
(2008) 05 AHC CK 0170
In the Allahabad High Court

Amod Kumar Srivastava

APPELLANT

Vs

State of U.P. and Others
Smt. Neelam Srivastava Vs
State of U.P. and Another

RESPONDENT

Date of Decision : 23-05-2008

Acts Referred:

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

Citation : (2009) 1 CivCC 306 : (2008) 2 DMC 528 : (2009) 1 RCR(Criminal) 786

Hon'ble Judges : Vijay Kumar Verma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vijay Kumar Verma, J.—"Whether a unmarried daughter who has attained majority, but unable to maintain herself and a wife, who wilfully disobeys the directions given by the court in the decree for the restitution of conjugal rights, can claim maintenance allowance under the provisions of Section 125 of the Code of Criminal Procedure 1973 (in short "the Cr.P.C.") are the main questions that fall for consideration in these revisions.

2. Challenge in both these revisions is to the judgement and order dated 24.06.2006 passed by the Family Court Varanasi in Case No. 12 of 2002 Smt. Neelam Srivastava v. Sri Amod Kumar Srivastava, whereby allowing the application u/s 125 Cr.P.C., maintenance allowance @ Rs. 2500/- per month to Smt. Neelam Srivastava and Rs. 2000/- per month to both the daughters namely Km. Bhavya and Km. Divya (opposite parties No. 3 and 4 in CrI. Revision No. 4400 of 2006) has been granted from the date of order. Smt. Neelam Srivastava has prayed in Criminal Revision No. 5598 of 2006 to enhance and grant maintenance allowance from the date of application u/s 125 Cr.P.C.

3. Shorn of unnecessary details, the facts leading to the filing of these revisions, as emerging from the record, in brief, are that marriage of Sri Amod Kukmar Srivastava and Smt. Neelam Srivastava took place according to the Hindu rites and rituals in the year 1981. Out of the wedlock, the couple was blessed with two daughters namely Km. Bhavya and Km. Divya. Unfortunately their marriage could not succeed. Ultimately, Smt. Neelam Srivastava had to resort to the provisions of Section 125 Cr.P.C. and she filed an application for maintenance against her husband Sri Amod Kumar Srivastava on 12.03.1986 in the court of Munsif Magistrate Varanasi. The case remained pending for a considerable long period and ultimately the application u/s 125 Cr.P.C. was allowed vide impugned order dated 24.06.2006 passed by the Family Court Varanasi, whereby the maintenance allowance as mentioned in para (2) above has been granted from the date of order. Hence these revisions.

4. When the revisions were called for hearing on revising the list, none appeared for Smt. Neelam Srivastava and her daughters Km. Bhavya and Km. Divya. Hence arguments of Sri Sameer Jain Advocate, learned Counsel appearing for Sri Amod Kumar Srivastava in both revisions and learned AGA for the State were heard.

5. Two contentions were raised by the learned Counsel for the revisionist Amod Kumar Srivastava. The first contention was that both the daughters namely Km. Bhavya and Km. Divya had attained majority prior to the passing of impugned judgment and hence they are not entitled now to get any maintenance under the provisions of Section 125 Cr.P.C. It was also submitted in this regard that the elder daughter Km. Bhavya has married on 13.05.2007 and on this ground also she is not entitled to get any maintenance from her father. In support of this first contention, the learned Counsel for the revisionist in Crl. Revision No. 4400 of 2006 has placed reliance on the following cases:

(1) Moideenkutty v. Pathumma and Ors. 1984 (2) (Ker) 355.

(2) Kum. L. Usharani and others Vs. D.S. Lakshmaiah, and

(3) T.P.S. Selva Saroja v. T.P.S.H. Sasinathana 1989 Crl LJ 2032

6. The second contention of Sri Sameer Jain was that a decree for the restitution of conjugal rights was passed against Smt. Neelam Srivastava on 17.04.1986 in suit No. 54 of 1986 by Civil Judge Jaunpur and since that decree has not been complied with by her and she did not come to live with her husband Sri Amod Kumar Srivastava, hence on this ground, she is disentitled to get any maintenance allowance from her husband. In support of this contention Sri Jain has placed reliance on the following cases:

(1) Harish Mansukhlal Vs. Hansagauri Ramshanker and Another,

(2) In the matter of : Rabindra Nath Roy 1995 CriL.J.1187.

(3) Balaram Dash Vs. Smt. Gitanjali Dash and Others,

7. The learned AGA on the other hand has supported the impugned judgement contending that the learned lower court has not committed any illegality in granting maintenance allowance to the wife and daughters of Sri Amod Kumar Srivastava.

