

*IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH*

CIVIL MISCELLANEOUS APPEAL No.1052 of 2005

Between:

K.Rama Kumari,

W/o K.Anil Kumar Benarji

... Appellant

And

K.Anil Kumar Benarji (died)

and another.

... Respondents

JUDGMENT PRONOUNCED ON 05.01.2017

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

HON'BLE SRI JUSTICE M.S.K.JAISWAL

1. Whether Reporters of Local newspapers : No
may be allowed to see the Judgment?
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : Yes
3. Whether Their Lordships wish to
see the fair copy of the Judgment? : Yes

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE M.S.K.JAISWAL

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
AND
HON'BLE SRI JUSTICE M.S.K.JAISWAL

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< Gist:

> Head Note:

! Counsel for the Petitioner: Mr. K.Rathangapani Reddy

^ Counsel for the Respondents: None appeared

? Cases Referred:

1. (1996) 6 SCC 371
2. AIR 1957 SC 176
3. AIR 1964 SC 40

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.... Appellant

And:

K.Anil Kumar Benarji (died)
and another.

.....Respondents

Counsel for the petitioner: Mr. K.Rathangapani Reddy

Counsel for the Respondents: None appeared

The Court made the following:

JUDGMENT: (per Hon'ble Sri Justice C.V.Nagarjuna Reddy)

This Civil Miscellaneous Appeal is filed against order and judgment, dated 29.08.2005, in O.P.No.766 of 2003 on the file of the learned II Additional District Judge, Ranga Reddy, NTR Nagar, whereby he has granted decree dissolving the marriage between the appellant and respondent No.1.

For convenience, the parties are referred to as they are arrayed in the O.P.

The facts leading to filing of the OP by the petitioner are briefly stated hereunder.

The marriage between the petitioner and the respondent was solemnized on 16.12.1998 according to their community (Christians) customs. The marital life between the parties ran into rough weather a few months after the marriage. The petitioner has filed O.P.No.766 of 2003 for dissolution of marriage under Section-10(ix) and (x) of the Indian Divorce Act, 1869 (for short 'the Act'). He has *inter alia* stated that after four months of their marriage, the respondent started behaving in an arrogant way; that she started ill-treating his parents for no reason; that she never prepared food and washed his clothes; that she refused to prepare even a cup of tea; that the respondent never cared him and his mother when they fell sick;

that she refused to lead marital life with him or sharing bed with him; that she always used to quarrel with him and his parents and also used to go to her parents' house without intimating either him or his parents; that the respondent always used to insist on him to purchase jewellery and expensive items and when he explained his financial position, she used to quarrel with him; that the respondent left his house on 05.6.2001 by quarreling with the latter and left his company deserting him; that the efforts made by him and his parents to bring the respondent back to his house became futile; and that there is no possibility of their reunion.

The respondent filed a detailed counter-affidavit, wherein she has *inter alia* averred that at the time of her marriage, her parents gave 5 tulas of gold, furniture, domestic articles and Rs.10,000/- towards Adapadachu katnam by spending a total sum of Rs.1 lakh. She denied the allegation of either her harassing the petitioner or not leading marital life with him. She also denied her not preparing the food and ill-treating the petitioner and his parents. She further averred that it is the petitioner who was harassing her and that, unable to bear the harassment and ill-treatment meted out by the petitioner and his parents, both physically and mentally, she was forced to leave the petitioner's house on 05.6.2001 permanently. She

denied the mediations alleged to have taken place at the instance of the parents of the petitioner. The respondent asserted that she was prepared to join the petitioner even at the time of filing the counter-affidavit. She has, accordingly, prayed for dismissal of the OP with exemplary costs.

In support of the petitioner's case, he has examined himself as P.W-1 and got Exs.A-1 to A-3 marked on his side. On behalf of the respondent, she has examined herself as R.W-1 and also examined her mother as R.W-2. No documentary evidence was adduced by the respondent.

Having regard to the respective pleadings of the parties, the lower Court has framed the following point:

“Whether the ill-treatment, harassment and desertion pleaded by the petitioner against the respondent are true and correct? “

The afore-mentioned point was answered in favour of the petitioner and the decree for dissolution of marriage was granted by the lower Court as noted hereinbefore.

