

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.06.2015

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

Crl.R.C.No.190 of 2015

M.P.No.1 of 2015

G.Sampath

...Petitioner

Vs

S.Sivakami

...Respondent

Criminal Revision filed under sections 397 r/w 401 of Criminal Procedure Code to set aside the order, dated 05.09.2014 passed in M.C.No.12 of 2012, on the file of the learned Judicial Magistrate No.II, Tindivanam.

For Petitioner : Mr.V.Vargees Amal Raja

O R D E R

Being aggrieved by the order made in M.C.No.12 of 2012, dated 05.09.2014, on the file of the learned Judicial Magistrate No.II, Tindivanam, granting maintenance of Rs.1,000/- to the wife and Rs.750/- each to the minor son and daughter, husband has filed the present Criminal Revision Case.

2. Material on record discloses that marriage between the spouses was solemnized on 01.07.1999 and they were residing at Thenpalai Village, Gingee Taluk. They were blessed with two children. According to the respondent/wife, at the time of marriage, five sovereigns of gold jewels and marriage articles worth Rs.75,000/-, were given. Minor children were studying in Sathamangalam Panchayat Middle School. Out of the sale proceeds of the jewels, the petitioner/husband purchased 0.04 Cents of house site, at Alampundi Village. There was shortage of money. Therefore, the respondent/wife obtained Rs.10,000/- from her parents.

3. It is the further case of the respondent/wife that her husband, petitioner herein, abandoned and driven her away from the

matrimonial home. She has been maintaining two children. Husband has not provided her with any maintenance. He was addicted to liquor. He was a mason and earning Rs.600/- per day. In the abovesaid circumstances, she has sought for a direction against the petitioner/husband, to provide maintenance, at the rate of Rs.6,000/- per month, for herself and Rs.3,000/- per month, each, to the children.

4. The petitioner/husband has opposed the petition, contending inter alia that after marriage, respondent/wife had not taken care of his aged parents. She has beaten his mother. Without any reason, she would leave the matrimonial home and go to her parents' house. Within one month, from the date of marriage, she has filed a false complaint, with the help of her parents and harassed him. After sometime, a separate matrimonial home has been set up at No.56, MGR Street, Annai Satya Nagar, Villivakkam, Chennai.

5. The petitioner/husband has further submitted that he has taken care of his wife and children. Dress and other materials were purchased. Articles worth Rs.75,000/- were not given as Sridhana. Property at Alampundi, was purchased out of his own income. He was not addicted to liquor. He has denied the allegation of physical assault. He has further submitted that through his relatives and friends, he had gone to the respondent's parents' house on many occasions, for compromise and in one such time, he was beaten up by the wife's brothers. H.O.M.P.No.2074 of 2012, filed for restitution of conjugal rights was filed on the file of the Family Court, Chennai and it was pending. He is willing to live with his respondent/wife. For the abovesaid reasons, the petitioner/husband has prayed for dismissal of order passed in M.C.No.12 of 2012, dated 05.09.2014.

6. The respondent/wife, examined herself as PW.1 and one Nagapan has been examined as PW.2. Documents, Copies of Marriage Invitation and Family Card, lawyers' Notice and Reply to the Notice have been marked as Exs.P1 to P4. Besides examining himself as RW.1, the petitioner/husband has examined one Mani, as RW.2. On his side, Ex.R1 - Lawyer's Notice, Ex.R2 - Letter sent to the All Women Police Station, Chengi and Ex.R3 - Reply Notice of the petitioner/husband, have been marked.

7. On evaluation of pleadings and evidence, the learned Judicial Magistrate No.II, Tindivanam, held that wife and children are entitled to maintenance, at the rate of Rs.1,000/- per month to the wife and Rs.750/- per month, each, to the children. The Court below has also directed that the amount to be paid on or before 5th of every English Calender month.

8. The main contention of the petitioner/husband is that the learned Judicial Magistrate No.II, Tindivanam, has failed to consider that the respondent/wife has failed to comply with the order of the Family Court, Chennai, for restitution of conjugal rights in H.M.O.P.No.2074 of 2012, dated 04.01.2012 and that the Court below has also failed to appreciate the evidence of the respondent/wife, in the cross-examination that she had knowledge about the abovesaid order and despite the same, refused to comply with the same.

9. In support of the contention that when there is a decree for restitution of conjugal rights that the petitioner/husband has no obligation to pay maintenance, learned counsel for the petitioner/husband relied on the following decisions,

- (i) David Daniel v. Chinnamma Daniel reported in 1972 KLT 396 = 1973 CrL.L.J.91 (Ker.);
- (ii) Teja Singh v. Chhoto reported in 1981 CrL.L.J. 1467;
- (iii) Sampuran Singh v. Gurdev Kaur reported in 1985 CrL.L.J. 1072;
- (iv) Sayyed Jabbar Ali v. Saheba Fatima reported in 2002 CrL.L.J. 1332;
- (v) Ramkrushna Somaji Nadekar v. Smt.Manjusha reported in 2011 (4) AIR (BOM) R 599

Heard the learned counsel for the parties and perused the materials available on record.

