

(1987) 01 RAJ CK 0090

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 178 of 1986

Ali Mohammed

APPELLANT

Vs

Smt. Zaida

RESPONDENT

Date of Decision : 19-01-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 482
Hindu Marriage Act, 1955 — Section 13, 5, 7

Citation : (1987) 2 WLN 27

Hon'ble Judges : Gopal Krishan Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Gopal Krishan Sharma, J.—The main miscellaneous petition u/s 482 Cr. PC is hereby disposed of Ali Mohammed filed the present petition u/s 482 Cr. PC against the judgment dated 12-2-1986 passed by the Additional Sessions Judge No. 2, Udaipur by which he dismissed the revision petition of the petitioner.

2. Smt. Zaida filed an application u/s 125 Cr. PC in the court of Munsif and Judicial Magistrate Kherwada. She alleged that she was married with Ali Mohammed some 10 years before and had three children from this marriage. Ali Mohammed one year after the marriage started quarrelling with her, used to beat her and he wanted to turn her out from the house on making false allegations against her. He has also married another woman, so she claimed maintenance allowance.

3. Ali Mohammed contested this application. He admitted that he was married with Zaida but denied all other allegations. He has also admitted his marriage to another woman. He had taken a plea that the character of the petitioner Zaida is not good and she is living adulterous life. She was found in the room of Maulana Akbar Ali on one night in presence of so many persons and he had divorced her.

4. The trial court framed four issues. The first issue was with regard to leading

adulterous life. The third issue was with regard to maintenance allowance.

5. The first issue is the only material issue in this case. The allegation of Ali Mohammed the petitioner is that Smt. Zaida is leading an adulterous life and she was caught in the room of Maulana. Number of persons were called there and she was found there. On this issue both the parties have led evidence and after discussing the evidence the learned trial court has come to this conclusion that Mst. Zaida had bodily and physical relation with Maulana Akbar Ali. In spite of this finding the trial court was of this opinion that this is a solitary instance which does not prove that Mst. Zaida is leading an adulterous life. Hence he decided issue No. 1 against Ali Mohammed. On issue No. 3 after considering the statement of both the parties the trial court fixed Rs. 150/- per month as maintenance allowance and granted this allowance from 29-4-1980.

6. Ali Mohammed felt aggrieved with this order of the trial court preferred an appeal in the Sessions Court which was disposed of by Addl. Sessions Judge No. 2, Udaipur vide order dated 12-2-1986. The learned Additional Sessions Judge did not agree with the contentions of Ali Mohammed and ultimately rejected the revision petition and confirmed the order of the trial court.

7. Ali Mohammed has now preferred this petition u/s 482 Cr. P.C. Mr. Kala, learned Counsel for the petitioner has argued that Section 125 Clause (4) Cr. PC is the relevant clause for deciding this petition. Section 125 is with regard to order for maintenance to wife and children Sub-section (4) of this section says that no wife shall be entitled to receive allowance from her husband under this section if she is living in adultery. Pointing out the relevant words "living in adultery," it was argued that Ali Mohammed has proved by his evidence that Smt. Zaida had relations with Maulana Akbar Ali. It is also proved from the statement of witnesses that Maulana Akbar Ali admitted before them that Mst. Zaida used to come to him while referring the statements and the portion of the order of the trial court where he had discussed the entire evidence it is clear that not only the day when Smt. Zaida was caught at the room of Maulana but Maulana had admitted that previously also she used to come. Thus this is not a solitary instance but from the statements of the witnesses it is clear that Smt. Zaida was habitual in coming to Maulana's house and both have physical relations with each other. It was also argued that even on a solitary instance it was held that the wife is living in adultery. To support his contention he has cited *Gokul Prakash Cure v. Dhanbhai 2 (1982) DMC 66*. This was a case under the Hindu Marriage Act where dissolution of marriage was prayed on the ground of committing adultery by the wife. Under Sections 13(1) one has to prove for getting a decree for dissolution of the marriage that after solemnisation of the marriage she had voluntary sexual intercourse with any person other than her spouse. In this case it has been observed that direct evidence of adultery is rarely possible, therefore, always be viewed with suspicion. Adultery can be proved only by circumstances after discussing the evidence of the witnesses. It was further observed that the lady lived with the man as a married couple. The

witnesses have seen her living together with another person. So on the basis of this evidence the court has found that the lady had committed adultery. So by citing this case it was argued that even a solitary instance can be sufficient to come to the conclusion that the lady is living in adultery.

