

(2013) 12 KAR CK 0508
In the Karnataka High Court
Case No : M.F.A. No. 4716 of 2009 (FC)

Dr. S. Geetha

APPELLANT

Vs

Dr. Surendran Doraiswamy (now known as Dr. D.S.A.
Suridher)

RESPONDENT

Date of Decision : 19-12-2013

Acts Referred:

Citation : (2013) 12 KAR CK 0508

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

Bench : Division Bench

Advocate : Gururaj Kulkarni, for the Appellant; P.B. Appaiah, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Chandrashekara, J.—This is an appeal filed by the wife against whom a decree of divorce has been granted by the I Addl. Prl. Judge, Family Court, Bangalore in M.C. No. 1203/2004 on the ground of desertion. Final order dated 27.05.2009 passed in M.C. No. 1203/2004 is called in question in this appeal on various grounds as set out in the appeal memo. The parties are referred to as per their ranking in the Trial Court. Parties to the appeal are doctors by profession and their marriage was solemnized on 09.05.1996 as per Hindu customs. Out of the marriage, a female child was born in October 1997 and her name is Dishaa. Now, she is aged 16 years. During May 1999, the 60th birthday of her husband's father was celebrated at Nanjangud of Mysore District where he was working.

2. Both the petitioner (husband) and wife (respondent) went to Nanjangudu to attend the function. In spite of his request to join him and live together happily, the respondent refused to his request. She is stated to have insisted that unless he set up a separate house without his parents, she would not join him. She further insisted that he must allow her parents to live with her, but he was not agreeable for such an arrangement. Then respondent expressed her desire to live separately and went away by deserting him on 15.05.1999 and took away all

her belongings. To this effect, she gave a written statement, is his averment.

3. Later on, petitioner went to Ludhiana to pursue his studies and respondent went to Bellary for higher education in ophthalmology. She left their daughter with her parents at Bangalore. When he came to Bangalore from Ludhiana on several occasions, she did not permit him to see his daughter. It is his pleading that he did not precipitate the matter with a fond hope that normalcy would be restored. But she never stayed with him after May 1999, is the averment.

4. Petitioner came from Ludhiana in January 2002 and made efforts to persuade her to join him and ultimately on 31.10.2002 both of them decided to have a divorce by consent. A petition was filed in M.C. No. 1558/2002 u/s 13B of Hindu Marriage Act and was registered as M.C. No. 1558/2002 in the Family Court at Bangalore. Respondent did not attend the Court on many hearings and ultimately on 13.08.2003, she submitted before the Court stating that she was not agreeable for mutual divorce. Accordingly, the petition was dismissed directing the parties to seek their remedies in other proceedings. It is his averment that she had unequivocally pleaded in the joint petition to the effect that she was living separately from 12.4.2000 without interruption. Thus, the respondent is stated to have deserted him irrevocably from 12.4.2000 i.e., for more than the statutory period of 2 years prior to the presentation of the petition for divorce u/s 13(1)(ib) of Hindu Marriage Act. With these averments, petition came to be filed on 22.07.2004.

5. Respondent-wife chose to file detailed objections denying all the averments relating to desertion on 15.05.1999 by writing a letter voluntarily. Marriage, relationship and birth of a female child in October 1997 are admitted by her. According to her, after the completion of her further studies, she went to Nanjanagudu and stayed with her in-laws till May 1999. During this period, she was harassed by her mother-in-law and that petitioner used to take side with his mother. According to her, he had even threatened that if she did not listen to his mother's words, he would divorce her. According to her, the situation in the house of her in-laws at Nanjanagud became so difficult for her, that she was thrown out of the house by the petitioner in mid May 1999. Petitioner summoned her mother and brother over phone and after their arrival, he asked her to go out of the house by writing a letter and as such she had to write a letter under duress.

