

**IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH**

DATED THIS THE 11TH DAY OF OCTOBER 2017

PRESENT

THE HON'BLE Mr. JUSTICE L.NARAYANA SWAMY

AND

THE HON'BLE Dr. JUSTICE H. B. PRABHAKARA SASTRY

M.F.A. No.21724 OF 2010 [MC]

BETWEEN:

DUNDAPPA S/O MUCHAKANDEPPA
AIHOLI, AGED ABOUT 30 YEARS,
OCC: COOLIE, R/O SIMIKERI,
BAGALKOT.

...APPELLANT

(BY SRI.P.H.GOTKHINDI, ADV.
AND SRI.V.R.DATAR, ADV.)

AND:

MRS.RENUKA W/O DUNDAPPA AIHOLI,
D/O TEERHAPPA BASAPPA KATAGERI,
AGE: 26 YEARS, OCC: HOUSEHOLD WORK,
R/O NEERBUDHIHAL, TQ: BADAMI.

...RESPONDENT

(BY SRI.ANAND R KOLLI, ADV.)

THIS APPEAL IS FILED UNDER SECTION 28 OF THE
HINDU MARRIAGE ACT, AGAINST THE JUDGMENT AND
DECREE DATED 21.01.2010, PASSED IN MC NO.28/2008 ON
THE FILE OF THE PRL.CIVIL JUDGE (SR.DN.) BAGALKOT,

REJECTING THE PETITION FILED U/SEC.13(1)(b) OF HINDU MARRIAGE ACT.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **DR.H.B. PRABHAKARA SASTRY J.**, MADE THE FOLLOWING:

J U D G M E N T

The petition of the present appellant filed before the Principal Civil Judge (Sr.Dn.) Bagalkot (henceforth for brevity referred to as the 'Court below') under Section 13(1)(ib) against the respondent herein seeking dissolution of their marriage came to be rejected by the order of the Court below dated 21.01.2010. On the contrary, considering the application filed under Section 24 of Hindu Marriage Act (henceforth for brevity referred to as the 'Act'), the Court below granted the respondent with a permanent alimony of ₹500/- p.m. from the petitioner therein. Challenging the said order, the appellant has preferred this appeal.

2. In his memorandum of appeal the appellant has taken a contention that the Court below committed a

serious error after assessing the evidence of RW.1 who had categorically stated in her deposition that she was not willing to lead life with the appellant. It also did not consider the preponderance of probability that the respondent had created a superiority complex with herself being highly educated compared to the petitioner. Further stating that the Court below also ignored that the respondent had deserted the appellant since long time, the appellant has sought for allowing the appeal by setting aside the judgment and decree under appeal.

3. In response to the notice, the respondent is being represented by her counsel. The lower court records were called for and the same are placed before us.

4. Heard the arguments from both sides.

5. For simplification, the parties herein would be referred to with the ranks they were holding in the Court below.

6. The Summary of the case of the petitioner in the Court below was that, he married the respondent in the year 1998 at Muchakhandi. He did not have schooling, whereas the respondent was studying SSLC at the time of the marriage. After marriage she completed her degree in B.A. along with computer science course. She never led marital life with the petitioner in spite of attempt being made by the petitioner at the intervention of their elders. On the other hand, she gave an application before the Women Association, Bagalkot, expressing her intention to obtain a divorce with respect to which the petitioner was summoned by the said association which advised both the parties to lead marital life. It is also the case of the petitioner that since all his efforts to call back the respondent went in vein, he was constrained to file this petition seeking divorce.

7. The respondent in her statement of objection filed in the Court below though admitted her marriage

with the petitioner but denied all other allegations made against her husband-petitioner including that she has deserted her husband. She further contended that after their marriage she led marital life with the petitioner for about 2 years, since thereafter the petitioner and his family members started ill-treating her. Further they were demanding dowry and also assaulted her and then she was driven away from her matrimonial home as such she is living separately. She alleged that her husband was addicted to vices including drinking, gambling and womanizing and she also alleged that the petitioner got married a second wife by name Saroja Angadi and has begotten a female child by name Aswini through her. She further stated that she was constrained to file a petition for maintenance in CrI.Misc.No.251/2008 on the file of the Second Additional JMFC, Bagalkot. It is in order to avoid the payment of maintenance under the said claim petition, the petitioner has filed the petition seeking dissolution of marriage. After recording the evidence led before it and

hearing both side, the Court below rejected the petition of the petitioner filed under Section 13(1)(ib) of the Act. On the contrary ordered the petitioner to pay permanent alimony of Rs.500/- p.m. to the respondent.

8. The petitioner in support of his petition in the Court below got himself examined as PW.1 and examined his father-Muchakhandappa as PW.2. The respondent as wife got herself examined as RW.1 and got marked documents at Exs.R.1 to R.5.

