

Abu Vs. Subaida

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Court : Kerala

Decided On : Jul-21-1994

Reported in : 1994CriLJ3672; II(1994)DMC528

Judge : K.T. Thomas and; S. Subramani, JJ.

Acts : [Family Courts Act, 1984](#) - Sections 19; [Code of Civil Procedure \(CPC\), 1908](#) - Order 7 Rule 11; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125 to 127

Appeal No. : A.S. No. 381 of 1994

Appellant : Abu

Respondent : Subaida

Advocate for Def. : None

Advocate for Pet/Ap. : Youseff and; Aysha, Advs.

Disposition : Appeal dismissed

Judgement :

S. Subramani, J.

1. Plaintiff in a suit filed by him before the Family Court, Ernakulam, is the appellant. The suit was not numbered and the same was rejected under Order 7

Rule 11 C.P.C. The same is challenged in this appeal. The appeal is filed under Section 19 of the Family Courts Act.

2. When the appeal came up for admission, the maintainability of the suit was doubted and arguments were heard. The reliefs sought in the plaint are, to declare that the order passed by the Family Court, Ernakulam in M.C. 343/1992 (Original No. M.C. 13/92 before the Judicial First Class, Magistrate Court, Fort Cochin) is null and void; and to issue a permanent prohibitory injunction restraining the defendant from realising any amount on the basis of the said order. A relief is also sought to declare that the plaintiff is not liable to pay maintenance to the defendant and that the defendant is not entitled to any maintenance from the plaintiff.

3. The relevant facts seen from the plaint are as follows : Defendant was admittedly married by the plaintiff in 1964 and they lived together for about 31/2 years Defendant filed an application before the Judicial First Class, Magistrate Court, Fort Cochin as M.C. No. 15 of 1992 under Section 125 of the Criminal Procedure Code for getting separate maintenance. On the establishment of the Family Court at Ernakulam, the said case was transferred to the Family Court. Plaintiff appeared in a person and he agreed that he is ready to pay Rs. 150/- per month as maintenance to his wife the defendant. On accepting the offer by the defendant, the Family Court passed an order directing the plaintiff to pay Rs. 150/- per month towards separate maintenance allowance. The Court also directed that the amounts can be sent by the 5th of each month by month order beginning from April, 1993. The order is dated 1-3-1993. It is admitted that the same has become final. When execution was taken to implement the order, the suit was filed for the reliefs mentioned above. The allegations are that the plaintiff has already divorced the defendant in 1969 according to the Islamic religious rites and ceremonies, and the Family Court has no jurisdiction to award maintenance. It is also alleged that he has no means to pay maintenance to the defendant.

4. Paragraph 17 of the plaint states the cause of action. It reads : 'The cause of action for the suit arose on 1-3-1993 when the Hon'ble Family Court passed the order dt. 1-3-1993 in M.C. 343/92 and thereafter in Marampilly Village in Ernakulam District.'

5. When we read the cause of action and the reliefs, it is clear that the suit is filed only to set aside the maintenance order under the guise of declaratory relief.

6. The question is how far the Civil Court can maintain such a suit ?

7. The main prayer is to declare that the order in M.C. 343/92 is null and void. In this connection, a reference to Sections 125 - 127 of the Criminal Procedure Code would be relevant. Section 125 was incorporated in the Code to provide maintenance for children, parents and wives. It means that some provision has to be made for the subsistence of the children, wife and parents unable to maintain themselves. The powers of the Criminal Court under the Chapter are limited in scope and the proceedings are summary in character. It is on the basis of the public policy that the Chapter was incorporated in the Criminal Procedure Code and Magistrates are given the power to provide maintenance. The Magistrate is primarily interested in providing for a possible vagrant, so as to stop the chances of destitution leading to crime. The only mode by which a maintenance order could be varied or cancelled is either by resorting to Section 127 Cr.P.C. Even after the judgment of a Civil Court regarding the status of parties, the order of maintenance will continue to be in force. It is not nullified by the decree of Civil Court. The Magistrate under Section 127 in exercise of his discretion is empowered to vary or cancel the order on an application made in that behalf.

