

(1995) 09 OHC CK 0010

In the Orissa High Court

Case No : Criminal Revision No. 104 of 1994

Hemanta Kumar Patnaik

APPELLANT

Vs

Smt. Basanti Patnaik and Others

RESPONDENT

Date of Decision : 27-09-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 127
Hindu Marriage Act, 1955 — Section 13(1)

Citation : (1996) 1 OLR 118 : (1995) 1 OLR 118

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : A.S. Naidu, P. Mohanty, S.P. Choudhury and P. Subhadra, for the Appellant; S.N. Sinha and Sujata Dash, for the Respondent

Judgement

A. Pasayat, J.—Grant of maintenance to opposite parties on disposal of an application made u/s 125 of the Code of Criminal Procedure, 1973 (In short, "the Code") is the subject-matter of challenge in this revision application.

2. Filtering out unnecessary details, case of parties as presented before the learned Judicial Magistrate, First Class, Baripada (in short, "JMFC") is as follows :

An application u/s 125 of the Code was filed by opposite parties before the learned JMFC inter alia stating that opp. party No. 1 is legally married wife of the petitioner, and opp. party Nos. 2 and 3 were born through their wed-lock. While opp. party No. 1 was staying at Bhubaneswar during her second pregnancy she was brought to her father's house near Baripada on 29-11-1985 by the petitioner, and though he promised to take her back after delivery, he failed to do so. When the opposite parties went to the house of petitioner at Bhubaneswar, they found that the petitioner was staying with another lady named Jhina Das, who claimed to be the wife of petitioner. Said Jhina Das did not allow opp. party No. 1 to enter into the house of the petitioner. The matter was reported to the Superintendent of Police, Bhubaneswar. There, for the first time the petitioner disclosed that he had already divorced opp party No. 1 and had obtained an ex

parte decree for dissolution of their marriage from the Court of Subordinate Judge, Bhubaneswar. The petitioner was getting Rs 5,000/- as salary per month, in addition to other income from different sources. The opp. parties having been deprived of minimum requirements for their sustenance, even through the petitioner had capacity and means to pay, and was legally bound to maintain them, claimed maintenance of Rs. 500/- for opp. party No. 1 and Rs. 200/- for each of other opposite parties. During trial the opp. parties filed an application for amendment for modification of the quantum of maintenance from Rs. 200/- to Rs. 350/- in respect of opp. party Nos. 2 and 3. The petitioner on receipt of notice admitted the marriage but objected to the petition on the ground that the marriage having been dissolved by the decree of divorce obtained from a competent Court, there is no scope for granting maintenance. Additionally opp. party No. 1 having voluntarily left the house of petitioner, without his permission she was not entitled to maintenance. It was also stated that opp. party No. 1 was of loose morals and tried to assault the petitioner at his Bhubaneswar residence, but he fortunately escaped. The income of petitioner as claimed by the opp. parties was also challenged. In addition, it was submitted that opp. party No. 1 being highly educated, was able to maintain herself, and in any event had potentiality to earn decently. It was also pleaded that total amount of maintenance cannot exceed Rs. 500/- per month.

The learned Magistrate allowed the petition of opp. party and directed the petitioner to pay Rs. 300/- to opp. party No. 1 and Rs. 160/- each to opp. party Nos. 2 and 3 from the date of filing of application, and directed enhancement of quantum to Rs. 400/- for opp. party No. 1 and Rs. 250/- for opp. party Nos. 2 and 3 from the date of filing of application for amendment, i. e. from April, 1993.

3. In support of the application Mr. P. Mohanty, learned counsel appearing for petitioner submitted that firstly, there being a decree of divorce, question of grant of maintenance did not arise. Secondly, in the plaint filed seeking divorce there was clear assertion about desertion of opp. party No. 1 and the suit having been decreed, it has to be held that there was desertion by opp party No. 1. Opp. party No. 1 being a highly educated lady has potentiality to earn and therefore, it cannot be said that she is unable to maintain herself which is sine qua non for grant of maintenance. It is also submitted that modification of the amount during pendency of the application and providing two different rates are not in accordance with law.

Miss. Sujata Dash, learned counsel for opposite parties on the other hand supported the order.

4. So far as the question whether the decree for divorce has any relevance in the matter of grant of maintenance is concerned, the pivotal provision, i. e. Section 125(1) of the Code needs to be quoted. The same reads as follows :

"125. 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 not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct :

Provided that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child if married is not possessed of sufficient means.

