

Madras High Court

Sivagamasundari vs Sundaram on 3 July, 1997

Equivalent citations: 1998 CriLJ 1723, I (1999) DMC 275

Bench: J Chouta

ORDER

1. Petitioner who has failed in both the courts below in claiming maintenance under section 125 of the Code of Criminal Procedure from the respondent, has filed this petition under section 482 of the Code of Criminal Procedure before this Court to set aside the order passed in Criminal Revision Petition No. 80 of 1993 on the file of Sessions Judge, Cuddalore.

2. This petition arose in this way. Petitioner filed a petition under Section 125 of the Code of Criminal Procedure, before the Judicial Magistrate No. II, Chidambaram, in N.C. No. 1/92, claiming maintenance of Rs. 500/- per month. The averments made in the said petition are that the petitioner is the wife of the respondent, who is working as Engineer in Public Works Department, earning Rs. 5000/- per month. The marriage between the petitioner and the respondent took place in 1968 as Bhuvanagiri, that the respondent was given Rs. 20,000/- and 15 sovereigns of jewels as dowry. After the marriage, they lived together for some time. Since the husband has started ill-treating the wife and developed some illegal contacts with women of ill-repute and he addicted to drinks and gambling, that the respondent demanded dowry from the petitioner's parents that the petitioner was driven out of his house and she was started residing in her parents house. Then the petitioner's father executed a settlement deed in respect of 1 acre of Nanja land to the petitioner on 2-6-1969, the petitioner lived with the respondent and she gave birth to a child and the child also died, that on transfer they moved to Mayiladuthurai and there since she was unable to secure sufficient money she was driven went and again she went to her parents house and the husband did not allow her to come to his house.

3. In the counter filed by the respondent, he denied all the allegations made in the petition. He has stated since the petitioner has been having illegal intimacy with some other persons, she left the respondent. The respondent filed O.P. 6/71 for divorce and the same was allowed. The present petition for maintenance has been filed after a lapse of 21 years with a view to harass the respondent. He has further stated that the earlier maintenance petition filed by the wife before the First Class Judicial Magistrate was dismissed. The petitioner had received a sum of Rs. 4500/- in full settlement of maintenance.

4. On the basis of the petition and counter and after hearing the parties, the learned Magistrate dismissed the said petition. Against the said order of dismissal, the petitioner filed Criminal Revision Petition No. 80/93 before the Sessions Judge, South Arcot Vallalar District Cuddalore and the Sessions Judge dismissed the said petition on 25-7-94 by confirming the order of the Magistrate. Hence the present petition under section 482 of the Code of Criminal Procedure.

5. I heard Ms. Geetha Ramaseshan, learned Counsel appearing on behalf of the petitioner and Mr. K. Srinivasan, learned Counsel appearing on behalf of the respondent.

6. Learned Counsel for the petitioner submitted that the Courts below have committed a serious error of law in placing reliance on Ex.R4, a deed executed by the petitioner on 9-1-1971, which is in Tamil, (a translated version of English has been furnished to me) in rejecting the application for maintenance under section 125 of the Code of Criminal Procedure as the said document has no legal sanction and could not come in the way of one's maintenance. She has further submitted that a compromise entered into between the parties is opposed to public policy and is unenforceable in Courts of law and such relinquishment of her right to claim maintenance cannot operate as a bar to an application to a maintenance.

7. In this connection, the learned Counsel has invited my attention to a decision reported in the case of Ranjit Kaur v. Pavittar Sing, 1992 Cri LJ 262. She has placed reliance on the following passage (at Page 264 of Cri LJ) :

"Therefore, this statutory right of a wife to maintenance cannot be bartered, done away with or negated by the husband by setting up an agreement to the contrary. Such an agreement in addition to it being against public policy would also be against the clear intendment of this provision. Therefore, giving effect to an agreement which overrides this provision of law, that is Section 125, Code of Criminal Procedure, would tantamount to not only giving recognition to something which is opposed to public policy but would also amount to negation of it."