9. Both PW.1 and RW.1 in their examination in chief filed in the form of affidavit evidence have reiterated the contention taken up by them in their pleadings in the Court below. The petitioner has stated that since his marriage with the respondent, she has not been residing with him except for a initial few days of 7-8 days duration. A similar statement was also made by PW.2-the father of the petitioner. PW.1 has further stated that for no valid reasons the respondent has been residing separately.

Further after completing graduation she is also doing job. He has also stated that respondent-wife has got issued a notice from Mahila Sangha (Women Association) of Bagalkot by petitioning them seeking a divorce from the petitioner. When he appeared before the Association, she made it clear that she is not ready and willing to reside with him but she would like to stay independently by pursuing her job. He also specifically stated that he has not undergone second marriage as alleged by the respondent. Even in his cross-examination he has also adhered to his original version and denied the suggestions made by the respondent side. He specifically denied a suggestion that for about 2 years the respondent was residing with him and that he was harassing his wife accusing her of not begetting children through him. He also specifically denied that he has undergone second marriage.

10. Even PW.2-the father of the petitioner also deposed in favour of his son accusing the respondent for deserting her husband. He stated that the officers of the Women Association of Bagalkot though suggested to the respondent to live with her husband, but the party from the respondent side suggested to pay money to the respondent and to obtain a divorce. In his cross-examination also except making some denial suggestions nothing could be elicited from the respondent side nor his evidence could be shaken.

11. The respondent as RW.1 in her examination-in-chief itself has stated that after marriage she has resided with her husband for about 2 years only. She alleged ill-treatment in her husband's house against her. In her cross-examination after admitting that she continued her studies even after her marriage and completed graduation, she also stated that for about 6 years she has been in her parental house. She also admitted as true a suggestion

that seeking maintenance from her husband she had instituted a petition at JMFC Court, Bagaklot. She further stated that in a place called Kerakalamatti in a sugar factory she is working as a receptionist. She also admitted a suggestion as true that before institution of the petition by the petitioner she had filed an application before Basaveshwara Mahila Sangha and that they had summoned the petitioner and advised the couple to live together. She further stated that the said Association also advised that in view of the fact that the parties are not residing together the petitioner-husband should pay a sum of Rs.38,000/- to his wife and the respondent should give her consent for divorce. She further alleged that the petitioner has undergone a second marriage and got a female child out of the second marriage. She also stated that the petitioner is working as loader and un-loader of the goods in Railway Department. She specifically responded to a question put to her in the cross-examination as to her readiness to join her husband

stating that she is scared of him, as such she is not ready to join him.

12. When the above evidence of the parties are analysed, the fact remains clear that the marriage of the parties with each other has taken place in the year 1998 i.e. about 19 years back. According to petitioner-husband the respondent-wife has resided with him in the said period only for 7-8 days, if not, at the maximum not beyond 10 days. On the contrary, the say of the respondent is that she has resided with her husband for about 2 years after their marriage. She herself has stated in her cross-examination recorded on 18.12.2009 that she was in her parental home after marriage for about six years. That means within a period of eleven years after their marriage for more than half of the period she was in her parents house than living with her husband. Even according to her, in the said duration of eleven years, she was with her husband only for a period of 2 years. Thus,

for the remaining nine years as on the date of her evidence in the Court below, she was living separately from her husband. Though for the initial period the reason for her living separately in her parents house can be taken as for persuading her studies in college, but the fact remains that even after her graduation studies she did not join her husband.

On the other hand, the respondent-wife herself has stated that she has been working in a private sugar factory nearby her parents house on a monthly salary. Thus, even after assuming that she was staying with her husband for 2 years after her marriage, the established fact shows that thereafter as on the date for about 16 years she has been residing separately from her husband. Neither in her pleading nor in her evidence the respondent has given any reasons for her living separately from her husband. Though she has stated that her husband has undergone second marriage and also got a child but both

her husband as PW.1 and his father as PW.2 categorically denied the said suggestion. That being the case her statement remains only an allegation without proof. Thus, her living separately from her husband for such a long time for about 16 years is established. Thus, the factum of separation is established.

13. The 'desertion' mentioned under Section 13(1)(ib) of the Act is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state. Thus, the intention to bring separation permanently to an end i.e. *animus deserendi* also to be established. The respondent-wife as RW.1 in her cross-examination in the Court below has reacted to a suggestion as below:

“ಅರ್ಜಿದಾರನೊಂದಿಗೆ ಇಗಲೂ ಹೋಗಿ ಬಾಳ್ವೆ ಮಾಡಲು ತಯಾರ ಇದ್ದೀರಾ ಅಂದರೆ ಸಾಕ್ಷಿಯು ಆತನಿಂದ ನನಗೆ ಭಯ ಇದೆ ಆದ್ದರಿಂದ ನಾನೂ ಹೋಗಿ ಬಾಳ್ವೆ ಮಾಡಲು ತಯಾರ ಇಲ್ಲ.”