6. After the petitioner returned from Ludhiana to Bangalore, the parents of the petitioner sent words through her close relatives for mediation. Since the petitioner assured her of behaving properly, she joined him in his house at Rajarajeshwarinagar, Bangalore and her daughter Dishaa was admitted to the school i.e., Jnanakshi Vidyaniketan and a joint S.B. Account was also opened in their name. Petitioner was permitted to operate the said account. It is averred that the petitioner had drawn money belonging to her. She stayed there for a few months and during this period the petitioner and his mother again started harassing her and knowing the developments, her brother filed a complaint to

the police. The police summoned them and advised to lead a normal life. The advice did not have any effect on the petitioner. On the other hand, he took her to the office of an advocate and forced her to sign a joint petition for divorce. After the dismissal of the said joint petition, petitioner is stated to have come up with the present petition on untenable grounds and false allegations. According to her, petitioner himself drove her out of the home in October 2002. Hence, she had requested for dismissal of the petition.

7. Petitioner is examined as PW-1 and has got marked 13 exhibits on his behalf. Respondent is examined as RW-1 and two documents have been got marked. After hearing the arguments and perusing the pleadings and evidence, the learned Judge has chosen to allow the petition by formulating the following points for consideration:

1. Whether the petitioner proves that the respondent has voluntarily deserted the petitioner for a continuous period of 2 years, before the date of filing the petition?

2. Whether the petitioner is entitled for visiting rights, if so, on what terms and conditions?

3. What Order?

8. Several grounds have been urged in the appeal memo assailing the impugned order of granting divorce. We have heard the arguments of the learned counsel appearing for the parties at length.

9. The main contention put forth on behalf of the appellant is that the Trial Court has considered 15.05.1999 as the date of alleged desertion and that the same is incorrect. It is contended that the respondent has never deserted him; on the other hand, petitioner drove her out of his house on 31.10.2002. It is argued that the aspect of desertion is not at all proved and that statutory period of two years had not elapsed by the time the petition was filed.

10. Per contra., learned counsel for the respondent has vehemently argued that the day on which she irrevocably withdrew from the matrimonial home was 15.05.1999 and that this is evident from Ex. P5 which is proved to the hilt. It is argued that even if she rejoined him in August 2002, the same was not with an unequivocal intention of joining matrimonial home to restart marital life and that she had never cohabitated during this short period of 2-3 months. In this regard he has relied upon several decisions. Hence following points arise for our consideration:--

1. Whether the trial Court is justified that the respondent had deserted the petitioner with an unequivocal intention of severing the marital i.e., for a minimum statutory period of 2 years prior to the presentation of the petition filed u/s 13(1)(ib) of Hindu Marriage Act, 1955?

2. Whether any interference is called for, and if so, to what extent?

3. To what order?

Reasons

Re. Point No. 1:

12. Section 13(1)(ib) of Hindu Marriage Act, 1955 mandates that a spouse seeking divorce on the ground of desertion has to prove that the opposite spouse has withdrawn from his or her society with a clear intention of breaking the marital tie. Two years of prior desertion is a mandate to file such a petition u/s 13(1)(ib) of Hindu Marriage Act. Burden is always upon the spouse taking up the plea of desertion. In the backdrop of this requirement, the evidence let-in will have to be assessed.

12. For the plea of desertion to be established, there must be foundation in the form of pleadings. What is pleaded by the petitioner in paragraph 15 of the petition is that the parties have been living separately since 12th April 2000 and hence there is no impediment to entertain this petition. According to the petitioner 12.04.2000 is the decisive date on which she deserted him with an unequivocal intention to break the marital relationship.

