

Mammad Kunhi Vs. Rukhiya

Mammad Kunhi Vs. Rukhiya

SooperKanoon Citation : sooperkanoon.com/724828

Court : Kerala

Decided On : May-25-1978

Reported in : 1978CriLJ1645

Judge : P. Subramonian Poti, J.

Appellant : Mammad Kunhi

Respondent : Rukhiya

Judgement :

ORDER

P. Subramonian Poti, J.

1. The petitioner married the respondent Rukhiya in the year 1971 and they lived together thereafter as husband and wife. After living at the husband's place for some time, the wife left for her tarward house where her Karanavan one Moidu was also living. It appears that for some period during that time the petitioner also lived in that house with his wife. In or about 1974 there seems to have arisen some misunderstanding between the petitioner and the Karanavan of the respondent, According to the petitioner, that concerned the failure of the Karanavan to make available a house specifically put up for the petitioner and his wife partly, with funds advanced by the petitioner. It is further his case that due to the unpleasantness that arose on this account the petitioner could not continue to stay with his wife at the tarwad house and so he left it. It was then that a notice

was issued to him on behalf of his wife claiming maintenance for her as well as a child who had been born in the marriage. The petitioner replied to it by Ext. P1 dated 11-10-74. In that he mentioned the circumstances under which he had to cease living with the respondent at her tarwad house and he further mentioned therein that he desired to live a proper married life if that was possible. He also mentioned in his reply that it was only a month earlier that he ceased to live with the respondent and for her expenses of that month he had sent a money order. He expressed his desire that proceedings contemplated by the notice must be avoided in the interest of the parties. Nevertheless the petition for maintenance was filed by the wife. This was contested by the husband. The contest survives here only regarding the maintenance allowed to the wife and not that awarded to the child. He refuted the liability to maintain his wife because, according to him, his wife, whom he wanted to take to his house so that she may live with him, was refusing to comply with his request to go over to his house. The learned trial Magistrate who enquired into this question found that on the evidence of the petitioner and the counter petitioner it had to be found that the relationship between the husband and the karavan of the wife was strained, and in the circumstances it may not be possible for the respondent to reside with the wife in her house. He further found that there was no reasonable ground for the wife to refuse to live with the husband. In this view maintenance was denied to her. It was against this that the wife took the matter in revision before the Sessions Judge, Telli-cherry. The learned Judge found that the offer to maintain the wife in his house was made by the husband only in answer to the petition, that it was belated and hence it was not bona fide. In this view he directed the husband to pay a sum of Rs. 70 per mensem to the wife besides a sum of Rs. 50 directed to be paid on account of the child. The petitioner has resorted to this Court complaining that the learned Sessions Judge ought not to have held in revision that the petitioner was liable to pay maintenance to his wife despite his offer to maintain her in his house. It is particularly urged in the revision before this Court that the wife has not indicated at any time any ground which may justify her conduct in living away from her husband, and in the absence of a finding on the availability of such a ground the learned Sessions Judge was not right in directing payment of maintenance by the petitioner.

2. The facts of the case as it has come out in evidence indicate beyond any doubt that there is no case of mis-conduct on the part of the husband in regard to his wife. It is not as if the husband was inconsiderate towards his wife or that living with him at his house would in any way be harmful to the mind or body of the petitioner. There is no case of ill-treatment at any time by the husband or want of affection which a wife could normally expect from her husband. On the other hand it appears that the wife wanted to live in her own tarwad house and wanted to have the husband also there. According to her she lived only for a few days with her husband in his house and thereafter went to her tarwad house. It was not suggested that this was for any specific reason. It was only a matter of her personal preference or choice. Evidently the husband was accommodating enough to adjust himself to residence with his wife at her tarwad house. Strained relationship between the petitioner and the karanavan developed, as a consequence of which he moved out of the house. This was followed by a notice calling upon the petitioner to pay maintenance for the wife and the child. The petitioner refuted this liability and indicated the circumstances under which he had to move out of the house where he had been living with his wife. Though this reply has been received on account of the wife she has evidently not come to know of the contents of the reply. Probably it was not brought to her notice by the karanavan. That is what she swears. She has come to court claiming maintenance. The petitioner seeks to meet the claim by the plea that he was prepared to take her with him and therefore she should live with him. The Sessions Judge took the view that the offer to maintain the wife at the husband's home was belated and therefore not bona fide. This, it is said, is not in accordance with law. That is what calls for consideration in this revision.

