

A. Jagadishwari and ors. Vs. A. Bikshapathy and anr.

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SooperKanoon Citation : sooperkanoon.com/435134

Court : Andhra Pradesh

Decided On : Sep-23-1997

Reported in : I(1998)DMC183

Judge : A. Hanumanthu, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125(4)

Appeal No. : Crl.R.C. No. 739 of 1995

Appellant : A. Jagadishwari and ors.

Respondent : A. Bikshapathy and anr.

Advocate for Def. : Public Prosecutor for the Respondent No. 2

Advocate for Pet/Ap. : S.T.P. Satyanarayana Chary, Adv.

Disposition : Petition allowed

Judgement :

A. Hanumanthu, J.

1. This revision is directed against the order dated 29.3.1495 of the learned Sessions Judge, Nalgonda, in Criminal R.P. No. 34 of 1994 on his file modifying the order of the learned Additional Judicial Magistrate of First Class, Bhongir, dated 25.3.1994 in M.C. No. 8 of 1991.

2. The first revision petitioner herein is the wife of the respondent. The revision petitioner Nos. 2 and 3 are their son. For the purpose of convenience the first revision petitioner and the respondent are referred to as wife and husband in this case. The revision petitioners filed M.S. No. 8 of 1991 under Section 125(1) A and B of Cr.P.C. for claiming maintenance at Rs. 400/- for the wife and at Rs. 200/- each to the sons from the date of petition on the ground that the respondent-husband deserted his wife and children and that they were subjected to harassment by demanding her to bring more dowry and that the husband also beat her mercilessly and drove her out of the house and that the husband has got sufficient means to provide maintenance. On the other hand, respondent-husband resisted the claim of the petitioners and his main contention was that the petitioner/wife was living in adultery and as such she is not entitled for the maintenance.

3. To substantiate their respective contentions PWs 1 to 3 were examined on behalf of the petitioners and no documents were marked. On behalf of respondent-husband RWs 1 to 7 were examined and Ex. RI was marked.

4. On consideration of the evidence on record, the learned Magistrate disbelieved the version of the husband that the first petitioner-wife was living in adultery and held that he deserted his wife and children and failed to maintain them, though having sufficient means to provide maintenance. Hence, he allowed the petition and granted maintenance @ Rs. 200/- to the wife and Rs. 150/- each to the children.

5. Aggrieved by it, the husband preferred Criminal R.P. No. 34 of 1991. The learned Sessions Judge on reappraisal of the evidence on record held that the husband has established that his wife is living in adultery, and therefore, the learned Sessions Judge set aside the order of the Magistrate granting maintenance to the wife, but confirmed the maintenance as ordered by the Lower Court in respect of two children @ Rs. 150/- per month each. Aggrieved by that, the wife and the children have come up with this revision. The respondent-husband failed to appear in this Court in spite of the notice served on him.

6. Heard the learned Counsel for the revision petitioners and the Public Prosecutor and perused the Lower Court record.

7. It is not disputed that the first petitioner is the legally wedded wife of the respondent and that the two revision petitioners are their legitimate children born out of their wedlock. It is also not disputed that after their marriage they lived for some time at Yadagirigutta which is the native place of the respondent and thereafter they shifted their residence to Hyderabad and after staying for about five or six years they once again shifted to Yadagirigutta and they lived happily for some time at Yadagirigutta and out of their wedlock these two children born to them. Admittedly, the wife and children are residing separately from the husband since 1990. As seen from the impugned order, the plea of the husband is that his wife is not entitled for maintenance as she is living in adultery. To prove his case that she is living in adultery, the husband examined RWs 1 to 7 and marked Ex. R.I. The learned Sessions Judge seems to have been carried away by the oral testimony of RWs 1 to 4 and 7 and so held that the respondent has established that his wife is living in adultery with one Mitta Raju of Yadagirigutta. The learned Counsel for the revision petitioners took me through the evidence of the respondents 1 to 4 and 7. The evidence of RWs 5 and 6 have not spoken to anything with regard to the alleged wife indulging in adultery. On the other hand, it is categorically stated that they are husband and wife and living separately. A perusal of the testimony of RWs 1 to 4 and 7 discloses that they saw the wife and one Mitta Raju moving closely at the public tap, Shivalayam and that they were making signs to each other. It is also in the evidence of RW 1 the husband that on one day having suspicion that his wife is having illicit intimacy with Mitta Raju, he wanted to verify the same and giving an impression that he is leaving for Hyderabad left the house. But within a short time he returned back and when he reached the house, the door of his house was closed and when he knocked the door his wife opened the door. But Mitta Raju went away through the rear door and since then his wife left his house and did not return back. It is also in the evidence of RW 2 that in the absence of the respondent from the house of the petitioner, the first petitioner used to see movies along with Mitta Raju and that she used to visit nearby temples. In his cross-examination RW 1 admitted that the parents of the respondent were also residing in the same house. But for the

