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Dayanand Vs. Asha

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Court : Mumbai

Decided On : Jun-22-2004

Reported in : I(2005)DMC228

Judge : P.B. Gaikwad, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 125(1) and 125(4)

Appeal No. : Criminal Application No. 578 of 2000

Appellant : Dayanand

Respondent : Asha

Advocate for Def. : V.A. Nimbalkar, Adv. h/f ;D.B. Rode, Adv.

Advocate for Pet/Ap. : V.D. Sapkal, Adv.

Disposition : Application dismissed

Judgement :

P.B. Gaikwad, J.

1. The applicant Dayanand S/o Sonu Ghodke filed present application to set aside the order passed by the Judicial Magistrate (first class) Shrigonda dated 30.11.1996 in Maintenance Application No. 147/1995, which is later on confirmed by the Additional Sessions Judge, Ahmednagar in Criminal Revision Application

No. 57/1997 by order dated 18.11.1998.

2. The facts, in nutshell leading to the present application are that: The respondent Smt. Asha Dayanand Ghodke filed application for maintenance before the Judicial Magistrate (first class) under Section 125 of Cr.P.C. on 17.7.1995. The gist of the contentions is that marriage of Asha performed with the opponent Dayanand on 14.12.1986 at village Shedgaon, Tal. Shrigonda. It is further alleged that the relations between applicant and opponent as husband and wife are still subsisting. It is further alleged that the opponent maintained the applicant properly for about 4 to 5 months, however, thereafter he started ill- treating and harassing her on account of unlawful demand. It is further alleged that there was assault, beating to the applicant at the hands of the opponent and lastly on 7th June, 1994 opponent drove out the applicant from his house, the brother of opponent namely Ravindra Ghodke left her to her parents house, however, two children namely Deepak and Gaurav were kept by opponent with him. It is further alleged that the applicant thereafter made several efforts to convince the opponent to take her for cohabitation, however, the efforts being fruitless and, therefore, the applicant started residing with her parents. It is further alleged that opponent thereafter performed second marriage with one Maya d/o Mahadu Avhad. It is also alleged that there are no hopes that the opponent will take the applicant for cohabitation as he is residing along with his second wife, the applicant it unable to maintain herself, there is negligence and refusal on the part of the opponent. So far as regards income of the opponent it is contended that he is serving in railway department and used to get salary of Rs. 4,500/-. Request is accordingly made to allow the application and to grant maintenance at the rate of Rs. 500/- per month.

3. The opponent appeared and filed say. The facts that marriage of applicant was performed with the opponent in the year 1986 and that couple is having two male issues from the said wedlock is not disputed. The other allegations about ill-treatment and harassment has been specifically denied. Even that the incident as alleged by the applicant dated 7th June, 1994 is also denied. In para 11 the opponent has given details about the incident and settlement between parties by which it is alleged that the applicant has relinquished her right to claim maintenance. It is also alleged about some incident took place in the month of

January, 1994 as the applicant was found in compromise with some another person at the house and on account of said incident agreement took place between the parties in which it is contended by the opponent that the applicant has relinquished her right to claim maintenance and also gave permission to the opponent to perform second marriage. It is further alleged that on 2.3.1995 at Shrigonda consent deed which is also known as 'Hakka Sod Patra' is executed, and in view of this position it is claimed that the application claiming maintenance from the opponent is not justified and accordingly requested to reject the said application.

4. Considering the pleadings the Judicial Magistrate (first class) allowed parties to lead oral and documentary evidence and after considering the same allowed the application directing opponent to pay maintenance at the rate of 400/- per month to the applicant from the date of application by his order dated 30.11.1996. The present applicant original opponent being dissatisfied with the said order filed Criminal Revision Application No. 57/1997 before the Sessions Judge, Ahmednagar and the Additional Sessions Judge, Ahmednagar by his order dated 18.11.1998 dismissed the said revision, however, amount of maintenance granted by the Judicial Magistrate (first class) at the rate of Rs. 400/- per month is reduced giving direction to the present applicant to pay maintenance at the rate of Rs. 350/- per month. Said order passed in criminal revision confirming the order passed by the Judicial Magistrate (first: class) allowing maintenance is being challenged by filing present application.

5. In the application I heard Mr. V.D. Sapkal, Advocate for the applicant and Mr. Nimbalkar for the opponent.

6. It is submitted by Mr. Sapkal, Advocate for the applicant that both the Courts below have misdirected themselves in considering the Sammati Patra Exhibits 21 and 22 in its proper perspective, as in fact in view of Section 125, Subsection (4) the applicant is not entitled to claim maintenance as she herself has relinquished her right to claim maintenance. Secondly, according to him both the Courts below have not considered the ratio laid down in 1990 M.L.J. 480 and 2004 M.L.J. 23. Lastly, accordingly to him at any rate considering the factual aspects in the present

case, the application for maintenance ought to have been dismissed by the Court below, however, wrongly allowed the same.

