

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.12.2016

CORAM

THE HON'BLE DR.JUSTICE P.DEVADASS

Crl.R.C.No.1169 of 2010

Ajithkumar

.. Petitioner

Vs.

1 Simmi

2 Minor Pooja Ajithkumar

.. Respondents

This Criminal revision is filed under Section 397 r/w 401 of Cr.P.C., against the order, dated 3.5.2010 passed by the Judicial Magistrate (Sub-Judge) Mahe, Puducherry in M.C.No.7 of 2006.

For Petitioner : Mr.Manoj Sreevalsan

For Respondents : Mr.Ashok Menon

O R D E R

The respondent in the Maintenance case in M.C.No.7 of 2006 on the file of the learned Judicial Magistrate (Sub-Judge) Mahe, Puducherry is the revision petitioner.

2. On 10.7.2003, the revision petitioner married the first respondent in Mahe, Union Territory of Puducherry. On 19.5.2004, their daughter/second respondent was born. Difference of opinion arose between the spouses. The revision petitioner is working and residing in Moradabad, U.P. The first respondent along with her daughter started living in her parents house in Mahe. The couples got separated.

3. In the circumstances, she filed M.C.No.7 of 2006 under Section 125 Cr.P.C. before the learned Judicial Magistrate, Mahe seeking maintenance for herself and for her daughter.

4. The revision petitioner filed counter opposing her claim contending that she has left him without sufficient reason.

5. The trial Court, brushing aside his contentions, on 3.5.2010, ordered him to pay monthly maintenance at the rate of Rs.3,000/- and Rs.1,000/- respectively to the respondents 1 and 2 from the date of its order.

6. Aggrieved, the revision petitioner has directed this revision.

7. Subsequently, on 26.5.2014, the revision petitioner filed O.P.No.261 of 2014, in the Family Court, Thalassery, Kerala seeking divorce under Section 13(i) (a) and 13(i) (b) of Hindu Marriage Act, 1955 on the ground of her cruelty and desertion. It was contested by her. Evidence was let in. Ultimately, on 8.7.2016, the Family Court dissolved their marriage on both the grounds (see Ex.R-2 decree and judgment of the Family Court, Thalassery).

8. The learned counsel for the revision petitioner would contend that divorce was granted on the ground of her desertion. The Family Court held that she has deserted him from 30.1.2005. M.C.No.7 of 2006 has been filed in 2006. Thus, even on the said date she has withdrawn her society from her husband. In such circumstances, as per Section 125(4) Cr.P.C, she is not entitled to maintenance from him.

9. In this connection, the learned counsel for the revision petitioner cited Rohtash Singh vs. Ramendri and others [2000 (3) SCC 180 = CDJ 2000 SC 136] and R.Mathialagan vs. V.Ravichandrika [CDJ 2015 MHC 5803].

10. On the other hand, the learned counsel for the respondents contended that the first respondent was harassed, she was driven out of the matrimonial home. The revision petitioner tries to reap benefit out of his own wrong.

11. The learned counsel for the respondents further contended that when divorce has been obtained by the husband or wife, Section 125 (4) Cr.P.C. will not apply to a maintenance petition filed under Section 125 (4) Cr.P.C.

12. In this connection, the learned counsel for the respondents also cites Rohtash Singh case (supra) and Parvatevva @ Roopa vs. Channabasappa (CrI.R.P.No.2122 of 2013 dated 29.1.2014 (Karnataka)).

13. The learned counsel for the respondents also contended that the Salary Certificate of the revision petitioner shows that he earns considerably. However, a ludicrously low amount has been granted towards their maintenance. The Court can consider the reality of the situation and fix the maintenance amount.

14. However, the learned counsel for the revision petitioner replied that the revision petitioner has lost his job.

15. I have anxiously considered the rival submissions, perused the impugned order, the entire materials on record and also the decisions cited by both sides.

16. In the facts and circumstances, now the question in exercise of this Court's power under Section 401 Cr.P.C. whether we have to interfere with the impugned order and if so, to what extent.

17. The dispute is between the revision petitioner and the first respondent. There is no dispute with regard to the grant of maintenance to the second respondent, who is the daughter of both. Further, as her father he is bound to provide her maintenance.

