

Orissa High Court

Jashelal Agrawal @ Jain vs Puspabati Agrawala on 12 August, 1998

Equivalent citations: I (2000) DMC 592

Author: P Tripathy

Bench: P Tripathy

JUDGMENT P.K. Tripathy, J.

1. This revision application is directed against the judgment dated 26.3.1996 in Criminal Misc. Case No. 41 of 1980 of the Court of Judicial Magistrate 1st Class, Kantabanji.

2. Opposite party was the legally married wife of the petitioner. Their marriage was solemnised on 17.5.1970. On 28.8.1980, opposite party filed a petition under Section 125 of the Criminal Procedure Code, 1973 (in short, 'the Code') claiming for maintenance on the ground of ill-treatment, cruelty and desertion and that she had no means to sustain her life whereas the petitioner is an earning person and capable of providing maintenance. On 4.1.1992 opposite party's claim for maintenance was allowed. Petitioner approached this Court in Criminal Misc. Case No. 2291 of 1992 under Section 482 of the Code via the Court of Addl. Sessions Judge, Titilagarh in Criminal Revision No. 6/9 of 1992. After filing of the petition under Section 125 and before the J.M.F.C., Kantabanji could pass the order for maintenance on 4.1.1992, there were several rounds of civil litigations between the parties. Petitioner's case for restitution of conjugal right/divorce vide Title Suit No. 14 of 1980 was decreed in favour of the petitioner on the ground of desertion by the opposite party. On the other hand, T.S. No. 33 of 1980 filed by the opposite party claiming for maintenance was dismissed for default. Similarly, T.S. No. 15 of 1984 filed by her to set aside ex parte decree of divorce in T.S. No. 14 of 1980 was also dismissed for default. Notwithstanding that learned Magistrate allowed the prayer for monthly maintenance in favour of the opposite party which was confirmed by the Addl. Sessions Judge, Titilagarh in the aforesaid Criminal Revision. This Court in Criminal Misc. Case No. 2291 of 1992 while examining legality of the said orders of maintenance held that-

"7. There is no dispute regarding the position that the right of a wife for maintenance is an incidence of the status or estate of matrimony, that according to the test of Hindu Law to which the parties belong, the obligation to maintain the wife arises from the very existence of the relationship between the parties and that apart from the liability which the husband incurs under personal law of maintaining his wife, the provisions of Section 125, Cr. P.C. independently vest the statutory right in a wife to claim maintenance from her husband, see (1986) 62 C.L.T. 92, Saraswati Meher v. Jadumani Meher, and that a divorced wife otherwise eligible, is entitled to the benefit of maintenance allowance and the dissolution of the marriage makes no difference to this right under Section 125(1), Cr. P.C., see AIR 1979 SC 362, Bai Tahira v. Alli Hussain Fissali Chothia And Anr. It is also not disputed that no wife shall be entitled to receive maintenance from her husband under Section 125, Cr. P.C. if she refuses to live with her husband without any sufficient reason which principle is incorporated in Sub-section (4) of Section 125...."

The Court further held that the finding of the Civil Court in matrimonial proceeding is binding on the Criminal Court which is not entitled to question the correctness and validity of the Civil Court's decision and in that connection this Court relied upon the cases of Purna Chandra Digal v. Sila Digal

@ Tube Digal, (1989) 2 OCR 142=II (1989) DMC 12; Sri Ram Prasanna Dash v. Bhabani Devi, (1990) 3 OCR 344=II (1992) DMC 134, Neheru Bag v. Tapaswini Bag, (1991) 72 CLT 104=I (1992) DMC 197; Teja Singh v. Smt. Chhoto, 1981 CrL. Law Journal 1467; and Hari Kishan v. Smt. Shanti Devi, 1988 (2) Crimes 599=II (1998) DMC 281. Thereafter it was held that-

