortunate and regrettable, but we must respect her views. That said, we felt it would be even more traumatic if, after hearing parties, we were to find for the

husband against the wife, and uphold the decree of divorce. Our findings might well prey far more on the mind and emotions of the wife than a decree for divorce by mutual consent. That our orders and judgments are now very much in the public domain and are publicly accessible on the website of the High Court - a situation that cannot be changed to allow only selective matters to be uploaded - would only exacerbate the problem. Indeed, we are of the view that in all matrimonial disputes, and particularly in those where there are children involved, courts should as a matter of inflexible practice, refer to parties only by initials and mask their true identities. It sometimes happens that not only our decisions, but even exchanges between Bar and Bench are widely reported in the media, very often for reasons that are merely salacious and have little or nothing to do with findings in law. The law permits courts to handle such cases in privacy: there are provisions, for instance, for in camera hearings (Sn.11 of the Family Courts Act, 1984). The purpose of such provisions is not far removed from our present objective: these are all personal matters, often touching issues of profound intimacy and privacy. These should, we believe, remain between the parties. We must decide the cases that come before us according to law, but if we can do so without harming the personal sentiments, privacy and deep-seated beliefs of individuals, then that it is an endeavour we believe we are equally duty-bound to make. We have, therefore, taken this step of keeping their identities from public view. We believe this should be the norm in all family court matters that come before a court of record.

3. The parties were married on 28th November 1993 in Mumbai following Hindu Vedic Rites and Customs. For a short while thereafter, they lived together as man and wife at Bandra in Mumbai. They have a son, born on 20th May 1996.

4. Central to the husbands case before the Family Court on the grounds of both cruelty and desertion is the matter of a separate residence, i.e., a matrimonial home away from the husbands parents. Y claims that well before the marriage S had been told that they would have to stay in the same house as his aged parents (especially since his father had a heart condition) and his younger brother, then a student, and that S expressly agreed to this.

5. Following their marriage and a honeymoon in Ooty, the parties returned to Mumbai and lived together as man and wife at Ys house in Bandra, which they shared with his parents. Both S and Y had full-time jobs, but had taken a months leave and spent that time together in Mumbai, resuming work in January 1994. Y was then a clerk with Corporation Bank while S worked with the Life Insurance Corporation. They would both leave in the morning, S an hour after Y, returning home only late in the evening.

6. Ys allegations of cruelty are, broadly, four: first, that S refused to assist her mother-in-law in household chores; second, that she did not contribute any part of her salary towards household expenses; third, that she constantly demanded a separate residence, and frequently left the matrimonial home to stay with her parents; and fourth, that she neglected their son in his infancy. The attitude of the wife, Y says, was a source of constant stress and tension in the home and affected his fathers health.

7. Y says that very soon after their marriage and honeymoon, S began demanding a separate residence, away from his parents. These demands, he says, grew in intensity and frequency. Y finally gave in: he took a housing loan and booked a flat in a building then under construction. Even this, he says, was not enough for S; she demanded that while the building was being completed, they move into temporary accommodation elsewhere, something that Y says was altogether beyond his means. Ys testimony on this was not shaken in cross-examination. It emerged at the trial that both spouses contributed to the down payment for the new house, but at some stage, Y returned the money put in by S. Ys mother corroborates his testimony on the issue of a separate residence, saying that she, too, suggested that the young couple move to a place of their own.

8. Y also says that after their son was born, S did not look after him, preferring to keep him in a crche rather than leave him at home with Ys mother. He also claims that S refused to breast feed the infant, and that she refused to care for the infant. S denies all these allegations, both in her pleadings and in her evidence; and while she says that she did in fact place the child in a crche, this was only because she believed that Ys parents were incapable of looking after one so young. She also

makes counter-allegations against Y, deploring his habits and preferences: he preferred spending time with his friends rather than with her and the family, he smoked and drank heavily and, after work hours, accepted engagements for mimicry shows in hotels and elsewhere, taking time away from the family. Of these allegations by S, beyond her testimony and pleadings - some of the latter are aggressively worded - there is nothing by way of actual evidence.