13. But in his petition, the petitioner has made a specific mention that she had come to Nanjanagud to celebrate the 60th birthday of his father and 15.05.1999 she left the house taking all her belongings and gave a letter in writing to that effect. In fact, the evidence is adduced to that effect by both the parties and the learned Judge has assessed this part of the evidence and has ultimately come to the conclusion that respondent-wife has failed to prove that letter marked as Ex. P5 dated 15.05.1999 was written by her under duress. The contents of this Ex P5, according to the learned Judge, would clearly indicate that she voluntarily left the house. Reason is assigned by the learned Judge about Ex P5 and the same is as follows:--

The contention of the respondent is that the letter Ex. P.5 was obtained by force. Even though, she was not agreeable for it. It is also her contention that her consent for filing the joint petition was obtained by force. In my opinion, these contentions are not prima-facie acceptable. In the cross-examination it is suggested that the primary object of getting Ex. P.5 executed was to show that the respondent has taken away all the articles with her. This suggestion goes to show that she was agreeable to take the articles with her and because of it she has put in writing about taking those articles. This clearly implies that she had not executed it due to any coercion. If it was executed due to such coercion, there was no reason for her to take those articles and execute it. Hence, Ex. P.5 has not come into existence in the circumstance as pleaded by the respondent.

14. On a plain reading of this portion of the judgment, it is clear that the learned Judge has taken 15.05.1999 as the date of respondent deserting her husband. The petitioner has not taken 15.05.1999 as the date of desertion while filing the petition. According to him, the date on which the petitioner deserted was on

12.04.2000. Reliance has been placed upon this fact by the petitioner on the basis of the averment found in the consent petition filed u/s 13B of Hindu Marriage Act. Ex. P10 is the joint petition filed for divorce u/s 13B before the Family court at Bangalore. What is averred in the said petition is that they have been residing separately since 12.04.2000 without any communication and that they have no intention of coming together as husband and wife. Clear averments are found in the paragraphs 4 and 5 of Ex. P10, the joint petition.

15. What is argued before this Court by the learned counsel for the appellant is that there is inherent inconsistency between the date relied upon by the petitioner in the petition filed for divorce on the ground of desertion and the date found in the petition marked as Ex. P10. It is further argued that the said petition was an outcome of duress or force exerted on the respondent-wife and therefore she withdrew her consent.

16. We have perused the certified copy of the order sheet of the joint petition filed before the Family Court. The learned Judge has passed an order dismissing the petition on the ground that wife withdrew the consent. Admittedly, wife is also well educated lady and she is a Doctor. It is not as though she did not know English. Having understood the contents of the joint petition, she had subscribed her signature. Probably she was not interested in getting a divorce by mutual consent and therefore she withdrew her consent. Therefore, the disposal of the said joint petition by the learned Judge of the Family Court cannot be construed as one because of coercion or undue influence stated to be pleaded on her. Therefore, the categorical averment made in the joint petition that the parties had not been able to reconcile between themselves and they were living separately from 12.04.2000 cannot be found fault with. This date can be considered as the decisive date on which she had made up her mind to stay away from her husband and thereby not to continue the matrimonial relationship.

17. Ex. P5 is the letter written by the wife on 15.05.1999 while coming out of the matrimonial home at Nanjangud. She has specifically deposed that her parents were also present at that time and she wrote the said letter. Though there is no express mention in the said letter that she was coming out of the matrimonial home once for all, the contents of Ex. P5 read as a whole would unequivocally indicate that she had made up her mind to go away from the matrimonial home and therefore she had taken all her belongings. If really she had been under duress while writing Ex. P5 she could have examined one of her parents either mother or father who were present on 15.05.1991 in support of the same. The learned Judge has considered all these circumstances surrounding Ex. P5 and the evidence of the parties and has rightly come to the conclusion that Ex. P5 could be considered as a document indicating her unequivocal right to desert the matrimonial tie.

18. The learned counsel for the appellant has vehemently argued that she rejoined her husband in July 2002 and started living with him in his house at Raja Rajeshwari Nagar, Bangalore and even admitted her daughter to a School

nearby. It is further argued that both the parties had decided to live together and therefore a joint S.B. Account was opened in SBI, Raja Rajeshwari Nagar. In fact, PW1 has also admitted that his wife lived with him for about three months in Raja Rajeshwari Nagar and later on, left the house. Ex. P3 is the passbook of SBI Branch, Raja Rajeswan Nagar, the entries therein were from 10.07.2002 to 07.05.2003.