Before proceeding further, it needs to be noted that the petitioner died during the pendency of this appeal. By order, dated 02.4.2015, his mother was brought on record as respondent No.2 in the appeal.

During the hearing of the case, Mr. B.Purushotham Reddy, the learned counsel for the petitioner, argued that as his client died, the cause in the appeal does not survive for adjudication.

Mr. K.Rathangapani Reddy, the learned counsel for the respondent, opposed this submission and placed reliance on the judgment of the Supreme Court in *R.Lakshmi Vs. K.Saraswathi Amma*¹.

The facts in the said case are that the husband died after obtaining an *ex parte* decree of divorce. On coming to know about the said *ex parte* decree, the wife filed an application under Order-IX Rule-13 C.P.C. for setting aside the decree of divorce. The trial Court dismissed the said application by observing that since divorce is a personal remedy, it cannot be pursued after the death of the husband. On appeal, the trial Court's view was reversed by the appellate Court. But, the appellate Court's view was, in turn, reversed by the High Court. On a further appeal filed before the Supreme Court, it was held as under:

“We are of the opinion that the wife should be and is competent to maintain the application under Order-IX Rule-13 CPC. Even though the husband is dead, yet the decree obtained by him is effective in law and determines the status of the appellant. If the appellant says that it is an *ex parte* decree and ought

¹ (1996) 6 SCC 371

to be set aside, her application has to be heard on merits. The decree of divorce determines her status as a wife apart from determining her rights in the properties of her deceased husband. This gives her sufficient *locus standi* and right to contest the divorce proceedings even after the death of her husband.”

The facts in the said case are almost identical to the instant case with the exception that in the instant case the decree of divorce was granted on merits and the petitioner died during the pendency of this appeal.

In the light of the dicta laid down by the Supreme Court in ***R.Lakshmi*** (supra), we were of the opinion that the cause in the appeal survives for adjudication. Hence, we have heard the learned counsel for both sides on merits on 30.12.2016 and when we proposed to dictate the judgment in the open Court on that day, Mr. B.Purushotham Reddy, the learned counsel for the petitioner, requested for an adjournment to get instructions from his client-respondent No.2 herein as to whether she is willing to part with a reasonable part of the family properties, in which her son has a share. Accepting this request, we have adjourned the case to today. Today, when the case was called in the pre-lunch session, none appeared for the petitioner. Even after the case was passed over, no one represented the petitioner

in the post-lunch session. Therefore, we have chosen to dispose of the case on merits.

As noted above, the petitioner has filed the OP for dissolution of marriage under Section-10(ix) and (x) of the Act. This provision reads as under:

“Grounds for dissolution of marriage: (1) Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment Act, 2001), may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent—
(i) has committed adultery, or
.....
(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or
(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.”

The point that arises for consideration in this appeal is whether the petitioner was able to produce sufficient evidence to satisfy the Court that the respondent has deserted him or whether she has treated the petitioner with such cruelty so as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for him to live with the respondent.

In his evidence affidavit given as P.W-1, the petitioner has reiterated the contents of the O.P regarding the alleged ill-treatment of himself and his parents by the respondent and also her deserting the matrimonial home. In his cross-examination, he has deposed that he and the respondent lived happily for about one year after the marriage; that the respondent used to behave arrogantly by going to the house of her parents without informing him or his parents; and that she used to suspect his character. He has further deposed that in the year 2001, the respondent left his house at about 9.30 am without informing him. A suggestion was put to him that the respondent did not leave his house without informing him and that she was not suspecting his character. It was also suggested to the petitioner that he did not lead marital life with the respondent at Suryapet and he used to maintain distance with her and that he brought the respondent from Suryapet and left her in her parents' house at Malkajgiri, Hyderabad on 05.6.2001.

