

(1964) 06 GUJ CK 0005

In the Gujarat High Court

Case No : Criminal Revision Appn. No. 81 of 1964

Dhayalal Amathalal Bhagat

APPELLANT

Vs

Bai Madhukanta

RESPONDENT

Date of Decision : 22-06-1964

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 488(4), 489(2)
Hindu Marriage Act, 1955 — Section 10

Citation : AIR 1965 Guj 247 : (1965) CriLJ 497(1) : (1964) GLR 895

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Advocate : D.K. Pandya, for the Appellant; A.D. Desai, Asst. Govt Pleader, Vasuben P. Shah and Manorama Thakor, for the Respondent

Judgement

(1) An order for maintenance was passed against the petitioner. Subsequently, he obtained a decree for judicial separation against the wife. On this ground he made an application to the learned Magistrate to cancel the maintenance order. The learned Magistrate refused to cancel or vary the maintenance order and he rejected the application of the petitioner.

(2) u/s 488 (4), Criminal Procedure Code, no wife shall entitled to receive an allowance from her husband, 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. It is therefore, clear that, if, without any sufficient reason, the wife refuses to live with her husband, she is not entitled to receive maintenance. Sub-section (2) of section 489, Cr. P.C. reads as follows:

"Where it appears to the Magistrate that, in consequence of any decision of a competent civil Court, any order made u/s 488 should be canceled or varied, he shall cancel the order or as the case may be, vary be same accordingly".

It is therefore, clear that the Legislature has given more importance to the decision of a civil Court on points such as this.

(3) u/s 10 of the Hindu Marriage Act, the husband is entitled to judicial separation. Section 10(1)(a) of the said Act reads as follows:

"Either party to a marriage whether solemnised before or after the commencement of the Act, may present a petition to the District Court praying for a decree for judicial separation on the ground that the other party

(a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition".

The explanation to section 10(1) of the Hindu Marriage Act also reads as follows:

In this section the expression "desertion" with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage".

It is therefore, clear that a decree for judicial separation should not be passed if the wife without sufficient reason does not live with her husband. The fact that a decree for judicial separation has been passed means that the wife has no reasonable ground not to live with the husband. In such case it is clear that sub-section (4) of section 488, Criminal Procedure Code applies, and the wife is not entitled to maintenance. In such a case, therefore, the order for maintenance must be cancelled.

(4) The learned counsel for the opponent relies on *Mailappa v. Sivagami* 1964 (1) Cri LJ 242, wherein it has been held by the Madras High Court as under:

"The effect of the Civil Court decree for judicial separation was not to cancel the order of maintenance nor did the Court purport to cancel the order for maintenance. The mere fact that the Civil Court had given an inconsistent finding was by itself not sufficient made by the criminal Court. It was no doubt open to the petitioner husband to have independently proved that he was willing to take the respondent and that the order of maintenance should be cancelled on account of the continued wrongful refusal by the respondent. But that was not the plea in this case. Therefore, the petition for cancellation of the order could not be entertained."

With great respect, for the reasons already given, having regard to the wording of section 10(1)(a) and the Explanation to Section 10(1) of the Hindu Marriage Act and having regard to the wording of sub-section (4) of section 488, Criminal Procedure Code, it is very difficult to agree with the learned Single Judge of the Madras High Court. Criminal proceedings u/s 488, Criminal Procedure Code, are somewhat summary. The Legislature has, therefore, given more importance to the Civil Court decisions. If there is inconsistency between the decisions of the Criminal Court and the decisions of the Civil Court, in such a matter the decision of the latter prevails, although, ordinarily, the decisions of the Civil Court is irrelevant in a criminal proceeding.

(5) The learned counsel for the opponent wife relies on Fakruddin Shamsuddin Saiyed Vs. Bai Jenab, . But that case relates to a decree for conjugal rights and not a case for a decree of judicial separation. Ordinarily, in such a case if a final decree of judicial separation is passed, the order for maintenance should be set aside. But in this case, I am told that the decree of the Civil Court is now the subject matter of a First Appeal to the High Court.

(6) Therefore, it is ordered that if the wife gives security to the satisfaction of the lower Court for the maintenance to be paid from the date of the application before the Magistrate, final order should be passed on the petitioner's application for cancellation after the first appeal in the High Court against the decree for judicial separation is decided. If she does not give security for the amount that may be paid as maintenance, the order for maintenance should be cancelled. If the wife wins her appeal in the High Court against the decree for judicial separation, it is open to her to make an application before the Magistrate for cancelling the order of cancellation.

(7) Orders accordingly.