8. Having given my thoughtful consideration to the rival submissions made by the parties' counsel, I agree with the first contention only of the learned Counsel for Sri Amod Kumar Srivastava. His first contention that on attaining majority a child (not being a married daughter) is not entitled to get maintenance allowance under the provisions of Section 125 Cr. P.C. unless on account of any physical or mental abnormality or injury, such child is unable to maintain itself, has got force and must be accepted. Before coming to the facts of instant case, it would be useful to reproduce the provisions of claiming maintenance allowance under the old and new Cr.P.C. Section 488 of old Cr.P.C., which was corresponding to Section 125 of new Cr.P.C. reads as under:

488(1) If any person having sufficient means, neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain, itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the Ist Class, may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding Rs. 500/- in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

Relevant part of Section 125(1) of new Cr.P.C. after amendment in the year 2001 reads as hereunder:

125(1) Order for maintenance of wives, children and parents:- (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child(not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may; upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

9. Basing on the difference of wordings in Section 488 and 125 of old and new Cr.P.C., Sri Samir Jain submitted that in instant case, both the daughters are not entitled to get maintenance allowance from their father under the provisions of Section 125 Cr.P.C. after attaining majority, because there is nothing on record to

show that after attaining majority they are unable to maintain themselves by reason of any physical or mental abnormality or injury. I entirely agree with this submission. Admittedly both the daughters namely Km. Divya and Km. Bhavya have attained majority. Annexure No. 1 to the accompanying affidavit in criminal revision No. 4400 of 2006 is the copy of the application u/s 125 Cr.P.C., which was filed by Smt. Neelam Srivastava against her husband Amod Kumar Srivastava. According to para 6 of this application, the first daughter of the couple was born on 14.09.1982 and the second daughter was born on 14.06.1984. The impugned order granting maintenance allowance to the daughters and their mother Smt. Neelam Srivastava was passed by the Family Court, Varanasi on 24.06.2006. Much prior to the passing of impugned order, both the daughters had attained majority. Therefore, having regard to the provisions of Section 125(1)(c) Cr.P.C., both the daughters were not entitled to get any maintenance allowance after attaining majority, because u/s 125(1)(c) Cr.P.C., the inability to maintain itself must be by reason of any physical or mental abnormality or injury in the case of child (not being a married daughter) who has attained majority.

10. The matter of granting maintenance allowance under the provisions of Section 125 Cr.P.C. to the unmarried daughter who attained majority came up for consideration before Madras High Court in the case of T.P.S.H. Selva Saroja v. T.P.S. H. Sasinathana 1989 Cri L.J. 2032. After considering the provisions of Section 488 of old Cr.P.C. and Section 125 of new Cr.P.C., it is observed as under in para 10 of the judgement at page 2035:

It is, therefore, seen that the Act makes it clear that any child, who has attained majority, is not automatically entitled to claim maintenance, even if he is unable to maintain himself, as was the case in the old Code but inability to maintain should arise out of physical or mental abnormality or injury. In the past as well as in the present, the limitation is the inability to maintain itself. This inability to maintain in the case of a major must be by reason of any physical or mental abnormality or injury. A mere physical or mental abnormality or a mere injury, which does not make the child unable to maintain itself will not be covered u/s 125(1)(c) of the Code.

11. This matter was considered by Karnatka High Court also in the case of Kum. L. Usharani and others Vs. D.S. Lakshmaiah, In that case also, provisions of Section 488 and 125 of the old and new Cr.P.C. were considered and it was held that "it may be noticed that the Parliament in its wisdom has enabled only a minor child whether legitimate or illegitimate to claim maintenance u/s 125(1)(b) and only one exception has been made by enacting Sub-section (c) which enables the child which has attained majority to claim maintenance. That is a case where the child by reason of any physical or mental abnormality or injury is unable to maintain itself."

12. In the case of Moideenkutty v. Pathumma and Ors. 1984 (2) Crimes 355, Kerela High Court has also taken the similar view. The following observations

made in para 5 and 6 of the judgement at page 356 of the report are worth mentioning:

5. The liability to maintain a child who has attained majority arise only (a) if that child is not a married daughter and (b) if it is unable to maintain itself on account of (i) physical or mental abnormality or (ii) injury.

6. The Act, therefore, makes it clear that any child who has attained majority is not automatically entitled to claim maintenance even if he is unable to maintain himself as was the case under the old Code. The inability to maintain himself should arise out of physical or mental abnormality or injury.

13. Keeping in view the law laid down in above mentioned cases, the impugned judgement granting maintenance allowance to Km. Bhavya and Km. Divya even after their attaining majority cannot be sustained, because as stated earlier also, both these daughters had attained majority much prior to the date of passing the impugned order and since their inability to maintain themselves cannot be attributed to any physical or mental abnormality or injury within the meaning of Section 125(1)(c) Cr.P.C., hence, they had become dis-entitled to get maintenance allowance from their father after attaining majority under the provisions of Section 125 Cr.P.C. If they want to claim maintenance allowance from their father even after attaining majority, then they can approach Civil Court for this purpose.