10. Section 125 of the Code of Criminal Procedure, deals with order for maintenance of wives, children and parents and the said Section reads as follows:

- (1) If any person having sufficient means neglects or refuses to maintain-
 - (a) his wife, unable to maintain herself, or
 - (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
 - (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
 - (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such

Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation.- For the purposes of this Chapter,-

(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are

living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

11. Upon considering the averments, oral and documentary evidence, the Court below has observed that within one month from the marriage, the respondent/wife has given a complaint against the petitioner/husband, to the All Women Police Station, Villupuram and Ex.R2 is the letter of the petitioner/husband. Though the petitioner has contended that he had provided maintenance and purchased dress and other materials, perusal of the order does not disclose that he had produced any material and substantiated the same.

12. Mr.V.Vargees Amal Raja, learned counsel for the petitioner/husband has contended that H.M.O.P.No.2074 of 2012 has been filed for restitution of conjugal rights and that the learned Magistrate has failed to consider the order made in H.M.O.P.No.2074 of 2012, dated 04.01.2012. It is also his submission that the wife was aware of the same and the Court below has failed to consider that the wife, who has refused to comply with an order of restitution of conjugal rights, is not entitled to maintenance. On this aspect, perusal of the impugned judgment shows that even before the institution of H.M.O.P.No.2074 of 2012, on the file of the Family Court, Chennai, the 1st respondent/wife has lodged a complaint against the petitioner/husband, in the All Women Police Station, Chengi, which has also been admitted.

13. Perusal of the impugned order further shows that when PW.1, 1st respondent/wife was cross examined by the petitioner/husband that she has chosen to live on her own, though the petitioner/husband was willing for restitution of conjugal rights, she has denied the suggestion and on the contra, she has deposed that she was driven away.

14. In David Daniel v. Chinnamma Daniel reported in 1973 CrL.L.J. 91 (Ker), it is held that the Civil Court decree for restitution of conjugal rights is binding on the proceedings under Section 125 of the Criminal Procedure Code. Same is the view in Teja Singh v. Chhoto reported in 1981 CrL.L.J. 1467. In the said judgment, the Punjab and Haryana High Court, at Paragraph 8, held as follows:

"8. In the present case the Civil Court had already held against the wife by pronouncing that she was not

entitled to a decree of restitution of conjugal rights, under Section 9 of the Hindu Marriage Act because it was not the husband who had deserted her, it was she who had withdrawn from his society and had deserted him. This finding of the Civil Court was binding upon the Magistrate and in the face of this finding the trial Magistrate could not come to a contrary finding and grant maintenance. In the petition for maintenance, it not being her case that after her petition under Section 9 of the Hindu Marriage Act had been dismissed, she had made efforts to join her husband and her efforts had been thwarted by him."

15. In *Sampuran Singh v. Gurdev Kaur* reported in 1985 CrL.L.J. 1072, it is held that restitution of conjugal rights is a defence in the matter for maintenance under Section 125 of the Criminal Procedure Code. Same is the view taken in *Sayyed Jabbar Ali v. Saheba Fatima* reported in 2002 CrL.L.J. 1332.

16. In *Ramkrushna Somaji Nadekar v. Smt. Manjusha* reported in 2011 (4) AIR (Bom) R 599, the Bombay High Court has held that in the case of restitution of conjugal rights, there is sufficient evidence of refusal on the part of the respondent/wife and that the evidence adduced for ill-treatment was not substantiated. The Court held that general allegations cannot be accepted. However, in the reported case, the Bombay High Court has also observed that in case of existence of a decree for restitution of conjugal rights against the wife, she has no right to claim for maintenance, but the wife can still be entitled for maintenance, if the conduct of the husband, is such, which obstructs her, to disobey the decree for restitution of conjugal rights.

17. Reverting to the case on hand, it could be seen that though the husband has obtained a decree for restitution of conjugal rights, thereafter, he has not taken any steps for reunion. Though he has adduced evidence that he is willing to living with his wife and children, in the proceedings, before the Court below, he has not marked any documents to prove that he had provided some maintenance to them, atleast to the children. The intention of Section 125 Cr.P.C., is to avoid vagrancy and to provide succor to destitutes.

18. Yet another factor to be taken into consideration is that whether justifiable cause on the part of the wife, to refuse to live with her husband, despite a decree for restitution of conjugal rights. As observed earlier, prior to filing of the maintenance case, the respondent/wife has given a complaint to the police, alleging ill-treatment. Marking of Ex.R3 - Letter sent by the husband to the

All Women Police Station, indicates that the Police seemed to have enquired into the matter. When the allegation of ill-treatment has been made, against the husband, that could be considered as a factor, for arriving at a conclusion, as to whether, refusal on the part of the wife to live together, was bona fide or not. On that aspect, the learned Magistrate has answered the issue, in favour of the respondent. Considering the evidence adduced, this Court does not find any perversity. Though a right to defend payment of maintenance, is available to the husband, on the ground that he has obtained a decree for restitution of conjugal rights, which decree, the learned Judicial Magistrate, is bound to consider, in the humble opinion of this Court, such right is not indefeasible, when the wife substantiates, her case for refusal to live. No doubt, in the case on hand, wife was aware of the decree, still she has adduced acceptable evidence, as to why, she could not live with him and the cause shown by her, cannot be held to be a unjustifiable cause, for denying maintenance.

