**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 31ST DAY OF JANUARY 2015**

**PRESENT**

**THE HON'BLE MR. JUSTICE H.G.RAMESH**

**AND**

**THE HON'BLE MR. JUSTICE P.B.BAJANTHRI**

**MISCELLANEOUS FIRST APPEAL NO.9783/2011 (FC)**

**BETWEEN:**

SMT. GEETHA
W/O. BASAVARAJAPPA
AGED ABOUT 35 YEARS
RESIDING AT MELLEKATTE VILLAGE
DAVANGERE TALUK & DISTRICT …APPELLANT

(BY SRI RAJASHEKHAR K., ADVOCATE)

**AND:**

BASAVARAJAPPA
S/O. LATE SHEKARAPPA
AGED ABOUT 44 YEARS
AGASANAKATTE VILLAGE
DAVANGERE TALUK & DISTRICT - 577005 …RESPONDENT

(BY SRI MUNISWAMY GOWDA AND
SRI HEMANTH KUMAR D., FOR
M/S. PRAMILA ASSOCIATES, ADVOCATES)

THIS MFA IS FILED U/S 19(1) OF THE FAMILY COURTS ACT, AGAINST THE JUDGMENT AND DECREE DATED:21.09.2011 PASSED IN M.C.NO.56/2011 ON THE FILE OF THE JUDGE, FAMILY COURT, DAVANAGERE, ALLOWING THE PETITION FILED U/S 13(1)(1-A) OF HINDU MARRIAGE ACT, FOR DECREE OF DIVORCE.

THIS APPEAL COMING ON FOR HEARING AND HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, **P.B.BAJANTHRI, J.,** DELIVERED THE FOLLOWING:

## **J U D G M E N T**

This appeal is filed under Section 19(1) of the Family Courts Act, 1984 against the judgment and decree dated 21.9.2011 passed in M.C.No.56/2011 on the file of the learned Judge, Family Court, Davanagere, in allowing the petition filed by the respondent herein under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act" for short).

2. The appellant and respondent are wife and husband (hereinafter referred to as appellant and respondent respectively). The appellant and respondent got married on 6.7.1998 as per Hindu customs. From the wedlock of the appellant and respondent, the appellant gave birth to two male children. As on the date of filing of the M.C. case they were aged about 12 years and 9 years respectively and they were living with the appellant.

3. The appellant and respondent were not happy in staying in respondent-husband marital home namely at Agasanakatte Village, Davanagere Taluk. The appellant was insisting and pressurized respondent from time to time for settling their family at Davanagere as their children were going to school at Davanagere and the respondent's business was also at Davanagere. More over, the respondent did not have his own house at Agasanakatte village. This issue lead to further rift between the appellant and the respondent. Since the respondent refused to succumb to her pressure, her behaviour changed towards respondent. The appellant in the month of March 2006 left the matrimonial home for celebrating Ugadi festival in her parents house. Thereafter, she did not return to the husband's house at Agasanakatte village. The appellant filed Crl.Misc.No.186/2006 for maintenance and on 2.2.2007 she withdrew the aforesaid criminal miscellaneous petition and she has returned to her marital house and she was staying with the respondent for about one year.

4. The appellant complained to the Swamiji of Seregere Mutt in the year 2006 stating that the respondent was harassing her. The same was taken note of by the Swamiji and number of sittings were arranged for solving the dispute between the appellant and the respondent in the year 2006 itself and it was amicably settled.

5. Abruptly, the appellant once again left marital home without informing the respondent and stayed in her parent's place namely Mellakatte village from 20.4.2009. In the year 2010, the appellant filed Crl.Misc. which was numbered as 80/2010 for maintenance for herself as well as for her children. The appellant at the instance of the children filed O.S.No.48/2010 for partition against the respondent. In the meanwhile, the respondent assaulted the appellant and she was admitted to the hospital on 20.4.2009 and discharged on 8.5.2009.

6. In this background, the respondent approached the Family Court, Davanagere by filing M.C.No.56/2011 seeking for dissolution of the marriage between the respondent and appellant dated 6.7.1998 under Section

13(1)(i-a)(i-b) of the Act. The respondent before the Family Court contended that the marriage between the respondent and appellant is broken since the appellant left the marital home on two occasions once in the year 2006 and in the year 2009 and the appellant has deserted the respondent. It was also on the ground that the appellant harassed the respondent by filing Crl.Misc.No.186/2006 and Crl.Misc.No.80/2010 and O.S.No.48/2010. Thus, the contention of the respondent before the Family Court was that the appellant had deserted him as well as given mental agony to him by filing number of cases. The appellant contended that the respondent has business at Davanagere and her children are studying at Davanagere and the respondent does not have his own house at Agasanakatte village therefore, the appellant insisted for shifting of the entire family to Davanagere from Agasanakatte Village, whereas, the respondent herein intends to stay at Agasanakatte village which is his native place.

7. The appellant examined herself in the matter and so also the respondent. The respondent in support of

his version relied on Exs.P1 to P5 whereas the appellant did not produce any material in support of her version.

