

**Raibari Behera Vs. Mangaraj Behera**

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**Court :** Orissa

**Decided On :** Jul-23-1982

**Reported in :** 54(1982)CLT566; 1983CriLJ125

**Judge :** B.K. Behera, J.

**Appellant :** Raibari Behera

**Respondent :** Mangaraj Behera

**Judgement :**

ORDER

**B.K. Behera, J.**

1. Aggrieved by the impugned order rejecting the petitioner's claim for maintenance made against the opposite party, her husband, under Section 125, Criminal p. C. (hereinafter referred to as the Code), on the sole ground of paucity of evidence indicating that the petitioner was unable to maintain herself, she has come to this Court in revision for relief against the order passed, as submitted before me on her behalf by Mr. Das, on a point of view based on a mere technicality and not on the facts and evidence entitling her to claim maintenance and the contention raised on behalf of the opposite party by Mr. Bohidar is that in view of her own evidence that she had been having business and maintaining herself, the order against the petitioner could not be called in question.

2. Admittedly, the opposite party married the petitioner about three decades ago and a daughter, born through their wedlock, was married. After such a long married life, the opposite party chose to take a second wife and as held by the learned Magistrate, this fact had been established by the petitioner. It was also held in favour of the petitioner that the petitioner's theory of ill-treatment, desertion and neglect by the opposite party was true. The learned Magistrate further observed that the petitioner was entitled to separate living and maintenance because the opposite party had admitted in his written statement and also in his evidence that he had married another lady, namely, Jajamati. After recording these findings in favour of the petitioner, the learned Magistrate took up the objection raised on behalf of the opposite party that the petitioner was disentitled to maintenance as on her evidence, she was able to maintain herself and accepting the contention raised on behalf of the opposite party that the petitioner, on her own showing, had been carrying on business in rice in weekly markets and had opened a small grocery shop at village Baurkola and as such, was in a position to maintain herself and taking into consideration the fact that the petitioner had not, in terms, stated either in her petition or in her evidence that she was unable to maintain herself, the learned Magistrate, on the principles laid down in the case of Bishambar Dass v. Smt. Anguri 1978 Cri LJ 385, by the Allahabad High Court, held that the petitioner was not entitled to the grant of maintenance as she was able to maintain herself.

3. It would not be correct to say, as observed by the learned Magistrate, that there was paucity of evidence from the side of the petitioner to indicate that the petitioner was unable to maintain herself. There was no clear and cogent evidence from the side of the opposite party himself in this regard against the petitioner. As a matter of fact, the learned Magistrate had characterised the opposite party to be a liar for which no reliance could be placed on his testimony. The petitioner did state in her petition that because of the cruelty and neglect by the opposite party who refused to give food, shelter and clothings to her, her condition at the time of making the application was precarious. It would appear from her evidence that because of such ill-treatment and neglect by the opposite party, the petitioner had to take shelter in the house of her brother. According to her, she had been earning her livelihood on wages and the opposite party had paid nothing to her for her

sustenance. Her evidence would show that she had no landed property of her own and she had clearly stated in para 5 of her evidence that she had no means to earn her livelihood. True, she had stated in her cross-examination that she had been staying in the house of her brother, had been living on wages and was having rice business in different weekly markets and had been maintaining her livelihood, but she had denied a suggestion made from the side of the opposite party that she had opened a small grocery shop at village Baurkela. The learned Magistrate was not justified in accepting the contention raised on behalf of the opposite party that the petitioner had opened a grocery shop. No materials had been brought out in the testimony of the two witnesses for the petitioner during their cross-examination to indicate that the petitioner was able to maintain herself. On the other hand, they had supported the case of the petitioner regarding her straitened circumstances owing to the neglect by her husband. The two witnesses for the opposite party did testify that the petitioner had been purchasing and selling rice in the weekly markets, but none of them had testified about the extent of these transactions. One of them, namely, Brundaban Samal, had admitted that he had neither sold to nor purchased rice from the petitioner at any time nor had he purchased anything from her shop. If in order to avoid starvation, the deserted and helpless petitioner had sold some grains of rice for earning a very small profit to have some food, it would not be reasonable to conclude that she would be disentitled to maintenance because she was able to maintain herself.

