

(2002) 04 OHC CK 0017

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 5183 of 1998

Laxman Naik

APPELLANT

Vs

Nalita ' Lalita Naik

RESPONDENT

Date of Decision : 30-04-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125

Citation : (2003) 95 CLT 294 : (2002) CriLJ 3418 : (2003) 2 DMC 275 : (2002) 2 OLR 230

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : B. Rath, B. Senapati, J.N. Rath, K.R. Mohapatra, P.S. Samantara, S. Ghosh, M.K. Panda, S.K. Jethy and S.B. Mohanty, for the Appellant; R.C. Rath, S.K. Panda and P.K. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J. 1. In this application u/s 482, Cr.P.C. the petitioner has challenged the legality of the orders passed by the Courts below in a proceeding u/s 125, Cr.P.C.

2. An application was filed by the opp. party for grant of maintenance u/s 125, Cr.P.C. for herself and her sons. The case of the opp. party is that she had married the petitioner as per Hindu rites and customs 15-16 years prior to the institution of the case and out of such wedlock 3 sons and 3 daughters were born. At the time of marriage the petitioner was a manual labourer in the coal mines and ultimately, became a driver and was getting Rs. 5000/- per month as salary. Being instigated by his colleagues, petitioner demanded Rs. 50,000/-, a colour TV and a scooter towards dowry. Since the opp. party refused to request her parents for such dowry, ill feelings started between the parties and the opp. party was subject to torture. It is alleged in the petition that the opp. party was assaulted very often but she kept quiet for a long period. In the year 1995 petitioner filed O.S. No. 52 of 1995 in the Court of the learned Civil Judge (Sr.

Divn.), Angul for a judicial separation on the ground of adultery committed by the opp. party. The opp. party appeared in Court on 21.12.1995 and was given an impression that the case has been withdrawn and left with the petitioner to stay together again at Bharatpur colliery residence at Talcher. Thereafter, the petitioner is alleged to have again started ill treating her on the plea of demand of dowry and forced her to vacate the house as a result of which the opp. party had to stay with her parents. Though the father of the opp. party tried to settle the matter amicably, he failed. On the above allegation and averments that the petitioner was getting Rs. 7000/- per month at the relevant time and had an income of Rs. 10,000/- from the landed property, prayer was made for grant of maintenance " Rs. 500/- per month.

3. Petitioner in his objection though admitted the marriage, denied the allegation of demand of dowry. He also denied allegation of torture or ill treatment at any point of time. A specific plea was taken by him that the opp. party was living in adultery and the suit which had been filed on the aforesaid ground having been decreed, the opp. party is not entitled for maintenance. The specific case of the petitioner was that the opp. party was having sexual relationship with one Duria Naik in her village and the same was known to her father and brother.

4. Considering the respective cases of the parties and evidence on record, learned Magistrate allowed the application and directed payment of Rs. 400/- per month towards maintenance by judgment and order dated 14.10.1997. The said order was challenged in revision before the learned Addl. Sessions Judge, Angul by the petitioner and by judgment dated 25.9,1998 the revision was also dismissed.

5. Sri Rath, learned counsel appearing for petitioner submitted that there being a decree of the Civil Court with a finding of adultery by the opp. party, the present application u/s 125, Cr.P.C. should not have been allowed. The findings of the Civil Court arrived at in the said suit are binding on the Courts below and disentitles the petitioner from claiming any maintenance. Sri R. C. Rath, learned counsel for the opp. party on the other hand, submitted that the decree passed in the suit was an ex parte decree and an application under Order 9, Rule 13, CPC is pending consideration. Apart from that it is submitted that a single instance of adultery as alleged in the suit is not enough to prove that the opp. party was living in adultery continuously and accordingly, the Courts below were justified in granting maintenance.

6. In the light of the argument advanced by the learned counsel for parties, I think it desirable to look into the findings arrived at in the suit as well as in the present application by the Courts below. The suit had been filed u/s 10 of the Hindu Marriage Act, 1955 for judicial separation. In the said suit, the petitioner while admitting the marriage with the opp. party as well as birth of six children alleged that one Duryodhan Naik who is working as Gram Rakhi in Pallahara P.S. was in visiting terms to the house of the petitioner and in due course the opp. party developed illicit relationship with the said Duryodhan Naik. On 30.9.1995