8. The next contention raised by the learned Counsel was that the Courts below were not justified in acting upon the said document. Ex. R4 to hold that the parties have mutually agreed to reside separately and to reject the maintenance petition. She has invited my attention in this connection to a decision reported in the case of Veranna v. Sumitrabai, 1991 Cri LJ 774, she has placed reliance on the following passage :

"Even if it is on the advice of panchayatdars it does not amount to living separately by mutual consent."

9. The last contention of the learned Counsel for the petitioner was that the Courts below should not have placed reliance on the ex parte decree passed by the Subordinate Judge of Mayuram, which was granted on the ground that the petitioner/wife was living in adultery. In this connection, the learned Advocate for the petitioner has placed reliance on the following decision, namely T. Raja Rao v. T. Neelamma, 1990 Cri LJ 2430. In the said decision in paragraph 3, what the Court was observed is as follows (at Page 2431) :-

"In these two petitions the learned Counsel for the petitioner i.e. husband contended that the wife is living in adultery and on a petition filed by the husband in the District Judge's Court, in Haryana State a decree for divorce has been passed under section 13 of the Hindu Marriage Act on the ground that the wife is living in adultery and therefore the wife is not entitled to claim maintenance. As I have stated above both the Courts found on the evidence placed before them that the husband failed to prove that the wife is living in adultery and there are no grounds to depart from that finding of fact which is given on evidence by both the Courts below. The only question which has to be considered is whether the fact of the husband obtaining decree for divorce on the ground that the

wife is living in adultery ipso facto enables the husband to seek for cancellation of the order of maintenance. Section 127(2), Cr.P.C. reads that where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."

10. In the decision reported in the case of Khem Chand v. State, (1990) 1 DMC 38 : (1990 Cri LJ 2314), the learned Counsel placed reliance on the following passage :

"It is, no doubt, true that in revision evidence cannot be reassessed. But it in assessment of evidence a legal mistake has been committed by the trial Court, the same can be corrected in revision. Cardinal Principle is that in matrimonial or maintenance cases solitary evidence of a spouse attributing unchastity or adultery to the other party, should not be relied upon because such spouse is extremely interested in the case. Hence even if reassessment of the evidence done by the lower revisional Court is set aside, the result would be the same, i.e., the finding of the magistrate regarding adultery cannot be legally sustained."

11. The next decision was reported in the case of Mariyumma v. Mohammed Ibrahim, . The learned Advocate has placed reliance on the following passage found at page 235 in paragraph 28.

"Therefore, we hold that the definition of wife given in Section 125(1) and the legal fiction implied therein apply to the entire section.

In para 26 of the judgment the learned Judges seem to assume that the definition of wife in the new Code is to be applied to all the sub-sections of Section 125. The learned Judges seem to assume without discussing the question that acts which may be said to constitute 'living in adultery' during wedlock will continue to be of that character even after divorce. That will amount to giving a meaning different from the recognised meaning to the term 'adultery' and the term 'husband'. That would be beyond the scope of the Section and is not warranted merely because the definition of the term wife takes in a divorced woman too. Though there is no requirement of joint residence in the case of a divorced wife with her divorced husband the learned Judges seem to assume that the idea behind sub-sec. (4) of Section 125 is to promote a process of reconciliation between the divorced spouses. We see no justification to assume so. On the other hand, the question is whether there is an obligation on any of the parties to the divorce to live with the other and whether anyone of the parties can insist upon the exercise of right to live with the other even where the other is not willing. We are afraid, the answer can only be in the negative. Sub-section (4) cannot hence logically apply to the case of a divorced woman."

12. Lastly, the learned Counsel placed reliance on the decision reported in the case of Mahalingam Pillai v. Amsavalli, (1956) 2 MLJ 289. The relevant passage at 294 is as follows :-

"There is a distinction between 'committing adultery and 'living in adultery'. Living in adultery means, following in a course of adulterous conduct more or less continuous' a single act of adultery cannot be considered as living in adultery. The word 'living in adultery' used in sub-section (4) of Section 488, Criminal Procedure Code and Section 13 of Act XXV of 1955, are merely an indication

of the principle that occasional lapses from virtue are not a sufficient reason either for refusing maintenance under section 488 of the Code of Criminal Procedure, or for granting divorce under Act XXV of 1955, as distinguished from judicial separation. The question, therefore, for Courts to decide is whether there had been such adulterous conduct at or about the time of the application, that is to say, shortly before or shortly after the application was made, interpreting the word "shortly" in a reasonable manner."