14. So far as the claim of Smt. Neelam Srivastava to get maintenance allowance from her husband is concerned, I do not find any illegality in the finding recorded by the court below on this issue in the impugned order. The Family Court Varanasi has recorded a finding of fact that Smt. Neelam Srivastava is unable to maintain herself and her husband Amod Kumar Srivastava has neglected to maintain her. This finding of fact can not be disturbed by this Court in its revisional jurisdiction, because the said finding does not suffer from any error of fact or law and this finding has been arrived at by the learned court below after proper appreciation of the evidence adduced by the parties, re-appreciation whereof is not possible by this Court in revisional jurisdiction.

15. Now the important question that arises for consideration is as to whether on the basis of the decree for the restitution of conjugal rights passed on 17.04.1986 by the Civil Judge Jaunpur in suit No. 54 of 1986 against Smt. Neelam Srivastava, she is not entitled to get maintenance allowance from her husband. Un-disputedly the said decree of the restitution of conjugal rights was passed ex-parte against Smt. Neelam Srivastava. It is also not disputed that the aforesaid decree was never put into execution by Sri Amod Kumar Srivastava. There is nothing on record to show that after obtaining aforesaid ex-parte decree, intimation thereof was given to Smt. Neelam Srivastava by her husband or any other person on his behalf for making its compliance. It was open to Sri Amod Kumar Srivastava to put that decree in execution under the provisions of Order 21 Rule 32 of the CPC (in short "the C.P.C."), but the said decree was not

got executed by him as provided in Order 21 Rule 32 C.P.C. Therefore, in my considered opinion, Smt. Neelam Srivastava has not become dis-entitled to get maintenance allowance from her husband due to non-compliance of aforesaid ex-parte decree for the restitution of conjugal rights. From the record it is revealed that the revisionist Amod Kumar Srivastava had filed suit No. 145 of 1986 for divorce against her wife u/s 13 of Hindu Marriage Act in the Family Court Varanasi. Annexure 2 is the certified copy of the petition for divorce. During the course of that divorce petition, the parties had settled their dispute and on that basis, the divorce petition was dismissed vide order dated 08.01.1998, in which an order was passed by the Family Court that it is expected that the parties will start to live together as husband and wife after seven days. It has come in the statement of Sri Amod Kumar Srivastava that after that order, he did not go to his sasural to bring her wife to his house. It shows that Sri Amod Kumar Srivastava was not interested to live with his wife Smt. Neelam Srivastava and it was for this reason that he did not show any desire to bring her to his house to live with him after aforesaid order of Family Court. Therefore, having regard to the reasons mentioned herein-above, ex-parte decree obtained by Sri Amod Kumar Srivastava for the restitution of conjugal rights from the court of Civil Judge Jaunpur in suit No. 54 of 1986 has no effect in this case on the rights of Smt. Neelam Srivastava to get maintenance allowance from her husband Sri Amod Kumar Srivastava.

16. Although, as stated herein-above, Smt. Neelam Srivastava is entitled to get maintenance allowance from her husband notwithstanding that ex-parte decree for the restitution of conjugal right is in existence against her, but in view the law laid down in the cases of Harish Mansukhlal v. Hansagauri Ramshanker, In the matter of : Rabindra Nath Roy and Balram Dash v. Smt. Gitanjali Dash (supra), on principle, I agree with the contention of Sri Sameer Jain Advocate that if a decree for the restitution of conjugal rights is passed against the wife and having knowledge thereof she wilfully disobeys the directions given by the court in the decree, then she is not entitled to get any maintenance allowance from her husband. This matter was considered by the Bombay High Court in the year 1920 in the case of Bai Parbati v. Chanchi Mansukh Jetha AIR 1920 Bom 203. In that case there was a decree for the restitution of conjugal rights in favour of the husband. The wife did not comply with the said decree. The Hon'ble Macleod, C.J. who decided the matter, observed that:

In my opinion a decree for the restitution of conjugal rights is a relic from the barbarous and middle ages. It is recognised, and has been recognised for many years in England, that a decree for restitution of conjugal rights is merely a preliminary step to enable a wife to get a divorce when she would not otherwise be able to do so, since the refusal of the husband to obey a decree for restitution of conjugal rights is considered as desertion, and desertion equivalent to cruelty, and therefore, such desertion, coupled with adultery, will be sufficient to enable a wife to get a decree for divorce. That is the only use to which proceedings for restitution of conjugal rights are now put in England. In this country they may be

used by the husband as a means for preventing the wife from claiming maintenance, since, if the Court passes an order against a wife to go and live with her husband, and she refuses to do so, then she is debarred herself from making any claim to maintenance. For a wife is only entitled to separate maintenance if she has some good reasons for living apart from her husband.

