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2022 PLRonline 590

HIGH COURT OF KARNATAKA AT BENGALURU

Justice Alok Aradhe and Justice S. Vishwajith Shetty.

**S. Shyamala @ Kathayayani v. B.N Mallikarjunaiah.**

Miscellaneous First Appeal 3352 of 2016

14.03.2022.

**Hindu Marriage Act, 1955, Section 13(1)(ia) - Cruelty - Mere filing of a criminal case itself cannot be termed as “cruelty”.**

For the purpose of Section 13(1)(ia) of the Act, “cruelty” could be wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society, to which the parties belong, their social values, status, environment in which they live. Cruelty need not be physical. If from the conduct of the spouse it is established or an inference can be legitimately drawn that the treatment of the spouse is such that it causes apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. [Para 10]

**Hindu Marriage Act, 1955 - Section 10(1)(a) - Desertion - Having regard to the nature of the allegations made by her in the complaint filed by her for the offences punishable under Sections 498- A, 323, 504, 506 read with Section 34 of IPC and Sections 3 and 4 of the Dowry Prohibition Act, 1961, it cannot be said that the wife had no valid reason to leave the company of the husband - It has been the specific defence of the husband in the criminal case that after filing of the criminal complaint, his wife has been sending him messages conveying her willingness to join him - Cannot be said that the wife had deserted the husband to put an end to the marital relation and cohabitation - Husband has failed to prove that the wife had intention to put an end to the marital relation and cohabitation and on the other hand, the material on record would go to show that she and her family members had made all efforts to join the husband, but they were all in vain. [Para 19]**

**Hindu Marriage Act, 1955, S. 13(1)(ia) and (ib) - Irretrievable failure of the marriage - Family Court granted decree of divorce observing that the marriage between the parties has been irretrievably broken down and the parties have been living separately for more than 9 years - Decree of divorce on the ground**

**of irretrievable failure of the marriage can be granted only by the Hon'ble Supreme Court in exercise of its powers under Article 142 of the Constitution of India and not by any other courts. [Para 22]**

THIS APPEAL COMING ON FOR FINAL HEARING, THIS DAY, **VISHWAJITH SHETTY J.**, DELIVERED THE FOLLOWING:

This miscellaneous first appeal under Section 19 of the Family Courts Act, 1984 has been filed by the wife challenging the judgment and decree passed by the court of IV Additional Principal Judge, Family Court at Bangalore, dated 15th March 2016 in M.C.No.3584/2011 wherein the petition filed under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (for short hereinafter referred to as "the Act") by the husband was allowed.

2. Brief facts of the case that would be relevant for the purpose of disposal of this appeal are: The marriage of the appellant-wife with the respondent-husband was solemnized on 24.03.2002 at Gurukula Kalyana Mantapa, Tiptur as per Hindu rites and customs and from the said wedlock, they have a female child, who was born on 18.06.2003. The respondent had approached the Family Court, Bangalore, seeking dissolution of the marriage contending that the appellant was demanding for setting up a separate house immediately after the marriage. It is his case that he lived with his widowed mother and a younger brother in his house and he had the responsibility to look after them and therefore, he had rejected the demand of the appellant for setting up a separate house. It is contended by him that the wife was in a habit of quarreling with his family members for no reason and she used to leave the matrimonial house and go to her sister's house and mother's house without informing him or his mother or brother. Because of this behaviour and conduct of the wife, his life was made miserable. It is further contended by him that in the month of January 2007, the appellant-wife without informing him left the matrimonial home along with the child and thereafterwards she did not return back, though he had made several requests to her. He thereafterwards got issued a legal notice dated 12.04.2007 and the appellant issued a untenable reply to the same. Subsequently she lodged a criminal complaint against him and his relatives for the offences punishable under Sections 498-A, 323, 504, 506 read with Section 34 of IPC and Sections 3 and 4 of the Dowry Prohibition Act, 1961, in Crime No.61/2007 at Nonavinakere Police Station, Tumkur and the respondent and his relatives were charge sheeted and tried for the alleged offences and subsequently they were acquitted in the said case. It is his further case that on 01.06.2009, wife had voluntarily left the child at his place of work and thereafterwards he had admitted the child in a private school and the appellant-wife had kidnapped the child from the School on 23.06.2009 and in this regard, on the basis of a complaint lodged by the School Authorities, a case was registered against the wife for the offence punishable under Section 363 of IPC in Crime No.171/2009. It is his definite case that the wife had no intention to live with him and perform her matrimonial obligation and there are no possibilities of re-conciliation and accordingly he had sought for dissolution of the marriage on the ground of cruelty as well as desertion.