13. Placing reliance on the above decisions, the learned counsel for the petitioner submitted that the orders passed by the Courts below are liable to be set aside and the petitioner's application for maintenance should be allowed.

14. On the other hand, learned counsel for the respondent raised a preliminary objection that this petition filed under section 482 of the Code of Criminal Procedure, cannot be entertained in view of Section 397(3) of the Code of Criminal Procedure and the party cannot circumvent the special provision by invoking Section 482 of the Code of Criminal Procedure. His next submission was that by virtue of Ex.R4, the parties have mutually agreed to reside separately and that being so, the petitioner cannot now again ask for maintenance after a period of 21 years. He also submitted that there is a decree passed by the competent Court for divorce on the ground of adultery and the respondent has given evidence before the said Court that the petitioner was continuing adultery at the time of filing the petition. He also further pointed out that the conduct of the petitioner does not entitle for maintenance by invoking the provisions of inherent powers by this Court under section 482 of the Code of Criminal Procedure.

15. He has placed reliance on the decision reported in the case of Rajarathnam v. Anantha Narayanan, 1978 Cri LJ 1856. In paragraph 9, this Court has held that :

"In Nathan v. Vaidyanathan, 1975 Mad LW (Cri) 36 : (1975 Cri LJ 994) this Court held that by reason of Section 597(2), Cr.P.C. 1973, the powers of revision conferred by sub-section (1) of Section 597 shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. In a case where the bar under Section 397(2), Cr.P.C. would operate, that bar cannot be circumvented by having recourse to Section 482, Cr.P.C. On this ground the request made by the petitioner in this petition cannot be granted".

16. The next decision on which the learned counsel for the respondent placed reliance was in the case of Dharampal v. Ramshri, , wherein the Court has held at page 438 in paragraph 6 as follows :-

"The question that falls for our consideration now is whether the High Court could have utilised the powers under section 482 of the Code and entertained a second revision application at the instance of respondent 1. Admittedly respondent 1 had preferred a Criminal Application being Cr. R. No. 180 of 1978 to the Sessions Court against the order passed by the Magistrate on October 17, 1978 withdrawing the attachment. The Sessions Judge had dismissed the said application on May 14, 1979. Section 397(3) bars a second revision application by the same party. It is now well settled that the inherent powers under Section 482 of the Code cannot be utilised for exercising powers which are expressly barred by the Code. Hence the High Court had clearly erred in entertaining the second

revision at the instance of respondent 1. On this short ground itself, the impugned order of the High Court can be set aside".

17. A few authorities were cited for the purpose of maintainability of the petition before this Court under section 482 of the Code of Criminal Procedure. He has also placed reliance on the decision reported in the case of Shrawan Sakharan Ubhale v. Sav. Durga Shrawan Ubhale, 1959 Cri LJ 211. In paragraph 4, the Bombay High Court has observed as follows :-

"That a divorcee is entitled to claim maintenance under section 125, Cr.P.C. admits no debate. The term wife used in Section 125(1)(a) includes divorcee who is not remarried, under Explanation (b) to sub-section (1) of Section 125. Therefore, the fact of mere divorce without anything more is no defence to the claim for maintenance allowance by a wife. Crucial question is, is she entitled to maintenance even if she chooses to live separately by mutual consent and voluntarily surrenders her right to maintenance ? Combined reading of the scheme of Section 125 and Section 127, Cr.P.C. in general and sub-section (4) of Section 125 and Clause (C) of sub-section (3) of Section 127 in particular would clearly provide an answer against maintainability of a claim for maintenance allowance in such circumstances. Sub-section (4) of Section 125, Cr.P.C. clearly mentions that no wife shall be entitled to receive allowance from her husband, inter alia, if "they are living separately by mutual consent". Clause (c) of sub-section (3) of Section 127 mentions that order of maintenance will have to be cancelled in case "the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce". In this background it is difficult to sustain the view taken by the learned Sessions Judge that legal right of maintenance cannot be given up. It is pertinent to notice that contracting out of the right under section 125, Cr.P.C. is not prohibited".

