
(1989) 07 AP CK 0021

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 1247 of 1988

Kamatham Venkatamma

APPELLANT

Vs

Kamatham Buruju Ramanna and Another

RESPONDENT

Date of Decision : 17-07-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 127, 482

Citation : (1990) CivCC 12

Hon'ble Judges : G. Radhakrishna Rao, J

Bench : Single Bench

Advocate : T. Niranjan Reddy, for the Appellant; Y. Rama Rao and Public Prosecutor, for the Respondent

Judgement

1. The second wife of the respondent filed an application under S. 125 Cr.P.C. before the Judicial First Class Magistrate, Dhone, claiming maintenance at Rs. 250/- per month. The husband contended that an arrangement has been entered into between both the parties and in pursuance of that arrangement, he gave Ac. 1-50 cents of dry land and 40 Tolas of silver in full settlement of her maintenance and executed a deed of maintenance on 22-12-1983. The learned Magistrate, after enquiry, found that the respondent-husband executed Ex. P-3, registered gift deed dt. 22-12-1983 gifting Ac. 1-50 cents of land to the petitioner towards her maintenance and also provided a house for her to live in after a Panchayat was held at the instance of the petitioner demanding maintenance. The learned Magistrate also held that the rights of maintenance were concluded in Ex. P-3. Basing on the income from the land, the Magistrate held that the petitioner is able to maintain herself and that the respondent did not neglect to maintain her.

2. Against that order, the wife filed a revision petition before the Addl. District and Sessions Judge, Kurnool. The First Additional District and Sessions Judge, Kurnool, also dismissed the appeal holding that petitioner is the second wife and there is no need for any other proof of neglect or refusal on the part of the respondent to maintain the petitioner-wife. On the facts the learned Judge found

that the petitioner was getting only Rs. 200/- per year and it is hardly sufficient to maintain oneself even for one month and that she is unable to maintain herself. But, however, basing on the judgment of the Madras High Court in Krishnappa Chettiar Vs. Sivagami Achi, he came to the conclusion that the parties are residing separately by mutual consent as a result of compromise and provision was also made for maintenance, and therefore summary remedy provided under S. 125 Cr.P.C. is not open to the wife and she can approach the Civil Court to claim enhancement of maintenance. With these observations he dismissed the revision petition. It is against this order, this petition is filed under S. 482 Cr.P.C., to quash the order of the learned Magistrate.

3. The husband admitted about the second marriage with the petitioner and no evidence has been let in before the Magistrate that the marriage is void on account of the fact that his first wife is living. As no plea has been taken in the counter by the husband and no evidence has been let in regarding the date of their marriage, the learned Judge by taking into account the age of the parties and as marriages for girls are generally performed at the early age thought that their marriage might have been taken place before 1949 i.e., prior to the coming into force of the Madras Hindu (Bigamy Prevention and Divorce) Act VI of 1948. When a person has got two wives and when the second wife files an application for maintenance under S. 125 Cr.P.C., she has to prove that there is a valid marriage between the two. After the passing of the Madras Act VI of 1948, so long as the first wife is alive, even if there is a second marriage, the second wife cannot have any right to claim maintenance under the provisions of the Code of Criminal Procedure as the second marriage is not a valid marriage. But in this case, as the lower appellate Court found that the marriage took place prior to the coming into force of the above Act, this Court need not interfere with that finding. The Court has, therefore, to proceed on the footing that there is a valid marriage between the petitioner and the respondent and that the parties lived together as husband and wife and children were also born to them and by consent and in pursuance of Ex. P-3, gift deed they were living separately.

4. The learned counsel for the petitioner-wife contended that on the basis of the evidence that has been let in by both the parties, it is clear that the petitioner is getting an income of only Rs. 200/- per year and it is not at all sufficient to maintain herself and she is entitled to file an application for enhancement of maintenance u/s 125 or Section 127 Cr.P.C. In support of his contention, he relied upon Bai Laxmiben Vs. Bharatbhai Vechatbhai Patel and Another, . In that case, an application for maintenance under sections 125 and 127 Cr.P.C. was filed by the divorced wife. The husband set up the plea of an agreement whereby the divorced wife has given up the right to claim maintenance. The Gujarat High Court held that she is entitled to maintain an application for enhanced maintenance. The Court observed (at p. 1420 of Cri LJ) :

"..... if the amount determined for future maintenance is illusory, the agreement to surrender the right to maintenance also would be unlawful as it would be

against the public policy and also unconscionable and unfair."

In that case an amount of Rs. 901/- was paid to the wife at the time of the execution of the deed of divorce. The learned Judge found that the amount of Rs. 901/- would not be sufficient for maintaining oneself for a period of even one year.