"8. Coming to the case in hand, from the discussion in the orders passed by the Courts below it is clear to me that the Courts have not made any attempt to ascertain if the Civil Court either in the suit filed by the husband for restitution of conjugal life/divorce or in the suit filed by the wife for maintenance had recorded a finding that she had deserted her husband. As noted earlier the consensus of the view taken in the decisions referred to earlier clearly bring out the position that it is the finding of the Civil Court regarding desertion which is binding on the Criminal Court. If it was a case of a decree of annulment of marriage then such decision of the Civil Court per se would be sufficient to disentitle the wife to claim maintenance. But such is not the position here. The contention in the present case is that the Civil Courts finding that the wife had deserted her husband and had not joined the matrimonial home on her Will and desire is binding on the Criminal Court. It was, therefore, incumbent on the part of the Courts below to scrutinise the judgments passed in the civil suits and ascertain if any such finding had been recorded therein. A further question which needs to be examined in the case is that if such a finding was recorded by the Civil Court whether in the averments made in the petition filed under Section 125, Cr. P.C. and in the evidence led in the proceeding there is anything to show that subsequent to the decree of the Civil Court there has been a material change in the fact position or supervening circumstances has taken place which entitles the wife to maintenance. No such attempt has been made by the Courts below. The learned Additional Sessions Judge repelled the contention relating to the maintainability of the application merely on the ground that change of status of the claimant from "wife" to "divorced wife" during pendency of the proceeding under Section 125, Cr. P.C. is not material and it will not be prudent to hold that on account of such change of status that the proceeding is not maintainable. The approach is completely erroneous based on misconception about the nature of the objection raised and the question for consideration. The learned Magistrate also does not appear to have delved deep into the question. He merely discussed some decisions of this Court and other High Courts laying down the general principles discussed in the proceeding paragraphs and appears to have laid much stress on the fact that the decree of divorce being an ex parte one could not be taken advantage of by the husband for negating the wife's claim of maintenance."

Accordingly, it was decided therein that the matter should be remitted back to the learned Magistrate to consider the relevant questions (as aforesaid) for proper adjudication of the dispute. The aforesaid decision of this Court is reported in (1993) 6 OCR 576.

3-4. After receipt of the matter on remand, learned Magistrate allowed parties to adduce further evidence, if any. Both the parties declined to adduce any further evidence. Argument was heard afresh and the impugned judgment dated 26.3.1996 was passed allowing the prayer of the opposite party and granting her monthly maintenance of Rs. 300/- from 20.8.1980 i.e. from the date of filing of the petition.

5. During the course of argument Mr. B.N. Rath, learned Counsel appearing for the petitioner argued that learned J.M.F.C., Kantabenji did not comply with the direction and observation which have been made in the remand order and mechanically disposed of the case by repeating the previous findings which had been set aside by this Court. His further contention is that in view of the provision in Section 125(1) of the Code a wife includes a divorced wife and if she has voluntarily deserted the husband then she is not entitled for maintenance and in that connection the findings of the Civil Court in T.S. No. 14 of 1980 decreed in favour of the petitioner and tendered in evidence as Ext. C clearly proves the stand of the petitioner. Since the findings of a Civil Court, he argued, is binding on a Criminal Court, therefore, the conclusion was inescapable that opposite party has made herself not entitled for maintenance on the aforesaid grounds. He further argued that even if opportunity was granted the opposite party did not adduce any evidence making out a case of desertion after the decree and therefore in the absence of any supervening circumstance or material change in the fact position her claim for maintenance is not maintainable. He heavily criticised the conduct of the Magistrate in disposing of the case mechanically notwithstanding specific direction of this Court. He thus prayed to set aside the impugned order of maintenance.

6. Mr. K.N.H. Niamat, learned Counsel arguing for the opposite party not conceding to the aforesaid argument of the petitioner, argued that learned lower Court has duly taken care of the observation made by this Court in the remand order and that taking into consideration the direction for fresh disposal of the case in accordance with law, he allowed the maintenance in favour of the opposite party. He further argued that the provision under Section 125(4) of the Code relating to the ground of refusal to stay with her husband, is not applicable in the present case in view of the fact that with effect from the date of the decree in T.S. No. 14 of 1980 opposite party's status has become that of a divorced wife and there is no necessity for her to stay with the petitioner any further. In that connection learned Magistrate having followed the correct principle of law in deciding the issue the impugned order is not liable to be interfered with.

7. The fact situation indicates that though the opposite party has filed the application for monthly maintenance in the year 1980 but for the last eighteen years the case has remained in the process of adjudication notwithstanding the principle of law that a proceeding under Section 125 of the Code should be disposed of expeditiously. At the time of the remand the observation of this Court as has been quoted earlier goes to indicate that this Court directed the Magistrate to accept the finding of the Civil Courts and to find out if after the decree of divorce is there anything to show that there has been a material change in the fact position or a supervening circumstance has taken place which entitles the wife to maintenance. That was the crux of the matter which was to be considered by the Magistrate. In deciding the relevant issue and nothing down the admitted position regarding existence of the decree of divorce, learned Magistrate has strongly relied upon the case of Smt. Sarojini Sahu v. Siba Prasad Sahu, (1988) 66 CLT 490, in which Hon'ble Mr. G.B. Patnaik, J. has been pleased to propound that a mere decree for divorce does not stand in the way of the wife to receive maintenance under Section 125 of the Code and a petition under that section is maintainable even if the husband obtains a decree for judicial separation or annulment of the marriage. His Lordship further held that "an order of maintenance to a wife can be made even though the husband has obtained a decree for divorce and the wife's right to receive the same is not fettered in any manner so long as she has not remarried. In this view of the matter, notwithstanding, the ex parte

