

(2002) 08 MAD CK 0138

In the Madras High Court

Case No : Criminal Revision Case No. 1141 of 1999

Kandasamy Gounder

APPELLANT

Vs

Palaniammal and Nattuthurai, represented by his mother first
respondent

RESPONDENT

Date of Decision : 08-08-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397

Citation : (2002) 08 MAD CK 0138

Hon'ble Judges : A.K. Rajan, J

Bench : Single Bench

Advocate : K. Kalyanasundaram, for the Appellant; S. Shanmughavelayutham,
for the Respondent

Final Decision : Allowed

Judgement

A.K. Rajan, J.—This revision is directed against the order of grant of maintenance to the respondents herein.

2.The second respondent is the son of the first respondent. According to the first respondent, she married the revision petitioner some eighteen years back and they lived together for some time and the second respondent was born through him. The revision petitioner demanded dowry from the first respondent; due to such harassment she was driven out of the matrimonial home and hence she lived separately. In the year 1998 panchayat was held and the revision petitioner did not agree to take back both the respondents. Therefore notice was issued to the petitioner on 20-04-1998 claiming maintenance for both the respondents. The revision petitioner sent a reply notice stating that the first respondent was not his wife and there was no marriage between them and the second respondent was not the son born to him.

3.On the above pleadings, the matter was tried by the learned Judicial Magistrate No.1, Dindigul.

4. In the trial Court, the first respondent examined herself as P.W.1 and marked Exs.P.1 to P.6 on her side; on the side of the petitioner, the petitioner and four other witnesses were examined and marked Exs.R.1 to R.3.

5. The first respondent in her evidence has stated that about eighteen years back the marriage between her and the revision petitioner took place in Chinna Mandavadi village and the marriage was celebrated after the death of the first wife of the revision petitioner namely, Chellammal. After the marriage, they were living in the garden house of the revision petitioner. The second respondent was born out of the wedlock. At the time of the marriage, ten sovereigns of jewellery was given to the revision petitioner and the revision petitioner demanded dowry. As she was unable to bring the dowry demanded by the petitioner, she was driven out of the matrimonial home. Thereafter, the respondents were living in the village where her parents are residing. The revision petitioner is owning 7 " acres of land and earning an annual income of Rs.2 lakhs from the lands. Rs.500/- was claimed for each of the respondents for their maintenance. The first respondent also stated in her evidence as P.W.1 that there was a panchayat and since the revision petitioner did not agree for the same, notice was sent to the revision petitioner. In her cross-examination, she has stated that the marriage between her and the revision petitioner was celebrated according to their community rites but no invitations were printed. The Village Head Man performed the marriage. The marriage was attended by about eighteen persons, including the following persons, Kumarasami, Palanisami, Karuppusami, Chellamuthu and Kaliyappan. She has denied the suggestion that no marriage took place between them. She has also denied the suggestion that Muthusami of Chinna Mandavadi was her husband. She admitted that in the ration card Ex.P.6 marked on her side only her photograph is affixed. She has also marked the community certificate issued to the second respondent, wherein the name of the father of the second respondent is written as Kandasami.

6. The revision petitioner, who examined himself as R.W.1 has stated in his evidence that the first respondent was not his wife and the second respondent was not born to him. The first respondent's husband is one Muthusami, who is residing at Mandavadi. The first respondent never lived with him. He has filed the ration card Ex.R.3 issued to him by the authorities concerned. The other witnesses examined on his side, R.W.2 and R.W.3 are neighbouring land owners. R.W.4 is the Revenue official working in the Taluk Office, Ottanchatiram, for proving that Ex.R.3 ration card was issued to the revision petitioner.

7. The trial Magistrate on going through the evidence available on record held that the marriage between the first respondent and the revision petitioner has been proved and awarded maintenance of Rs.250/- to the first respondent and Rs.150/- to the second respondent. Aggrieved by the above order of the trial Magistrate, the present revision has been filed by the petitioner herein.

8. Learned counsel appearing for the revision petitioner submitted that the first respondent is not the wife of the revision petitioner and there was no marriage

between them. Learned counsel for the respondents submitted that in the case of maintenance, no proof of marriage is necessary as required in the case of adultery or in divorce proceedings. Learned counsel for the respondents further submitted that mere oral evidence adduced by the first respondent is sufficient to prove the factum of marriage. The counsel for the respondent placed reliance on the decision in Krishan Kaur Vs. Kartar Singh, . The Jammu and Kashmir High Court held that for the purpose of Section 125 Criminal Procedure Code, standard of proof of marriage is not as high as under Divorce Act or Sections 494, 495, 497 and 498 of Penal Code. When marriage is established maintenance should be awarded and if legal validity of the marriage is questioned it should be raised before a Civil Court. It is not open to the Criminal Court to require the wife to first prove the existence of the marriage in a Civil Court and then seek relief under the above Criminal Procedure Code provision.