3. Section 125(1) of the Code of Criminal Procedure confers the right to any wife unable to maintain herself to claim maintenance from her husband if he has sufficient means but neglects or refuses to maintain her. It is not as if every wife is entitled to maintenance irrespective of other factors. It is not every indigent wife that is so entitled to maintenance. Apart from showing that the husband has sufficient means it must further be shown that he neglects or refuses to maintain his wife. If a person is willing to maintain his wife in accordance with his civil obligation, there is neither neglect nor refusal. Therefore the question whether the

wife is justified in refusing to live with the husband is not a question independent of Section 125(1) of the Code of Criminal Procedure. Even in deciding the question of liability of the husband to maintain his wife the court would be called upon to decide one way or other as to whether there was neglect or refusal on his part. If a person is bound only to maintain his wife properly in his own home and that he is ready to do but the wife refuses to live there with him it cannot be said that there is neglect to maintain the wife or there is refusal. Normally a husband who provides a congenial matrimonial home to his wife is under no further obligation to pay maintenance if she, notwithstanding that he has a home where she could live a pleasant life discharging her obligations as wife wants to be in her own home, where she expects the husband to join her company. I am attempting to indicate that where a wife is unreasonably refusing to live with her husband who is prepared to provide her with a matrimonial home that is a matter which must go into reckoning in passing an order under Section 125(1).

4. When an order for maintenance is passed the allowance directed to be paid must be paid in accordance with the order by the person who is so directed. There must necessarily be a sanction on non-compliance. That is provided in Sub-section (3) of Section 125. This execution is in the manner indicated in that subsection. There are two provisos under that subsection and the 2nd proviso is relevant in this context. That reads:

Provided further that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

The sub-section enables the husband to make an offer to maintain his wife even when execution in accordance with the order of the Magistrate is taken out and that would be an answer for the claim. Evidently that would operate only prospectively in regard to the obligation to maintain. But the provision indicates that an offer to maintain must be assumed as relevant in disposing of a petition for maintenance, That of course must be so for where there is a proper and reasonable genuine offer to maintain a plea of refusal or neglect cannot hold good.

Whether the offer is bona fide is another question. But the offer cannot be said to be belated because it is made in answer to a petition. Merely because it is so made in answer to a petition it cannot be said to be wanting in bona fides.

5. An offer to maintain may sometimes be not genuine or good and if, the circumstances under which it is made indicate that it is only a colourable offer just to meet the legal action instituted by the wife it would not be an answer. Several factors may have relevance in the determination of the question whether such offer is bona fide or not. If a person who had been ill-treating his wife as a consequence of which she had to live apart offers to take back his wife to his home when threatened with action, the court may examine the circumstances closely to determine whether the offer is genuine or bona fide. There may be other similar circumstances to which I need not make any particular reference here. Suffice to say that in a case such as that one before me where the parties have been living happily together ever since the marriage but were living separate for some time (for one month before the notice according to the husband and 1 year and 2 months according to the wife) and that is suggested to be due to the conduct of a third party residing along with the wife and husband in the wife's home where the husband also was living and further, there are no other circumstances of relevance one would wonder how it could be said that there is any want of good faith in the conduct of the husband in offering to maintain the wife at his home. That is an offer that he could properly make in the circumstances of the case. The fact that he did not make an earlier offer would not derogate from the earnestness of his offer. It does not suggest in any way that the offer is sham. The relevant question in such a case is why the wife is refusing to live with her husband despite his offer. It is for her to explain her reasons. Want of bona fides in the husband's offer has necessarily to be judged in the background of the justification pleaded by the wife for her refusal to live with him and not divorced of it. Absence of any imputation of misconduct on the part of the husband is relevant. The wife when in the box was asked whether she would live with her husband. She shows no justification for refusing to live with him except one and that is that by convention and usage in the area wives are entitled to call upon their husbands to live in their houses, the validity of which plea, I will consider hereafter. For the time being suffice to state that I am not impressed with the plea. If that is the only

excuse the wife has, and if that is the only reason for not living with the husband I find that she has no justification for her refusal. Things may be different where the plea is that the matrimonial home offered by the husband is not a congenial home or that there would be third party interference to domestic peace.

