

Ram Prasanna Dash Vs. Bhabani Devi

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Court : Orissa

Decided On : Apr-23-1990

Reported in : II(1992)DMC134

Judge : D.P. Mohapatra, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 127(2), 401 and 402; [Hindu Marriage Act, 1955](#) - Sections 5 and 11

Appeal No. : Cri. R. No. 161 of 1990

Appellant : Ram Prasanna Dash

Respondent : Bhabani Devi

Advocate for Def. : R.C. Rath, Adv.

Advocate for Pet/Ap. : G.S. Rath, ;P.K. Misra, ;S.K. Misra and ;B. Prusty, Advs.

Disposition : Petition allowed

Judgement :

D.P. Mohapatra, J.

1. Being aggrieved by the order passed by the learned Sub-divisional Judl. Magistrate, Puri on 16.3.1990 in Criminal Misc. Case No. 46 of 1989 refusing his prayer to consider the question of maintainability of the proceeding and to drop the

proceeding forthwith, the petitioner filed this application under Sections. 401 and 402, Criminal Procedure Code (shortly referred to as the 'Code') with the prayer to quash the said order and to drop the proceeding. The proceeding before the learned Magistrate was initiated on the application filed by the opposite party under Section. 125 of the Code claiming maintenance from the petitioner.

2. The opposite party filed the application under Section 125 of the Code claiming to be the wife of the petitioner which relationship is strongly denied by the petitioner. It is stated by the petitioner in the revision petition and not denied by the opposite party that in the application filed under Section 125 of the Code, she stated, inter alia, that at the time of marriage she had no knowledge that the petitioner has married another lady previously and further that the petitioner is a shrewd and litigant man and taking advantage of her innocence and simplicity he cheated her not only in the monetary transaction but also suppressed the facts of the previous matrimonial relationship and wedlock with one Binapani Das who was living at Bhubaneswar. After two years of her marriage she came to know that the petitioner is already married to another lady and has his children, the name of his wife is Binapani, that of his son is Ramapada Das, aged about 22 years, and that of his daughter is Sarmita Das aged about 20 years.

3. It is the case of the petitioner that the opposite party has been falsely claiming to be his wife and has initiated several proceedings in different Courts to harass him. To avoid such claims the petitioner filed O.S. No. 246 of 1988 in the Court of the Subordinate Judge, Bhubaneswar to declare that the opposite party is not the wife of the petitioner and to permanently injunct her from laying any claim as his wife. In the said suit by order dated 11.11.1988 the Subordinate Judge, granted temporary injunction against the opposite party restraining her from offensive jactitation of marriage till the disposal of the suit. Subsequently the suit was decreed ex-parte with the declaration that there has been a jactitation of marriage by the defendant which is false and tendentious and accordingly the defendant is permanently injuncted from the act of such jactitation of marriage. The decree was signed on 30.9.1989.

4. Thereafter the petitioner filed objection in the proceeding initiated under Section 125 of the Code raising the objection regarding its maintainability in view of the decree of Civil Court disentitling the opposite party from laying any claim as his wife and prayed to the learned Magistrate to consider the point and drop the proceeding forthwith. However the learned Magistrate by the impugned order rejected the petition and proceeded to record evidence adduced on behalf of the opposite party (petitioner before the Magistrate). Hence, the grievance of the petitioner.

5. Sri G.S. Rath, appearing for the petitioner contends that the learned Magistrate clearly erred in refusing to consider the question of maintainability of the proceeding, inasmuch as, in view of the decree passed by the Civil Court, the opposite party has no locus standi to file the application under Section 125 of the Code and the learned Magistrate is not competent to proceed with the case initiated on the application filed by her. It is his further contention that continuing such a proceeding which is ex facie not maintainable will only mean harassment to the petitioner and waste of public time. Sri. R.C. Rath, appearing for the opposite party made an attempt to support the order passed by the learned Magistrate.

6. The position is beyond controversy, indeed, it is clear from a bare perusal of the provisions under Section 125 of the Code that the term 'wife' used in the Section means a legally married wife and includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. The benefit of the provision does not extend to a woman whose marriage is null and void or to a concubine or mistress (See 1980 CrL. L.J.423, Bajirao Raghoba Tambare v. Miss Tolanbai and Another). In the present case the opposite party on her own showing claims to be the second wife of the petitioner whose first wife is living; and therefore the alleged marriage of the opposite party with the petitioner is void in view of the provisions in Sections 5 and 11 of the [Hindu Marriage Act, 1955](#). To add to this is the decree of the Civil Court declaring that she is not the wife of the petitioner and has no right to lay any claim on the basis of such relationship. In this view of the matter there is no scope for doubt that the proceeding initiated on the application filed by the opposite party under Section 125 of the Code was not maintainable and should have been dropped without proceeding further. The

revisionpetition can be disposed of on this finding, but Sri G.S. Rath appearing forthe petitioner has raised certain other legal questions which may be of somegeneral importance. Therefore, I propose to deal with the contentions raisedby him.