18. The contentious issue is with regard to the grant of maintenance to the first respondent.

19. The revision petitioner and the first respondent were married. Fate has separated them. They have to face each other in the Magistrate's Court in Mahe in M.C. No.7 of 2006. She was granted maintenance on 3.5.2010.

20. Subsequently, her marital tie with him was snapped by the Family Court, Thalassery in O.P.No.261 of 2014 on 8.7.2016 on the ground of deserting her husband.

21. In order to protect the parents, wives and children from vagrancy, Section 125 Cr.P.C. has been inserted in the Code of Criminal Procedure, 1973. In the old Code of 1898, it was section 488 Cr.P.C.

22. The crux of the said provision is that when an husband having sufficient financial capacity refuses or neglects to maintain his wife who is unable to maintain herself, who does not have sufficient financial capacity to sustain herself, the husband shall be directed to pay her a reasonable sum towards her maintenance.

23. However, under three circumstances mentioned in Section 125(4) Cr.P.C. namely, (1) when the wife without sufficient reason refused to live with her husband; (2) she is living in adultery; and (3) the spouses are living separately under a mutual agreement, the husband can refused to pay her maintenance. Thus, Section 125 (4) Cr.P.C. acts as an exceptional clause to Section 125 (1) Cr.P.C.

24. The effect of granting of divorce to a woman visa-a-vis a contention placed on the anvil of Section 125 (4) Cr.P.C. was considered by the Hon'ble Supreme Court in Rohtash Singh case [2000 (3) SCC 180].

25. In the said case, as before us, it was argued that as she has refused to live with her husband as per Section 125 (4) Cr.P.C., she is not entitled to maintenance.

26. In this connection, it is relevant here to notice the following observations made by the Hon'ble Supreme Court in the said case:

"4. The principal contention raised by the learned counsel for the petitioner is that a decree for divorce having been passed under Section 13 of the Hindu Marriage Act on the ground of desertion by the respondent, an order for maintenance could not have been passed in favour of the respondent on account of Sub-section (4) of Section 125 Cr. P.C. Sub-section (4) of Section 125 Cr. P.C. provides as under :-

"(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."

6. Under this provision, a wife is not entitled to any Maintenance Allowance from her husband if she is living in adultery or if she has refused to live with her husband without any sufficient reason or if they are living separately by mutual consent. Thus, all the circumstances contemplated by Sub-section (4) of Section 125 Cr. P.C. presuppose the existence of matrimonial relations. The provision would be applicable where the marriage between the parties subsists and not where it has come to an end. Taking the three circumstances individually, it will be noticed that the first circumstance on account of which a wife is not entitled to claim Maintenance Allowance from her husband is that she is living in adultery. Now, adultery is the sexual intercourse of two persons, either of whom is married to a third person. This clearly supposes the subsistence of marriage

between the husband and wife and if during the subsistence of marriage, the wife lives in adultery, she cannot claim Maintenance Allowance under Section 125 of the Code of Criminal Procedure.

7. The second ground on which she would not be entitled to Maintenance Allowance is the ground of her refusal to live with her husband without any sufficient reason. This also presupposes the subsistence of marital relations between the parties. If the marriage subsists, the wife is under a legal and moral obligation to live with her husband and to fulfil the marital obligations. She cannot, without any sufficient reason, refuse to live with her husband. "Sufficient reasons" have been interpreted differently by the High Courts having regard to the facts of individual cases. We are not required to go into that question in the present case as admittedly the marriage between the parties came to an end on account of a decree for divorce having been passed by the Family Court. Existence of sufficient cause on the basis of which the respondent could legitimately refuse to live with the petitioner is not relevant for the present case. In this situation, the only question which survives for consideration is whether a wife against whom a decree for divorce has been passed on account of her deserting the husband can claim Maintenance Allowance under Section 125 Cr. P.C. and how far can the plea of desertion be treated to be an effective plea in support of the husband's refusal to pay her the Maintenance Allowance.