8. Shri Mridul Jain pointed out that the words "living in adultery" have been mentioned in Sub-section (4) and these words are very relevant. According to him this section does not speak of an act of adultery but living in adultery. The expression "living in adultery" therefore connotes neither a single act of adultery nor even isolated acts but means the following of a course of continuous adulterous conduct. The argument is that Ali Mohammed had to prove that Mst. Zaida was leading an adulterous life. A single act of adultery is not sufficient to prove her adulterous conduct. In case of *kista Pillai v. Amrithamba* AIR 1938 Mad 833, the wife has claimed maintenance u/s 488 Cr. PC. In that case while relying on a case of the Bombay High Court *In Re: Fulchand Maganlal*, it was observed that the words "living in adultery" are merely indicative of the principle that occasionally lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by living in adultery.

9. In case of *M P. Subramaniam v. T.T. Ponakshiammal* AIR 1958 Mys 41, while observing regarding living in adultery. it has been observed that it is not a stray act or two of adultery that disentitles a wife from claiming maintenance from her husband but it is a course of continuous conduct on her part by which it can be called that she is living an adulterous life that takes away her right to claim the said maintenance.

10. In the case of *Mt. Durghatia Vs. Ayodhya Prasad*, while defining the words "living in adultery" it has been observed as under:

The plaintiff who alleges that the defendant "lives in adultery" has to prove a course of conduct over some period with the same or more than one person. Between an individual lapse and life as a common prostitute, there are gradations to increasing impurity, where exactly the occasional lapse deepens into a "life in adultery" is a question of fact depending upon repetition and the brazenness of the conduct the signs of remorse and readiness to turn back, but it certainly begins at a stage below the first lapse.

Even supposing a child has been conceived in adultery, but itself it is insufficient to hold that she "lives in adultery."

AIR 1966 Mad 833 was later on relied by Kerala High Court in *T. Mercy v. V.M. Varughese* AIR 1966 Ker 569, and after discussing it was observed as under:

It is clear from the above judicial pronouncements that "living in adultery" means something different from leading an unchaste life. In the present case even if the alleged letters are believed and that the first petitioner had been moving friendly with Appukuttan Nair, she does not become disentitled to maintenance, because the bar of "living in adultery" is not established thereby.

The learned Magistrate therefore has clearly erred in having refused maintenance to the wife.

11. Mr. Kala also cited the case of Pulikkottial Cheru Zechariah Vs. Smt. Mary Zechariah and Another, In this case after discussing the law regarding divorce and matrimonial matters it was observed that the change in principle as to the standard of proof will most often not make any difference in the result, for even applying the civil standard of proof to divorce proceedings based on adultery and high standard of proof will be needed to satisfy the court that adultery has been committed. Agreeing with this principle in that case the court believing the contention of the husband granted a decree of divorce. In this case the parties were Christians and according to the Indian Christian Marriage Act the divorce petition was submitted. The ground for divorce was that the wife had committed adultery with the respondent No. 2 and the decree was passed. After going through this judgment it is clear that there was sufficient evidence to show or prove that the wife had earlier eloped with some other gentleman. There was also evidence that the respondent No. 2 who gained confidence of the petitioner husband used to visit the house in his absence. There was also evidence that the respondents were even roaming together although respondent No. 1, the wife was not supposed to go with respondent No. 2. Then there was evidence of one Fateh Mohammed a milk seller who had stated that he had seen both the respondents sleeping on one cot. So all the evidence proved that the wife had committed adultery and the divorce decree was granted and the marriage dissolved. This case is distinguishable with the present case. Here the evidence is that Mst. Zaida was found in the room of Maulana Akbar Ali. There is no evidence to prove that previously also she was found at the house of Maulana. The only evidence is, as stated by witnesses, Maulana told them that prior to this also Zaida had visited him twice or thrice. This evidence is not sufficient to prove that Mst. Zaida is leading adulterous life. The evidence has been discussed by the trial court and he has agreed that Mst. Zaida was found at the house of Maulana Akbar Ali and she had illicit relations with him. It being a solitary instance the trial court held that she is not living in adultery. This order has been confirmed by the Additional Sessions Judge.

12. Mr. Kala has also cited the case of (9) B.D. Charles Vs. Smt. Nora Benjamin and Another, It is a Full Bench decision of this Court. In this case it has been observed that association coupled with opportunity, illicit affection, undue familiarity guilty attachment are some of the instances which create an inference upon which the court can act. The fact of adultery has, therefore, to be inferred from the totality of circumstance that lead to it by fair inference and as a necessary conclusion. It was also observed that following principles emerged from the aforesaid decision: (i) direct proof of adultery is very rare; (ii) adultery can be established by circumstantial evidence and (iii) circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion of adultery.