3. The appellant-wife had entered appearance in the said proceedings before the Family

Court and had filed her statement of objections admitting the relationship but denied all other allegations made against her by her husband. She had contended in her statement of objections that during her stay in the matrimonial home, her husband used to ill-treat her and also assault her for having not brought sufficient dowry from her parents house. She had further contended that on 17.01.2007, her husband assaulted her and demanded to bring a sum of Rs.2,00,000/- from her parents house and when she refused and pleaded her inability to bring the said amount, her husband and his relatives forcibly threw her out of the matrimonial house and therefore, she was constrained to live in her parents' house thereafterwards. Though a request was made by her and her parents to take her back, all efforts made in this regard were in vain and though several panchayats were convened by her parents, all such efforts were also in vain and it is only thereafterwards, she had lodged a police complaint against her husband and his relatives.

4. To substantiate the case of the respondent – husband, he had examined himself before the Family Court as PW.1 and got marked 13 documents as Exs.P1 to P13. The wife had got herself examined as RW.1, however, no documents were marked in support of her case. The learned Judge of the Family Court vide the impugned judgment and decree has allowed the petition filed by the respondent – husband under Section 13(1)(ia) and (ib) of the Act and the marriage between the parties solemnized on 24.03.2002 at Gurukula Kalyana Mantapa, Tiptur was dissolved by a decree of divorce. Being aggrieved by the same, the wife has preferred this appeal.5. Learned counsel for the appellant-wife submits that the learned Judge of the Family Court has erred in granting a decree of divorce since the husband had failed to prove the ground of cruelty and desertion against the wife. He submits that the learned Judge of the Family Court has proceeded to allow the petition mainly for the reason that the wife had filed a criminal case against the husband and his relatives for the offences punishable under Sections 498-A, 323, 504, 506 read with Section 34 of IPC and Sections 3 and 4 of the Dowry Prohibition Act. He submits that mere filing of a criminal case itself does not amount to cruelty unless it is proved that the wife was in the habit of filing false cases 7 against the husband and his relatives. He also submits that the wife had a valid reason to stay away from her husband and therefore it cannot be said that she had deserted the husband. He submits that the husband had thrown away the wife for having not brought enough dowry and thereafterwards no attempt was made by him to bring her back and instead, he got issued a legal notice immediately thereafterwards seeking divorce. He also submits that at the instance of the husband, a false case was registered against the wife for the offence punishable under Section 363 of IPC and subsequently in Criminal Appeal No.1576/2017 disposed on 27.12.2017 by the court of I Additional City Civil and Sessions Judge, Bangalore, the appellant-wife has been acquitted of the alleged offence.

5. Learned counsel for the appellant-wife submits that the learned Judge of the Family Court has erred in granting a decree of divorce since the husband had failed to prove the ground of cruelty and desertion against the wife. He submits that the learned Judge of the Family Court has proceeded to allow the petition mainly for the reason that the wife had filed a criminal case against the husband and his relatives for the offences punishable under Sections 498-A, 323, 504, 506 read with Section 34 of IPC and Sections 3 and 4 of the Dowry Prohibition Act. He submits that mere filing of a criminal case itself does not amount

to cruelty unless it is proved that the wife was in the habit of filing false cases against the husband and his relatives. He also submits that the wife had a valid reason to stay away from her husband and therefore it cannot be said that she had deserted the husband. He submits that the husband had thrown away the wife for having not brought enough dowry and thereafter no attempt was made by him to bring her back and instead, he got issued a legal notice immediately thereafter seeking divorce. He also submits that at the instance of the husband, a false case was registered against the wife for the offence punishable under Section 363 of IPC and subsequently in Criminal Appeal No.1576/2017 disposed on 27.12.2017 by the court of I Additional City Civil and Sessions Judge, Bangalore, the appellant-wife has been acquitted of the alleged offence.

