

(1985) 06 RAJ CK 0001
In the Rajasthan High Court

Case No : Criminal Miscellaneous Application No's. 152 and 157 of 1985

Abdul Salam

APPELLANT

Vs

Smt. Aisha

RESPONDENT

Date of Decision : 06-06-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 273, 274, 275, 482

Citation : (1985) WLN 269

Hon'ble Judges : Vinod Shanker Dave, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Vinod Shanker Dave, J.—These two miscellaneous applications u/s 482 Cr. PC are in the same proceedings u/s 125 Cr. PC and hence they are disposed of together by this single order. Though Application No. 152/85 is directed against the order, dated 4-1-1985 is an application u/s 125(5) Cr. PC and the other, dated 21-7-1984 disposing of an application u/s 125(4) Cr.PC. The present case has a chequered history. The petitioner was married with non-petitioner on May 22,1970 when the non-petitioner was only eight years of age. For six years she remained with her parents and thereafter she was sent to her husband's place where she is alleged to have stayed only for a period of ten days. During this period, the case of the petitioner is that there was no cohabitation and the marriage was not consummated and this fact is also admitted by the non-petitioner. The petitioner's case is that consequent upon the non-petitioner's going to her parents he tried his best to persuade her to come home but she would not yield to the request and so panchayat of the community has to be summoned. Thereafter a notice was also given to the non-petitioner requesting her to come, but it is alleged that she refused. It is in these circumstances that the petitioner who is governed by the Muslim Personal Law and who could lawfully have more than one wife, remarried in 1978, as a result of which the non-petitioner got annoyed and moved an application for maintenance u/s 125

Cr.PC on June 21, 1978. This application was contested by the petitioner who, inter alia other grounds, submitted that he is ready and willing to maintain her and that it was she who has deserted him, the petition should be dismissed. The trial court vide its order, dated 5-2-1981 dismissed the petition against which an appeal was preferred by the non-petitioner and the same was allowed. The petitioner had come in revision to this court but the same was dismissed on the short ground that since the petitioner has contracted a second marriage she is entitled to refuse to stay with him and is entitled to maintenance. The trial court on May 16, 1983 fixed the quantum at Rs. 180/- p.m. from the date of filing of application. A revision and thereafter an application u/s 482 Cr.PC were preferred against the quantum but the petition met with no success. He, therefore, moved an application and prayed for a decree for restitution of conjugal rights but that too was dismissed and also the appeal against the said judgment and decree. The petitioner filed a suit for declaration and injunction with a prayer that it should be declared that the non-petitioner is not entitled to any maintenance, but that too was dismissed. The petitioner thereafter moved an application u/s 125(4) Cr.PC wherein it was stated by him that he is entitled for marrying four times according to his Personal Law and this cannot be a ground for refusal by the first wife to come and he is ready and willing to maintain her and not only this he is prepared to hire a separate room for her where she can remain separately from his other wife. In this view of the matter his application may be allowed and the maintenance should be refused. This application was dismissed vide order, dated 4-1-1985 against which the application No. 152/85 is pending. Prior to this an application was filed u/s 125(5) Cr.PC on 20-6-1984 where in also the petitioner has prayed for cancellation of the order on the ground that there was no reasonable and valid reason for herself withdrawing and deserting the petitioner. In this application it was categorically mentioned that the High Court has granted the maintenance on the ground of second marriage but has stated nothing regarding her voluntarily remaining, away and therefore, after accepting application the order of maintenance should be cancelled. This application was rejected vide order, dated 21-7-1984 after which the application referred to above u/s 125(4) Cr.PC. was filed but this revision petition was registered in High Court later on and, therefore, has been numbered 157/85.

2. Mr. Garg, appearing for the petitioner in both the cases, submitted that the courts have not taken into account an important fact that in the instant case there is no consummation of marriage and if there is no consummation of marriage in case of minors marriage having taken place during minority there is repudiation and wife withdrawing herself from the company without consummation it amounted to repudiation of the marriage and therefore, relationship of husband and wife never existed and in this view of the matter she is not entitled to any maintenance. It is further submitted that the orders granting maintenance is abundantly against the provisions of Sub-section (1) of Section 125 Cr.PC and that when he was prepared to keep and maintain her the court could not grant maintenance. It is submitted that Sub-section (1) of

Section 125 Cr.PC is complete in itself and reference could not have been made to Sub-section (3) which puts a limitation on Sub-section (1). It was submitted that this court in *Bhanwari Bai alias Ranji Bai v. Mohd. Ishaq* RLV 1982 600 has held that contracting second marriage is not a ground for withdrawing from the company of the husband and maintenance cannot be granted on this ground. It is submitted, therefore, that the judgment in this case which had been passed earlier that maintenance is granted for the reason that petitioner has married second wife is diametrically opposite to the view taken and in this view of the matter this case requires a reference to the larger Bench. It has also been submitted that this court has wide powers u/s 482 Cr.PC to set aside the earlier order of this court where the grant of maintenance has been upheld.

