



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 01.10.2020

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.R.C(MD)No.788 of 2016

and

Crl MP(MD)No.11306 and 440 of 2017

Pachaimuthu

... Petitioner / Respondent

Vs

1.Minor Vishanthini

Daughter of Pachaimuthu

[Represented by her mother and
natural guardian, the 2nd respondent]

2.Manimegalai

... Respondent / Petitioners

PRAYER: Criminal Revision Case has been filed under Section 397 r/w 401 of the Criminal Procedure Code, to call for the records in M.C.No.1 of 2013 on the file of the Judicial Magistrate, Palani dated 14.10.2016 and set aside the same.

For petitioner

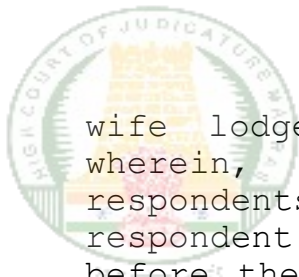
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Mr.D.Venkatesh

ORDER

This criminal revision case has been filed as against the order dated 14.10.2016 passed in M.C.No.1 of 2013 on the file the learned Judicial Magistrate, Palani.

2.The case of the second respondent is that she is the second wife of the petitioner. Since there was no issue between the petitioner and his first wife Jeyalakshi, with her consent and the family members, the petitioner married the second respondent on 25.03.2009 as per the customs of Hindu customs at Murugan Temple in Aavinan Kodi. Out of their wedlock, the second respondent gave birth to a female child [first respondent] on 23.11.2010, namely, Vishanthini and the petitioner was also taking care of them. However, after sometimes, often he picked up quarrel with the respondent wife and started harassing the respondents. Even, he did not take care of the respondents and maintain them. Getting afraid of the attitude of the petitioner, the respondent wife along with her child went to her sister's house and started residing there with her sister. Subsequently, against the petitioner, the respondent



wife lodged a complaint before the All Women Police Station, wherein, the petitioner agreed to pay maintenance to the respondents. But he did not pay any maintenance amount to the respondent as agreed by him. Therefore, the wife filed a petition before the learned Judicial Magistrate, Palani seeking maintenance on the ground that the petitioner was running a furniture shop and a textile shop and was having sufficient source, even then, he did not maintain the respondents.

3.The learned Judicial Magistrate, Palani by order dated 14.10.2016 allowed the petition insofar as the first petitioner is concerned, by ordering Rs.4000/- towards the expenditures for food, accommodation and medical and Rs.1000/- towards educational expenditure for the first respondent/daughter of the petitioner and the second respondent and dismissed the petition insofar as the second respondent/wife.

4.Aggrieved over the judgment of the learned Judicial Magistrate, the petitioner/husband has filed this revision case.

5.Heard Mr. D.Venkatesh, learned counsel for the petitioner and perused the materials placed on record.

6.According to the learned Counsel appearing for the revision petitioner the contention of the respondent / wife that this petitioner is running a furniture shop is not proved by her. The said furniture shop is owned by the first wife of the petitioner and he is working under RW2 and is earning only a sum of Rs.3,500/- per month. The learned Magistrate has ordered maintenance without any proof of income of the petitioner.

7.In this case, the petitioner and second respondent admitted their marriage. Of course, the petitioner married this second respondent with the consent of the first wife and the family members. Both have also admitted that the first respondent Vaishanthini is their child.

8.The only ground raised by the petitioner is that the respondent/wife has not elicited through any evidence that the petitioner is having sufficient source and according to the petitioner, he is not having sufficient means to pay the maintenance to the respondents.

9.It is seen that the trial Court disbelieving the evidence of the petitioner/husband and RW.2 with regard to his salary, since the husband deposed that he was working in Amman Traders and earning Rs.3,500/-, whereas, RW2 deposed that the husband was working in his spare parts company and earning Rs.3,500/-, held that it is the husband, who has to prove his income and thereby, concluded that he is earning enough, so as to pay maintenance to the first respondent.

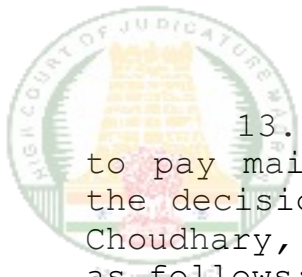


10. It is seen that the trial Court has also held that the second respondent/wife is not entitled for any maintenance, as she cannot be stated to be the legally wedded wife as the provisions of the Hindu Marriage Act, 1955, when the first marriage of the petitioner / husband with her first wife Jeyalakshi, is still in force.