decree obtained by the husband-opposite party, petitioner No. 1, would be entitled to receive maintenance under Section 125 of the criminal Procedure Code... "His Lordship also considered the effect of the Civil Courts decree and held that even if the decree of a Civil Court is admissible under Section 41 of the Evidence Act but such decree for divorce itself does not disentitle the wife to receive maintenance and in that connection His Lordship held that "the right to receive maintenance under Section 125 of the Code flows from the statute and if all the pre-conditions are satisfied then that right cannot be taken away in any manner. The pre-conditions under Section 125 of the Criminal Procedure Code are that if the applicant is the wife and the husband neglected or refused to maintain the wife who is unable to maintain herself. If all the pre-conditions are satisfied, then the wife's right to receive maintenance under the Criminal Procedure Code remains unaffected by any decree of divorce even of a competent Civil Court". On the materials on record, learned Magistrate found that the pre-conditions have been satisfied and this finding has not been set aside by the Revisional Court. In that view of the matter, in my opinion the learned Sessions Judge grossly erred in law in disentitling the wife to receive maintenance merely because of a decree of divorce obtained by the husband-opposite party..."

As it appears, the findings of the Magistrate in this case in the aforesaid manner cannot be said to be in contravention of or in violation of the direction in the remand order.

8. Learned Counsel for the petitioner has strongly relied on the view expressed by this Court in the case between the parties reported in (1993) 6 OCR 576=II (1994) DMC169 (SC), Sri Jasholal Agrawal @ Jain v. Smt. Puspabati Agrawala, and all the decisions relied upon in that case in paragraph 7 of the decision (already referred to) that the Civil Court's decree is binding on the Criminal Court. There cannot be any quarrel on that principle. It reveals from the ex parte judgment dated 21.8.1981 T.S. No. 14 of 1980 that the plea of desertion by the opposite party with effect from 28.4.1974 was accepted and accordingly decree of divorce was passed. Ext. D is that judgment and Ext. C is the decree which was drawn up. No order was passed therein either for maintenance or alimony. It further reveals from Exts. M and N i.e. the judgment and divorce in T.S. No. 33 of 1980 filed by the opposite party that her suit for maintenance was found not maintainable under Section 18 of the Hindu Adoption and Maintenance Act, in view of the decree of divorce and she being no more wife of the petitioner.

9. Thus, it is to seen what is the effect of those decrees on the claim of the opposite party under Section 125 of the Code. It goes to show that from the date of decree of divorce the relationship of husband and wife as per the conception of that relationship under the personal law of the parties i.e. Hindu Law, has severed. Therefore, so long that decree remains in force, the opposite party cannot advance any claim as the wife of the petitioner according to their personal law. But Section 125 of the Code entitled a divorced wife to claim maintenance and includes her within the fold of the term 'wife' for the limited purpose of that section. Therefore, the decree of the Civil Courts only changed her status from 'wife' to a divorced wife. Contention of learned Counsel for the petitioner is that when the decree of divorce was granted against the opposite party on the ground of voluntary desertion made by her, she is debarred and precluded from getting maintenance in terms of Section 125(4) of the Code. On a reference to that provision it appears that a wife shall not be entitled to receive allowance i.e. the monthly maintenance if she, (i) lives in adultery or (ii) refused to live with

her husband without any sufficient reason or (iii) if they live separately by mutual consent.

10. In this case petitioner has banked upon the second circumstance i.e. the conduct of the opposite party to withdraw from the society of the petitioner without sufficient reason as per the binding finding of the Civil Court, as noted earlier. In support of that contention he has also relied upon the following citations. In AIR 1966 All. 133, Ravendra Kaur v. Achant Swarup, it was held that wife is not entitled for maintenance when husband has obtained a decree for judicial separation on the ground of desertion made by the wife. In 1981 Cri. L.J. 1467, Toja Singh v. Smt. Chhoto, it was held that wife is not entitled for maintenance under Section 125 when her petition under Section 9 of the Hindu Marriage Act was dismissed on the ground of her refusal to stay with her husband. In 1988 (2) Crimes 599, Hari Kishan v. Smt. Shanti Devi, order of maintenance in favour of the daughter of Shanti Devi was cancelled under Section 127, Cr. P.C. on the ground of illegitimacy of that girl. In (supra), Sri Ram Prasanna Dash v. Bhabani Devi, this Court held that Bhabani Devi is not entitled to maintenance under Section 125 when Civil Court has granted a decree declaring the marriage as null and void. Same view was also expressed in (supra), Purna Chandra Digal v. Sila Digal @ Tube Digal, In all those decisions the issues were different than the present one. Hence, the said ratios are not applicable to the present case.