19. The evidence on record would disclose that she did not come on her own to join her husband. On the other hand, she was persuaded to come and join him and therefore she joined him with much reluctance. What is argued before this Court is that there was cohabitation between the short period of four months and therefore 31.10.2002 the date on which she left the house will be decisive and if that date is taken, the present petition filed for divorce on the ground of desertion is not maintainable because two years statutory period prior to the filing of the petition had not elapsed.

20. We have perused the evidence of RW1 It is specifically suggested to her that there was no cohabitation between them during this period. It is also to be seen that she was in Kollegal taluk of Chamarajnagar District on a rural posting for a period of one month and she was coming only once a week to Bangalore. The honest attempt made by the petitioner to get her back was of no use and on 30.10.2002 her brother chose to file a complaint to the Byatarayanapura Police Station and all of them had been summoned to the Police Station. The very next day petition came to be filed u/s 13B of Hindu Marriage Act seeking divorce.

21. Learned counsel for the respondent has relied upon the decision in the case of Durga Prasanna Tripathy Vs. Arundhati Tripathy, , to contend that though both of them were in the same house, there was no co-habitation and therefore this short period will have to be excluded and should not be taken into consideration. As per the facts in Durga Prasanna's case, the husband had filed a petition for divorce on the ground of cruelty and also on the ground of desertion. Though marriage had been solemnized on 05.03.1991, dispute arose between them during May 1996 when her mother-in-law went to bring her on account of the marriage ceremony of her younger son. She not only declined to come, even misbehaved with her and insulted her mother-in-law. She did not even attend the death ceremony of her father-in-law. Parties had not lived for almost 14 years and the marriage had virtually broken down and taking all this into consideration, the Trial Court had granted a decree of divorce and the same was approved by the Hon''ble Supreme Court.

22. In another decision reported in Savitri Pandey Vs. Prem Chandra Pandey, it is seen that though the husband and wife lived in the same house for six weeks after the marriage there was no cohabitation and as such marriage had not been consummated Hence the petition filed by the wife seeking divorce on the ground of desertion came to be dismissed. What is held in Savitri Pandey's case is that desertion may be constructive and can be even inferred from the attendant circumstances and that separate residences are not required. Even in the present

case though the parties had lived together for a short period of four months from July to October, there was no cohabitation and that she came to his house only at his instance and not voluntarily to resume conjugal rights.

23. Here also the parties have been living separately from May 1999. There are no chances of union or reunion. In fact, we tried to bring about a settlement. Parties are firm on their respective stand. The chances of parties coming together are almost remote. Marriage has virtually broken down irretrievably. This is further supported by their own petition filed for mutual divorce u/s 13B of Hindu Marriage Act, and wife going away from matrimonial home once for all by taking all her belongings that too, after writing a letter.

24. Taking all these circumstances into consideration and the evidence placed on record, we are of the opinion that the learned Judge has properly analysed the evidence on the basis of intrinsic probabilities. The Trial Court has adopted a right approach to the real state of affairs. The judgment is based on sound reasoning and it is neither opposed to law nor facts nor probabilities. Even on re-appreciation of the entire evidence, we do not find any reason to take a view contrary to the one taken by the learned Judge of Family Court.

25. We do not find any reason to interfere with the well reasoned judgment of the Trial Court. Hence, I answer point No. 1 in the affirmative.

Point No. 2:

26. In view of our finding on point No. 1 the appeal will have to be dismissed and the impugned order of granting divorce on the ground of desertion will have to be upheld.

ORDER

The appeal filed challenging the order passed in M.C. No. 1203/2004 on the file of I Addl. Prl. Judge, Family Court, Bangalore, dated 27.05.2009 is dismissed. Consequently, the impugned order is upheld.

Parties to bear their own costs.