8. The Family Court while recording the statements made by both the appellant and respondent has arrived at the conclusion that the appellant has harassed the respondent with reference to the filing of number of criminal cases as well as filing of case for partition on behalf of her children and further the appellant is stubborn and she is not co-operative with the respondent-husband. The Family Court has come of the conclusion that the appellant may not stay with the respondent even if the family is shifted to Davanagere by hiring a rented house. In view of the above reasons, the Family Court granted divorce under Section 13(1)(i-a) while rejecting the petition under Section 13(1)(i-b) on the ground that there is no desertion by the appellant. The appellant being aggrieved by the order dated 21.9.2011 passed in M.C.No.56/2011 presented the above appeal.

9. To constitute cruelty, the conduct complained should be "grave and weighty" so as to come to the

conclusion that the appellant's spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions so also in the interest of their children. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty.

10. The learned counsel for the appellant contended that the appellant has not harassed the respondent and the action of the appellant in filing criminal miscellaneous cases and original suit does not amount to cruelty on the other hand it is the right accrued in favour the appellant and her children. Further, the appellant contended that while she was living with the respondent she was assaulted by respondent and so also by his family members thereby the appellant was compelled to live separately and it was not with an intention to desert the respondent permanently. In

support of assault by her husband, she has produced documents in respect of admission to the hospital as well as discharge summary in the month of April-May 2009. It was also contended by the appellant that she is willing to join the respondent and lead married life even to this day. The appellant's counsel contended that appellant's attitude towards respondent stated above do not fall within the definition of cruelty. The appellant's counsel has relied on the decision of this Court namely MFA.No.10939/2013 disposed of on 25.3.2014 in support of her contention that her act does not amount to cruelty. The relevant portion of the said judgment is extracted hereunder:-

> "14. ……..This is a right conferred under law to a wife who is subjected to cruelty. If a wife exercises the legal right, it cannot be held to be an act of cruelty. When wife is thrown out of the house, when she is not paid any maintenance, when she has been physically abused, the Parliament has enacted various legislations protecting woman from such acts. When a woman exercises her right given to her under law, that cannot be held against her as act of cruelty. The trial Court completely misapplied the law to the facts of this case and erred in coming to the conclusion that this amounts to 'cruelty'. The evidence on record shows that it was an arranged marriage."

11. The respondent's counsel vehemently argued that each and every act of the appellant like leaving marital home of respondent on two occasions without informing the respondent; staying away from him since 2009; non-disclosure of details of her children's education to him i.e., one of their son was sent to Kolar for studies, where the appellant's sister is staying; filing of criminal cases against the respondent for maintenance and so also original suit through her children for partition have caused mental agony to the respondent, all these acts and omissions amount to cruelty and desertion. Further contended that the cruelty was constituted to the extent that it was impossible for the husband to live with such a wife. which amounts to cruelty.

12. The family Court has granted divorce under Section 13(1)(i-a) and rejected under Section 13(1)(i-b). The family Court relied on the issues like filing of criminal cases for maintenance by the appellant and filing of original suits in relation to the property through the appellant's

children to come to the conclusion that it amounts to cruelty on the respondent. This Court in MFA.No.10939/13 held that merely filing of maintenance application and other cases do not amount to cruelty for the reasons that right accrued under law to a wife has been exercised which is a legal right, which cannot be held to be an act of cruelty. Further, this Court has observed that when wife is thrown out of the house, when she is not paid any maintenance, when she has been physically abused, the parliament has enacted various legislations protecting woman from such acts. Therefore, the appellant-wife has exercised her right given to her under law and that cannot be held against her as an act of cruelty towards her husband-respondent herein.

13. The respondent's contention is that appellant and himself are separated for a sufficient length of time i.e. they are away from April 2009 to till date and therefore, it is to be presumed that the marriage has broken down. The respondent in support of his contention has relied on the decision of the Apex Court, which is reported in **(2007)**

**4 SCC 511 (SAMAR GHOSH .VS. JAYA GHOSH)** at para 95, which reads as follows:-

> "95. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties."

Whereas the Apex Court in the case of **VISHNU DUTT SHARMA VS. MANJU SHARMA, (2009) 6 SCC 379** at paras 12 and 13 held as follows:

> "12. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for Parliament to enact or amend the law and not for the courts. Hence, we

> do not find force in the submission of the learned counsel for the appellant.
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> 13. Had both the parties been willing we could, of course, have granted a divorce by mutual consent as contemplated by Section 13-B of the Act, but in this case the respondent is not willing to agree to a divorce."

Factual aspect of the present matter cannot be comparable to that of the aforesaid decision viz., SAMAR GHOSH. The Apex Court itself held that each case depends on various factors. Therefore the decision in SAMAR GHOSH's case is of no help to the respondent herein. In this case, the respondent has not demonstrated that the conduct of the appellant amounts to cruelty. In the present case the respondent's conduct with reference to few instances like beating appellant indicates the respondent's attitude. Therefore, the family Court ordering dissolution of marriage under Section 13(1)(i-a) of the respondent and appellant is incorrect and contrary to the decision of this Court passed in MFA.No.10939/2013. Therefore, the judgment of the

family Court dated 21.9.2011 passed in M.C.No.56/2011 is liable to be set aside. Hence, we pass the following order:

The appeal is allowed. The impugned order of the Family Court dated 21.09.2011 passed in MC.No.56/2011 is hereby set aside. The petition of the respondent for grant of divorce is dismissed. Parties to bear their own costs.

**Sd/-**
**JUDGE**

**Sd/-**
**JUDGE**

*alb/-.