11. In addition to that he has also relied upon the citations as referred to herewith. In the case of Smt. Shantabai Saitwal v. Jindas Baburao Saitwal, 1985 (2) Crimes 901, Bombay High Court held that on obtaining a decree for divorce by the husband, his application under Section 127 of the Code was liable to be allowed, since the husband has obtained a decree of divorce on the ground of desertion by the wife. In the case of Rabindranath Roy v. Anjana Roy (supra), the Calcutta High Court has held that a wife against whom a decree of divorce has been obtained on the ground of not complying with the decree for restitution of conjugal rights, she is not entitled to maintenance under Section 125(1) in view of the provisions in Section 125(4) of the Code.

12. At this stage it is relevant to refer to some of the citations relied upon by the opposite party. In the case of Vanamala v. H.M. Ranganatha Bhatta, IV (1995) CCR 1 (SC), while considering the question of entitlement to maintenance of a divorce on mutual consent vis-a-vis the provisions of law under Section 125(1) of the Code the Apex Court while answering it in favour of the divorcee have been pleased to propound that-

"On a plain reading of this sub-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 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 woman who has obtained a decree for divorce....."

13. In the case of Gurmit Kaur v. Surjit Singh @ Jeet Singh, I (1996) CCR 56 (SC) =I (1996) DMC 354 (SC), while considering a similar issue of agreement for a divorce and thereafter remaining

separately by mutual consent, the Apex Court have been pleased to held that-

"4. The concept of living separately by mutual consent arises so long as the marriage subsists and the parties agree to live separately by consent. In other words, during the subsistence of the marriage, if the parties agree to live separately by mutual consent, no party is entitled to lay any claim for maintenance from the other party.

"5. In view of the divorce agreement referred to hereinabove, the marital relations have come to a terminus. By virtue thereof, the respondent had already contracted the second marriage. In other words, the first marriage has been put to an end. The appellant thereby became entitled to claim maintenance and will continue to do so, so long as she remains unmarried and she is unable to maintain herself in the case of *Mariyumma v. Mohammed Ibrahim*, AIR 1978 Ker. 231 (FB); *Mampokkattu Nanu v. Mampokkat Vasantha*, 1986 Cri. LJ 652 (Ker.); *Biswanath Saha v. Sikha Saha* (Calcutta), 1986 Cri. LJ 1199; and *L. Srinivasasulu Reddy v. L. Ramalakshumma*, III (1996) CCR 352 (DB) (AP)=II (1996) DMC 186 (DB) (AP), similar view has been expressed entitling a wife to get maintenance even after a decree of divorce obtained against her on the ground of unreasonably withdrawing from the society of the husband.

14. It thus emerges from reference to the series of citations relied upon by both the parties that the Apex Court has not only disapproved the theory of debarring a divorcee to get maintenance on the ground of disentitlement under Section 125(4) of the Code but also Their Lordships have clearly and categorically explained that after divorce the concept of living together being not enforceable under law, custom or practice, the factum of separate living does not by itself disentitle the divorcee to claim for maintenance under Section 125 of the Code. Thus, on a logical corollary it can well be recorded that the fact of desertion on which a decree of divorce was granted against the wife i.e. the divorced wife, that fact cannot be extended to post-decree period. The factum of divorce and the change of the status from wife to divorced wife is a supervening circumstance which the Court, adjudicating the claim of maintenance under Section 125 of the Code, should not ignore as stated earlier, the case of *Smt. Sarojini Sahu* (supra) in which similar view has been propounded by this Court was referred to by the learned Magistrate while granting maintenance in favour of the opposite party. No doubt, learned Magistrate did not specifically record about the supervening circumstance, but it is apparent from the impugned order that notwithstanding the separate living of the opposite party, her claim for maintenance was allowed because she is a divorced wife.

15. Admitted facts in record and the above discussed provision of law, as has been found by this Court makes the petition under Section 125 of the Code maintainable and that opposite party is entitled to monthly maintenance. Learned Magistrate has granted the same from the date of application i.e. 20.8.1980. But in the given facts and circumstances, she is not entitled for maintenance till the date of decree of divorce i.e. 21.8.1981 /29.8.1981. Hence, the impugned order of monthly maintenance is modified to the extent that the opposite party is entitled to get the monthly maintenance thereafter, say with effect from 1st September, 1981.

16. No other point was canvassed in challenging the impugned order of maintenance.

In the result, the Criminal Revision is disposed of accordingly with modification of the date from which the opposite party is entitled to maintenance. No cost.