reasons best known to the respondent, his parents were not examined. They would have been the best witnesses to speak about the character of their daughter-in-law i.e., first petitioner herein and they would be knowing the movements of PW 1 with Mitta Raju or the visits of Mitta Raju to their house, but they have been kept back. RW 3 deposed that he saw once PW 1 and Mitta Raju talking each other in the market, but in cross-examination he admits that he had no acquaintance with PW 1 at any time before the date on which he saw her. RW 4 seems to be more loyal than King as he deposed that PW 1 eloped with Mitta Raju though it is not the case of the respondent. The admissions made by these witnesses in their cross-examination make their evidence unworthy of credence with regard to the allegation that the first petitioner/wife is living in adultery. Another significant fact in his case is that the husband filed O.P. No. 29 of 1990 on the file of the Sub-Court, Bhongir against his wife for granting decree of divorce on the ground that she is living in adultery, but that petition was dismissed as he failed to pay interim maintenance as ordered by the Court. Therefore, the plea of adultery attributed to the first petitioner is merely an allegation. He did not choose to pursue the O.P. No. 29 of 1990 for obtaining divorce on the ground that she is living in adultery. Further, even if the evidences of RWs 1 to 4 and 7 is admitted to be correct for arguments sake, it is a stray act of adultery on the part of the wife and such a single act of adultery does not necessarily amount to 'living in adultery' within the meaning of Clause (4) of Section 125 Cr.P.C. and it would not be justified in refusing maintenance to the wife because the words 'living in adultery' referred to a course of conduct and mean something more than a single 'lapse from virtue'. I am fortified in my opinion by the Division Bench Judgment of Karnataka High Court in M.P.Subramaniam v. T.T. Ponnakshiammal, AIR 1958 Mysore 41, wherein it is observed that: 'after careful consideration of the law on the point, we are of the opinion that it is not a stray act or two of adultery that disentitles a wife from claiming maintenance from her husband; but it is a course of continuous conduct on her part by which it can be called that she is living an adulterous life that takes away her right to claim the said maintenance. It is significant to note that the wording in Section 12(4) of the Cr.P.C. is not 'if she commits adultery' but 'if she is living in adultery'. To our mind there is a certain amount of emphasis on the terms 'living'. A mere lapse, whether it is one or two, and a return back to normal

life cannot be said to be 'living in adultery'. If the lapse is continued and followed up by a further adulterous life, the woman can be said to be 'living in adultery'.

8. In *Baishnab Charan Jena v. Ritarani Jena*, 1993 Cri. Law Journal 238, Orissa High Court also held that : 'merely proving one or more instances of lapses in character of wife is not sufficient to absolve her husband from liability to pay maintenance to her'. Therefore, the respondent-husband failed to establish that the first petitioner is not entitled to claim maintenance on the plea that she is living in adultery.

9. With regard to the capacity of the respondent to provide maintenance to the petitioner and her children there is concurrent finding by both the Courts below that he is having sufficient means and therefore, I do not find any reason to interfere with the said finding.

10. For the aforesaid reasons, the impugned judgment of the learned Sessions Judge, Nalgonda, in Criminal Revision Petition No. 34 of 1994 rejecting the claim of the wife for maintenance is set aside. The order of the learned Magistrate in M.C. No. 8 of 1991 is confirmed.

11. In the result, the Cri. Revision Case is allowed.