[emphasis supplied by us]

8. Admittedly, in the instant case, the respondent is a divorced wife. The marriage ties between the parties do not subsist. The decree for divorce was passed on 15th of July, 1995 and since then, she is under no obligation to live with the petitioner. But though the marital relations came to an end by the divorce granted by the Family Court under Section 13 of the Hindu Marriage Act, the respondent continues to be "wife" within the meaning of Section 125 Cr.P.C. on account of Explanation (b) to Sub-section

(1) which provides as under :-

"Explanation. - For the purposes of this Chapter -

(a).....
.....

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

9 On account of the Explanation quoted above, a woman who has been divorced by her husband on account of a decree passed by the Family Court under the Hindu Marriage Act, continues to enjoy the status of a wife for the limited purpose of claiming Maintenance Allowance from her ex-husband. This Court in Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Others, AIR (1978) SC 1807, observed as under :-

"9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Art. 39. We have no doubt that, sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause-the cause of the derelicts."

10. Claim for maintenance under the first part of Section 125 Cr.P.C. is based on the subsistence of marriage while claim for maintenance of a divorced wife is based on the foundation provided by Explanation (b) to Sub-section (1) of Section 125 Cr. P.C. If the divorced wife is unable to maintain herself and if she has not remarried, she will be entitled to Maintenance Allowance. The Calcutta High Court had an occasion to consider an identical situation where the husband had obtained divorce on the ground of desertion by wife but she was held entitled to Maintenance Allowance as a divorced wife under Section 125 Cr.P.C. and the fact that she had deserted her husband and on that

basis a decree for divorce was passed against her was not treated as a bar to her claim for maintenance as a divorced wife. See : Sukumar Dhibar v. Smt. Anjali Dasi, (1983) CrL. L.J. 36. The Allahabad High Court also, in the instant case, has taken a similar view. We approve these decisions as they represent the correct legal position.

11 Learned counsel for the petitioner then submitted that once a decree for divorce was passed against the respondent and marital relations between the petitioner and the respondent came to an end, the mutual rights, duties and obligations should also come to an end. He pleaded that in this situation, the obligation of the petitioner to maintain a woman with whom all relations came to an end should also be treated to have come to an end. This plea, as we have already indicated above, cannot be accepted as a woman has two distinct rights for maintenance. As a wife, she is entitled to maintenance unless she suffers from any of the disabilities indicated in Section 125 (4). In another capacity, namely, as a divorced woman, she is again entitled to claim maintenance from the person of whom she was once the wife. A woman after divorce becomes a destitute. If she cannot maintain herself or remains unmarried, the man who was, once, her husband continues to be under a statutory duty and obligation to provide maintenance to her.'

27. The said ratio in Rohtash Singh (supra) has been adhered to in Parvatevva @ Roopa case (supra) and in Mathialagan case (supra) by the Karnataka and the Madras High Courts.

28. Thus, what follows from the above is only when the marital relationship viz., status of the husband and wife subsists a woman can be denied maintenance under Section 125(4) Cr.P.C. When the marriage was dissolved by virtue of the inclusive definition for the term 'wife' given in Section 125 (1) (b) Cr.P.C, still she is entitled to maintenance.

29. Thus, the contention based on Ex.R-2 decree of divorce to deny her maintenance vide Section 125 (4) Cr.P.C is of no avail to the revision petitioner.

30. In Rohtash Singh case (supra), at the penultimate part of its judgment, the Hon'ble Supreme Court also held as under:

'12 Learned counsel for the petitioner then contended that the Maintenance has been allowed to the respondent from the date of the application. The application under Section 125 Cr.P.C. was filed by the respondent during the pendency of the civil suit for divorce under Section 13 of the Hindu Marriage Act. It is contended that since the decree of divorce was passed on the ground of desertion by respondent, she would not be entitled to Maintenance for any period prior to the passing of the decree under Section 13 of the Hindu Marriage Act. To that extent, learned counsel appears to be correct. But for that short period, we would not be inclined to interfere.'

[emphasis supplied by us]

31. The maintenance case in M.C.No.7 of 2006 was filed in August, 2006. Their marriage was dissolved on 8.7.2016. Between August, 2006 and 8.7.2016, they continue to be husband and wife. During this period only on 3.5.2010 the maintenance order was passed. Till 8.7.2016 she must show that she has not deserted him. The Family Court, Thalassery after considering the evidence adduced by both sides, recorded a finding that with effect from 30.1.2005 itself she has deserted her husband. This is the position between August, 2006 and 8.7.2016.

