

Andhra High Court

N. Babji vs N. Sarada & Anr. on 20 January, 1998

Equivalent citations: 1998 (3) ALD 560, 1998 (2) ALT Cri 21, 1998 CriLJ 4281, II (1998) DMC 642

Bench: A Hanumanthu

ORDER

1. This revision is Referred against the order dated 29-12-1995 passed by the learned Judge, Family Court, Visakhapatnam in MP No.94/95 in MCNo.15/1985 dismissing the petition.

2. The facts in brief, resulting in filing of this revision, are as under :

The revision-petitioner herein is the husband of the respondent herein. For the sake of convenience, they are referred as wife and husband hereinafter. The respondent herein is the legally wedded wife of the petitioner. They lived happily for some time. As disputes arose between them, they are living separately. The wife filed OP No.122/82 on the file of the I Additional Subordinate Judge, Visakhapatnam for restitution of conjugal rights and that was allowed on 30-12-1982 directing the petitioner herein to go and live with the respondent, and give conjugal happiness to the respondent. Ex.P1 is the certified copy of the order in OP No.122/82, There was no restitution of conjugal rights between the parties in pursuance of the said order. Subsequently, there were exchange of notices between the parties. The wife also filed MC No. 15/85 for granting maintenance and that petition was allowed on 18-11-1985 and maintenance was granted at the rate of Rs.250/- per month. On revision to this Court, this Court reduced the maintenance amount to Rs.200/- per month. Subsequently, the husband filed OP No.380/89 on the file of II Additional Sub-Judge, Visakhapatnam for granting decree of divorce, on the ground that the respondent did not join him inspite of the orders in OP No.122/82. After contest that petition was allowed and decree of divorce was passed on 18-8-1993. Thereafter, on 12-6-94, the husband filed MP No.94/95 under Section 127(2) Cr. PC to cancel the order of maintenance granted in MC No. 15/85 for the reason that a decree of divorce has been granted between the parties and mat the wife had deliberately deserted the petitioner. The wife resisted that application by filing her counter to the effect that the petitioner himself deserted the respondent, that she had preferred an appeal against the decree of divorce passed in OP No.380/89, that she did not remarry and that she is unable to maintain herself. During the course of enquiry, the petitioner himself got examined as PW1 and got marked Exs.P1 to P6, and the wife-respondent herself got examined as RW1 and no documents were marked on her behalf. On a consideration of the oral and documentary evidence placed before him, the learned Judge, Family Court dismissed the petition. Aggrieved of that order, the husband has come up with this revision.

3. The learned Counsel for the petitioner vehemently contends that the respondent herein did not comply with the directions passed in OP No.122/82, that she did not join the petitioner inspite of the notice issued by him and therefore, the petitioner obtained the decree of divorce in OP No.380/89 and in view of the decree of divorce passed by a Civil Court, the order of maintenance granted in MC No.15/85 is liable to be cancelled. The learned Counsel for the respondent, on the other hand, submits that subsequent to the order for restitution of conjugal rights passed in OP No.122/82, the wife made attempts to join the petitioner, but the petitioner himself refused to take

her back into his house, that no notice was served on the respondent and that as a divorcee also, she is entitled for maintenance and therefore, the maintenance order passed in MC No.15/85 is not liable to be cancelled.

4. The point for consideration is whether the Judge, Family Court, Visakhapatnam has committed error in refusing to cancel the maintenance order passed in MC No.15/85 in favour of the respondent-wife, who is a divorcee of the petitioner on the ground that a competent Civil Court passed a decree of divorce between the parties ?

5. Admittedly, the respondent herein was the legally wedded wife on the petitioner till the petitioner obtained divorce as per the orders in OP No.380/89 (Ex.P6), Earlier, the respondent filed OP No. 122/82 for restitution of conjugal rights and the petition was allowed. The respondent also filed MC No.15/85 for grant of maintenance alleging that the petitioner failed to maintain her having sufficient means and that petition was allowed and maintenance was granted. The petitioner obtained divorce on the ground that the wife did not join him subsequent to the passing of the order in CP No.122/82. Hence, the respondent is now a divorced wife and she is getting maintenance by virtue of the maintenance order in MC No.15/85. The petitioner sought for cancellation of that maintenance order on the ground that a decree of divorce has been passed between the parties and that he is not liable to pay maintenance any longer. He filed the petition under Section 127 Cr.PC which reads as follows:

"127. Alteration in allowance :-- (1) On proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) Where it appears to the Magistrate, 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.

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that :--

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order.-

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof."

