

Molyabai Vs. Vishram Singh

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Court : Madhya Pradesh

Decided On : Sep-20-1991

Reported in : 1992CriLJ69; II(1992)DMC33

Judge : V.S. Kokje, J.

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

Appeal No. : M. Cr. C. No. 606 of 1991

Appellant : Molyabai

Respondent : Vishram Singh

Advocate for Def. : Jaisingh, Adv.

Advocate for Pet/Ap. : P.K. Saxena, Adv.

Disposition : Application allowed

Judgement :

V.S. Kokje, J.

1. This is an application under Section 482 of the Code of Criminal Procedure, challenging the order dated 7.2.1991 passed by the III Additional Sessions Judge, Shajapur, confirming the order dated 9.5.1989 passed by the Judicial Magistrate First Class, Shajapur in a case under Section 125 of the Cr. P.C.

2. The applicant wife came before the Court alleging that she was married to the non-applicant in the year 1981. In the year 1986 she was deserted by her husband. On 8.3.1987 the non-applicant took another wife. The applicant initiated proceedings under S. 13. of the Hindu Marriage Act on 10.3.1987 and because of a settlement out of Court on 11.12.87 the marriage stood dissolved. The applicant has further contended that she is not able to maintain herself and the non-applicant has sufficient sources to maintain her but is neglecting to do so.

3. The application has been mainly contended on the ground that the applicant has accepted Rs. 1500/- by way of full and final settlement towards all the claims arising out of the marriage and was, therefore, disentitled for claiming maintenance. Reliance has been placed heavily on Ex. D-1, which is an application moved before the divorce court by both the parties. In para 1 of this application it is stated that the parties have entered into a compromise on the advice of people and the applicant had obtained a sum of Rs. 1500/- before the Court and no amount what-so-ever was due against the non-applicant. It is contended that the case squarely falls within sub-section 4 of S. 125 of the Cr.P.C which disentitles a wife to receive an allowance from her husband under S. 125, if the husband and wife are living separately by mutual consent. Both the Courts have accepted the plea of the non-applicant and have rejected the claim for maintenance solely on the ground that the applicant had relinquished all her rights by accepting a sum of Rs. 1500/- at the time of dissolution of marriage.

4. Having heard Shri P.K. Saxena, the learned Counsel for the applicant and Shri Jaisingh, the learned Counsel for the non-applicant, I find that both the Courts have misdirected themselves and have not read the evidence in the case properly. Ex. D-2, the proceedings dated 11.12.1987 of the divorce Court show that the parties had entered into a settlement out of Court and on that basis the application was rejected. Thus, there is neither the grant of divorce by the Court nor recognition of it by the Court. However, both the parties did not dispute the fact of dissolution of marriage between the parties. Therefore, we need not go into the validity of divorce. We have to proceed on the assumption that the applicant is a divorced wife of the non-applicant. The only question for consideration is, therefore, whether by accepting Rs. 1500/- as a lumpsum payment, the applicant has given up her

right to claim maintenance and whether the applicant was living separately by mutual consent of the parties. It would be interesting to note that in Ex. D.1 itself para 3 was typed, which put a condition that the criminal cases going on between the parties shall be got dismissed by the parties. This para 3 was scored out and non-applicant Vishram Singh has initialed this deletion. This clearly shows the intention of the parties and indicates that though Vishram Singh wanted to insert this condition, but the applicant Molyabai did not agree to do so. The acceptance of Rs. 1500/- was, therefore, clearly in lieu of all claims which were raised in that divorce case and did not affect the rights of the parties in other cases. The intention of the parties was clearly to confine the compromise to the divorce litigation alone and not to extend it to all other disputes between them. Molyabai in her statement had denied the suggestion that she had accepted Rs. 1500/- from the non-applicant. She had even denied having executed any document like Ex. D.1. The non-applicant Vishram Singh has not stated in his statement that on Ex. D. 1. Molyabai had put her thumb impression before him. He had denied his signatures 'A.' to 'A' and 'B' to 'B' part of Ex. D. 1, which are in lieu of scoring out para 3. He has tried to improve upon the written document Ex. D.1 by adding the condition contained in para 3, which was scored out. In the result Ex. D.1, which is executed on a non-judicial stamp of Rs. 5/-, though styled as an application before the divorce court has not been proved. Even otherwise, it does not seem to be a reliable document when Molyabai having not accepted having put her thumb impression on it, and anyone else having not proved her thumb impression on the document. The non-applicant who is pressing this document in service, has himself admitted it to be a tampered document so far as scoring out para 3 is concerned and his initials in lieu of paragraph 3 is concerned. There is no explanation also as to why this so-called application was not filed in the Court and was typed on non-judicial stamp papers. The document cannot, therefore, be acted upon and taken into consideration in this case. There being no other evidence on the point, it has to be taken that even if it is assumed that Rs. 1500/- were taken by the applicant from the non-applicant the same was not in lieu of forgoing the claim for maintenance in future.