The questions raised are these :

(a) What is the effect of a decree or order of the Civil Court on a proceeding under Section 125 of the Code;

(b) Whether an application under Section 127(2) of the Code can be filed to cancel the order of the Magistrate initiating a proceeding under Section 125 of the Code even before an order for payment of maintenance is passed.

7. Coming to the first point formulated above, in my view, the principle is well-accepted that it is the bounden duty of a Criminal Court to give due weight and importance to a decree/order of the competent Civil Courts declaring the status/relationship of the parties. The Criminal Court is not entitled to go into the question of correctness of the decree/order of the Civil Court. It is also not open to the Criminal Court to take the view that it is not bound by the decree/order of the Civil Court and will consider the question independently to come to his own conclusion. This view is founded on the principle that the Civil Court is the competent forum to decide the status/relationship of the parties whenever there is a dispute regarding the same and that forum having come to a particular conclusion its decision cannot be lightly brushed aside or reconsidered by the Criminal Court. The point has engaged the attention of different High Courts including this Court. I may notice here some of the decisions cited at the Bar, 1989 (II) Divorce and Maintenance Cases, 12 (Orissa), 1988 (II) Crimes 599 (Rajasthan), 1981 Cr.L.J. 151 (Punjab and Haryana), AIR 1947 Madras 425 and AIR 1944 Calcutta 17.

8. In the present case, in view of the Civil Court decree expressly declaring the opposite party to be not the wife of the petitioner and injunctioning her from laying any claim on the basis of the said relationship, the learned Magistrate ought to have considered the question of maintainability of the proceeding before proceeding

further in the case and should not have postponed for consideration of the matter.

9. Next I shall take up the second contention of Sri. G.S. Rath, whether a petition under Section 127(2) of the Code could be filed by the petitioner even before any order for payment of maintenance was passed in the proceeding under Section 125 of the Code. On perusal of the provision of Section 127, it appears that the section deals with the question of alteration in allowance in a case where any order of payment of allowance has been made under Section 125 of the Code. It is also the common experience that petition under Section 127 is filed usually in the proceeding under Section 125 which has been concluded by passing an order for payment of maintenance. Such cases present no difficulty regarding maintainability. In the present case the doubt arises, since the application to drop the proceeding under Section 125 of the Code was filed, as stated by Sri. G.S. Rath, under Section 127(2) of the Code during pendency of the proceeding. At this stage, I may clarify the position that there is no express provision in Section 125 of the Code to enable the Magistrate to consider the question of maintainability of the proceeding preliminarily if the point is raised by the opposite party. Sub-Section (2) of Section 127 reads as follows :

'Where it appears by the Magistrate that, in consequence of any decision of a competent Civil Court any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.'

10. The question is/does the term any order under Section 125 include an order of the Magistrate initiating the proceeding under Section 125 and directing issue of notice to the opposite party therein to appear in the case or means only order directing, payment of maintenance to the applicant. It is stated at the Bar that there is no decided case specifically dealing with the point.

11. On giving my anxious consideration, I am inclined to take the view that the term 'any order made in a proceeding under Section 125' should be given a wider meaning and not a restrictive one; in other words in an appropriate case the term may also include the order to initiate the proceeding under Section 125 and calling upon the opposite party to show cause on the application. Such an interpretation,

in my view, will help in avoiding unnecessary harassment to the parties and waste of time of the Court in a case where ex facie, the proceeding under Section 125 is not maintainable. Viewed from another angle, this question of maintainability may not be of much significance. Generally speaking, in a case where objection to maintainability of the proceeding on the ground of lack of jurisdiction of the Court or want of locus standi on the part of the applicant is raised, it is apt and proper that the Court should consider the question of maintainability first before proceeding to consider the case on merit. Therefore, whether the objection relating to maintainability of the proceeding is raised by filing an objection in the proceeding under Section 125 or by filing an application under Section 127(2) of the Code is more a matter of form and should not create any serious difficulty on the part of the Magistrate to consider the question. Depending on the facts and circumstances of the case, the Magistrate in seisin of the proceeding under Section 125 of the Code should consider the question of maintainability of the proceeding raised before him and should deal with it before proceeding further in the case.

12. Coming to the facts of the present case as noticed earlier, the point of maintainability was raised relying on averments made by the opposite party-wife in her application in the petition filed under Section 125 of the Code and the decree passed by the Civil Court. The matter did not involve any enquiry into the complicated facts and the point if accepted was sufficient to render the proceeding invalid. Therefore, the learned Magistrate should have considered the question of maintainability on the date fixed and should not have postponed its consideration merely because some witnesses present in Court were to be examined.

13. Shri R.C. Rath, appearing for the opposite party made a feeble attempt to refute the contentions raised on behalf of the petitioner but ultimately gave up and accepted the analysis made and the conclusion reached in the foregoing paragraphs.

14. On the analysis and the discussions in the foregoing paragraphs, considered from any angle, the conclusion is inevitable that the proceeding under Section 125 of the Code is not maintainable. The revision petition is therefore allowed, the impugned order is set aside and the proceeding in Criminal Misc. Case No. 46 of

1989 pending in the Court of the Subdivisional Judl.Magistrate, Puri is to be dropped; the learned Magistrate is directed to pass appropriate order to that effect.

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