6. Is the refusal of a wife to live with the husband in his house legitimate even if there is a case that it is the practice in the locality for the husband to live in the wife's home? There is no law that I know of obliging the husband to be a resident at the family home of the wife nor is any practice or convention shown assuming that this would make any difference. May be that in Muslim tarwads husbands may choose to live with their wives at the tarwad house whenever it is convenient. That only means that it is open to him to do so and does not oblige him to live at the tarwad house of his wife if he wants the company of the wife and that otherwise he will be forfeiting the conjugal company of his wife. If there is obligation to maintain one's wife the husband may choose his home and it is at that home that the wife has to live unless there are specific and valid reasons why that may not be practicable in any given instance. There is an obligation on the part of the wife to give her attention to the husband and if she does not feel inclined to discharge such obligation the husband is not without any remedy. The law enables a husband to seek the assistance of an order for restitution of conjugal rights, where he is aggrieved by the conduct of a wife refusing to live with her husband on the plea that she wishes to remain at her tarwad house where the husband, if he so desires may visit her or stay with her and have her company. It goes without saying therefore that it is not a justifiable reason for the wife to contend that the husband may live in her family house.

7. On the above facts it appears to be clear beyond doubt that in this case the husband cannot be called upon to pay maintenance to his wife for he has neither neglected nor refused to maintain his wife. He is willing to maintain his wife as law obliges him by providing a house where she would get all attentions and affections which normally a wife could expect from her husband. Merely because the petitioner made his offer to take her to his home only in the reply statement such offer would not militate against the good faith particularly in the background of the case indicated in this judgment.

8. Before I close I think I should advert to Section 125(4) of the Code of Criminal Procedure, for, my attention has been drawn to a decision of my learned brother(?) (Colleague) Janaki Amma J. in a case where there was a claim for maintenance by a wife and the question of applicability of Section 125(4) of the Cr. P.C. was considered by the learned Judge. Section 125(4) reads thus:

Section 125(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

There are three circumstances under which the normal obligation of the husband to maintain the wife will stand negatived. That is by reason of the subsection. These are : (a) where the wife is living in adultery, (b) where the wife and husband are living separately by mutual consent and (c) where the wife refuses to live with her husband without sufficient reason. It goes without saying that if the husband sets up any of these as answer to the claim of the wife it is for him to prove. That the wife is living in adultery is a matter necessarily to be proved by the husband. That the parties are living separately by mutual consent is also to be proved by the husband if he wants to meet the claim for maintenance on that plea. Similarly it is also to be proved that the wife refuses to live with him. 'Refusal' is not shown by the proof of the fact of not living with the husband. It is not sufficient to show that the wife is not living with him. The refusal can be proved only by the husband indicating that he is willing to allow the wife to live with him, that he is ready to take her to his home for residence with him, but nevertheless she is not willing. There may be cases where the wife is not living with the husband because she has been driven out of his house. The burden that the wife is 'refusing' to live with him is to be discharged by the husband. But when once that is proved I would assume that it is for the wife to show that there are reasons for her living apart from the husband. One of the grounds for denying maintenance, as already indicated, is refusal to live with the husband without any sufficient reason and the burden on the husband to prove this would be discharged by showing that there is refusal by the wife to live with him. The existence of a reason cannot be anticipated by the husband and he cannot be expected to prove that such reason does not exist. One can imagine a number of reasons for a wife refusing to live with the husband.

It may be that the wife does not consider the husband sufficiently healthy, sufficiently fair, that the house in which she is asked to live is not good enough for her, that she does not like the surroundings, the home is not congenial, she does not like the presence of the proverbial mother-in-law, that she objects to the pets brought up in the same house and the like. But how can any husband anticipate the reason the wife may possibly have and answer it by showing that such circumstance does not exist. The burden of proof of showing the Justifiable reason must in such circumstances rest not on the husband. If the wife alleges any reason it is such reason that may have to be examined. For instance in this case until the wife indicated her mind that the reason for not living with the husband was that the people in the locality usually lives with the wives in their wives' house one would not have known of that reason. Once that is disclosed whether that is a justifiable reason is easy of determination.

9. In the decision in *Sarada v. Kumaran* 1977 Ker LT 942 : 1978 Cri LJ NOC 215 Janaki Amma J. has said:

Evidently Section 125(4) is an exception to the general liability to maintain referred to in Section 125(1). He who claims exemption from liability has to prove the existence of circumstances which entitle him to put forward such a claim. Viewed in the above light it is for the respondent to prove that there has been an improper refusal on the part of the petitioner to live with him.

I understand the learned Judge to say that the burden of proving the refusal on the part of the wife to be on the husband and I do not think that the learned Judge further indicated the view that the husband should anticipate the reasons which the wife may have for not living with him and answer that too. Anyhow, it is not necessary to go into this question further for in any view of the case on the facts and circumstances here an improper refusal on the part of the wife to live with the husband has been proved. Hence the question of burden of proof is academic in this case.

10. In the result the revision petition is allowed. The order of the learned District and Sessions Judge is vacated and the order of the Chief Judicial Magistrate restored. Allowed as above. No costs.