5. Shri Jaishankar also contended that it is clear from the record that it has not been proved legally that divorce has taken place between the parties and that the

parties were living separately by mutual consent. He, therefore, submitted that in view of Sub-section 4 of S. 125, the applicant was not entitled to maintenance. The Supreme Court has in *Bai Tahira v. Ali Hussain Fissalli Chothia and Another* (A.I.R. 1979, SC 362) has laid down that a divorced wife is otherwise legally entitled to maintenance allowance and the dissolution of marriage makes no difference to this right. In the same case the Supreme Court has also observed as follows :

'The next submission is that the absence of mutual consent to live separately must be made out if the hurdle of S. 125(4) is to be overcome. We see hardly any force in this plea. The compulsive conclusion from a divorce by a husband and his provision of a separate residence as evidenced by the consent decree fills the bill. Do divorces have to prove mutual consent to live apart? Divorce painfully implies that the husband orders her out of the conjugal home. If law has nexus with life this argument is still-born.'

6. In the present case on the pleadings of the parties, it is clear that a divorce has taken place between the parties and the parties are living separately because of the divorce. It cannot therefore, be said that they are living separately by mutual consent as husband and wife and, therefore, the applicant is disentitled from receiving maintenance. Though the definition of wife by virtue of Explanation-B to S. 125(1) includes a woman who has been divorced by or has obtained a divorce from her husband and has not re-married, in the very nature of things, in Sub-section 4 of S. 125, the word 'wife' so far as the question of living separately by mutual consent is concerned, cannot be said to include a divorcee wife also. Reading in the proper context, a wife who has been divorced by her husband, or has obtained a divorce from her husband and has not remarried, is by the very fact of divorce, has to live separately from her husband, she is not expected at all to live with her husband and, therefore, the question of her living separately by mutual consent does not arise. Consent to live separately is required only when there is an obligation to live together. When the obligation to live 'together' itself has come to an end living separately on a divorced couple cannot be said to be living separately by mutual consent for the purpose of Sub-sec. 4 of S. 125 disentitling the divorced wife from claiming maintenance. The very purpose of the Explanation B to sub-section (4) of S.125 of the Cr.P.C. shall be defeated if a divorced wife is expected

to live or intaken to be living separately from her husband by mutual consent. The harmoni-ous construction of the two provisions can only be that a divorced wife shallnot be deemed to be living separately from her husband by mutual consent, shehas to be taken to be living separately from her husband under the compulsionof failure of her marriage which is acknowledged by the decree of divorce.

7. In the result, the refusal by both the Courts below to entertain theapplication of the applicant on the ground that she had accepted a sum of Rs.1500/- as full and final settlement of her claims cannot be upheld. The claimof the non-applicant that the applicant is disentitled from claiming maintenancebecause of the provisions of S. 125(4) of the Cr.P.C. as she was living separatelyfrom her husband by mutual consent is also not tenable. The learned trialMagistrate has not decided the quantum of maintenance in view of the factthat he decided that the application was not tenable. The judgment of the trialMagistrate as well as that of the Sessions Court is set aside. The trial Magis-trate shall now decide the quantum of maintenance on the basis of the evidencealready on record after hearing arguments of the parties. This shall be donewithin two months from the date of appearance before trial Court The partiesshall appear before the trial Magistrate on 23.10.1991 for the purpose of fixinea date for arguments. The record be transmitted to the lower court immediately.