13. Keeping these principles and discussing the evidence and the circumstances of the case the appeal filed by the adulterer was allowed.

14. This case does not help the petitioner. In a case of adultery it is difficult to have direct proof and the adultery can be proved or established by circumstantial evidence. This principle cannot be denied whether the petitioner by circumstances established that Mst. Zaida is leading adulterous life, the argument that the witnesses have seen her coming from the house of Maulana Akbar Ali and the witnesses have stated that they had seen her going to the house of Maulana, this evidence and the circumstances are sufficient to prove that she was living in adultery. I do not agree with this submission. Whatever evidence has been adduced by the petitioner is not sufficient to establish that Mst. Zaida has been leading an adulterous life. The learned trial court has correctly held that this is the solitary instance which cannot be taken as a proof for leading an adulterous life. The conclusion arrived at by the trial court and confirmed by the Additional Sessions Judge needs no interference.

15. Shri Kala learned Counsel for the petitioner argued about the grant of maintenance allowance and submits that there is no proof about the income of the petitioner and Rs. 150/- p m. has been granted which is excess to the income of the petitioner. From the judgment of the trial court it seems that the petitioner has failed to prove what is his exact income. He is running some "parchuni" shop and according to him his income is not such that he could pay Rs. 150/- p m. to the non-petitioner. The burden was on the petitioner to prove his financial position to pay the maintenance to his wife and the petitioner has failed to prove his income. The trial court has granted Rs. 150/-per month to non-petitioner. According to the petitioner one child is living with the non-petitioner while according to the non-petitioner two children are living with her. Though there is no definite evidence with regard to this fact but in these days a sum of Rs. 150/- per month cannot be said to be an excess amount granted to the non-petitioner for her maintenance. Therefore, the argument about quantum of maintenance has no substance.

16. It was also argued that the trial court granted this maintenance from 29-4-1980 i.e the date when the application u/s 125, Cr. PC was submitted The petitioner was directed to pay a huge amount and as his financial position is weak be is not a position to pay the amount in lump sum. In the alternate it was prayed that he may be permitted to pay this amount in instalments. This argument also has no substance On one hand the petitioner says that he is not in a position to pay even Rs. 150/- per month, how would he be able to pay the instalment of the maintenance amount awarded to non-petitioner in instalment apart from the monthly maintenance fixed by the court. This is nothing but simply a way to avoid the payment. There is no illegality committed by the lower courts in granting the maintenance allowance from the date of her application. In this respect the case of Mohanlal v. Mst. Pushpa (1979) 5. RCC 73 helps the non-petitioner. In this case it was held that the courts below erred in fixing an

arbitrary maintenance without considering the earning capacity of husband. The award of maintenance was reduced from Rs. 200/- to Rs. 100/- per month from the date of application. This was also a case u/s 482, Cr. P.C. In view of this case of our own High Court the present application which is also u/s 482, Cr. P.C. has been considered. The non-petitioner has been awarded Rs. 150/- per month. There is nothing on the record to prove the income of the husband petitioner. He should have proved his monthly income so that the court could arrive at a reasonable conclusion. In the absence of this proof about his income the amount of Rs. 150/ p.m. cannot be said to be unreasonable. Therefore, this argument too is not acceptable.

17. Mr. Kala also argued that after coming into force the Muslim Women (Protection of Rights on Divorce) Act, 1986 a divorced Muslim Women is not entitled to any maintenance u/s 125, Cr. P.C. By this Act her rights have been taken away. In this regard he has referred to Section 7 which says "every application by a divorced woman u/s 125 or 127 of the Cr. P.C. 1973. (II of 1974), pending before a Magistrate on the commencement of this Act shall not with standing anything contained in that Code and subject to the provisions of Section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act."

18. When this Act came into force the application u/s 125, Cr. P.C. was not pending before the Magistrate. He had pronounced the order on that application and the petitioner preferred a revision before the Addl. Sessions Judge which was pending. Therefore, in view of Section 7 of the Act the application u/s 125, Cr. P.C. was not pending but was disposed of. Though the revision petition was pending against the order. Therefore, the argument that after coming into force of this Act Mst. Zaida the non-petitioner has no right to claim any maintenance allowance is not acceptable. This Act is no bar to the present case.

19. As already observed above the prayer for granting instalments in the payment of the amount has no substance and this request is also disallowed. The petition u/s 482, Cr. P.C. has no substance and it is, therefore, hereby dismissed.