

Madhya Pradesh High Court
Babulal vs Sunita on 30 January, 1986
Equivalent citations: 1987 CriLJ 525
Author: V Gyani
Bench: V Gyani
ORDER V.D. Gyani, J.

1. This revision petition arises out of an order dt. 13-2-1985, passed by the Judicial Magistrate; 1st Class, Indore in Cri. Case No. 4 of 1984, thereby rejecting the objection raised by the petitioner about the maintainability of proceedings Under Section 125, Cr. P.C. in face of a decree for restitution of conjugal rights.

2. The brief facts are that the respondent Smt. Sunita moved an application for maintenance on 6-4-1984. The petitioner-respondent made his appearance on 31-8-1984 and prayed for copy of the petition, which was supplied to him. The case was fixed for reply on 28-9-1984 and as none appeared for the petitioner, the case was directed to proceed ex parte and 18-10-1984 was fixed as the date for ex parte evidence. On 9-10-84, the petitioner filed his reply. On 16-11-1984 a certified copy of the judgment dt. 13-2-1984, passed by the Addl. District Judge, Burhanpur, was also filed on record. By order dt. 18-10-1984 the trial Court permitted the petitioner to participate in the proceedings. The reply filed by him was taken on record and 16-11-1984 was fixed for evidence of both the parties. It was at this stage that the petitioner moved an application raising an objection that in view of the decree for restitution of conjugal rights passed by the Addl. District Judge, against which no appeal as such was preferred by the respondent, the application for maintenance was liable to be dismissed and should be dismissed without recording any evidence. The respondent Smt. Sunita submitted her reply to this application stating that the decree for restitution of conjugal rights passed against her was obtained ex parte and she could not contest the suit as she was confined to bed and was required to be hospitalised on 5-1-1984. In such circumstances, the ex parte decree obtained by the present petitioner should not be allowed to come in her way of claiming maintenance.

3. The trial Court considering the rival submissions made by the parties, rejected the objection raised by the petitioner and fixed the case for evidence on 28-2-1985, but for one reason or the other, it could not be recorded.

4. The present revision petition raised a short question, whether in face of a decree for restitution of conjugal rights, can a wife not complying with the decree, still maintain the proceedings Under Section 125, Cr. P.C.? learned Counsel appearing for the petitioner, placing reliance on Sunderlal Puniwala v. Nirmalabai 1962 MPLJ (SN) No. 258 and Hiranman Singh v. Smt. Urmilabai 1966 MPLJ (SN) 82 urged that these decisions are binding on the subordinate Courts and the learned Magistrate should have followed the same in upholding the petitioner's objection in preference to the decision of the Karnataka High Court in K. Narayan Rao v. Bhagyalakshmi 1984 Cri LJ 276, which in turn relies on the decision in Mst. Zohara Khatoon v. Mohd. Ibrahim .

5. So far as the decisions relied upon by petitioner are concerned, in the case of Hiranman Singh (supra), the facts as can be gathered from the Note indicate that the question before the Court was one of enforcement of the order of maintenance and it was during the enforcement proceedings that the objection was raised, while in the case of Sunderlal Puniwala (supra), the question considered by the Court was whether the wife, who refused to live with her husband without any sufficient cause, would be entitled to claim maintenance in face of Sub-section (4) of Section 488. Cr. P.C. and the Court held that in face of such a decree, the Magistrate could not award any maintenance allowance to the wife. Along with these two decisions of the same learned Judge, the trial Court has also referred to yet another decision of this Court in *State of M.P. v. Yeshpal* 1964 MPLJ (SN) No. 131 which takes a contrary view. In this case an ex parte decree for restitution of conjugal rights was passed in favour of the husband during the pendency of the wife's application for maintenance and the Court held that the fact that such a decree was obtained, did not ipso facto bar the jurisdiction of the Magistrate to adjudicate upon the application for maintenance filed ' by the wife.