14. By stating so, the respondent-wife has made it clear that as on date also she is not ready to join her husband and reside with him. Though she has stated that she is scared of him but she has not attributed any reasons for alleged fear about her husband. This establishes the *animus deserendi* on the part of the wife and shows her intention of not to joint her husband for ever. This aspect the Court below did not appreciate in its proper perspective. Even after noticing the statement of RW.1 as extracted above, still the Court below bent on to hold that the respondent since has not made an attempt of recalling his wife by instituting a petition for restitution of conjugal rights was not entitled for relief of divorce under Section 13(1)(ib) of the Act. Thus, the Court below appears to have been under an impression that for obtaining a divorce under Section 13(1)(ib) of the Act, the petitioner should have necessarily instituted a petition seeking restitution of conjugal rights as a condition precedent. The said approach of the Court below cannot

be considered as a correct approach of analysing Section 13(1)(ib) of the Act. As already observed above, the person seeking divorce under Section 13(1)(ib) of the Act is required to fulfill the ingredient of (i) the factum of separation; and (ii) the intention to bring cohabitation permanently to an end (*animus deserendi*); (iii) the element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period.

In the instant case as already observed above, the petitioner has established all these three ingredients. He has also stated clearly that since his effort to bring back his wife has failed, he was constrained to institute the petition seeking the relief of divorce. The said averment of the petitioner has not been specifically denied by the respondent-wife. On the contrary, as observed above, the wife herself has shown her intention not to join her husband forever. Thus, she has shown it very clear that

no purpose would be served even by asking her to join her husband since she has already determined not to join him permanently. From the reading of the pleading and the evidence, it is clear that since several years prior to the petitioner instituting the petition in the Court below the respondent-wife has been living away from him. Therefore, it has to be necessarily held that the petitioner has established that the respondent-wife has deserted him for a continuous period of not less than 2 years immediately preceding the presentation of the petition.

15. Therefore, the petitioner-husband is entitled for the relief of dissolution of his marriage with the respondent by a decree of divorce on the ground of dissolution. Thus, the finding of the Court below rejecting his petition for the said relief deserves to be set aside and relief as prayed by the petitioner-husband deserves to be granted.

16. Apart from rejecting the petition filed by the petitioner, the Court below has also ordered the petitioner to pay the respondent permanent alimony of Rs.500/- p.m. from the date of the impugned order. No reasons to that effect has been given by the Court below except stating that respondent-wife has got produced three records of rights and two assessment extracts of house at Exs.R.1 to R.5. No doubt Exs.R.4 and R.5 shows that two small house properties in the village are standing in the name of petitioner-husband but the records of rights at Exs.R.1 to R.3 does not show that all the lands mentioned in those three RTC's are standing exclusively in the name of the petitioner. It is only land measuring 1 acre 15 guntas as shown in Ex.R.1 alone stands in the name of the petitioner-husband. The rest of the lands in other two RTC's stand in the name of other persons, who may be his family members. By that itself it cannot be considered that the petitioner has got sufficient income to maintain his wife.

On the other hand, the respondent-wife in her cross-examination has stated that the petitioner-husband is working as loader and un-loader in the goods in the Railway Department. She has stated that she is working as a receptionist in a sugar factory and earning a sum of Rs.1,500/- p.m. However, she denied a suggestion that she was drawing salary of Rs.5,000/- p.m. Thus, the proven fact remains that she is working independently and earning a monthly salary of Rs.1,500/-, whereas her husband/petitioner is only a loader and un-loader of the goods in Railway Department. It is not even her case that he is an employee of Railway Department and drawing monthly salary. Even according to her, her husband is educated only up to 2nd standard schooling. Thus, the fact shows that the income of her husband is far less than her income. As stated by RW.1 in her cross-examination, her petition for maintenance was also dismissed. The Court below did not appreciate any of these facts but without attributing any reasons has simply granted permanent

alimony of Rs.500/- p.m. to the respondent-wife payable by the petitioner-husband. Thus, the said order also deserves to be set aside and the application of the wife filed under Section 24 of the Act deserves to be rejected.

17. Accordingly, we proceed to pass the following:

ORDER

The appeal is allowed.

The order passed by the Principal Civil Judge (Sr.Dn.) Bagalkot, in M.C.No.28/2008 dated 21.01.2010 is set aside.

The petition filed by the petitioner in M.C.No.28/2008 before the Principal Civil Judge (Sr.Dn.) Bagalkot under Section 13(1)(ib) of Hindu Marriage Act, 1955, is allowed.

The marriage solemnized between the petitioner and the respondent at Muchakhandi in the year 1998 is dissolved.

The application filed by the respondent wife in the Court below under Section 24 of the Hindu Marriage Act, 1955, is rejected.

No order as to costs.

Draw decree accordingly.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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