19. In Noor Muhammed V. Sulkiya, reported in 2012 (1) KLT 307, the question that was considered by the Kerala High Court was whether on basis of an order of restitution of conjugal rights, obtained by the husband, he can resist the claim of maintenance by the wife. Addressing the above question and on the facts and circumstances, a learned Single Judge of Kerala High Court, at paragraph No.3, held as follows:

"3. The main thrust of challenge canvassed by the counsel for the husband is built upon the order of restitution of conjugal rights, which he has obtained ex parte against the wife and its noncompliance by her, stressing upon that her living separately from him after such an order has been passed by the Judge, Family Court (Civil Court) could be treated only as without justifiable cause. Admittedly, he has not taken any steps till date to execute the ex parte order of restitution of conjugal rights to compel the wife to join him and fulfill her obligations as such. He did not offer to maintain her when a claim was made for maintenance against him. Even if an order of restitution of conjugal rights has been obtained by the husband, that alone would not be sufficient for him to resist the claim of maintenance of the wife, which is a statutory right enforceable where it is shown that there was neglect on his part to maintain her and also her inability due, to lack of means for sustenance in life. The laudable objective behind Section 125 of the Code can never be lost sight of in appreciating the objections raised to resist the claim of the wife and children, as its very intend is to avoid vagrancy and to provide succor to destitutes. More

over it has also to be taken note of what is contemplated under Section 125 of the Code-for determination of the disputes canvassed in relation to a claim of maintenance is only by way of a summary trial, leaving the parties to agitate complicated questions affecting their substantive rights in appropriate forum. When that be so, and also that the husband has not set forth any offer to maintain the wife when the claim for maintenance was made against him, resistance to such claim banking upon the ex parte, order of restitution of conjugal rights cannot be given unmerited consideration"

20. In Zeenath Vs. Sulfiker Ali, reported in 2008 (4) Crimes 239 (Ker.), wife of the minor son, claimed maintenance under Section 125 of the Code, before the Family Court. In the same Court, husband filed a petition seeking for restitution of conjugal rights. Both the petitions were simultaneously tried. Family Court found that wife and son were living separately from husband without any valid reason and hence directed wife to resume conjugal relationship with husband. Further observing that the said order is binding on the parties the Court rejected the claim for maintenance. Question framed by the Kerala High Court was that can the Court dismiss a petition for maintenance filed under Section 125 of the Code of Criminal Procedure ('the Code', for short) on the ground that a decree is passed against the wife, in a petition for restitution of conjugal rights?

21. Giving its careful consideration to Section 125 of the Code and considering the decisions of the Apex Court viz., (1) Begum Subanu v. A.M.Abdul Gafoor - (1987) 2 SCC 285, (2) Mohd.Ahmed Khan v. Shah Bano Begum - (1985) 2 SCC 556, (3) Savitaben Somabhai Bhatiya v. State of Gujarat - (2005) 3 SCC 636, (4) Capt.Ramesh Chander Kaushal v. Veena Kaushal - (1978) 4 SCC 70, (5) Kirtikant D.Vadodaria v. State of Gujarat - (1996) 4 SCC 479 at page 489, the Kerala High Court, at Paragraph 23, held as follows:

"23. Thus, having established all the requirements of section 125(1) of the code and the court below ought not to have rejected the petition filed by the petitioner, particular in the absence of any legally sustainable ground to reject the claim made by the petitioner. As already held by me, the decree passed in the petition for restitution of conjugal rights by itself, is not sufficient to deny maintenance to the wife. The considerations in a petitioner for restitution for conjugal rights and a petitioner for maintenance under Section 125(1) Cr.P.C. are totally different. The court below committed an illegality in

refusing maintenance to the wife without taking note of the difference. The petitioner is entitled to get an order for maintenance allowance from her husband and the order rejecting her claim is unsustainable.”

22. In the light of the discussion and decisions, this Court is inclined to confirm the order made in M.C.No.12 of 2012, dated 05.09.2014, on the file of the learned Judicial Magistrate No.II, Tindivanam. Hence, the Criminal Revision Case is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

The Judicial Magistrate No.II,
Tindivanam.

Copy to

The Section Officer,
Criminal Section,
High Court, Madras.

CA (CO)
PSI (23.06.2015)

CrI.R.C.No.190 of 2015
and M.P.No.1 of 2015

सत्यमेव जयते

WEB COPY