

(2013) 12 KAR CK 0117
In the Karnataka High Court
Case No : M.F.A. No. 10187 of 2011 (FC-DB)

Chennigaiah

APPELLANT

Vs

Smt. Lakkamma @ Lakshmamma

RESPONDENT

Date of Decision : 05-12-2013

Acts Referred:

Citation : (2013) 12 KAR CK 0117

Hon'ble Judges : K.L. Manjunath, J;A.V. Chandrashekara, J

Bench : Division Bench

Advocate : R. Gopal, for the Appellant; Iqbal Patel, for the Respondent

Final Decision : Dismissed

Judgement

K.L. Manjunath, J.—The unsuccessful husband who has failed to get a decree of divorce on the ground of cruelty, desertion and adultery has filed this appeal challenging the Judgment passed by the I Addl. Principal Judge, Family Court, Bangalore, dt. 30th July 2011 passed in M.C. No. 725/2009. Heard the counsel for the parties.

2. The admitted facts are:

The marriage between the appellant and respondent was solemnized on 23.3.1967 at Vanaganahalli, Tavarekere Hobli in Bangalore District. After the marriage, they lived in South End Slum, Bangalore, for some time. In the marriage they have three children, by name, Anjanappa, Pandukrishna and a daughter-Chandralakshmi. According to the appellant, the respondent used to quarrel every now and then. Therefore, since 12.5.1978 she is residing separately by executing a document in his favour and that she is also living in adultery with one Krishnappa. On the ground of desertion, cruelty and adultery, a petition came to be filed u/s 13(1)(ia) & (ib) of Hindu Marriage Act.

3. The respondent contested the matter. She denied the allegations made against her. According to her, she was not quarreling with the appellant. On the contrary

she was driven out of the house and that therefore she filed a petition u/s. 125 Cr.P.C. for grant of maintenance in the year 2006 and it is the appellant who has taken a second wife by marrying one Nagaveni and that four children are born out of such marriage. It is alleged that the appellant and his second wife - Nagaveni are convicted for the offences punishable u/s. 494 and 496 IPC in CC No. 9241/2004 and that she is living in adultery with Krishnappa. In the circumstances, she requested the court to dismiss the petition.

4. To prove their respective contentions, the appellant has got himself examined as P.W. 1 and also two more witnesses by name Thimmaiah and Cheluvaiah as P.Ws. 2 and 3 and relied upon Ex. P1 to P4. The respondent has got examined herself as R.W. 1 and she has relied upon Certified Copy of the Judgment copy of the appellant in Criminal Appeal No. 513/2008.

5. The Trial Court after examining the entire case on merits formulated the following points for its consideration:

1. Whether the petitioner has established that subsequent to the marriage the respondent had voluntary sexual intercourse with one Krishnappa and thus the respondent is leading adulterous life?

2. Whether the petitioner has established that subsequent to the marriage the respondent treated him with cruelty?

3. Whether the petitioner has established that the respondent has deserted him for a continuous period of not less than two years immediately preceding the presentation of this petition?

4. What order?

6. The learned Judge after appreciating the evidence placed by both the parties has held all the points against the appellant and ultimately dismissed the petition. Therefore, the present appeal is filed.

7. Mr. Gopal, learned counsel appearing for the appellant contends that the Trial Court has committed a serious error in dismissing the petition even though the appellant has successfully proved the adultery and cruelty and that the cruelty meted out to him and that the respondent living separately since 1978. In the circumstances, he requests the court to re-appreciate the entire evidence and reverse the findings of the Trial Court.

8. Per contra, the learned counsel for the respondent submits that none of the grounds urged by the appellant is proved and established by him before the Trial Court. According to him, when adultery alleged against the respondent without making an adulterer as a party, petition filed on the ground of adultery is not maintainable. He further submits when the appellant contends that the respondent has been living separately since 1978 and when the petition is filed in 2009, the question of cruelty does not arise at all. Therefore, it is argued that the ground of cruelty has not been established. He further contends that even in

regard to desertion the case of the appellant has not been proved by placing material evidence on record. According to him, if the respondent is living separately on her own, the petition filed by her u/s. 125 Cr.P.C. for grant of maintenance on the ground that the appellant has neglected to maintain the respondent would not have been allowed.

9. The very fact that the maintenance awarded by the Magistrate Court is not questioned by the appellant would disclose that there is no voluntary desertion. On the contrary, on account of the act of the appellant in marrying Nagaveni and getting four children out of such marriage, the respondent was compelled to reside separately and on account of the same if respondent is living separately, the appellant cannot get a decree of divorce on the ground of desertion. In the circumstances, he request to dismiss the appeal.

10. Having heard the counsel for the parties, we have to consider the following points in this appeal:

1) Whether the appellant has proved that the respondent living in adultery with Krishnappa?

2) Whether the appellant has proved that the respondent has treated the appellant with cruelty?

3) Whether the appellant has proved that voluntarily the respondent is living separately with an intention to put an end to the marital status two years prior to the petition?

11. So far as the ground of adultery is concerned, as rightly pointed out by the learned counsel for the respondent, adulterer is not a party to the petition. As per the Rules framed by the High Court of Karnataka, when a ground of adultery is urged, adulterer is a necessary party and moreover evidence let in by the petitioner to prove the adultery is not at all sufficient. Therefore, we are of the view that the petition filed on the ground of adultery is not maintainable since the adulterer is not made as a party. Therefore, there is no necessity for us to examine the evidence let in by the parties in regard to adultery.

12. So far as the cruelty is concerned, when the appellant admits that respondent is living separately since 1978, when he has filed a petition to grant a decree of divorce in 2009, 32 years after the respondent living separately, the question of considering the cruelty does not arise at all. When the respondent is not living with the appellant for the last 30 years, the question of treating the appellant with cruelty does not arise at all. Therefore, the said ground is also not available to the appellant.

13. So far as the ground of desertion is concerned, the appellant's contention is that since 1978 she is living separately. But the contention of the respondent is that on account of the ill treatment given to her, she is living separately. Even if we accept that Ex. P1 is proved by the appellant, the same cannot a ground for this court to grant a decree of divorce on the ground of desertion. When the

respondent has obtained an order for grant of maintenance on the ground of appellant having failed to maintain her and that she has been neglected by him, is a good ground for the respondent to live separately.

14. Moreover the respondent has produced the documents to show that appellant and his second wife -Nagaveni have been convicted for the offence of bigamy and that out of the second marriage with Nagaveni, he is having four children. If the husband is having second wife and living with the second wife having four children and if the legally wedded first wife is living separately, the same cannot be considered as a desertion and she is entitled to live separately. Though an attempt is made by Mr. Gopal, that against the Judgment of conviction and order of sentence, a revision is filed and the matter is pending before this court in revision, cannot be a ground to hold that respondent has deserted the appellant. As a matter of fact against the Judgment and conviction, the criminal appeal filed by the appellant in Criminal appeal No. 513/2008 has also been dismissed as per Ex. R1. Merely because a criminal Revision Petition is filed, the same cannot be a ground for us to hold that the respondent with an intention of putting an end to her marital status has been living separately.

15. In the circumstances, we are of the view the Trial Court is justified in determining all the points against the appellant. In the result, the appeal is dismissed and the impugned order passed in M.C. No. 725/2009 is affirmed. Parties to bear their own costs.