9. That cruelty in matrimonial law is undefined, and lends itself to myriad interpretations, each dependent on its factual context, is now well-settled (Ravi Kumar v Julmi Devi, (2010) 4 SCC 476). We must see if there is evidence of some course of conduct sufficiently grave, beyond the vicissitudes of daily life, as would make it impossible reasonably to expect the complaining spouse to live with the other. There is no longer any legal requirement of proof of apprehension of harm, injury or physical violence (ManishaTyagi v Deepak Kumar, (2010) 4 SCC 339). Much of the evidentiary material is, of necessity, inferential. One partys inability to fully compromise and adjust may not, per se, constitute cruelty. It is true that cruelty sometimes walks in silence. It may, in a given case, be no more than a persistent attitude wholly inimical to the relationship (A. Jayachandra v Aneel Kaur, (2005) 2 SCC 22). We find no such evidence here. We must balance the evidence of Y and his mother against the refutations of S.

10. Ys allegations of cruelty by Y appear to us to be either trivial, or insufficiently established. There are allegations and counter-allegations, but little by way of substantive evidence on either side. We note that though, in his Petition, Y alleges that these acts of what he calls cruelty began almost at once, the Petition also indicates that they were not so serious as to cause a disruption in relations, for two years later, in 1996, their son was born. In her Written Statement and Counter-Claim (for restitution of conjugal rights) before the Family Court, S denied the allegations made by Y. The evidence led by Y, examining himself and then his mother, does not seem to us to carry the case further. There are allegations, for instance, that S did not share the burden of household chores, and that she did not contribute any part of her salary to meet household expenses. S denies these in her pleadings and in her evidence. We do not think Ys allegations, stated in generalities, can ever be said to constitute cruelty of so egregious a nature as

would warrant, on their own, the severance of matrimonial ties. Before the Trial Court it was contended that S had not fully adjusted to life with Ys family in the joint family home. We are unable to appreciate such a submission. Adjustment in a marriage is never a one-way street; in a joint family, it demands accommodation and adjustment from all sides. It would, in our assessment, be singularly unjust, and even implausible, to attribute a failure of adjustment to S alone. It is equally possible that she is right in her contention that Ys mother was far too rigid and conventional in her own thoughts and habits, and that Y, for his part too, was unwilling to adapt to Ss legitimate needs and desires. The material before the court was insufficient to arrive at any positive conclusion of matrimonial wrongdoing on Ss part on this score. The Trial Court was right in finding itself unable to accept Ys allegations about Ss conduct in the family in other respects such as participating in household chores. Mr.Warunjikar, Learned Counsel for the Appellant, S, is justified in contending that, having rejected the other allegations of cruelty, the Trial Court was overly swayed only by Ys allegations of S demanding a separate residence. The judgment under appeal appears to accept that this was itself an act of mental cruelty. This seems to us to be unwarranted. What the Trial Court seems to have overlooked is that notwithstanding that Y may have, before marriage, made it clear that there was no question of a separate residence, his view on this did alter. He did book another apartment. Even his mother deposes to this, claiming that she, too, believed that a separate residence was best for the couple. When, according to Y, did Ss demands for a separate residence begin? He says almost at once, just a few months into the marriage. But some time later, he paid the earnest money for a new apartment. S contributed to this from her own savings. There was, therefore, an agreement of sorts between husband and wife, to live separately. On its own, this wholly undermines Ys case of the demand for a separate residence being an act of cruelty. It is, on the contrary, little more than an allegation retrofitted to make out a non-existent case. Further: a little short of three years after their marriage, S and Y had a son. The trajectory of this marriage does not, therefore, indicate that Ss wanting a separate residence was seen by either Y or his parents as fatal to the marriage. Demanding privacy - and there is evidence that this was admittedly lacking in the confined spaces of the matrimonial home - and a separate residence is not, per se, an act of cruelty, even mental cruelty or

emotional trauma. We must gauge how the parties responded to this. In this case, Mr.Warunjikar is correct in his contention that on the pleadings and evidence and looking to the conduct of the parties, it is not possible to hold in favour of the husband on the ground of cruelty on this ground.

11. Ys Petition also seeks divorce on the grounds of desertion. Here, his case is that on 24th January 1997, when their son was but seven months old, S left the matrimonial home and has not since shown any intention of resuming cohabitation. Y claims that from the time S left the house, their son has been in his custody and care, and that he has brought up their son as a single parent. Ss response is that on that day, she did not leave the house but was driven out by Y, who accompanied her to her parents house and left her there. She claims she has often tried to return, but has not been allowed to do so by Y; and that she has often attempted a reconciliation, including with the intercession of her sister, but that all efforts have been unfruitful.

