
(2010) 06 OHC CK 0025

In the Orissa High Court

Case No : Criminal Revision No. 874 of 2003

Smt. Chandrama Biswal ' Chanduri Biswal

APPELLANT

Vs

Banchhanidhi Biswal

RESPONDENT

Date of Decision : 23-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(1), 125(4)

Citation : (2011) 1 DMC 545 : (2010) 2 OLR 476

Hon'ble Judges : B.K. Patel, J

Bench : Single Bench

Judgement

B.K. Patel, J.—This revision is directed against the order dated 2.9.2003 passed by the learned 1st Additional Sessions Judge, Aska in Criminal Revision Petition No. 23 of 1999 (110 of 1990 GDC) setting aside the order dated 30.7.1998 passed by the learned J.M.F.C., Aska in Misc. Case No. 31 of 1997 by which the opposite party-husband had been directed to pay Rs. 200/- per month to the petitioner-wife towards her maintenance for the date of filing of the application u/s 125 of the Cr.P.C.

2. Till 1979, petitioner and opposite party along with their four daughters and two sons were residing in Nagaland where opposite party was employed. Three of their daughters got married by 1985. In order to get the daughters married and sons educated, the petitioner started residing in the opposite party's native village Gudiali near Aska. Opposite party and the elder son remained in Nagaland. At present the petitioner is residing in Aska, whereas, after his retirement in 1996, the opposite party is living at Gudiali. Their youngest daughter married in 1998. It was alleged in the application for maintenance filed by petitioner that opposite party not only subjected her to physical assault and mental torture but also stopped to provide food and clothing to her. He drove her out of the house in 1994. It was averred that opposite party earned Rs. 7,000/- from vegetable business and received Rs. 2,000/- towards pension per month in addition to income from agricultural land and that she has no income and

residing in a rented house. Opposite party resisted the application for maintenance pleading that during his absence from village Gudiali petitioner went astray and led an adulterous life with one Ragunath Biswal, a widower belonging to village Ganganathpur. The youngest daughter and youngest son, who were living with their mother, objected to her immoral conduct. Ultimately, petitioner left the house and started living with Ragunath Biswal in Aska. Also, opposite party denied to have any income from agriculture, business and pension. In order to substantiate their assertions, petitioner examined two witnesses including herself as P.W. 1 and opposite party examined four witnesses including himself as O.P.W.2, his eldest son as O.P.W.1 and youngest daughter as O.P.W. 4.

3. In awarding maintenance in favour of the petitioner the learned J.M.F.C, Aska appears to have disbelieved adultery on the part of the petitioner. It was held that opposite party neglected to maintain her. On reappraisal of evidence on record, learned revisional Court took the view contrary to the finding of the learned J.M.F.C. and held that petitioner was living in adultery for which she was not entitled to maintenance in view of the provision u/s 125(4) of the Cr.P.C.

4. It was contended by the learned Counsel for the petitioner that on a threadbare analysis of evidence on record, learned Magistrate was not inclined to believe the allegation of adultery against the petitioner. In such circumstances, learned revisional Court was not entitled to enter into the arena of reappraisal or reappraisal of evidence. Referring to depositions of witnesses examined on behalf of opposite party it was contended that evidence on record does not indicate that petitioner was "living in adultery" as contemplated u/s 125(4) of the Cr.P.C. In support of his contentions learned Counsel for the petitioner relied upon decisions of this Court in Madan Mohan Rai v. Sm. Niladri Dei : (32) 1966 CLT 827, Smt. Rachita Rout Vs. Basanta Kumar Rout, , Baishnab Charan Jena Vs. Ritarani Jena, , Laxman Naik Vs. Nalita " Lalita Naik, and Smt. Arana Kar Vs. Dr. Sarat Kumur Dash alias Nachhi, .