6. Per contra, learned counsel appearing for the respondent-husband submits that the parties have been residing separately ever since the year 2007 and all efforts made for conciliation has failed and therefore, the marriage has irretrievably failed and there is no point in continuing such a marriage. He submits that the ground of cruelty as well as desertion has been proved by the husband before the Family Court and therefore, there is no scope for interference by this court. He submits that the wife had left the company of her husband without there being any valid reasons and she is also guilty of filing false complaint against her husband and his relatives only with an intention to harass and coerce them. In support of his case, he has relied upon the judgments of the Hon'ble Supreme Court in the case of Narendra -vs- K.Meena reported in (2016) 9 SCC 455 and in the case of R.Srinivas Kumar -vs- R.Shametha in Civil Appeal No.4696/2013 DD 04.10.2019 and accordingly, he prays to dismiss the appeal.

8. The respondent-husband had approached the Family Court with a prayer to dissolve his marriage with the appellant-wife on the ground of cruelty as well as desertion. To establish the ground of cruelty, in addition to his oral statement, the husband has mainly relied upon the depositions and judgment passed in C.C.No.23/2008 wherein he and his relatives were tried for the offences punishable under Sections 498-A, 323, 504, 506 read with Section 34 of IPC and Sections 3 and 4 of the Dowry Prohibition Act, by the jurisdictional Magistrate Court. It is the further case of the husband that the said criminal proceedings were registered against him and his relatives on a false complaint lodged by his wife and therefore, the same would amount to cruelty.

9. From the perusal of the judgment and depositions made in C.C.No.23/2008, which are available at Exs.P7 and P8, it is seen that various incidents of ill-treatment and harassment meted out on the wife by the husband and his family members were brought on record. During the course of statement made under Section 313 of Cr.P.C., by the husband in the said criminal case, he had produced certain SMS messages sent by the wife during the pendency of the criminal case, which is marked as Exs.D4 to D7 wherein she had shown her inclination to join him. These documents were taken into consideration by the learned Magistrate who, on the basis of the same, has observed that there was no such break of relationship between the accused-husband and the complainant-wife. The jurisdictional Magistrate had acquitted the accused persons in the said case on the ground that the prosecution had failed to prove the guilt of the accused beyond reasonable doubt and therefore, they were entitled for the benefit of doubt. Therefore, it cannot be said that the

wife had lodged a false complaint against the husband and his family members.

10. Mere filing of a criminal case itself cannot be termed as "cruelty". For the purpose of Section 13(1)(ia) of the Act, "cruelty" could be wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society, to which the parties belong, their social values, status, environment in which they live. Cruelty need not be physical. If from the conduct of the spouse it is established or an inference can be legitimately drawn that the treatment of the spouse is such that it causes apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty.

11. The husband had also alleged that his wife was in the habit of leaving the matrimonial house and she used to go to her sister's and parents' house without informing him. The said allegation has not been proved by the husband by examining any independent witness.

12. Insofar as the complaint filed against the wife by the School Authorities for the offence punishable under Section 363 of IPC, the learned counsel for the appellant-wife has produced the judgment passed in Criminal Appeal No.1576/2017 disposed on 27.12.2017 wherein she has been acquitted for the alleged offence under Section 363 of IPC. The appellate court while setting aside the judgment and order of conviction and sentence passed by the trial court has observed that the accused was the mother of the victim girl and taking the minor victim girl into her custody would not amount to kidnapping as the accused herself being the mother of the victim girl was her lawful guardian and therefore, has held that offence under Section 363 of IPC cannot be invoked as against her on the complaint of School Authorities, who cannot be considered as lawful guardians of the minor girl.

13. The Hon'ble Supreme Court in the case of Raj Talreja (supra) has held that mere filing of complaints is not cruelty, if there are justifiable reasons to file the complaints. It is further held that merely because no action is taken on the complaint or after trial the accused is acquitted may not be a ground to treat such accusations of the wife as cruelty within the meaning of the Hindu Marriage Act.