12. On its own, and shorn of context, this evidence might again have been incapable of unequivocal assessment, but for the attendant circumstances. Beyond her bare word, there is no evidence that S ever attempted to resume cohabitation. Y filed his Petition for divorce on 18th December 1999. S received the summons on 12th May 2000. The parties were referred to the marriage counsellor. On 18th August 2000, the counsellor reported that a reconciliation was not possible. On 19th January 2001, well over a year after the Petition was filed, and a little over two years after S left the matrimonial home, she filed her Written Statement and included a Counter-Claim for restitution of conjugal rights. This is the first time that we see any positive statement by S in support of her case for restitution of conjugal rights. It comes far too late in the day to be of any assistance to S or to lend any weight to her testimony that she always sought reconciliation and restitution of conjugal rights. Against this, it is uncontroverted that the S has been away from both Y and, more importantly, her son from his infancy. Till the time she filed the Counter-Claim, there is nothing to indicate that she ever attempted to resume cohabitation.

13. There is also, importantly, the reference in paragraph 32 of Ss Written Statement and Counter-Claim to her sister who, she says, attempted to bring about a rapprochement. This might have tilted the evidentiary balance, but for the fact that S did not call her sister as a witness at all. No explanation is given, even now, as to why her sister could not be called to give evidence. An adverse inference is inescapable: that there were, in fact, no such attempts at reconciliation by Ss sister, and, by necessary extension - since S makes this averment to support her contention that she has always been willing to resume cohabitation but has not been allowed to do so - that there were no such attempts by S at all. Even if the burden of proof does not lie on a party, a court may draw an adverse inference if the party who relies on a certain state of affairs [withholds] from the court the best evidence that could throw light upon the issues in controversy (GopakKrishnaji Ketkar v Mahomed Haji Latif and Ors., AIR 1968 SC 1413).

14. There is no reliable evidence that S was driven from the matrimonial home; only that after 24th January 1997 she has not resided there. Beyond her word, there is no evidence of her making any attempt to resume cohabitation. At the time of the separation, the son was just seven months old. Let us assume that what S says is true: that she was driven from the home and not permitted to return, despite every effort to do so. On her own admission, she is an educated working lady of some means. It would be reasonable to expect that, had her case been true, she would have filed a petition for restitution of conjugal rights. She did not. It was only after Y filed for divorce and the mandatory attempt at counselling and reconciliation had failed that she filed an action for restitution of conjugal rights in the form of a Counter-Claim. Ss case proceeds on the basis that Ys conduct was such that she was driven from the matrimonial home; quite literally, for she alleges that it was he who threw her out by taking her to her parents residence and leaving her there. Throughout her pleadings and testimony, S has portrayed her husband in the darkest of hues, all culminating in her eviction at his hands from the matrimonial home. Were any of this to have credence, we should have expected to find evidence of it in the way she conducted herself vis--vis Y. All we have, instead, is a very belated attempt to mount a claim for restitution of conjugal rights. The conclusion is inescapable: S clearly preferred to stay away from the matrimonial home, her husband and his family even at the cost of being separated

from her son. It is impossible to resist the conclusion of desertion by Y or to expect any greater evidence of the animus deserendi essential to establishing desertion(SavitriPandey v Prem Chandra Pandey, (2002) 2 SCC 73).

15. On this, the decision of the Trial Court is flawless, and we cannot agree with Mr.Warunjikar when he says that S had no intention to break the matrimonial tie, or that this is a case of mere separation, but not desertion. As a general proposition in law, that separation is not equivalent to desertion, Mr.Warunjikar is correct. But desertion, it is now settled, can also be constructive and inferred from the attendant circumstances (SavitriPandey, supra.). In this case, however, this proposition is of no assistance to S. Mr.Patil, Learned Senior Counsel for the Respondent, Y, is justified in his submission that this is not a case of the wife merely separating, or doing so for a brief period; it is a case of complete abandonment of the matrimonial home and, more importantly, her infant son. The Trial Court, he points out, correctly noted that S made no attempt to take her son with her; this is not even her case, and there is no evidence of it. There is also the matter of her much-delayed claim for restitution of conjugal rights (almost exactly two years after the divorce Petition was filed), another circumstance noted by the Trial Court in finding against the appellant. As far as S is concerned, there can be no doubt about either the fact of separation or her intention to cease cohabitation permanently. The record indicates that this permanent separation was without Ys consent and there is nothing to show that his conduct forced S out of the matrimonial home. The four elements required to establish desertion thus all exist: (a) the factum of separation; (b) the deserting spouses intention to cease cohabitation permanently; (c) Ys lack of consent; and (d) the absence of any evidence that his conduct forced S out of the matrimonial home. Mr.Warunjikars reliance on the decisions of the Supreme Court in BipinchandraJaisinghbhai Shah v Prabhavati (AIR 1957 SC 176) and LachmanUtamchand Kirpalani v Meena (AIR 1964 SC 40) are therefore of no assistance to him. The constituents of desertion required by law, as enunciated in those decisions, all exist in the present case.