5. Learned Counsel for opposite party supported and defended the order passed by learned revisional Court.

6. Scope and ambit of appeal and revision are different. The revisional Court is not a Court of appeal. Placing reliance upon Thakur Das (Dead) by Lrs. Vs. State of Madhya Pradesh and Another, and Duli Chand Vs. Delhi Administration, , it has been pointed out by this Court in Rabindra Sethi v. Premalata Sethi : 1989 (II) OLR 548 that the established principle of law is that the revisional jurisdiction is not to be ordinarily invoked or used merely because the lower Court has taken a wrong view of the law or misappreciated the evidence on record. If the revisional Court on appreciation of the evidence on record and re-appraisal of the evidence, takes a view different from and contrary to the view taken by the lower Court, then also it cannot be a ground for interfering in revision. It is only when the Magistrate has not kept in view the correct position of law and has failed to appreciate the evidence in its true perspective, it would be within the jurisdiction

of the revisional Court to appraise the evidence and come to a conclusion as to whether the conclusion of the trying Magistrate was justified or not. Where the conclusion of a Magistrate is grossly and palpably unjust or is based upon a manifestly erroneous approach and erroneous appraisal of the evidence, and further the Magistrate has misconceived the evidence and has come to an obviously wrong conclusion the revisional Court would be fully justified to go into the facts and correct the error that has cropped into the judgment of the trying Magistrate. In such a case, the revisional Court is not interfering on the ground of inadequacy of evidence, but on the ground that there has been a clear case of miscarriage of justice. Decision in *Smt. Rachita Rout v. Basanta Kumar Rout* (supra) may be referred to in this context.

7. Sub-Section-1 of Section 125 of the Cr.P.C. casts legal obligation on the person having sufficient means to maintain his wife, minor children and parents unable to maintain themselves. Sub-Section-4 of Section 125 of the Cr.P.C. provides:

No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this Section 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.

Thus, if wife "is living in adultery" she is not entitled to maintenance u/s 125 of the Cr.P.C.

8. In the present case adultery is set up as the defence to resist claim of maintenance by the petitioner. It has been consistently held in authoritative judicial pronouncements that the expression "living in adultery", occurring in Sub-Section 4 of Section 125 of the Cr.P.C, does not denote an isolated act of immoral conduct. It denotes a course of continuous adulterous conduct.

9. It has been held by this Court in *Madan Mohan Rai v. Sm. Niladri Dei* (supra):

The expression "living in adultery" does not connote either a single act of adultery or even several such isolated acts. It means the following of a course of continuous adulterous conduct. The principle is that occasional lapses from virtue are not a sufficient reason for refusing maintenance. The husband is absolved from the obligation to maintain his wife when she has a "de facto" protector, i.e., with whom she lies and by whom she is mainlined as if she were his wife. The obligation of a husband to maintain his wife arose from the anxiety of the legislature to protect deserted wives from the bitter necessity of earning and living by trading of their sex. That obligation, however ceases when it has been voluntarily assumed by some man other than the woman's husband. No woman can fairly claim a right to be kept by two men.

10. Also it has been held by this Court in *Smt. Rachita Rout v. Basanta Kumar Rout* (Supra):

The expression "if she is living in adultery" undoubtedly connotes a course of adulterous conduct more or less continuous. An occasional lapse would not be sufficient reason for refusing maintenance within the ambit of Sub-section (4). Therefore, a Magistrate has to probe and find out whether at or about the time of the application, there has been an adulterous conduct on the part of the wife. Further, there must be clear proof of adultery. A suspicion nurtured by the husband will not disentitle the wife to receive the maintenance under the Code. It is true that direct evidence of adultery can seldom be given, but at the same time there must be some evidence to prove the allegations of adultery and a mere bazaar gossip would not prove adultery. Since Sub-section (4) is in the nature of an exception to the main Section, it is for the husband claiming protection under the said provision to show that the said sub-Section is applicable that is to say, the husband must establish that the wife is living in adultery.