6. These authorities are under the old Code, Section 488 and in view of the new enactment, which came into force on 1-4-1974 the question of maintenance has been subject-matter of much debate and discussion before the highest Court of the land. In a very recent decision in *Smt. Savitri v. Govind Singh Rawat* 1986 Cri LJ 41. the Supreme Court had the occasion to consider the scope and nature of maintenance proceedings and the jurisdiction which a Magistrate exercised under Chapt. IX of the Criminal P.C.:

The jurisdiction of a Magistrate under Chapt. IX of the Code is not strictly a criminal jurisdiction while passing an order under I hat Chapter asking a person to pay maintenance to his wife, child or parent, as the case may be, the Magistrate, is not imposing any punishment on such person for a crime committed by him. Chap IX of the Code contains a summary remedy for securing some reasonable sum by way of maintenance subject to a decree, if any, which may be made in a civil Court in a given case provided the personal law applicable to the person concerned authorises the enforcement of any such right to maintenance. The Code, however, provides a quick remedy to protect the applicant against starvation and to tide over immediate difficulties. Chap. IX of the Code does not in reality create any serious new obligation unknown to Indian Social life, in *Bagwan v. Smt. Kamla Devi* at p. 486 : at p. 85 : 1975 Cri LJ 40 at p. 41 this Court has explained the object of Sections 488, 489 and 490 of the Criminal P.C. 1898, which replaced by the provisions in Chap. IX of the Code, thus:

Sections 488, 489 and 490 constitute one family. They have been grouped together in Chap. XXXVI of the Code of 1898 under the caption "of the maintenance of wives and children". This Chapter, in words of Sir James Fitzstephen provides "a mode of preventing vagrancy, or at least or preventing its consequences." These provisions are intended to fulfil a social purpose. Their object is to compel a man to perform the moral obligation, which he owes to society, in respect of his wife and children. By providing a simple speedy, but limited relief, they seek to ensure that the neglected wife and children are not left beggard and destituted on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence.

7. A perusal of the order passed by the learned Magistrate goes to show the learned Magistrate had shown a live concern for the various grounds on which either restitution or dissolution, of marriage can be had under the law and has posed a question, whether in all these circumstances the wife should not be granted maintenance.

8. The petitioner's counsel has submitted that the case of restitution under the personal law should be distinguished from the case of divorce between the parties. In case of a decree for divorce, his contention is that the wife can claim maintenance. It is submitted that a divorced wife is included within the meaning of "wife" as defined by Section 125(1) proviso (b) where as there is no such provision Under Section 125, Cr. P.C. of granting maintenance to a wife against whom a decree for restitution, of conjugal rights has been passed. This submission cannot be accepted as a decree for restitution of conjugal rights is the offer or willingness of the husband to maintain his wife, provided she lives with him and Section 125(3), second proviso thereto envisages such a situation, where the husband offers to maintain his wife, on condition of her living with him and she refuses to live with him, the Magistrate may consider any such grounds of refusal stated by her and may make an order under this section, notwithstanding the offer or willingness of the husband, if the Magistrate, is satisfied that there is a just, ground for so doing. Section 125 Cr. P.C. is a provision with a social object and the interpretation of this section should be in such a manner that the object of the provision, 'as indicated, is served. Law is a social mechanism to be used for the advancement of) he society. It should not be allowed to be dead weight on the society, while interpreting ancient texts, the Courts must give them a liberal construction to further the interests of the society.

9. According to Manu IX 74:

(This matter being in Sanskrit, we regret that we have to omit it here as we have no facilities for printing Sanskrit Ed.) A husband, who had to go abroad for business, may depart after securing a maintenance for his wife, even though virtuous may go astray distressed by want of subsistence, "..... Manu-----enjoins a Hindu husband to provide for maintenance of his wife, even while going abroad, amongst the seven steps 'Saptapadi' in a traditional Hindu marriage, the first four steps are for food, for strength, wealth and prosperity (comfort). The obligation of a Hindu husband to maintain his wife does not cease with the obtaining of a decree in his favour for restitution of conjugal rights.