5. No special rights have been conferred under the Hindu customary law for a divorcee-wife to claim maintenance against her divorced husband. S. 125 Cr.P.C. applies only to an abandoned wife and not to an abandoned mistress. The Explanation to sub-section (1) of S. 125 Cr.P.C. makes it clear that "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and is still to be considered as wife so long as she remains unmarried. She must be unable to maintain herself. If she can maintain herself with her own income, whether such income is fabulous or moderate, then the Magistrate may not grant her anything as the power to grant maintenance is discretionary. Wife includes a woman who obtains divorce by mutual consent. The wife's right to maintenance is not absolute. Her separate income if any will be taken into consideration. The husband cannot ask a divorced wife to come and reside with him as a condition precedent to the payment of maintenance. The words "refusing to live with the husband without a sufficient cause" or "living separately by mutual consent" in sub-sections (4) and (5) of S. 125 are applicable to a wife whose marriage is subsisting and not in the case of wife as defined in Explanation (b) of S. 125(1). In the judgment cited above, (Bai Laxmiben's case (1986 Cri LJ 1418 Guj) the learned Judge has not considered the effect of S. 13B of the Hindu Marriage Act. Under the Hindu Marriage Act even without disclosing valid reasons, both husband and wife are entitled to file an application for divorce by consent and the same can be ordered by the Court. When the parties are entitled to a decree of divorce by consent, it can easily be said that both parties also can arrive at a settlement or agreement with regard to the payment of future maintenance also. The consequences of that agreement have to be taken into consideration. Merely because a divorced wife is also entitled to claim maintenance, it does not mean automatically she is entitled to claim maintenance by ignoring the compromise that has been effected between them with regard to the payment of future maintenance. The altered situation with regard to the decree obtained by consent under S. 13-B of the Hindu Marriage Act has to be taken into consideration at the time when the divorcee filed an application. By virtue of that altered situation, the husband may marry again and he has to maintain his wife and the children begotten by that wife and he may have to discharge several obligations consequent upon the remarriage. When a final settlement has been arrived at between the husband and wife, it should not easily be taken away or set aside on the ground that the amount that has been paid is only a pittance and a reasonable amount has to be awarded. The claim for maintenance made by an abandoned wife is entirely different from the claim made by a divorced wife particularly when there is an agreement between the parties at the time of the divorce with regard to the maintenance, the Court must

be cautious enough to distinguish the consideration that has to be with regard to the abandoned wife and the consideration that has to be made with regard to the divorced wife. No attempt has been made in the above cited decision (Bai Laxmiben's case) and, therefore, that decision is not applicable to the facts of this case.

6. In this case, it is the admitted case of both parties that Ex. P-3, gift deed was executed after a Panchayat was convened in that connection. Both parties agreed for that settlement i.e., the husband parting with Ac. 1-50 cents of land, 40 Tolas of silver wear and a separate room for residence. The compromise that has been arrived at by both the parties cannot be said to be a compromise that has been made under S. 125 Cr.P.C. The compromise arrived at between the parties is outside the purview of the Criminal Court and it does not form part of the decree that has been passed by any Court. If the original order was passed on the basis of a compromise, it can be enhanced under S. 127 Cr.P.C. A petition under S. 127 Cr.P.C. for enhancement or reduction in the amount of maintenance granted under S. 125 has to be filed before the Court which passed the original order under that section. In the present case, as already pointed out, there is no order or decree that has been passed by any Court. An order passed under S. 125 Cr.P.C. is not a bar to file a suit for maintenance in a Civil Court. A right of maintenance is a special right and the mere fact that similar analogous remedy is available under the Hindu Adoptions and Maintenance Act in a Civil Court does not take away the jurisdiction of the Magistrate to order maintenance to a Hindu wife. A direct ruling on this point is reported in *Krishnappa Chettiar v. Sivagami Achi* 1953 Cri LJ 1058 (Mad) (supra). In that case the husband executed Ex. X-1, a deed providing maintenance and the wife executed another document accepting the same. The learned Judge found as follows (Para 6) :

"Where a claim for maintenance is amicably settled by the parties, the Magistrate should simply dismiss the petition if pending before him. - *Lingadu v. Labbakka*, 2 Weir 629; *Mt. Rahim Bibi v. Khair Din*, (1988) Pun Re No. 42 Page 107 (Cri); *Raham Ali v. Fateh Bibi*, (1905) Pun Re No. 39 Page 79 : (1905 2 Cri LJ 690) (Cri). In Madras High Court Cr.R.C. No. 489 of 1903, a husband and wife came to a settlement outside the Court, whereby the husband consented to maintain the wife. It was held by the High Court that the Magistrate had no longer any power to make an order under this section as it could no longer be said that the husband was refusing to maintain the wife."

7. In this case Ex. P-3 was executed and it was already acted upon between the parties. If the petitioner was dissatisfied with the income of Rs. 200/- per year secured by her, she can only approach a Civil Court seeking enhancement of maintenance. The object of S. 125, Cr.P.C. is to avoid vagrancy by providing that a Magistrate may up to a limited extent see that a wife and children are maintained by a husband or father able to maintain them. It only provided a speedy remedy against starvation for a deserted wife or child or parents. It provides for a summary procedure which does not cover entirely the same

ground as the civil liability of a husband or father or son under his personal law to maintain his wife or child or parents. When substantial issues of civil laws are raised between the parties, their remedy lies only in the Civil Court. As there is settlement Ex. P-3 between the parties the matter has to be investigated in a full dressed trial, but not under summary procedure as provided in S. 125, Cr.P.C. As there is no order passed under S. 125, Cr.P.C. the wife is not entitled to ask for enhancement of maintenance and the petitioner can work out her remedies in a Civil Court if she is so advised.

8. The petition is accordingly dismissed.

9. Petition dismissed.