11. Upon scrutiny of materials on record, keeping in view the aforesaid parameters relating to the revisional jurisdiction and the meaning of expression "living in adultery", it is found that the learned Additional Sessions Judge has reversed the finding of fact recorded by the learned J.M.F.C. upon reappraisal of evidence on record. As regards the allegation of adulterous conduct on the part of the petitioner, O.P.W.1, elder son of the parties, deposed that he was informed by his father regarding illicit relationship between his mother with Raghu Biswal. Opposite party examined as O.P.W.2 deposed that on being informed by his children regarding illicit relationship between the petitioner and Raghu Biswal he came to village and saw their affair. However, he did not depose regarding any specific instance of such relationship. According to him, it was his daughter O.P.W.4 who first informed him regarding petitioner's illicit relationship. O.P.W. 3, a co-villager of the parties deposed to have seen Raghu Biswal visiting the house of the petitioner regularly at about 4 p.m. to 5 p.m. It was categorically stated by him in cross-examination that Raghu Biswal was not visiting petitioner's house secretly. It is in his evidence that Raghu Biswal is aged about 70 years. O.P.W.4 alleged that petitioner had developed illicit relationship with Raghu Biswal during her father's absence. Raghu Biswal was to visit their house at least twice to thrice a week. She also alleged that Raghu Biswal used to spend night with petitioner in one room. Admittedly, Raghu Biswal happens to be a distant relation of the parties. It is also not disputed that opposite party had left petitioner in his village in order to keep their daughters married and sons educated. In the absence of conclusive evidence indicating that petitioner was "living in adultery" with above-said Raghu Biswal, the learned J.M.F.C. was not inclined to accept the allegation on the basis of vague allegations made by O.P.W.4. The learned J.M.F.C. did not find witnesses examined by opposite party including O.P.W.4 to be reliable so as to accept the allegation of adultery on the part of the petitioner. However, the learned Additional Sessions Judge appears to have been swayed away by the fact that petitioner's daughter and son made allegations against her. Despite good reasons assigned by the learned J.M.F.C. for

not accepting the allegation that petitioner was "living in adultery", the learned Additional Sessions Judge reversed the finding upon reference to evidence of O.P.W.4 stated to have been supported by O.P.Ws.1,2 and 3. It is also pertinent to note that the learned Additional Sessions Judge has not assigned any reason to support the finding that petitioner was "living in adultery".

12. In *Madan Mohan Rai v. Sm. Niladri Dei* (supra), it was observed by this Court:

From the facts that Debananda is a man of objectionable character, that Niladri resided in his house for a period of about 5 months prior to the filing of the application and that she had an act of adultery about 8 months after the filing of the application do not establish that she had a course of continuous adulterous conduct. Debananda is one of her near relation. After living for a period of two years with her daughter, she came to reside with him for a short time before the filing of the application. Though acts of adultery may be taken into consideration if committed shortly at the time of the filing of the application, instances are not rare that mutual obligations develop out of gratitude after a person gives shelter to a destitute woman for a long time.

13. As has been observed above opposite party left the petitioner in his house as early as in the year 1979 to arrange their daughters' marriage and to look after their sons' education. She was deprived of his company. On the basis of materials on record, it has been held by the learned J.M.F.C. that allegations of assault and ill-treatment made by petitioner against opposite party has been amply proved. That apart, it is well settled that unsuccessful bid by the husband to castigate the wife as a person living in adultery entitled her to live separately from her husband and claim maintenance from him. The very allegation by the husband and members of his family that the wife is having extramarital relationship with a person other than her husband is insulting and humiliating her amounting to cruelty. Decision in *Baishnab Charan Jena v. Ritarani Jena* (supra) may be referred to in this context.

14. In the above circumstances, the impugned order of the learned Additional Sessions Judge is not sustainable and is liable to be set aside.

15. In the result, the revision is allowed and the impugned order of the learned 1st Additional Sessions Judge, Aska in Criminal Revision Petition No. 23 of 1999 (110 of 1990 GDC) is set aside.