16. We do not believe that Mr.Warunjikars next submission, that there can be no desertion where the separated spouse attempts to rejoin the matrimonial home but is prevented from doing so, is a correct statement of the law. Once desertion is

established, the deserted spouse is under no obligation to appeal to the other to change his or her mind. Even if the former takes no steps to effect a reconciliation, he/she can still press for reliefs. As long as the deserting spouse shows no sincere attempt at a reconciliation, he or she must be presumed to continue in desertion. It is another matter if the deserted spouse obstructs attempts at reconciliation or makes it plain that should any such attempt be made, it would be only rebuffed; that might lend a different complexion to the matter (Indeed, this is the ratio of LachmanUtamchand Kirpalani, supra, cited before us by Mr.Warunjikar, though in support of another proposition). Sincerity demands proof, and in the present case, we have no evidence of it from S. Mr. Warunjikar cited additional authorities inter alia contending that the burden is on the deserted spouse to establish the factum of desertion. We find that that burden has been established, and these authorities do not, therefore, assist Mr.Warunjikar (RohiniKumari v Narendra Singh, AIR 1972 SC 459; DharmendraKumar v Usha Kumar, AIR 1977 SC 2218; SandhyaKumar Agarwal v Nandini Agarwal, AIR 1990 SC 594; ChetanDass v Kamla Devi, AIR 2001 SC 1709; AdhyatmaBhattar Alwar v Adhyatma Bhattar Sridevi, (2002) 1 SCC 308). Given that we have found in favour of Y, we need only note Mr.Patils submissions supporting the impugned judgment and order, to the effect that leaving the infant and not participating in his upbringing, both in themselves constitute acts of cruelty; we do not think this submission needs further consideration in the view we have already taken as regards the ground of desertion.

17. At the early stages of the legal battle between husband and wife, there were also proceedings for access by S to their son. An interim order for access was confirmed in the impugned order and judgment. Both parents have, at least for their sons sake, conducted themselves with restraint and dignity in the time that followed: S visited her son every weekend at Ys house, and, we are told, even took him on short holidays. That order of access is, by now, almost academic. S and Ys son is today a young man of about 17, on the threshold of adulthood. He has admission to a college and plans to study engineering. It is unfortunate that he was denied the comfort and strength of a united family in his formative years. We note this only in passing, expressing our regret that, despite our every effort, we were unsuccessful in bringing about a mutually acceptable resolution, one that

would have avoided us having to come to a finding against S.

18. It is now almost twenty years since the parties were married. The Family Court proceedings began in 2000. The impugned order and judgment is of 2002, the appeal of 2003. By the time the Petition was filed in late December 1999, and certainly by the time S filed her Written Statement and Counter-Claim, the marriage had ended in all but name. Counselling and attempts at reconciliation had failed. It is far too late for S to step back into the stream of a marital bond; those waters have moved on. The parties are not to be blamed for this delay; we are. Had this Appeal been decided within a reasonable time, perhaps things might have been different. The vagaries of litigation have only added to the parties misery. Our courts have repeatedly held that marriage and families are essential to the fabric of our society. We understand this to mean, among other things, that courts must address these matters at the earliest and not leave them lingering for a decade or more. A concerted effort by the judiciary and the legislature to devise a mechanism to achieve this is, we believe, imperative, if parties are not to be left only with the fragments of what might once have been.

19. The appeal is therefore partly allowed. To the extent that the impugned judgment and order dated 31st October 2002 decreed Ys Petition on the ground of cruelty under Section 13(1)(i-a) of the Hindu Marriage Act, it is quashed and set aside. However, the decree of divorce is confirmed on the second ground of desertion under Section 13(1)(i-b) of the Hindu Marriage Act. There will be no order as to costs.