11. Even though the petitioner made an attempt to prove that he was earning Rs.3,500/- per month, the trial Court has disbelieved that the petitioner has not proved his income and it is the petitioner who has to prove his income. In this regard it would be apposite to refer to judgment of this Court in **Arul Selvi vs Sathish Kumar** [Crl.R.C.(MD) No.470 of 2013 on 14 September, 2015], wherein it is held that the duty to prove the income is only upon the husband, as contemplated under Section 106 of the Indian Evidence Act and this court also relied on a judgment of the Calcutta High Court, in the case of **Mosammam Mamuda Bibi vs Sk. Maniruddin @ Monirul And Another**, [on 23 March, 2005] (Equivalent citations: 2005 (3) CHN 62), wherein, it has been held as follows:

"The husband has the duty to prove his own income. In view of provisions of Section 106 of the Evidence Act, the burden of proof is on the husband as it is within his special knowledge regarding his income. The wife's case was that the husband runs a Nursing Home and earns more than Rs. 2 lakhs per month and on the other hand, the husband took the plea that he is a confirmed unemployed person and works sometimes in a Nursing Home and earns hardly Rs. 1000/- to Rs. 1500/- per month. The wife could not produce relevant papers and documents before the Trial Court to prove the exact or probable income of the husband, but at the same time the husband also did not produce any paper and document to show his actual or probable income per month or annually. On a consideration of evidence of both parties and considering that the quasi civil proceeding, the preponderance of probabilities would be in favour of the evidence of the wife."

12. Therefore, the above judgments are squarely applicable to this Case and though the petitioner made an attempt before the trial Court, in this connection, he could not succeed in disproving his income. Further, it appears that the revision petitioner runs the shop in his first wife's name, however, he claimed that he is working as an employee for a salary of Rs.3,500/-. Thus the respondent has taken such a plea only to avoid the payment of maintenance of the child.



13. Insofar as the plea of the petitioner that he has no means to pay maintenance is concerned, it would be relevant to refer to the decision of the Hon'ble Supreme Court in *Sumitra Devi vs Bhikan Choudhary*, reported in **[1985] 1 SCC 637**, wherein, it has been held as follows:

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"4. Now that the matter is going back to the original Court we think it appropriate to bring it to the notice of the learned Magistrate that under Section 125 of the CrPC even an illegitimate minor child is entitled to maintenance. Even if the fact of marriage is discarded, the minor child being found to be an illegitimate daughter of the respondent would be entitled to maintenance."

14. The Hon'ble Supreme Court in ***Bakulbhai and another vs Gangaram & another***, reported in **1988 SCC (1) 537** has held that even an illegitimate child is entitled for maintenance and the relevant portion of the judgment reads as follows:

"The other findings of the Magistrate on the disputed question of fact were recorded after a full consideration of the evidence and should have been left undisturbed in revision. No error of law appears to have been discovered in his judgment and so the revisional courts were not justified in making a reassessment of the evidence and substitute their own views for those of the Magistrate. (See *Pathumma and another v. Mahammad*, [1986] 2 SCC 585). Besides holding that the respondent had married the appellant, the Magistrate categorically said that the appellant and the respondent lived together as husband and wife for a number of years and the appellant No. 2 Maroti was their child. If, as a matter of fact, a marriage although ineffective in the eye of law, took place between the appellant No. 1 and the respondent No. 1, the status of the boy must be held to be of a legitimate son on account of s. 16(1) of the Hindu Marriage Act, 1955, which reads as follows:

"16(1). Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act."



Even if the factum of marriage of his mother is ignored he must be treated as an illegitimate child of the respondent on the basis of the findings of the Judicial Magistrate and is entitled to relief by reason of Clauses (b) and (c) of s. 125(1) of the Code specifically referring to an illegitimate child. We, therefore, hold that the order of the Judicial Magistrate allowing the maintenance to the appellant No.2 was correctly passed."

14.It would be relevant to refer to Section 125 CrPC, which 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 herself, 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 to maintain himself or herself,

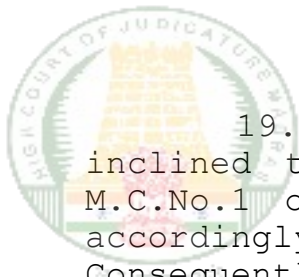
(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such a child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct."

15.Section 125 CrPC provides that an illegitimate child is entitled for maintenance and this has also been reiterated by the Hon'ble Supreme Court in a number of cases.

16.In view of discussion held above, it is well settled that the husband is duty bound to maintain his dependants, regardless of his job and income. As already held, the petitioner is having sufficient means to pay maintenance to the first respondent, who is none other than his own child and as a father of the child, it is his responsibility and moral duty to take care of his own daughter by paying the maintenance.

17.The scope of Criminal Revision under Section 397 r/w 401 CrPC is very limited and this Court cannot re-appreciate the evidence, unless and until there is a illegality, perversity or impropriety in the findings of the trial Court and the appellate Court.

18.The grounds raised by the petitioner in this revision, do not lead to any illegality, perversity or impropriety in the findings of the Court below.



19. In the light of the above discussion, this Court is not inclined to interfere with the order dated 14.10.2016 passed in M.C.No.1 of 2013 by the learned Judicial Magistrate, Palani and accordingly, this Criminal Revision Case stands dismissed. Consequently, connected miscellaneous petitions are closed.

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Assistant Registrar (CS-II)

// True Copy //

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Sub Assistant Registrar(CS)

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NOTE: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. The Judicial Magistrate,
Palani.
2. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Cr1.R.C(MD)No.788 of 2016
01.10.2020

PM(CO)

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