4. The facts of the reported case of the Allahabad High Court, referred to above, on which reliance had been placed by the learned Magistrate were different and could be distinguished. In that case, the lady seeking maintenance had neither stated in her petition nor in her statement in the court that she was unable to maintain herself and had merely stated that she was maintaining herself with some difficulty. In the instant case, however, there was clear and convincing proof from the side of the petitioner that she was not able to maintain herself for which she had even to work on wages,

5. In another case before the Allahabad High Court reported in 1982 Cri LJ 1022 (Aijaz Ahmad Lalri v. Smt. Shahjehan Begum), for maintenance under Section 125 of the Code, it was urged that in the application, it had not been alleged by the

person claiming maintenance that she was unable to maintain herself and that was fatal and the application could not have been entertained. As would appear from the order passed by M. Wahajuddin, J., the decision of the same court reported in 1978 Cri LJ 385 (supra) had not been placed by either side for consideration. M. Wahajuddin, J. observed and held thus (Para 4):

4. The provisions under Section 125, Cr. P.C., are based on a public policy. Dependents like wife and children are not to be rendered destitute and that is the object behind the enactment of such provisions. I was referred to the judgment of the Additional Sessions Judge in revision, in which it was observed that although in the application itself it was not specifically stated that the wife has no means to maintain herself, the matter did arise for consideration during the hearing as the present applicant took a stand that the wife has means to maintain herself and that was contested by the wife and evidence was led on the point. With the counter-affidavit, the copy of the application preferred under Section 125, Cr. P.C., has also been annexed to para. 4 of the application, it was expressly stated by the opposite party 1 that she was sent to her parents' place in April 1973, and her father Sri Mahboob Ali is maintaining her since then. This by necessary implication amounted to an assertion that she has no independent means of living, but is being maintained by her father. The proceeding under Section 125, Cr. P.C., may be akin to civil proceedings, but one important distinction between the two cannot be overlooked, namely, the object behind the enactment of maintenance provisions in the Cr. P.C. The crux of the matter always is whether the party claiming maintenance has the means or not. The law of pleading in civil cases may be more strict, but it may not be so when the matter of public policy and its objective are involved,

XX XX XX XXReliance was placed upon two cases by the learned Counsel for the applicant. The first case is of *Munni Devi v. Om Pal* 1980 All LJ 296. It has no doubt, been mentioned in the pronouncement that the condition precedent for making an application under Section 125, Cr. P.C. is that the wife is unable to maintain herself, that observation was made in another context. What transpired was that the husband did not come forward. The aforesaid averment as condition precedent was there in the application and it was held that even if evidence is not

led when the allegation made as condition precedent is not refuted nor repelled, the condition for allowing maintenance is satisfied. The other pronouncement relied upon is the case of Manmohan Singh v. Smt. Mahindra Kaur 1976 Cri LJ 1664 (All). What has been laid down in that ruling is that maintenance cannot be allowed to every neglected wife. After, the enforcement of new Cr. P.C. such maintenance can be granted only to a wife who is unable to maintain herself. In the body of the judgment the following observations were made:

was not alleged... in her application... and it was also not stated in her statement...that she was unable to maintain herself.<sup>5</sup> The observation if considered in its context may rather indicate that even if it was not stated in the application, had it been so stated in the statement before the Court, the condition would have been satisfied. In that particular case, it was not so stated before the Court also...

As laid down in the aforesaid case, and would say with respect, rightly so, that the law of pleading in civil cases may be more strict although it is not so when the matter of public policy and its objective are involved. The case of a deserted lady claiming maintenance and unable to maintain herself is not to be thrown out merely because she has not, in her petition, stated, in terms of the provisions of Section 125 of the Code, that she is 'unable to maintain herself.' If on a review of the contents of her petition and the evidence led before it, the court comes to find that she is unable to maintain herself, she would be entitled to succeed in a case of maintenance under Section 125 of the Code.

6. As has been observed by the Supreme Court in the case of Bai Tahira v. Ali Hussain Fissalli Chothia : 1979 CriLJ151 , in this generous jurisdiction, a broader perception, and appreciation of the facts and their bearing must govern the verdict not chopping little logic or tinkering with the burden of proof.

7. Section 125 of the Code provides a swift and cheap remedy against any person who, despite means, neglects or refuses to maintain his wife unable to maintain herself. Emphasis has been laid on the expression 'inability to maintain' because the primary object of the section is to prevent starvation and vagrancy. A wife's petition cannot be dismissed because she has relations or friends willing to

maintain her.

8. In *Abdul Salim v. Smt. Najima Begum* 1980 Cri LJ 232, the interpretation of the expression 'unable to maintain herself' came for consideration before Allahabad High Court and H. N. Kapoor, J., observed thus (Para 4):

It is true that under Section 125, Cr. P.C. an important ingredient is that the wife if found unable to maintain herself will be entitled to claim maintenance. I, however, do not think that by this phrase it is meant that she should be absolute destitute and should first be on the street, should beg and be in tattered clothes and then only she will be entitled to move an application under Section 125, Cr. P.C. which too may take some time and that time may be enough for her death. A woman, no doubt, has to depend on some of her maternal relations for her maintenance when she leaves her husband's house. She can be maintained for some time by her relations. But that alone will not be sufficient. What is necessary is that she herself should be in a position to maintain herself and that it should not be much below the status which she was used to at the place of her husband.