10. There is no bar Under Section 125 Cr. P.C. to grant of maintenance to a wife against whom a decree for restitution of conjugal rights has been passed. There being no express prohibition, the Supreme Court in the case of Smt. Savitri (1986 Cri LJ 41) (supra) held that interim maintenance pending final disposal can be granted and observed that it is the duty of the court to interpret the provisions of Chapt. IX of the Code in such a way that the construction placed on them would not defeat the very object of the Legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chap. IX as offering an implied power on the Magistrate to direct the person against whom an application is made Under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application.

11. In view of this liberal and the social object, which Section 125 seeks to serve and in absence of any express bar against ; entertaining of an application for maintenance of a wife, against whom a decree for restitution of conjugal rights Under Section 9 of the Hindu Marriage Act has been passed it is open to the Magistrate to entertain the applica#onj and decide the same, keeping in mind Section 125(3) Second proviso. In fact, such a proviso being there in the Act, supports the view propounded in the case of State of M. P. v. Yeshpal 1964 MPLJ (SN) No. 131 (supra) discussed above.

12. It would be incongruent to assume that a wife against whom a decree for restitution of conjugal rights has been passed is disentitled to move the Magistrate's Court Under Section 125 Cr. P.C. praying for maintenance, while a wife who has been divorced, can still move the Court. In this case the wife was at Indore and the husband filed the suit for restitution of conjugal rights at Burhanpur and obtained an ex parte decree. The wife, as stated by her, in her reply dt. 19-11-84 to the objection preferred by the husband, was sick and confined to bed and had to be hospitalised on 5-1-1984. Placed in such circumstances, even if she wanted, helpless as she was, she could not have been able to contest the suit for want of money and ill health. A decision of the Karnataka High Court in K. Narayan Rao v. Bhagyalakshmi 1984 Cri LJ 276 (supra) was relied by the trial Court. In that case the wife was living in Udipi Taluqa of Karnataka, while the husband who was employed in a Spinning Mill in Salem district Tamil Nadu, obtained a decree for restitution of conjugal rights from the District Judge, Salem. The learned Judge of the Karnataka High Court, relying on a decision of the Supreme Court in Mst. Zohara Khatoon v. Mohd. Ibrahim 1981 Cri LJ 754 (supra) held "that the two proceedings, one Under Section 125 and the other under the respective Personal Law of the spouses operate in different spheres, though in a very limited area they do overlap. Generally they are intended to serve different purposes. The remedy Under Section 125 is purely a discretionary one. It is not so, to that extent, under the Personal Law. The aim and object of this provision (S. 125) and other provisions in Chap. IX of the Code is to help the weaker of the two to obtain assistance of the Court in getting maintenance, Discarded or helpless wives, deserted children and destitute parents can get much relief by invoking Section 125. The provisions may not be inconsistent with other parallel Acts in so far as maintenance is concerned, but the section undoubtedly excludes to some extent the application of any other Act. At the same time, it cannot be said that the personal law of the parties is completely excluded for all purposes. For instance, where the validity of a marriage or mode of divorce or cessation of marriage under the personal law of a party is concerned, that would have to be determined according to the said personal law. Thus, thee exclusion by Section 488(125) extends only to the quantum of the maintenance and the circumstances under which it would be granted.

13. The trial Court was right in rejecting the petitioner's application. There is yet another reason. The objection raised was of a preliminary nature. There is scope for inquiry before the Magistrate under Section 125(3) Second proviso, whether refusal, if any, on the part of the wife is based on a just ground and this can always be gone into. No prejudice can be said to have been caused to the petitioner, who is armed with a decree for restitution of conjugal rights, if he meets the ground of refusal, which may be advanced by the wife. After all in all matrimonial matters, a biparty decision is always preferable to one which is ex parte. .

14. For the foregoing reasons this revision petition fails and is accordingly dismissed.