(4) [Not relevant.] Under sub-section (2) of Section 127, the Magistrate has to cancel or vary the order of maintenance granted under Section 125 Cr.PC to bring it in conformity with the decision of a Civil Court. Under clauses (a) and (b) of sub-section (3) of Section 127, the Magistrate can cancel the order of maintenance granted under Section 125 in favour of a woman, who has been divorced by or obtained divorce from her husband, if he is satisfied that the woman has after the date of divorce remarried, cancel such order from the date of her remarriage and if that woman had received whether before or after the date of divorce the whole of the sum which under any customary or personal law applicable to the parties, was payable on such divorce, cancel that order of divorce. In the instant case, admittedly, the respondent did not remarry after the decree of divorce obtained by the petitioner. There is also nothing on record to show that the respondent received any amount from the petitioner, either before or after the decree of divorce was passed. It is no doubt true that a competent Civil Court passed a decree in favour of the husband dissolving the marriage between the husband and the respondent-wife. But, that decision itself gives no right to the husband to get the maintenance order cancelled, because the definition of "wife" has been extended so as to include a divorced wife under Section 325(1) Explanation-b of Cr.PC which reads thus:

"Wife" includes a woman who has been divorced or obtained a divorce from her husband and she has not been remarried." A divorced wife under Section 125 Cr.PC is entitled to receive maintenance from her former husband. Therefore, obtaining divorce, by a decree of divorce in a Civil Court after an order under Section 125 Cr.PC had been passed, is not a valid ground under Section 127 Cr.PC for the cancellation of that order.

6. It is contended by the learned Counsel for the petitioner that the respondent is not entitled for maintenance as the valid decree of divorce has been granted by competent Civil Court on the ground that she failed to fulfill her marital obligations as per the decree for restitution of conjugal rights passed in OP No.122/82. Under Section 125(1) Cr.PC, a wife is entitled for maintenance if she is unable to maintain herself. As earlier stated, under explanation-b to Section 125(1) Cr.PC, a divorced woman is included in the term "wife". It, therefore, follows that even a divorced wife is entitled for maintenance, if she is unable to maintain herself and she is not remarried, after divorce.

7. There are catena of decisions of our High Court and Supreme Court for the proposition of law that even a divorced woman who has been divorced on the ground that she had deserted her husband, is entitled for maintenance under sub-section (1) of Section 125 Cr.PC.

In *Bai Thaira v. Ali Hussain Fissali Chothia and another*, 1979 Cr.LJ 151, the Supreme Court in para 5, held thus :

"We hold that every divorcee otherwise eligible, is entitled for the benefit of maintenance allowance and the dissolution of the marriage makes no difference to this right under the Code." In *Smt. Vanamala v. H.M. Ranganathanbatta*, 1995 (3) Crimes 524, their Lordships of the Supreme Court held that a divorced wife, if not remarried, is entitled to maintenance, In that case, their Lordships explained the scope of Section 125(1) and (4) Cr.PC as follows :

"Section 125 makes provision for 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 herself, a Magistrate of the First Class may, upon proof of such neglect or refusal order that person to make a monthly allowance for the maintenance of his wife not exceeding Rs.500/- in the whole as such Magistrate think fit and to pay the same to such persons as the Magistrate may from time to time direct. Clause (b) of the explanation to sub-section (1) 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 is a legally wedded wife of the respondent prior to passing of the decree of divorce. By virtue of definition referred to above, she would, therefore, be entitled for maintenance if she could show that the respondent had neglected or refused to maintain her."

It is also observed in the same decision thus :

"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 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 divorced 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." On a reference by a learned single Judge, Division Bench of this Court in *L. Srinivasula Reddy v. L. Ramalaxmamma and another*, , considered the point "whether a divorced wife, when a finding is recorded that she alone deserted her husband in an application under Section 13(i) of Hindu Marriage Act, and if she continues as divorcee without being married again, is entitled for maintenance and what is the effect of sub-section (4) of Section 125 Cr.PC upon sub-section (1) thereof and their Lordships answered that reference as follows:

"The wife is entitled for maintenance even though she has been divorced by her husband as long as she remains unmarried and she is not in a position to maintain herself and inspite of her request, her husband has refused to maintain her or neglected her. Maintenance will be disallowed only

when it is shown that the wife is re-married. Thus, a divorced wife as defined in Section 125(1) Explanation (b) of Cr.PC, is entitled for maintenance."

From the above legal position, it is clear that a divorced wife who deserted her husband and has not remarried and not living in adultery, is entitled for maintenance. It is a statutory right. Because of divorce, the wife is no longer under the marital obligation to the husband, yet she can claim maintenance if the husband neglects to maintain her as long as she remains unmarried and not guilty of unchastity. In the instant case the respondent as a divorced wife is entitled for maintenance from her former husband, the petitioner herein under Section 125(1) Cr.PC, it stands to reason to say that the order of maintenance granted earlier in MC No. 15/85 should not be cancelled under Section 127(2) Cr.PC till the respondent-wife gets remarried. The same view has been expressed by Bombay High Court in Smt. Raja Bai v. Arjun Keruwalekar and another, 1987(2) Crimes 574. Therefore, I hold on the point that the learned Judge, Family Court, Visakhapatnam committed no error in refusing to cancel the maintenance order granted in MC No.15/85. Hence, I do not find any reason to interfere with the impugned order.

8. In the result, I do not find any merits in this revision case and the same is dismissed. The petitioner-husband is directed to pay Rs.500/- to the respondent-wife towards the costs of this petition.