17. The Calcutta High Court also considered this matter in the matter of Rabindra Nath Roy 1995 Cri.L.J. 1187 in which following observations have been made in para 3 of the judgement

Normally the finding of a competent Civil Court on a relevant issue is binding upon the Magistrate and, therefore, there cannot be any manner of doubt that at least during the subsistence of marriage, a husband can successfully resist the claim of his wife for maintenance on the ground that he has obtained a decree for restitution of conjugal rights on the ground of desertion. On the basis of such a decree the learned Magistrate is bound to hold that the wife without any sufficient reason has refused to live with her husband and the application claiming maintenance is liable to be lost. Looking to the provisions of the Section 125(4) Code of Criminal Procedure.

18. Similarly in the case of Balaram Dash Vs. Smt. Gitanjali Dash and Others, the Orisa High Court has observed that:

When a decree for restitution of conjugal right has been passed against the wife it can be held prima facie that refusal of the wife to comply with the direction regarding restitution amounts to refusal to live with the husband without sufficient reason.

It is further held as under:

In view of the fact that the decree for restitution of conjugal right has not been complied with by the wife, prima facie, it must be taken that the wife has refused to live with her husband without sufficient reason and is disentitled to claim maintenance. In such view of the matter, the order of interim maintenance in favour of the wife cannot be sustained.

19. This Court also considered the effect of the decree for the restitution of conjugal rights to claim maintenance under the provisions of Section 125 Cr.P.C. in the case of Smt. Mahtaqb Begum v. Ansar Ahmad 1986 A.L.J.1096. The following observations made in para 9 of the judgment at page 1100 are worth mentioning:

Where the claim for the restitution succeeds and that too finally upon the finding that the wife has had no reasonable ground to live away from the spouse, it would be incongruous if the courts were to grant maintenance to the former in the same breath. The remedy by way of restitution of conjugal rights is based on the theory that husband and wife are entitled to the society of each other, it follows from the very nature of the matrimonial relation that they must be so entitled.

20. Now I come to Crl. Revision No. 5598 of 2006, which has been preferred by Smt. Neelam Srivastava against her husband to enhance and grant maintenance allowance from the date of the application u/s 125 Cr.P.C. From the evidence adduced in Family Court Varanasi in the proceeding u/s 125 Cr.P.C., this fact is borne out that gross salary of Sri Amod Kumar Srivastava is more than Rs. 20,000/- per month and he is getting Rs. 12,000/- per month as net salary after deductions in G.P. Fund etc. The salary of Sri Amod Kumar Srivastava will be increasing from time to time. He is living alone and has no liability to maintain any other person. The prices of all the essential commodities are increasing day by day. Sri Amod Kumar Srivastava is a grade-I officer in New India Assurance Co. Ltd. He is income tax payee. Therefore, having regard to the social status of the parties and monthly income of Sri Amod Kumar Srivastava, his wife Smt. Neelam Srivastava also is entitled to live with dignity and comfort according to the status of her husband. Rs. 2000/- per month was granted as maintenance to both the daughters vide impugned judgment and that amount also was being paid to their mother Smt. Neelam Srivastava with their consent. In view of the findings recorded herein-above, this amount will not be paid now to the daughters. Therefore, keeping all these facts in view, the maintenance allowance granted to Smt. Neelam Srivastava vide impugned judgment should be enhanced and it would be just and proper, if Rs. 4000/- per month are granted to her as maintenance allowance. For the reasons assigned in the impugned judgment by the court below for granting maintenance allowance from the date of order, no interference is warranted by this Court in the finding on this matter, as the said finding is neither illegal nor unjustified.

21. Consequently, both the Revisions are partly allowed. The impugned judgment and order dated 24.06.2006 is modified to the extent that Smt. Neelam Srivastava will get Rs. 4000/- per month as maintenance allowance from her husband Amod Kumar Srivastava from the date of impugned judgement, but Km. Bhavya and Km. Divya (opposite parties No. 3 and 4 in Crl. Revision No. 4400 of 2006) are not entitled to get any maintenance allowance under the provisions of Section 125 Cr.P.C. from the date of their attaining majority.

Three months time is granted to Sri Amod Kumar Srivastava to make payment of the entire arrear of maintenance allowance, as modified by this judgment, after making adjustment of the maintenance allowance paid to Smt. Neelam Srivastava on behalf of both the daughters after attaining their majority. In further the payment of maintenance allowance will be made by 10th day of each month through the court or by Bank Draft in the name of Smt. Neelam Srivastava.

The Office is directed to send copy of this judgement to the Family Court Varanasi for further necessary action.