9. Even u/s 125 of CrI.P.C., the marriage shall be established; the factum of existence of relationship of husband and wife must be proved. The contention that no strict proof of marriage as required for conviction u/s 494 of Penal Code, is not required in the maintenance proceedings, is acceptable. But there must be evidence to prove the status of husband and wife; that is there must be evidence to prove that there was marriage between the parties before the Court.

10. In this case, the first respondent is the only witness examined on her side. Except her oral testimony, no other witnesses were examined on her side to prove the marriage. When the marriage is disputed by the revision petitioner, the onus is on the first respondent to prove that there was a marriage between them. This can be proved by examining some other witnesses who had seen the marriage being celebrated or there could be evidence to the effect that they were living as husband and wife for some time. But in this case no such evidence has been adduced. In the absence of any such evidence, the mere assertion of the first respondent that she got married to the revision petitioner, cannot be accepted, when there was equal assertion by the revision petitioner that there was no marriage between him and the first respondent. Courts cannot presume that there was a valid marriage between the revision petitioner and the first respondent, on the basis of mere assertion of P.W.1. Even though she had stated in her cross-examination the name of persons who attended the marriage, no attempt was made by her to examine any of those persons. Therefore, there is absolutely no evidence to prove that the first respondent was the wife of the revision petitioner.

11. The case of the revision petitioner is that his marriage with one Chellammal took place some 27 years back and through her he got two daughters, but she died subsequently. The case of the respondents is that after the death of Chellammal, the revision petitioner married the first respondent. But this is stated only in the evidence; this was not stated in the petition. Learned counsel for the revision petitioner submitted that the onus is on the respondents to prove the factum of marriage between her and the revision petitioner. It is argued by

the learned counsel for the revision petitioner that the onus is only on the first respondent to prove her case. Only the person who alleges a fact to exist has to prove that fact by adducing evidence. That cannot be done by pointing out the holes in the evidence of the other party who denies the existence of such a fact. This argument has force. In a case for maintenance u/s 125 Cr.P.C. though the strict proof as required to prove bigamy is not necessary, but there must be sufficient evidence, at least prima facie evidence to prove the marriage. The marriage shall be "established". Such evidence is lacking in this case.

12. All that is stated in the petition filed by the respondents are that "some 18 years back the marriage took place between the first respondent and the revision petitioner according to Hindu rites. Out of the wedlock the second respondent was born to them and he is seventeen years old". When she examined herself as P.W.1, she has not even stated how long they were living together, she has not even stated when or where the panchayat was held; who were the panchayatdars. Such a bald statement is not sufficient to prove the marital status. If such evidence is accepted as sufficient for a case u/s 125 Cr.P.C., it will be wrong signal by the Courts. In the absence of any proof of marriage, maintenance cannot be awarded even u/s 125 of Cr.P.C. For awarding maintenance u/s 125 Cr.P.C. there should be a finding that there was a marriage between the revision petitioner and the first respondent. Without such proof of marriage when the marriage is denied by the other spouse, no court can grant maintenance. Therefore, when the marriage between the revision petitioner and the first respondent was not established, the respondents are not entitled for any maintenance.

13. Learned counsel for the respondents submitted that even assuming that the marriage between the revision petitioner and the first respondent was not proved, the second respondent, who is the son of the first respondent should be provided with maintenance as he was born to the revision petitioner and the first respondent. The learned counsel further submitted that it is not necessary for the respondents to prove the fact that the second respondent is the son of the revision petitioner by submitting medical report. The counsel for the revision petitioner has stated that the second respondent was not born to the revision petitioner as there was no relationship between the revision petitioner and the first respondent. Therefore, in the absence of any evidence, that the revision petitioner and the first respondent were living together at any point of time, it cannot be presumed that the second respondent was born to the revision petitioner. Therefore, no maintenance can be awarded even for the second respondent.

14. The learned Magistrate has awarded maintenance on the ground that u/s 125(b) Cr.P.C. it is not necessary to prove the marriage. He relied upon the ration card Ex.P.6. In Ex.P.6 the name of one "Kandasami" is mentioned as the head of the family. From this, it cannot be presumed that the said Kandasami is the petitioner herein. The ration card marked by the petitioner, namely, Ex.R.3 refers

to the name "Kandappa Gounder". The name "Kandasami" mentioned in Ex.P.6 cannot be considered to refer the same A.K. Rajan. J.

"Kandappa Gounder" mentioned in Ex.R.3. In this area where the revision petitioner and the first respondent live, the name "Kandasamy" and "Kandappan" are very common; every third or fourth person will have that name. Therefore, the maintenance awarded by the trial Magistrate is not legally sustainable and the same is liable to be set aside.

15. In the result, the revision is allowed and the order of the trial Magistrate is set aside.