In her evidence affidavit given as R.W-1, the respondent deposed as under:-

"I submit that after my marriage, I went to the house of the petitioner situated at H.No.18-310, Mallikarjuna Nagar, Malkajgiri, Secunderabad, where the parents of the petitioner are residing. After I went to the house of the petitioner to the said house to lead my conjugal life with the petitioner,

the petitioner left me in the said house of his and went to Suryapet of Nalgonda District and used to reside at Suryapet and as such, the petitioner spent six months at Suryapet and used to visit the house of the parents of the petitioner and used to maintain distance from me, though I tried to come near to the petitioner. Vexed with the attitude of the petitioner, I informed the same to my parents and upon that, my parents came to the house of the petitioner and questioned the attitude of the petitioner as to why he was maintaining such sort of distance from me and upon that, the petitioner acted as he was convinced and took me to Suryapet and put up family at Suryapet where he was residing i.e., Kudakuda road and after that, the petitioner used to harass me by stating that as to why I informed his attitude to my parents and after one year, the petitioner shifted me from Suryapet to the house of the parents of the petitioner i.e., H.No.18-310, Mallikarjuna Nagar, Malkajgiri, Secunderabad and again the petitioner went to Suryapet and used to reside at Suryapet. As the petitioner is away from me, nobody was there in the parents of the petitioner to look after me well and the parents of the petitioner, his sister-Jyothirmai, his brother-Vivekananda used to abuse me in a filthy language and used to harass me psychologically by demanding more dowry and also for want of issues to me. Besides that, in the year 2001, the petitioner came to his parents' house in a drunken state and tried to kill me by pressing my neck and also tried to kill me with L.P.G. by making the gas leak in the house of the parents' of the petitioner. The parents and the brother-in-law of the petitioner never allowed us to lead happy marital life for the reasons best known to them. At last, the petitioner and their family members necked me out on 05.6.2001 and after I was necked out, I

went to my parents' house situated at Miryalaguda of Nalgonda District and after that, myself and my parents placed the matter before the elders at Suryapet and as per the advise of the said elders, I went to the house of the petitioner at Suryapet, but the petitioner again forcibly took me to his parents house situated at Malkajgiri and left me there and again the petitioner went to Suryapet and after the petitioner left to Suryapet, all the family members of the petitioner abused me in a filthy language and necked me out from their house and when there is no alternative left to me, I again went to my parents house and informed about the incident to my parents and after that my parents again placed the matter before the elder and again as per the advise of the elders, I again went to Suryapet to the company of the petitioner, but again the petitioner on the same day forcibly brought me to his parents house at Malkajgiri and I bore all the humiliations and the harassment caused by the family members of the petitioner and on 26.10.2003 again all the family members of the petitioner abused me in a filthy language and again necked me out from their house by threatening me with dire consequences and as such, I again went to my parents' house and now I am residing with my parents and living at the mercy of my parents. Subsequently, the petitioner filed the present petition for grant of divorce, with all false allegations and after receiving the notices by me in the above O.P., the petitioner and his father threatened me with dire consequences, if I do not come to the Court in the above O.P. and in view of the attitude of the petitioner and his family members, I lodged a police complaint in the Malkajgiri Police Station on 09.6.2004 and the same is under investigation by the said police."

In her cross-examination, while denying that her father had no capacity to give dowry and other gifts, the respondent has stated that her parents convened a panchayat and convinced the petitioner to take her back on 05.6.2003. The suggestion put to her that no such panchayat has taken place was denied by her. She has also denied the suggestion that the petitioner did not harass her and further stated that number of times, the petitioner used to take her to Suryapet and bring her back to Hyderabad. She has also denied the suggestion that neither the petitioner nor his parents or their daughter has harassed the witness both physically and mentally. She has also denied the suggestion that she left the house of her parents-in-law on 05.6.2001 without informing anyone and that, she did not return to their house thereafter. She claimed that she has filed some documents to show that she resided in the house of her parents-in-law till 26.10.2003. She denied the suggestion that she has stated in her sworn affidavit that she is prepared to go and join the respondent in his house with the sole intention of denying the divorce to him.

R.W-2-the mother of the respondent has spoken in detail about the alleged harassment meted out to her daughter by the petitioner and his parents. In her cross-examination, she has deposed that when the respondent complained of harassment by

the petitioner and his family members, they have persuaded the petitioner to take the respondent to Suryapet in the years 2001 and also 2002. She has also deposed that while she has not filed any document to show that the respondent lived with the petitioner till the year 2003, her daughter approached the Police and gave a complaint under Section-498-A IPC when the petitioner and his family members approached the Court against her daughter. She denied the suggestion that the petitioner and his family members did not beat and drive away the respondent from their house on 05.6.2001.

