



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF MAY, 2023

PRESENT

THE HON'BLE MR JUSTICE ALOK ARADHE

AND

THE HON'BLE MR JUSTICE ANANT RAMANATH HEGDE

MISCELLANEOUS FIRST APPEAL NO. 5882 OF 2016 (FC)

BETWEEN:

SMT G GEETHA
AGED ABOUT 30 YEARS
W/O K.M.APPOJIGOWDA
D/O SRI GOVINDAPPA
RESIDENT OF PAREHOSAHALLI,
KAMADENUHALLI POST-563 103
HUTHUR HOBLI
KOLAR TALUK AND DISTRICT.

...APPELLANT

(BY SRI. GIRIDHAR H.,ADVOCATE)

AND:

SRI K M APPOJIGOWDA
AGED ABOUT 38 YEARS
S/O MUNIVENKATAPPA
RESIDENT OF KALLIKUPPA VILLAGE
T.GOLLAHALLI POST
BETHAMANGALA HOBLI
BANGARAPET TALUK
KOLAR DISTRICT - 563 114.

...RESPONDENT





(VIDE ORDER DATED 20.04.2023 NOTICE TO RESPONDENT HELD SUFFICIENT)

THIS MFA IS FILED U/S.19(1) OF THE FAMILY COURT ACT PRAYING TO CALL FOR RECORDS IN M.C.NO. 73/2014 ON THE FILE OF THE LEARNED PRINCIPAL JUDGE, FAMILY COURT AT KOLAR AND SET ASIDE THE JUDGMENT AND DECREE DATED 05.07.2016 CONSEQUENTLY, DISMISS THE PETITION FILED BY THE RESPONDENT SEEKING DECREE OF DIVORCE.

THIS APPEAL, COMING ON FOR FINAL HEARING THIS DAY, **ANANT RAMANATH HEGDE J.**, DELIVERED THE FOLLOWING:-

JUDGMENT

This appeal under Section 19(1) of the Family Court Act, 1984 is filed impugning the judgment and decree dated 05.07.2016 passed in M.C.No.73/2014 on the file of the Principal Judge, Family Court at Kolar. Initially, the respondent-husband filed the petition in M.C. No.13/2012 on the file of the Senior Civil Judge, Kolar. After the establishment of the Family Court, the case is transferred to the Family Court at Kolar. The petition seeking dissolution of marriage on the ground of cruelty and



desertion is allowed and the marriage of the parties is dissolved.

2. Aggrieved by the aforesaid judgment and decree, the appellant-wife is before this Court. The respondent-husband though served has not appeared.

3. Heard the learned advocate appearing for the wife and perused the records.

4. For the sake of convenience, the parties to the proceeding, are referred to as husband and wife.

5. The brief facts of the case can be summarised as under:

The husband contends that the marriage was solemnised on 21.02.2002 at the instance of the maternal uncle of the wife. The husband's parents were not informed about the marriage. After the marriage, the husband started residing with the wife in her parents'



house. The wife who was studying II PUC at the time of marriage, expressed her desire to pursue her studies and the husband allowed the wife to pursue her studies. After completion of the B.Ed course, the wife joined Suguna Educational Institution as a teacher and thereafter the wife did not join the company of the husband. It is also the contention of the husband that a child was born to the wife on 11.09.2006. It is alleged that the wife was not taking care of the husband and he was treated with cruelty by the wife. It is also alleged that the wife was insisting the husband to give money as she believed in spending lavishly. It is further alleged that the wife withdrew from the company of the husband for no reason. On these grounds, the husband has sought for dissolution of the marriage.

6. The wife denied the allegations in the petition. The wife contends that after the marriage she wanted to pursue her studies and accordingly with the consent of the husband she had joined the B.Ed course. It is also her



contention that both the husband and wife stayed together in Sundarapalya where the wife was pursuing her B.Ed course. It is stated that from the wedlock a child was born on 11.09.2006, that after completion of the course she had joined Suguna Educational Institution as a teacher. The wife contends that the husband started ill-treating her and he forcibly made her to go out of the house with the child and it is for this reason that the wife had to live separately though she wanted to live with the husband. It is also her defence that she always wanted to stay with her husband and continue the marital relationship and therefore she has prayed for the dismissal of the petition.

7. The husband got himself examined as PW.1 and also examined two witnesses PWs.2 and 3 and produced five documents which are marked as Exs.P-1 to P.5. The wife in support of her contentions has examined herself as RW.1 and marked three documents, Exs.R1, C1 and C2. The Family Court, on consideration of the materials on



record, has concluded that the husband has proved cruelty as well as desertion and consequently allowed the petition.

8. The learned counsel for the wife would submit that the specific instances of cruelty have not been spelt out in the pleading and even the pleading relating to desertion is also lacking in requisite particulars to attract the desertion under the Hindu Marriage Act, 1955. It is urged that it is not the case of the husband that the wife is residing separately to end the marital relationship and she has been staying separately for more than two years before the institution of the petition. It is further urged that the Family Court has not appreciated the oral and documentary evidence on record and the applicable law in proper perspective which resulted in miscarriage of justice.