7. On the other hand it is submitted by Mr. Nimbalkar that the order allowing the application for maintenance is proper and justified. He further submits that practically in the present case Sub-section (4) of Section 125 has no application as the relations between parties as husband and wife does not exist as on perusal of evidence of opponent and pleadings and terms of document Exhibits 21 and 22 it is sufficiently clear that there is a divorce and that the marriage tie does not exist. According to him Section 125(4) have application only when marriage is subsisting and when in the present case marriage is not subsisting said sub-section has no application. Even otherwise according to him the order granting maintenance is definitely proper and justified and in support of his contentions he also placed reliance on certain authorities.

8. Considering the submissions it is now necessary to see whether the order allowing application for maintenance is proper and justified and for which firstly, to my mind, reference to Section 125(4) on which reliance is placed by Mr. Sapkal is necessary which reads as under:

S. 125(1).....

(2).....

(3).....

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refused to live with her husband, or if they are living separately by mutual consent.

9. Mr. Sapkal relying on the above sub-section contended that in the present case practically both the Courts have failed to consider the terms as entitled in Exhibit 22. As a matter of fact on perusal of evidence on record the applicant wife has not disputed her signature on the said document, however, explanation given by her as according to her same was taken on a blank paper and she has not executed any such agreement. A reference is also necessary to the evidence of present

applicant which is at Exhibit 18 and very first word of his evidence is to the effect that 'The applicant is nobody of mine at present. Previously she was my legally wedded wife.' Then in cross-examination of this witness i.e., present petitioner he has admitted 'I have disclosed to my Counsel about my divorce on two occasions at the time of drafting written statement'. He also admits that the document Exhibits 21 and 22 is divorce/relinquish deed. Even in chief-examination in para 4 according to him the original divorce deed is at Exhibit 21 and further made clear to the effect that 'Now my relation with the applicant as husband and wife has come to an end.'

10. I have referred in detail in respect of the above aspect with a view that the present applicant himself came before the Court with positive case that relation between applicant and present opponent as husband and wife does not exist and in view of this position I find that Sub-section (4) of Section 125 have no application in the present case and, therefore, the contentions on behalf of the present applicant original opponent in that respect needs to be discarded. I find that both the Courts below have properly considered Exhibits 21 and 22 and rightly concluded that divorced wife is entitled for maintenance and accordingly allowed application filed by the applicant.

11. Even otherwise considering the submissions on behalf of the present applicant I find a reference is necessary to one authority i.e., in the case of Vanamala v. H.M. Ranganatha Bhatta : (1995)5SCC299 , wherein it is observed to the following effect:

'Divorce obtained by mutual consent-Such divorced wife who has not remarried and entitled to maintenance under the Explanation cannot be debarred by invoking Section 125(4)-Expression wife in Sub-section (4) does not include a divorced woman.'

12. Reference is also necessary to one another authority i.e., in the case of Gurmit Kaur v. Surjit Singh, : (1996)1SCC39 , wherein it is observed to the following effect:

'Divorce agreement by mutual consent-Wife not disentitled to claim maintenance so long as she remains unmarried and is unable to maintain herself-Concept of living separately by mutual consent arises only during subsistence of marriage.'

13. Reference is also necessary to one another authority i.e., in the case of Rajesh Kochar v. Reeta Kumari , wherein it is observed to the following effect:

'Section 125. Maintenance-Agreement to surrender right to maintenance- is an agreement against spirit of law and opposed to public policy-Does not bind parties-Wife is entitled for grant of maintenance even though she has entered into any such agreement.'

14. Reference is also necessary to one another authority i.e., in the case of Rajesh Kochar v. Reeta Kumari 2002 ALL MR 141, wherein it is observed to the following effect:

'An agreement to forgo maintenance allowance is against the spirit of statutory provision under Section 125, Cr.P.C. and it was also against the public policy. The spirit of Section 125, Cr.P.C. is to prevent destitution or vagrancy of divorced wife. So, any promise or agreement by any of the parties to the marriage would be against this spirit of law and it would also be opposed to the public policy, because it would be against the social order and, accordingly, opposed to public policy.'

15. Thus, considering the factual aspects referred above, ratio laid down in the above authorities and from the evidence on record I find that the present applicant original opponent has neglected and refused to maintain the applicant. Even on bare perusal of say filed by him to the applicant and plain reading of para 11 allegations are made against the applicant as she is having some relation with one Raju Rokade. It is further seen that the stand taken by the present applicant original opponent is inconsistent. On one hand he claims that the relations between the applicant and opponent as husband and wife does not exist in view of the document Exhibits 21 and 22 as against this he insisted to take benefit of the said documents contending that the applicant has relinquished her right to claim maintenance and that too without any consideration being paid at the time when said agreement or relinquished deed was executed and this is apparent from the

terms of the agreement. So far as regards other contentions for claiming maintenance it is apparently clear that the applicant is unable to maintain herself, secondly the present applicant original opponent is having sufficient means to pay separate maintenance as he is serving in railway department.

16. Considering the object of Section 125 it is well established that right to claim maintenance is a statutory right which the Legislature has framed irrespective of the nationality, caste or creed of the parties. It is necessary to make it clear that even if any such agreement is in existence, to my mind, such agreement is opposed to public policy and also against the clear intendment of the provisions. Thus, I do not find any infirmity in the conclusion arrived at by both the Courts below in allowing the application for maintenance. Thus, the present application deserves to be dismissed as same being without merit.

In the result application is dismissed.

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