I would respectfully adopt the view of H. N. Kapoor, J. Merely because a woman in distress has to depend on others for having a shed to take shelter Or in order to avoid starvation, she takes to living on wages or runs from market to market for the sale of some grains of food articles to earn a very small profit to have her food to save her life, it cannot be said that she is not 'unable to maintain herself' within the meaning of Section 125 of the Code.

9. For the aforesaid reasons, I would hold that the learned Magistrate was not justified in law in rejecting (he petition for maintenance solely on this ground after recording conclusions in all other respects in favour of the petitioner. The petitioner is, therefore, entitled to maintenance from the opposite party,

10. The next question for consideration is as to what would be the reasonable quantum of maintenance to be paid by the opposite party and from which date. What is to be kept in mind while fixing the quantum of maintenance has been laid down by this Court in *Basanta Kumari Mohanty v. Sarat Kumar Mohanty* (1982) 53 Cut LT 53 : 1982 Cri LJ 485 and the same view has been adopted in the case of

Smt. Choti Dei v. Hemanta Kumar Sahu (1982) 54 Cut LT 36 : 1982 Cri LJ NOC 173. The object of the provision being to prevent vagrancy and destitution, it has to be found out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for a moderate living, the earnings of the husband and his capacity to earn and his commitments are relevant factors while determining the quantum of maintenance. In the instant case, the evidence from the side of the petitioner was that the opposite party was possessed of about seven acres of landed property and had sufficient means to maintain the petitioner, while the opposite party, by the evidence from his side and on the basis of Ext. A the record of rights wanted to establish that there had been partition between him and his two brothers of the 4.81 acres of land recorded in Ext. A and that he had been in possession of about one and a half acres of land. The opposite party was certainly an able-bodied person capable of maintaining the petitioner. The word 'means' does not signify only means like estate or definite employment, but also includes capacity to earn money. If a man is healthy and able-bodied, he must be taken to have means to support his wife and children and he cannot take the plea of not having sufficient means. A person has sufficient means if he has capacity to earn. Notwithstanding the fact that a husband is an insolvent or a professional beggar or a minor or a monk, he must support his wife so long he is able-bodied and can eke out his livelihood (See the case of *Basanla Kumari Mohanty v. Sarat Kumar Mohanty* 1982 Cri LJ 485 (supra) ). The word 'means' does not imply only visible means. It includes a capacity to earn. A person who is fit to earn his livelihood cannot be relieved of his liability under the section even if he is young and unemployed, as has been laid down by this Court in *Smt. B. Veragam v. Manoranjan Samanta Kumar* ILR (1963) Cut 415 : (1963) 29 Cut LT 584. Judicial decisions are unanimous that the expression 'means' occurring in Section 488 of the Code (old) (corresponding to Section 125 of the present Code) does not signify only visible means, such as, real property or definite employment and that if a man is healthy and able-bodied, he must be held to possess the means to support his wife and children and he cannot be relieved of his obligation on the ground that he is unemployed. The opposite party, having sufficient means, has neglected and refused to maintain the petitioner.

11. It has been brought to my notice that in an earlier proceeding under Section 125 of the Code, the opposite party had executed an agreement (Ext. 1) wherein it had been agreed that he would take back the petitioner and maintain her and that if she was dissatisfied, he would pay a maintenance of Rupees 100/- per month to her till her death. The execution of Ext. 1 by the opposite party had been established by the petitioner, as found by the learned Magistrate, although the opposite party had denied the execution of any such agreement. It could be that in order to avoid the proceeding then pending against him, the opposite party had agreed to pay a maintenance of Rs. 100/- per month. This would, however, show that the opposite party was possessed of means to maintain the petitioner. The petitioner and the opposite party are village-dwellers. Keeping in mind the evidence adduced from both the sides with regard to the capacity of the opposite party to earn and taking an overall picture, I feel that a grant of maintenance at the rate of Rs. 75/- per month with effect from the date of the application for maintenance i. e., August 31, 1979, would be reasonable and equitable.

12. In the result, I would allow the application in revision set aside the impugned order and direct payment of maintenance by the opposite party to the petitioner at the rate of Rs. 75/- (rupees seventyfive) per month with effect from August 31, 1979.