14. In the case of Omprakash (supra), the Delhi High Court has held that demand by the wife for a separate residence would not amount to "cruelty" in all cases. In the said case it has been held that every time a wife asks the husband to live separately from the mother and relatives, it would not be an unreasonable behaviour on the part of the wife and it would not amount to cruelty.

15. In the case of Shyam Lata (supra), the Punjab and Haryana High Court has held that merely for the reason that the prosecution had failed to establish the case against the accused-husband, institution of such a proceedings by the wife does not amount to cruelty justifying the grant of divorce.

17. Insofar as the ground of desertion is concerned, it is the case of the husband that the

wife had deserted him in the month of January 2007 without there being any valid reasons and thereafterwards she has not come back. Though the husband has contended that he made efforts to bring back his wife and child thereafterwards, no material evidence is produced in support of the said contention. On the other hand, in the month of April 2007, he had got issued a legal notice to his wife seeking divorce.

18. It cannot be said that the wife had no valid reason to leave the company of the husband, having regard to the nature of the allegations made by her in the complaint filed against him for the offences punishable under Sections 498- A, 323, 504, 506 read with Section 34 of IPC and Sections 3 and 4 of the Dowry Prohibition Act, 1961, in Crime No.61/2007. It has been the specific defence of the husband in the criminal case that after filing of the criminal complaint, his wife has been sending him messages conveying her willingness to join him. In that event, it cannot be said that the wife had deserted the husband to put an end to the marital relation and cohabitation.

19. The Hon'ble Supreme Court in the case of Smt.Rohini Kumari (supra), has held that desertion within the meaning of Section 10(1)(a) of the Hindu Marriage Act read with the Explanation does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation. Without animus deserendi there can be no desertion within the meaning of Section 10(1)(a) of the Act. In the present case, the husband has failed to prove that the wife had intention to put an end to the marital relation and cohabitation and on the other hand, the material on record would go to show that she and her family members had made all efforts to join the husband, but they were all in vain.

20. In the case of Narendra (supra) relied upon by the learned counsel for the respondent-husband, there were allegations against the wife that she had threatened and also attempted to commit suicide and only for monetary considerations, she was demanding her husband to get separated from his family. Having regard to the facts of the said case, the Hon'ble Supreme Court had held that the allegations made against the wife constitute an act of cruelty. But in the present case, no such serious allegations have been made against the wife and even the allegation with regard to the demand by the wife to set up a separate house has not been proved by the husband by examining any independent witnesses nor has he disclosed the reason as to why the wife is seeking a separate residence. Under the circumstances, the judgment in the case of Narendra (supra), would not be applicable to the facts of the present case.

21. Further, the judgment in the case of R.Srinivas Kumar (supra) relied upon by the learned counsel for the respondent-husband was rendered by the Hon'ble Supreme Court exercising its powers under Article 142 of the Constitution of India and therefore, even the said judgment would not be of any aid to the case of the respondent – husband. Therefore, it is very clear that the respondent-husband has not made out a case for grant of divorce even under Section 13(1)(ib) of the Act, as the allegation of desertion without there being any valid reason has not been proved by him.

22. The learned Judge of the Family Court has observed that the marriage between the

parties has been irretrievably broken down and the parties have been living separately for more than 9 years and therefore, it is proper to grant divorce as sought in the petition. The Hon'ble Supreme Court time and again has observed that a decree of divorce on the ground of irretrievable failure of the marriage can be granted only by the Hon'ble Supreme Court in exercise of its powers under Article 142 of the Constitution of India and not by any other courts. Further in the case of *Mangayakarasi* (supra), the Hon'ble Supreme Court has held that merely on the ground that the parties have been litigating and they have been residing separately for quite some time would not itself be a ground for dissolution of marriage.

23. Under the circumstances, we are of the considered view that the learned Judge of the Family Court was not justified in allowing the petition filed by the respondent- husband under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 and dissolving the marriage by a decree of divorce. Resultantly, the impugned judgment and decree is liable to be set aside.

Accordingly, the following order:

The Miscellaneous First Appeal is allowed.

The judgment and decree passed by the court of IV Additional Principal Judge, Family Court at Bangalore, dated 15th March 2016 in M.C.No.3584/2011, is set aside.