3. Mr. Mehrish, appearing on behalf of the non-petitioner, submitted that the petitioner is dragging the non-petitioner into litigation one after another and is creating the circumstances which are miserable for her. She is being dragged from court to court and it was his attitude from the very beginning for which the non-petitioner had to withdraw from the company and live separately. The petitioner who can divorce her is deliberately not divorcing and now has invented a new plea of repudiation of marriage which had never been taken at an earlier stage. On the contrary he had filed a suit for restitution of conjugal rights holding it to be valid and subsisting marriage and still his offer of maintaining her as wife goes contrary to his pleading of repudiation. Thus he is estopped from taking the plea of repudiation and his moving the application u/s 125(5) Cr.PC presupposes a valid order and no application u/s 125(5) can ever be filed unless an order stands on record. Thus, it is submitted that the petitioner himself has been taking contrary pleas and has to suffer the consequences. It is further submitted that application u/s 125(4) Cr. PC. was misconceived and rightly rejected in the circumstances of the case. Mr. Mehrish also relied on a decision reported in *Smt. Kalavati Vs. Ausan*,

4. Before I discuss the contentions raised it would be proper to reproduce Section 125 Cr. PC:

Section 125. Order for maintenance of wives, children and parents:

...

(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.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery or that without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent, the Magistrate shall cancel the order.

5. A perusal of the aforesaid section indicates that Sub-section (5) of Section 125 Cr.PC is only applicable when there is a valid order already on record as the

words "cancel the order" contemplate a previous order. Therefore, when the petitioner himself has filed an application u/s 125(5) Cr.PC he intended to seek the cancellation of the order already passed, i.e. an order which has been made under this section. This subsection has been enacted with a view that if subsequent to the passing of an order u/s 125(1) Cr. PC, the husband furnishes a proof to the effect that the wife is living in adultery or that for sufficient reason she refuses to live with her husband or that they are living separately by mutual consent the order shall be cancelled. This section does not contemplate the declaration either the initial order was void ab initio or erroneously passed. Thus the application u/s 125(5) Cr.PC besides the grounds mentioned by the court below was misconceived and has rightly been rejected. Coming to the application u/s 125(4) Cr.PC it is true that the courts should have considered that the wife should not be living in adultery or she could not refuse to live with her husband without sufficient reason or that they should not be living separately by mutual consent. All these three ingredients are questions of fact which cannot be gone in to by this court unless it is shown that the findings arrived at on any of the grounds are perverse or inference drawn is erroneous. The petitioner in this case has come on the ground of repudiation of marriages. u/s 273 of the Mahomedan Law a wife is entitled to the dissolution of the marriage if she proves firstly that the marriage has not been consummated, (2) the marriage took place before she attained the age of 15 years and (3) she has repudiated the marriage before attaining the age of 15 years. u/s 274 of the Mahommedan Law there is an option of puberty and it is mentioned that the right of repudiating the marriage is lost in the case of a female, if after attaining puberty and after being informed of the marriage and of her right to repudiate it, she does not repudiate without unreasonable delay. However in the case of a male the right continues only if he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitating u/s 275 of the Mohammedan Law. The mere exercise of the option of repudiation does not operate as a dissolution of the marriage. The repudiation must be confirmed by the court under the dissolution of Muslim Marriage Act, 1939, then the marriage subsists. In the instant case there is no iota of evidence to suggest that either party has repudiated the marriage. On the contrary there is positive evidence to suggest that both the parties are insisting on their rights under the contract of marriage. So far as the husband is concerned, he neither repudiated the marriage nor divorced, on the contrary it moved an application for restitution of conjugal rights. He thereafter moved the application u/s 125(4) Cr. PC which confirms the facts that he himself considers Smt. Aisha as his validly married wife till date and it does not lie in his mouth to disown the wife on the ground of repudiation because he has to pay the maintenance. He is not only entitled to maintain his wife under the provisions of Section 125 Cr.PC but even Mahomendan Personal Law makes an obligation under the law to maintain the wife. So far as the wife is concerned, she has been contesting the case on ground of cruelty and that the husband has contracted a second marriage for which under these circumstances according to her she is justified in refusing to live with her husband. The argument of learned counsel

that contracting a second marriage is not a ground for withdrawing from the company of the husband and maintenance cannot be granted on this account has only been advanced for being rejected in this case. As this ground has been considered in the earlier proceedings before this court and if the petitioner was aggrieved of that order it was open to him to have filed the SLP before their Lordships of the Supreme Court. This court could neither alter its judgment at that stage nor it can be revoked in these proceedings. In this view of the matter there are no merits in these two petitions and they deserve to be dismissed.

6. Before parting with this judgment. I may however, make it clear that the findings in those proceedings, on an application u/s 125(5) Cr. PC do neither operate as res judicata nor prevent the petitioner to take such recourse of law as permissible under the Muslim Law. But all those shall only be effective after any decision on them. Till then the petitioner is liable to pay maintenance u/s 125 Cr. PC as awarded before and confirmed by this court in its previous judgment.

7. Both the revision petitions fail and are dismissed.