Explanation--For the purposes of this Chapter,--

- (a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;
- (b) "wife" includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried.

xxx xxx xxx"

The Explanation appended to Sub-section (1) leaves no manner of doubt that every divorced woman is entitled to maintenance, if she has not been remarried. It is not the case of petitioner that opp. party No. 1 was remarried, and even though there was decree of divorce, same is of no consequence while dealing with an application u/s 125 of the Code.

5. Coming to the plea about the assertion in the plaint about desertion, it has to be noticed that Original Suit No. 228 of 1986 (1) was filed in the Court of Subordinate Judge, Bhubaneswar for dissolution of marriage on the ground of cruelty. The suit was u/s 13(1)(ia) of the Hindu Marriage Act, 1955, which reads as follows :

"13. Divorce--(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

- (i) xxx xxx xxx (i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty."

The decree of divorce has not been passed on the ground of desertion, but on the ground of cruelty. In the judgment of the Court decreeing the suit there is no finding of any desertion. It is significant to note here that in case of desertion, an aggrieved party can seek dissolution of marriage u/s 13(1)(ib).

6. So far as the question of potentiality of earning is concerned the object of enacting Section 125 of the Code is to secure much intended relief to deserted wives, and children and destitute parents. It is intended to serve civil purpose. The jurisdiction conferred is not punitive, and is preventive rather than remedial. It is aimed at preventing vagrancy and destitution. The object is to provide cheap and speedy but limited relief for deserted wives and children and destitute parents. Whenever a person having sufficient means neglects or refuses to maintain, the persons mentioned in Clauses (a) to (d) of Sub-section (1) of Section 125 of the Code, can move a Magistrate of the first class, who may upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of such person or persons, at such monthly rate not exceeding Rs. 500/- in the whole.

The words used in Section 493 of the Code of Criminal Procedure, 1898 (in short, "the old Cods") were "his wife or his... child unable to maintain itself" and it was held in some cases that the expression "unable to maintain itself" governed the word "child" and not "wife" in some cases. A different view was taken in some cases. The controversy whether the words "unable to maintain itself" covered the wife also was set at rest by the Code. u/s 125 of the Code, the "wife unable to maintain herself" is entitled to claim maintenance from her husband or former husband provided she fulfils the other conditions stipulated in several clauses of Section 125. The concept of able-bodied person's capability to earn should not be applied to determine the question whether she is "unable to maintain herself". The said expression has nothing to do with the phrase "potential earning capacity" of the applicant for maintenance. "Unable to maintain herself" does not mean that if the wife is able-bodied and possesses an earning potentiality, she can maintain herself. If that were so, applications u/s 125(1) by the wives would be thrown out on the ground that they are physically fit. "Unable to maintain herself" does not mean that she should be an absolute destitute and should be first on the street, beg for alms and extend her hands for charity. It only means that she herself should not be in a position to maintain herself and that it should not be much below the limits to maintain. Even if she has potentiality to earn, she is entitled to maintain the application.

7. Coming to the question of quantum and the maximum limit, the plea that Section 125 of the Code restricts the total quantum to Rs. 500/- as raised by petitioner has no substance. The words "in the whole" does not seem that Rs. 500/- would be the maximum limit in respect of all the dependants together. It means for the maintenance of each dependant. "Not exceeding five hundred rupees in the whole" in Section 125(1) does not mean that the entire amount put together cannot exceed Rs. 500/-. It only means that each claimant cannot get

more than Rs. 500/- per month. (See Captain Ramesh Chandra Kaushal v. Mrs. Veena Kaushal : AIR 1970 SC 1807).

8. There is, however, substance in the plea that there cannot be increase in the quantum before disposal of the application. It is clear from a bare reading of Section 127. Alteration in allowance, if any, can be made only after an order u/s 125 of the Code is passed. In other words, the petitioner's liability shall be to pay Rs. 300 - per month to opp. party No. 1 and Rs. 150/- per month to each of opp. party Nos. 2 and 3, as was originally directed to be paid by the learned Magistrate. But in view of the undisputed position that enhancement is permissible after disposal of the application, I direct that the amount shall be enhanced to Rs. 400/- per month in respect of opp. party No. 1 and to Rs. 250/- per month in respect of opp. party Nos. 2 and 3 from 1st December, 1993. This date is being fixed because the application for maintenance was disposed of by the learned Magistrate on 23-11-1993. It is stated that certain amounts have been paid during pendency of the application. The balance amount on the basis of this order shall be paid within four months from today. The said amount is to be paid in addition to the amount directed to be paid monthly by this order.

The revision application is disposed of accordingly.