8. In this case, plaintiff has not sought any relief declaring the status of the defendant as a divorced wife. He wanted only the order to be declared as null and void. The question whether such a suit is maintainable came up for consideration in (1973) 1 MLJ 344 (Krishnammal v. Mahadeva Iyer). In that case, a learned single Judge of the Madras High Court held that the Civil Court has no jurisdiction to set aside or vary an order passed by the Criminal Court under Section 488 of the Criminal Procedure Code, 1898 (old Code corresponding to Section 125 of the present Code). His Lordship further held that once a competent Civil Court gives a decision upon the liability for maintenance or the quantum thereof the Criminal Court is statutorily bound under Section 489, Clause (2) of the old Code to cancel or vary its own decision in accordance with the decision of the Civil Court. The proceedings under Chapter IX of the Code are summary in nature and are devised

for the purpose of affordings speedy relief. A declaration that the Criminal Court's order is null and void and for a permanent injunction restraining the defendant from claiming maintenance order by the Criminal Court was held in that case as unsustainable.

9. Same is the case in AIR 1970 All. 185 (Gauri Devi v. Bishwanath) It was held that the Civil Court has jurisdiction to set aside an order duly and properly passed by a Magistrate under Section 488 of the old Code, it was further held that if an order is made against a husband for payment of maintenance to his wife after contest it could only be modified or set aside in appeal or revision by the higher Court as provided by the Code. The only exception pointed out, in the decision was, where the order is obtained on the ground of fraud. The said decision was discussed by a learned Single Judge of this Court in 1988(1) KLT 654 (Baby v. Mathai). That was a case for declaration of status and for a consequential relief that there was no legal obligation to pay maintenance. In that case, it was held that even if the maintainability of the suit was assumed, rigorous are the requirements for invalidating an order duly passed by a Criminal Court. The learned Judge doubted whether the Civil Court has jurisdiction when once an order of maintenance was passed by a Competent Criminal Court. The learned Judge relied on the judgment in S.A. No. 1031 of 1983, indicating the approach to be made by the Civil Court in such cases. Thus the said decision is of no avail to the appellant here.

10. In AIR 1918 Mad. 431 (Narayanan v. Itticherry Amma) following an earlier decision in ILR 18 All. 29 (Subhudra v. Basdeo Dube) it was held by a learned Single Judge that a party cannot get a magisterial order for maintenance set aside by a Civil Court where there has been no change of relationship between the parties between the date of the order and the date of suit in the Civil Court.

11. In AIR 1930 Cal. 753 (Krishna Gobinda v. Mt. Kishoribala) it was held that a Civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy under Section 488 of the old Code in a Criminal Court. It is barred under Section 41 of the Specific Relief Act.

12. A Civil Court is not sitting in judgment over the Magistrate so as to decide if he should have made the order under Section 125 CrI.P.C. Therefore that Court cannot entertain a suit for the relief that the Magistrate should not have passed the order or the order should be set aside or that there should be an injunction upon the realisation under the order. Such being the legal position, the suit cannot be entertained since it is barred by law.

13. A case was also put forward by the plaintiff that after the Muslim Women (Protection of Rights on Divorce) Act 1986 came into force, the Family Court has no jurisdiction to deal with the matter. What happened in the Family Court was that both parties agreed before it that an order might be passed fixing the maintenance as Rs. 150/- per month. It was an agreement between the plaintiff and the defendants. Sections 5 & 7 of the Muslim Women (Protection of Rights on Divorce) Act, provide that both parties may agree to elect to the procedure governed under Sections 121 - 198 of the CrI.P.C. It clearly suggests that in such cases, the provisions of the Code can be invoked. The conduct of the plaintiff also suggests that he had no objection in invoking the said jurisdiction. It therefore, cannot be said that the order in M.C. No. 343 of 1992 of the Family Court, Ernakulam, is without jurisdiction and hence a nullity.

14. Since the order in M.C. 343/92 was passed by a Court of competent jurisdiction the same cannot be treated as null and void and hence no declaration can be given. The suit is therefore barred and the order of the Family Court in rejecting the plaint is proper.

15. Appellant has no case that the order of the Family Court was obtained by fraud and that he had no knowledge of passing the order. In fact, the order was passed on the basis of compromise. The validity of the order, therefore, cannot be questioned by the plaintiff.

We do not find any ground of interfere with the order and hence the appeal is dismissed.