the said Duryodhan Naik came to the quarter of the petitioner to see Dasahara and during his stay, he had sexual relationship with the opp. party. Earlier to the aforesaid occasion also, the petitioner had warned the opp. party not to lead adulterous life but it yielded no result. The specific case of the petitioner in the said suit was that on 5.9.1995 at about 3 O'clock in the night he had found the aforesaid Duryodhan Naik cohabiting with the opp. party. The suit was decreed ex parte accepting the case of the petitioner with regard to adultery. From paragraph-4 of the judgment it appears that an allegation was made with regard to adultery and petitioner in his evidence stated that he ascertained from others that the opp. party had illicit connection with the aforesaid Duryodhan Naik. It is clear from such evidence that only on one occasion i.e. on 5.9.1995 he had seen the opp. party cohabiting with the aforesaid Duryodhan Naik. For the purpose of Section 10 of the Hindu Marriage Act, for the purpose of judicial separation even one act of adultery is enough; whereas for the purpose of an application u/s 125, Cr.P.C. a single act of adultery is not enough for refusing maintenance. In this connection, some case laws need be referred. In a decision of this Court in the case of Smt. Rachita Rout Vs. Basanta Kumar Rout, this Court held that living in adultery as mentioned in Section 125(4), Cr.P.C. means that adulterous conduct must be more or less continuous. Occasional lapse is not sufficient to refuse maintenance. In another decision of this Court in the case of Baishnab Charan Jena Vs. Ritarani Jena, a similar view has been taken and the Court has further held that merely proving one or more instances of lapses in the character of the wife is not sufficient to absolve the husband from his liability to pay maintenance to her. Paragraph-9 of the judgment is quoted below :

"9. I shall next consider the correctness of the findings of the learned Addl. Sessions Judge in the light of the principles laid down in the aforementioned decided cases. From the facts of the case stated earlier, it is clear that right from the inception of the proceeding while admitting that the opposite party is his wife the petitioner had tried to avoid his liability to pay maintenance to her mainly on the ground that she was leading an adulterous life while living in his house and continued to lead such life after she had left his house. In support of the plea he relied the alleged incident in which during the night Debuli Jena was seen in the bed room of the opposite party and that the opposite party after parting company with the petitioner had lived with Babuli Jena for a certain period. The petitioner had also alleged that the opposite party had an extra-marital affair with her brother-in-law, Laxmidhar Jena. On sifting the evidence led on behalf of the petitioner the learned Addl. Sessions Judge held, in my view, rightly, that the materials do not establish that the opposite party was leading an adulterous life at the material point of time. As held in the case of Smt. Rachita Rout (supra) merely proving one or more instances of lapses in the character of the wife is not sufficient to absolve the husband from his liability to pay maintenance to her. Therefore even assuming that the instances alleged by the petitioner are held to have been established still he will not be entitled to succeed to deny his liability for payment of maintenance. The entitlement of the opposite party to

maintenance which flows from the marital relationship, which is admitted in this case, subsists. Further, as held in the case of Smt. Pramila Dei alias Kuni (supra) the unsuccessful bid by the husband to castigate the wife as a person living in adultery entitles her to live separately from her husband and claim maintenance from him."

In the present application, it appears that the allegation is with regard to a single instance of adultery and there is no material to show that the alleged adultery was a continuous one and in view of the decisions referred to above, a single or more lapses alone will not be sufficient to refuse maintenance u/s 125, Cr.P.C.

7. The next question that arises for consideration is whether the finding of the Civil Court with regard to adultery is binding on the Court deciding the petition u/s 125, Cr.P.C. or not. Sri Rath, learned counsel for petitioner relied upon a decision of this Court in the case of Sri Jasholal Agrawalla alias Jain v. Smt. Puspabati Agrawalla reported in (1993) 6 OCR 576. In the said decision, this Court held that the finding of the Civil court in a matrimonial proceeding is binding on the Criminal Court. It appears from the said case that a decree was passed by the Civil Court for divorce on the ground of desertion. This Court held that the said finding is binding on the Criminal Court and since the wife had deserted the husband, she was not entitled to maintenance u/s 125, Cr.P.C. In another decision of this Court in the case of Hrushikesh Mallik Vrs, Smt. Rukmani " Sandhya Mallik reported in (1993)75 CLT 791 this Court observed that the finding of the Civil Court in a matrimonial proceeding is binding on the Criminal Court. The distinguishing feature in this case is that the Civil Court decree was based on a single adultery and an instance of single adultery is enough for the purpose of judicial separation. But for the purpose of an application u/s 125, Cr.P.C. merely proving one or more instances of lapses in the character of the wife is not sufficient to absolve the husband from his liability to pay maintenance to her.

8. After carefully going through the findings of the Civil Court, it appears that with regard to living of adulterous life by the opp. party was only heard by the petitioner from others and he had only seen on one occasion the lapses on the part of his wife. Such evidence may be sufficient for a decree for judicial separation but will not be enough to refuse maintenance to the wife.

9. Accordingly, I do not find any merit in this application which stands dismissed.