32. This Court cannot simply brush aside Ex.R-2 divorce decree which has been granted by a competent Matrimonial Court/ Family Court, Thalassery (see Section 41 of Evidence Act). As long as Ex.R2 remains, in other words, it has been set aside by a competent Court in the State of Kerala or by the Hon'ble Apex Court it will act as a barrier for her to claim maintenance from August, 2006 to 8.7.2016. The categorical finding of the Family Court is that from 31.5.2006 till 8.7.2016 she has deserted her husband; in other words, as mentioned in Section 125(4) Cr.P.C., she has refused to live with him. In view of Ex.R-2 we cannot go into the question what made her to desert or leave or refuse to live with her husband.

33. In the light of the view expressed by the Hon'ble Supreme Court in para 12 of its judgment in Rohtash Singh case (supra), the first respondent is disentitled to claim maintenance from August, 2006 to 8.7.2016. However, any amount paid towards her maintenance covering the said period cannot be asked for because the principle of restitution cannot be applied to maintenance issue as the amount paid towards her maintenance

has gone and no question of recouping or reimbursement of such amount arises.

34. In the light of the above, it may be a reprieve for the revision petitioner for the period from August, 2006 to 8.7.2016. But it cannot be forever because by virtue of the inclusive definition of the term 'wife' given in Section 125(1) (b) Cr.P.C. on and from 8.7.2016, the revision petitioner is bound to pay her maintenance.

35. In the impugned order, he was directed to pay Rs.3,000/- and Rs.1,000/- p.m. respectively to the respondents 1 and 2.

36. Page No.20 of the typed set filed by the respondents contains the salary certificate issued to the revision petitioner by his employer viz., Shivom International, dated 3.6.2008. As per that, his gross monthly salary is Rs.37,525/-, net pay is Rs.32,363/-. He was also paid Rs.7,505/- as bonus .

37. The learned counsel for the revision petitioner did not deny that the revision petitioner was employed as a Computer Operator in the said company. He says that he was paid only around Rs.4,500/- per month, now he has lost that job also. To establish this there is no concrete material or documentary proof on his side.

38. At any rate, he is not aged. He is not afflicted with any sickness. He is able bodied. He can work more, earn more and pay more to his ex-wife and his daughter.

39. Now, cost of living is increased. Prices of essential commodities are on the rise. In such circumstances, an adult woman/first respondent and her daughter who is now sufficiently grown up. Rs.3,000/-, Rs.1,000/- per month will be only hand to mouth.

40. Under Section 125 (1) Cr.P.C., there is no ceiling limit, there is no cap. Quantum of maintenance depends on the facts and circumstances of each case. In the maintenance petition, without knowing or gauging the reality of the situation, unknowingly they may ask more amount or a lesser amount. But, the Court has to consider all the relevant aspects and grant maintenance, which may be less than what was claimed in the maintenance petition or more than the amount mentioned in the maintenance petition.

41. In the facts and circumstances, the revision petitioner shall pay Rs.5,000/- per month and Rs.3,000/- per month respectively to respondents 1 and 2.

42. In view of the foregoing, it is ordered as under:

(1) The first petitioner is entitled to maintenance only with effect from 8.7.2016.

(2) With effect from the said date, the revision petitioner shall pay her Rs.5,000/- p.m.

(3) Any amount paid to her upto the said date cannot be adjusted towards her future maintenance payable with effect from 8.7.2016.

(4) The second respondent shall be paid Rs.1,000/- per month till the filing of this revision and on and after that date she shall be paid enhanced maintenance at the rate of Rs.3,000/- p.m.

43. Accordingly, this revision is disposed of.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

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To

1.Judge,
Family Court,
Thalassery,
State of Kerala.

2.Judicial Magistrate,
(Sub Judge)
Mahe, Union Territory of Puducherry.

1 cc to M/s. Manoj Sreevalsan, Advocate, Sr. 71775

2 ccs to M/s. Ashok menon, Advocate, sr. 71867

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and M.P.No.1 of 2011

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