18. The last decision on which the learned counsel for the respondent has placed reliance was on the decision of the Karnataka High Court reported in the case of Malayaiah v. G. S. Vasanthalakshmi, 1997 Cri LJ 163. He has placed reliance on the following passage found in paragraph 6.

"Sub-section (4) of Section 125 of Cr.P.C. disentitles a wife from claiming maintenance under section 125, Cr.P.C. in case where the husband and wife live separately by mutual consent. Sub-section (5) further provides for cancellation of any such order under section 125, Cr.P.C. subsequently, on proof that husband and wife are living separately by mutual consent. It is thus clear that a wife living separately from her husband by consent cannot enforce her right and ask for maintenance under section 125, Cr.P.C."

19. Placing reliance on the above decisions, learned counsel for the respondent submitted that there is no merit in this criminal revision petition, and hence it is liable to be dismissed.

20. Now let me consider this petition in the light of the arguments adduced by both sides. It is a petition filed under section 482 of the Code of Criminal Procedure, invoking the inherent powers of this Court, either to prevent abuse of the process of any Court or otherwise to secure ends of justice. In exceptional cases, this Court can invoke jurisdiction under section 482 of the Code of Criminal Procedure, even though there is a bar to file a revision petition under Section 397(3) of the Code of

Criminal Procedure. Let me see, whether it is such an exceptional case. Ex.R4, the translated version in English, executed by the petitioner reads as follows :-

"This deed is executed this 9th day of January 1971 by Mrs. Sivagamasundari, D/o. Sivachidambaram Pillai residing at Kilamangudi village, Chidambaram Taluk to G. Sundaram Son of Govinda Pillai working as Section Officer in PWD.

Due to misunderstandings between us and as we are unable to lead a life as Husband and wife, you having filed divorce proceedings at Sub-court, Mayavaram, I having initiated proceedings at Addl. I Class Magistrate Court, Mayavaram, at this juncture with the settlement of Mediators, I have received from you the Articles detailed in this deed which belong to me and were in your possession.

As to what I am entitled as maintenance as per the decision of mediators, I give up all my rights of maintenance in lieu of the payment of Rs. 3000/- and the pronote given by you for Rupees 1,500/- in my name, thereby for a total sum of Rs. 4,500/- as lump sum. I hereby declare that from this date, I have no right or relationship with you. I hereby declare in this deed that you can pursue with the divorce case before the sub-court while I will not pursue the case before the I Class Magistrate Court. You have no right over the one acre land that is in my name".

21. It may be there cannot be any estoppel against the statue. The right given under a statute cannot be curtailed. But at the same time, I have to consider the conduct of the parties. The petitioner after taking advantage of the said document and getting all the benefits mentioned therein, now cannot say that the said document is not binding on her. In the said document, she has clearly stated that she has given all her rights of maintenance in lieu of the payment of Rupees 3,000/- and the pronote given by her husband for a sum of Rs. 15,00/- in her name. She has given a declaration that from that onwards she has no right or relationship with the respondent. That means, she has mutually agreed to reside separately from the respondent. Further, under the said document, she has acquired right for one acre of land.

22. In addition to this document, the respondent has obtained a decree for divorce on the ground of adultery. He has given evidence before the Court in the said divorce proceedings, wherein he has stated that the petitioner is living in adultery. That may be an ex parte decree, but the said decree has not been set aside. Furthermore, the maintenance petition filed by the petitioner was dismissed. Now after a period of 21 years, the present proceedings have been initiated. Her conduct to denying the earlier proceedings and the denial of signature in Ex.R4, will not entitle her to invoke the Court's jurisdiction under Section 482 of the Code of Criminal Procedure. Both the Courts on the basis of the materials placed before them have come to the conclusion that the petitioner is not entitled for maintenance.

23. After having considered the rival submissions, I am of the opinion that there is no merit in this Criminal Original Petition and, accordingly, this petition shall stand dismissed.

24. Petition dismissed.