

THE HONOURABLE SRI JUSTICE C. PRAVEEN KUMAR

And

THE HONOURABLE SRI JUSTICE P. KESHA RAO

C.M.A.No.350 of 2005

JUDGMENT: (per Hon'ble Sri Justice C.Praveen Kumar)

1) Aggrieved by the order and decree dated 23.12.2004, passed in O.P.No.10 of 2003 on the file of the Senior Civil Judge, Punganur, wherein an application filed by the appellant under Section 13 (1) (ib) of Hindu Marriage Act, 1955 seeking dissolution of marriage, was dismissed, the present appeal came to be filed.

2) The averments in the O.P. are as under:

The marriage between the appellant and the respondent was said to have solemnized about 10 years prior to the date of filing of O.P. in accordance with the customs prevailing in their community. After marriage both of them lived happily and out of wedlock they were blessed with two children. Thereafter, the appellant shifted his family to Bangalore, where he was working as Goldsmith. It is said that the respondent/ wife developed hostile attitude towards the parents of the appellant and demanded to go to Palamaneru to live with her parents, for which the appellant did not agree. It is said that the respondent used to left the company of the appellant and go to her parents house without knowledge of the appellant. The appellant used to bring back the respondent with the help of

village elders. A quarrel is said to have been taken place in the month of May, 2001 between the respondent and the parents of the appellant. Pursuant to which, the respondent left the house and started living at Palamaneru in her parents house. In spite of best efforts made by the appellant, the respondent failed to join the appellant. The averments in the petition further show that the respondent is leading a wayward life and she deserted the appellant by her own. The appellant got issued a legal notice on 12.02.2003, as there was no reply from her, and having lost the hope that the respondent joining him, the present O.P. came to be filed.

3) A counter came to be filed by the respondent stating that the divorce O.P. is filed only to harass the respondent with an ulterior motive. The appellant had addicted to vices and sold away the jewellery and cash presented by the parents of the respondent at the time of marriage. It is stated that pursuant to the demand made by the appellant, the father of the respondent paid an amount of Rs.11,000/- . The appellant necked out the respondent and her children, hence, the respondent started living at Bellary along with her children. It is also stated that she filed M.C.No.23 of 2000 before the Principal Junior Civil Judge, Ballary and she also filed a criminal complaint against the appellant before Panjani Police as the appellant was contracting second marriage. In a

panchayat, the appellant agreed to execute some of the properties in the name of the children, but later it was ended in futile.

4) In support of his case, the appellant/ husband got examined PWs.1 to 3 and got marked Exs.A1 and A2, while the respondent/ wife got examined RWs.1 to 3.

5) After considering the evidence available on record, the Court below dismissed the O.P. holding that the respondent has not deserted the appellant in the month of May, 2001, but on the other hand, she was driven out from the house of appellant. Challenging the same, the present appeal came to be filed.

6) Learned counsel for the appellant mainly submits that though the appellant issued a notice in the month of February, 2003, the respondent failed to join him. Having left with no other option, the appellant filed the O.P. It is his case that the respondent failed to join the appellant in spite of his efforts, the same would amount to desertion on her own and hence plead for divorce. He further contended that in view of Section 114 of the Evidence Act, a presumption has been drawn that the respondent intentionally did not join the appellant which act according to him would fall under Section 13 (1) (ib) of the Hindu Marriage Act. He further submits that since the averments in the legal notice categorically discloses that the respondent left the company of the appellant on her own, which remain un-rebutted and no further evidence need

be adduced to prove the same. Since admitted facts need not to be proved as per Section 58 of the Evidence Act, he would submit that no further evidence is necessary to prove that the respondent on her own deserted the appellant.

7) The same is opposed by the learned counsel for the respondent contending that the evidence on record is totally contrary to the arguments advanced by the learned counsel for the appellant and various findings were given by the Court below.

8) As seen from the record, the main ground raised by the appellant appears to be that the respondent has deserted the appellant in the month of May, 2001 and since the desertion was for a period of two years prior to the date of filing of the petition, the appellant is entitled for divorce on the said ground. In order to prove the same, he examined PWs.1 to 3. PW.1 stated that when the demand made by the respondent to shift their residence to Palamaneru, was refused by him, the respondent left his company in the month of May, 2001. He got issued a legal notice in the month of February, 2003, but the respondent neither gave any reply nor joined him. He got marked Ex.A1-legal notice and Ex.A2-postal acknowledgment.

9) It is to be noted here that merely because the appellant had issued notice and that no reply was given to the said notice does not mean that the contents of the said notice have been un-

rebutted. The Court has to see the evidence produced by either side before the Court so as to come to the conclusion as to whether there was any willful desertion by the respondent or whether the respondent was necked out of the house along with children.

10) It is to be noted that though the appellant claimed that the respondent used to quarrel with his parents and brother in the month of May, 2001 and left the house, but he failed to examine any one of them to prove the same. Due to non-examination of parents and brother of the appellant, the claim of the appellant that the respondent quarreled with his parents and brother and voluntarily left the company of the appellant by deserting him cannot be believed.

11) It is to be noted that a perusal of Ex.A1-notice would show that in spite of best efforts made by PW.1 personally and through elders V.Ramaiah, Madivilli Subbraiah and others, the respondent did not join her conjugal society. A panchayat was also conducted at Palamaneru and in that panchayat the respondent refused to join him. PW.3, who is one of the elders, conducted panchayat, categorically stated that he conducted panchayat about 3 or 4 years ago and at that time, the respondent was at Velagatur. PW.3 further stated that he had attended only one panchayat. RW.2 in his cross-examination admitted about conducting of

panchayat at Velagatur and in the said panchayat, the elders decided that the appellant and respondent live together. Hence, the contention of the appellant that a panchayat was conducted at Palamaneru, wherein the respondent refused to join the appellant, cannot be accepted.

12) [Section 13\(1\)\(ib\)](#) of the Hindu Marriage Act requires that a party claiming divorce on the ground of desertion has to necessarily satisfy the two ingredients contemplated under [Section 13\(1\)\(ib\)](#) of the Act, that is to say, the appellant has to first of all satisfy that the wife has left his society for no fault of him and secondly, that leaving of the wife from the society of the husband is only to put, an end to the marital life. Further, before resorting to filing a petition under Section 13 (1) (ib) of the Act for grant of divorce on the ground of desertion, there should be a clear period of two years desertion preceding the date of filing of the petition.

13) In the instant case, the appellant claims that RW.1 deserted him in the month of May, 2001. Merely because RWs.1 to 3 admitted that the respondent is residing with her parents, it cannot be said that she deserted the appellant on her own. RW.1 in her cross examination categorically stated that the appellant beat her and driven her out from the house along with children. The said fact was corroborated by the evidence of RWs.2 and 3. As

stated earlier, in the absence of the evidence of the parents of the appellant, the version of the appellant that the respondent deserted the petitioner in the month of May, 2001 cannot be believed.

14) For the aforesaid discussion, we are of the opinion that the appellant/husband failed to prove the basic ingredients of two years desertion prior to filing of the petition and the two facets of the requirement contemplated under [Section 13\(1\)\(ib\)](#) of the Hindu Marriage Act.

15) Accordingly, the appeal is dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this appeal shall stand closed.



C. PRAVEEN KUMAR, J

JUSTICE P. KESHA RAO

02.11.2017
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