It needs to be observed that though the O.P was filed by the petitioner both on the grounds of desertion as well as cruelty, no specific finding has been rendered by the lower Court on the latter ground. Therefore, it is unnecessary for this Court to delve into that aspect.

In *Bipin Chandra Vs. Prabhavati*², the Supreme Court while dealing with desertion, elaborately considered several English decisions in which the ingredients of desertion were considered and, approved the following summary of the law in Halsbury's Laws of England (3rd Edition) Volume-12, which reads as under:

“In its essence, desertion means the intentional permanent forsaking and abandonment of one

² AIR 1957 SC 176

spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases."

It was further explained by the Supreme Court as under:-

"If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently they cease cohabitation, it will not amount to desertion. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid..... Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference, that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. But, it is not necessary that they should commence at the same

time. The de facto separation may have commenced without the necessary *animus* or it may be that the separation and the *animus deserendi* coincide in point of time.”

This judgment was referred to and reiterated by the Supreme Court in *Lachman Utamchand Kirpalani Vs. Meena @ Mota*³

When we examine the case on record keeping in view the above noted legal position, we are of the opinion that the petitioner miserably failed to prove *animus deserendi* on the part of the respondent, a *sine qua non* for grant of decree of dissolution of marriage on the ground of desertion.

Though there is a serious dispute as to whether the respondent has left the matrimonial home on 05.6.2001 or in the year 2003, the fact, however, remains that except the *ipsi dixit* of the petitioner, no evidence has been placed before the Court through independent witnesses such as panchayatdars, who allegedly mediated between the petitioner and the respondent, in an alleged attempt to persuade the latter to join the former.

If we analyse the evidence on record from proper perspective, it appears that differences cropped up between the spouses leading to the respondent leaving her matrimonial

³ AIR 1964 SC 40

home. While there is no evidence in support of the plea of the respondent that the petitioner and his parents have harassed her, the petitioner, on whom the initial burden lies to show that the respondent has deserted him, equally failed to produce any evidence to prove such desertion. What is relevant to be mentioned in this context is the stand taken by the respondent in the counter-affidavit expressing her willingness to join the petitioner. This offer of the respondent was spurned by the petitioner by terming the same as a foul play to deny him the decree of dissolution of marriage. If the respondent has abandoned the petitioner and the latter was keen to live with his wife, the least that was expected of him was to cause a legal notice calling upon her to join his company. No such notice was issued by the petitioner. Though he has claimed that himself and his parents got a mediation held, no mediator was examined to support this plea. It is also relevant to note that on 12.12.2011, both the parties have appeared before this Court and after conducting conciliation, this Court has passed the following order:

“Both the parties appeared. On conciliation, both of them agreed to live together. The husband stated that he would take his wife in a week’s time.

In view of this development, post after two months.”

Unfortunately, the petitioner did not stand on his word and thereafter, he has passed away. From the afore-mentioned facts and evidence on record, we have no hesitation to hold that the petitioner failed to prove that the respondent has deserted the petitioner. In the absence of proper evidence, the act of the respondent leaving her matrimonial home cannot be construed as desertion, but only as a temporary measure taken on account of simmering differences between herself and the petitioner.

What is significant is that the respondent has been consistently taking the stand that she is ready and willing to join the company of the petitioner. The Court below having observed that though the conduct of the respondent in visiting her parents' house frequently is not a ground to dissolve the marriage, however, jumped to the conclusion that the respondent has deserted the petitioner on 05.6.2001. We find no basis for this finding of the lower Court.

Before concluding this case, it is necessary to observe that respondent No.2 herein has taken an objection in the counter-affidavit filed in this appeal that the appeal filed under Section-28 of the Hindu Marriage Act is not maintainable. However, this point has not been pressed into service by the learned counsel for the petitioner-respondents herein, obviously, realizing that

this is an inadvertent mistake as, the provisions of the Indian Divorce Act, 1869 alone govern to the parties in the appeal.

For the afore-mentioned reasons, the order of the lower Court is not sustainable and the same is set aside. The O.P. filed by respondent No.1 is dismissed.

The Civil Miscellaneous Appeal is, accordingly, allowed.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE M.S.K.JAISWAL

05th January 2017

Note:

LR copies to be marked.

B/o

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