



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.08.2021

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

CrI.R.C.No.1337 of 2016

And

CrI.M.P.No.11971 of 2016

P.Ramakrishnan

... Petitioner

Vs.

P.S.Avvai

... Respondent

Prayer:

Petition filed under Section 397 read with Section 401 of Criminal Procedure Code, seeking to set aside the order dated 11.12.2014 in Cr.R.C.No.19 of 2013 on the file of the Principal Additional District Judge No.III, Thirupathur, Vellore District reversing the order dated 17.05.2013 in M.C.No.20 of 2010 on the file of Judicial Magistrate No.I, Thirupathur, Vellore District.

For Petitioner : Mr.M.Sathish Kumar
For Respondent : Mr.A.Gopinath
Amicus Curiae

O R D E R

The petitioner has filed this petition seeking to set aside the order dated 11.12.2014 passed in Cr.R.C.No.19 of 2013 by the learned Principal Additional District Judge No.III, Thirupathur, Vellore District reversing the order dated 17.05.2013 passed in M.C.No.20 of 2010 by the learned Judicial Magistrate No.I, Thirupathur, Vellore District.

2.The facts of the case is that the marriage between the petitioner and respondent was solemnized on 11.06.1987 as per Hindu Rites and Customs at Tirupathur. Thereafter, they led their marital life happily for a period of one year at the petitioner's house at Vellore. Since the respondent not begotten child, the petitioner threatened her to give written consent for him to perform second marriage and since she refused, the petitioner left her in her parental home. Hence, the respondent filed M.C.No.20 of 2010 before the Judicial Magistrate Court No.I, Thirupathur, Vellore District and the



said petition was dismissed on 17.05.2013. Aggrieved by the same, the respondent filed Cr.R.C.No.19 of 2013 before the Principal Additional District Court No.III, Thirupathur, Vellore District and the said petition was allowed on 11.12.2014 granting a sum of Rs.3,000/- per month as maintenance to the respondent. Challenging the same, the petitioner has filed this revision.

3.The learned counsel appearing for the petitioner submitted that the petitioner and the respondent separated by mutual consent. In order to prove the same, the petitioner marked Ex.R1 and in order to establish the same, he examined the neighbouring land owner as R.W.3 before the trial Court. He further submitted that R.W.3 deposed that there was panchayat inbetween the petitioner and the respondent and both agreed to live separately and further submitted that the maintenance case was dismissed by the trial Court on the ground that the respondent is living separately from the petitioner by mutual consent. However, without considering the same, the lower Appellate Court has awarded maintenance in favour of the respondent, which is un-sustainable one. In support of his contentions, the learned counsel relied upon the decision of this Court in the case of Marimuthu Vs. Janaki (Cr.L.R.C.No.1491 of 2005 dated 22.02.2008).

4.Per contra, the learned Amicus Curiae appearing for the respondent submitted that though the petitioner claim that the respondent is living separately by mutual consent, she is entitled for maintenance under Section 125 of Cr.P.C. Hence, the respondent is entitled for maintenance and the order impugned in this revision warrants no interference.

5.The facts in the case is not disputed. The relationship between the petitioner and the respondent is not disputed. The petitioner claims that the respondent got separated by mutual consent. In order to prove the same, the petitioner marked Ex.R1 and in order to establish the same, he examined the neighbouring land owner as R.W.3 before the trial Court. It appears that R.W.3 deposed that there was panchayat inbetween the petitioner and the respondent and both agreed to live separately. However, there is no evidence to substantiate that the petitioner and respondent are living separately by way of mutual consent. It appears that Ex.R1 document which was created inbetween the parties is not valid in the eye of law. Further in customary practice with regard to consent divorce or living separately by way of consent also is not permissible once the Hindu Marriage Act came into force. Further, Ex.R1 is not established by way of independent witness and relying upon such evidence is not permissible.



6. In this background, it is useful to extract hereunder the relevant portion of the decision of the Hon'ble Apex Court reported in (1995) 5 SCC 299 [Vanamala Vs. H.M. Ranganatha Bhatta]:

"3. Section 125 of the Code makes provision for the grant of maintenance to wives, children and parents. Sub-section (1) of Section 125 inter alia says that if any person having sufficient means neglects or refuses to maintain his wife unable to maintain 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 not exceeding Rs 500 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. Clause (b) of the Explanation to the sub-section defines the expression 'wife' to include a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. In the instant case it is not contended by the respondent that the appellant has remarried after the decree of divorce was obtained under Section 13-B of the Hindu Marriage Act. It is also not in dispute that the appellant was the legally wedded wife of the respondent prior to the passing of the decree of divorce. By virtue of the definition referred to above she would, therefore, be entitled to maintenance if she could show that the respondent had neglected or refused to maintain her. Counsel for the respondent, however, invited our attention to sub-section (4) of Section 125, which reads as under:

125. (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.

On a plain reading of this Section it seems fairly clear that the expression 'wife' in the said sub-section does not have the extended meaning of including a woman who



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has been divorced. This is for the obvious reason that unless there is a relationship of husband and wife there can be no question of a divorcee woman living in adultery or without sufficient reason refusing to live with her husband. After divorce where is the occasion for the woman to live with her husband? Similarly there would be no question of the husband and wife living separately by mutual consent because after divorce there is no need for consent to live separately. In the context, therefore, sub-section (4) of Section 125 does not apply to the case of a woman who has been divorced or who has obtained a decree for divorce. In our view, therefore, this contention is not well founded.

4. Counsel for the appellant also pointed out that some of the High Courts had taken a similar view. Reference was made to the case of Kongini Balan v. M. Visalakshy [1986 Cri LJ 697 : 1985 Ker LJ 749 : 1985 Ker LT 967 (Ker)] , wherein it was held that a wife who obtains a divorce by mutual consent cannot be denied maintenance by virtue of Section 125(4) of the Code. Similar view was taken in Krishan Kumar v. Kiran [(1991) 1 DMC 248 (MP)] , wherein it was held that the expression "living separately by mutual consent" does not cover cases of those living separately due to divorce. The same view was expressed in M. Ramakrishna Reddy v. T. Jayamma [1992 Cri LJ 1368 (AP)] . In that case divorce was obtained by mutual consent on the ground of incompatibility and thereafter the woman was living separately, it was held that this could not be construed to be an agreement for living separately by mutual consent and hence the woman was entitled to maintenance. We think these decisions are in conformity with the plain language of sub-section (4) of Section 125 which we have construed hereinbefore. The contention raised by the counsel for the husband is, therefore, unsustainable. The High Court was, therefore, clearly wrong in reversing the order passed by the Sessions Judge. In the result, this appeal succeeds.



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The impugned order of the High Court dated 19-8-1991 is set aside. The order of the learned Sessions Judge dated 5-9-1988 is restored. The respondent will pay Rs 5000 by way of cost."

(emphasis supplied)

7.The decision of the Hon'ble Apex Court cited supra makes it clear that a wife who obtains divorce by mutual consent cannot be denied maintenance by virtue of Section 125(4) of Cr.P.C.

8.In view of all the above, this revision deserves to be dismissed and the same is accordingly dismissed. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Additional District Judge No.III,
Thirupathur, Vellore District.
2. The Judicial Magistrate No.I, Thirupathur,
Vellore District.
3. The Section Officer,
Criminal Section,
High Court, Madras

Cr1.R.C.No.1337 of 2016
And

Cr1.M.P.No.11971 of 2016

LN (CO)
K.RK. (24.09.2021)