9. This Court has considered the contentions raised by both parties and perused the materials placed on record.



10. It is well-settled law that a petition seeking dissolution of marriage on the ground of cruelty should contain specific instances of cruelty. ***Neelam Kumar Vs. Daya Rant***¹. The Apex Court in the aforementioned case has held that desertion means the intentional abandonment of the spouse by the other without the consent of the other and without a reasonable cause. It has further been held that deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. It has also been held that in other words, there should be *animus deserendi* on the part of the deserting spouse.

11. As far as the plea of desertion is concerned, the import of the expression 'desertion' found in Section 13(1)(i-b) of the Hindu Marriage Act is considered by the Apex Court in the case of **LACHMAN**

¹ (2010)13 SCC 298



UTAMCHAND KIRIPALANI Vs. MENA @ MOTA² which has been followed in **DEBANANDA TAMULI Vs. KAKUMONI KATAKY**³ and the Apex Court has held that desertion means the intentional abandonment of the spouse by the other without the consent of the other and a reasonable cause. It has further been held that a deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. It has also been held that in other words, there should be *animus deserendi* on the part of the deserting spouse.

12. Insofar as cruelty is concerned, the Apex Court in the case of **NEELAM KUMAR vs DAYA RANI**⁴ has held that the cruelty under Section 13(1)(i-a) of the Hindu

² AIR 1964 SC 40

³ (2022)5 SCC 459

⁴ (2010) 13 SCC 298



Marriage Act, 1955 has to be pleaded and proved by leading acceptable evidence.

13. Keeping in mind the aforementioned principles the correctness of the impugned judgment and decree is examined.

14. The pleading relating to desertion in the petition is extracted here as under:

" 7. It is humbly submitted that as the husband had voluntarily withdrawn from the society and company of the petitioner and living on her own accord. As the petitioner had suffered humiliation, mental agony, at the hands of the husband with a fond hope that good sense will prevail and the husband may change her attitude, but in vain."

15. The husband contends that the wife was staying in a hostel while she was pursuing her B.Ed Course and to substantiate this contention the husband has examined the employee of the said hostel where the wife was



residing at the time of pursuing her B.Ed course. The Secretary of Ravi Vidya Samsthe, who was examined as PW.2, did not support the case of the husband. Thus the attempt to prove desertion on the ground that the wife stayed in the hostel also has failed. It is also relevant to note that the wife delivered a child on 11.09.2006 when she was pursuing her B.Ed course. This again would establish the fact that the husband and the wife were cohabiting and were living together and the contention that the wife was not cohabiting with the husband gets demolished. It is also relevant to note that the Family Court has given a finding that the husband is the father of the child.

16. In the instant case, as already noticed, specific instances of cruelty are not pleaded and there is no evidence in this regard. The Family Court has paid much attention to the DNA Report which is said to be produced in a proceeding between the parties where the present wife is seeking maintenance. The Family Court has



referred to that report and has concluded that the DNA Report cannot be accepted and the child born to the wife is presumed to be the child of the husband. The Family Court has also taken into consideration the fact that the husband has accepted the child and he was living with the child along with the wife, however, while allowing the petition, the Family Court has concluded that desertion must be inferred from the facts of the case.

17. The evidence placed on record would not give any such inference as to desertion. On the other hand, the petition would indicate that the wife and the husband stayed in Sundarapalya when she was pursuing her B.Ed course and thereafter both of them were cohabiting till March 2008 and when the husband forced the wife out of the house she had to inevitably stay away from him. Since the husband forced the wife to go away, the act of the wife living separately cannot be construed as an act of desertion to put an end to the marital relationship. It is the husband who has forced the wife to live apart.



18. In these circumstances, this Court is of the view that the finding of the Family Court that there is desertion on the part of the wife is an erroneous finding and the finding that the desertion could be inferred is also erroneous. The decree for divorce cannot be granted by inferring desertion. The desertion must be pleaded and proved with cogent evidence. As already noticed, no evidence is produced to support the finding.

19. This Court has perused the pleading relating to cruelty. Hardly there is any pleading to attract the ground of cruelty under Section 13(1)(i-a) of the Hindu Marriage Act, 1955. No specific instance of cruelty is pleaded and proved. It is also relevant to note that in the impugned judgment, the Family Court has hardly discussed anything about alleged cruelty. The finding of the Family Court is predominantly on the ground of desertion. However, in the operative portion of the order the Family Court has held that the husband has proved the grounds under Section 13(1)(i-a) and (i-b) of the Hindu Marriage Act,



1955. For the reasons discussed supra, the impugned judgment and decree are to be set-aside.

Hence, the following:

ORDER

- (i) The impugned judgment and decree dated 05.07.2016 in M.C.No.73/2014 by the Principal Judge, Family Court, Kolar are set aside.
- (ii) Consequently, the petition in M.C.No.73/2014 on the file of Principal Judge, Family Court, Kolar is dismissed.
- (iii) The appeal is allowed without costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**