

Snehalata Biswal Vs. Saroj Kumar Biswal

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Court : Orissa

Decided On : Jun-20-1986

Reported in : 1986(II)OLR379

Judge : D.P. Mohapatra, J.

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

Appeal No. : Criminal Revision No. 292 of 1984

Appellant : Snehalata Biswal

Respondent : Saroj Kumar Biswal

Advocate for Def. : J.P. Misra, Adv.

Advocate for Pet/Ap. : A.K. Padhi and ;S.S. Das, Advs.

Disposition : Petition allowed

Judgement :

D.P. Mohapatra, J.

1. The petitioner's application Under Section 125, Criminal Procedure Code (in short 'the Code') claiming maintenance at the rate of Rs. 500/- per month from the opposite party having been dismissed by the Sub- divisional Judicial Magistrate,

Bargarh, she filed this application Under Section 401 of the Code challenging the said order.

2. After stating the facts, findings of Court below and contentions of the counsel His Lordship held:

3. As noticed earlier, the marriage between the petitioner and the opposite party is admitted. It is also the admitted factual position that the wife has been living with her parents separately since 1980. It is not the case of the opposite party that she is possessed of sufficient income/means to maintain herself. There is some controversy over the facts whether the divorce was voluntary or it was under force and undue influence and the document Ext A is vitiated on that account. But that controversy is not very relevant for the purpose of this case since Under Section 125(1), Explanation (b) 'wife' includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried. Therefore even if the case of the opposite party that there has been a divorce by mutual consent between the parties is accepted, the petitioner cannot be said to have been deprived thereby of her claim for maintenance.

4. The main question that arises for consideration is whether the petitioner can be said to have been deprived of her right to maintenance under Sub-section (4) of Section 125 of the Code on the ground that she and the opposite party are living separately by mutual consent. It is pertinent to note that this provision disqualifies the deserted wife from claiming maintenance from her husband for her separate living and is in the nature of an exception to the right vested in her Under Section 125(1) of the Code. As such the provision under Sub-section (4) has to be strictly construed. In order to establish a case of the spouses living separately by mutual consent it has to be established that this is done under contract voluntarily and freely made between the parties expressing their mutual consent for living separately. This cannot be inferred merely because a divorced wife is compelled to live separately from her previous husband, sheerly by force of circumstances. Surprisingly enough the document Ext. A, purportedly containing consent of the wife for divorce, is totally silent about her living separately from her husband. All the recitals in the document are regarding her consent to free the opposite party

from the wedlock and to give her consent for him to marry again. She has made no statement in the document regarding her consent for separate residence. Even the opposite party examined as O P. W. 2 does not make a statement that both of them agreed to live separately after the document Ext. A was executed by the petitioner.

5. The other witness examined on behalf of the opposite party is also silent about any agreement between the parties regarding their separate residence. In view of such evidence the trial Court clearly erred in holding that the parties were living separately by mutual consent, inferring such consent merely from the document executed by the petitioner agreeing to divorce her husband.

6. On the first question also the finding of the trial Court is erroneous. Physical assault and torture by the husband are not a sine qua non for a claim of maintenance by the wife. It is sufficient for a claim Under Section 125 of the Code if the wife establishes circumstances under which she was compelled to leave her husband's home and reside separately. In the present case, as noticed earlier, it is the definite case of the petitioner that the opposite party has taken Subasinl as his second wife and has been residing with her. The chain of events leading to execution of the document, Ext. A, by the petitioner as alleged by the opposite party is sufficient to show that the atmosphere was not congenial for her stay in the house of the opposite party and under such compelling circumstances, she had to return to her father's house. Therefore, simply because the evidence in support of the allegation made by the petitioner about physical assault and torture to her by the opposite party is not acceptable, the Court below was not justified in coming to the conclusion that her right to claim maintenance could be denied.

7. On the discussions aforesaid, the findings of the trial Court on both the points formulated by him having been found to be erroneous, the order is unsustainable and has to be vacated. The trial Court did not embark upon any enquiry regarding the reasonable amount to be awarded to the petitioner towards her maintenance, presumably because he held her application to be not maintainable. I made some efforts to bring about an agreement between the parties on an acceptable amount, but did not succeed since the minimum amount claimed by the petitioner was not

accepted to the opposite party. It may be noted here that it is the case of the petitioner that one acre of land alleged to have been given to her by the opposite party towards her maintenance was never given to her and the said property continues to be in possession of the opposite party and she has derived no benefit from it. i do not propose to enter into the question since that matter would be considered by the trial Court after the proceeding is remanded to it.

8. In the result, the revision petition succeeds and the same is allowed. The impugned order is set aside and the proceeding is remanded to the trial Court for fresh disposal in the light of observation made in the judgment in accordance with law. The trial Court will give opportunity to the parties to lead evidence on the question of quantum of maintenance, if necessary.

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