

Cholamarakkar Vs. Pathummamma and anr.

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Court : Kerala

Decided On : Jul-11-2008

Reported in : 2008(3)KLJ429

Judge : Kurian Joseph and; Harun-Ul-Rashid, JJ.

Acts : [Indian Majority Act, 1875](#); Muslim Women (Protection of Rights on Divorce) Act, 1986 - Sections 3(1); [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 125(1) and 125(1)(C); Indian Penal Code (IPC) - Sections 44; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 488 and 488(1); Hindu Law; Mohammedan Personal Law; [Constitution of India](#) - Article 141

Appeal No. : M.F.A. Nos. 985 and 1114 of 2002 and RF(FC) No. 99 of 2003

Appellant : Cholamarakkar

Respondent : Pathummamma and anr.

Advocate for Def. : N.M. Madhu, Adv.

Advocate for Pet/Ap. : V.R. Kesava Kaimal and; K.V. Reshmi, Adv.

Judgement :

Kurian Joseph, J.

1. Vagrancy is the fruit of a sin and the sin is capital where the root is the parent. It is this painful thought that lingers in the background while analysing the facts of these cases.

2. One of the main questions arising for consideration is whether legitimate or illegitimate child who has attained majority is entitled to maintenance. There cannot be any dispute that the said question can be tackled only under Section 125 of the Code of Criminal Procedure, 1973.

To the extent relevant, the provision reads as follows:

Section 125: Order for maintenance of wives, children and parents,-

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this subsection, order

such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person Explanation - For the purposes of this Chapter,-

(a) 'minor' means a person who, under the provisions of the [Indian Majority Act, 1875](#) (9 of 1875) is deemed not to have attained his majority;

(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

((2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.)

In the factual background of the instant case, it is Section 125(1)(C) that is relevant. The provision makes no difference as to whether the child is legitimate or illegitimate, since what is sought to be prevented is vagrancy of children and whether legitimate or illegitimate, the child is a human being. However, if such a child is a married daughter, there is no obligation on the father, as such situation under law is expected to be handled by the husband.

3. The provision in contradistinction to Section 125(1)(b) makes no difference as whether the child is minor or major, again because no person who is physically or mentally challenged or injured and thus unable to maintain himself or herself shall not suffer on account of the neglect or refusal on the part of the father. The only precondition under Section a married daughter, is unable to maintain himself or herself owing to any physical or mental abnormality or injury. There may not be much of a dispute or lack of clarity regarding physical or mental abnormality or

physical injury is yet a grey exactly is the scope and ambit of mental injury is yet a grey area under law in the matter of entitlement for maintenance. For analyzing the above position, we have to refer to the facts.

4. Pathumma is the first petitioner in O.P. No. 188/2000 and the second petitioner is her daughter. The respondent is Cholamarakkar who, according to the first petitioner, is her husband and the father of the second petitioner. Parties are described as above. The said original petition was filed for a declaration that a legally valid marriage as per Muslim religious rites was performed on 07-02-1974 between the first petitioner and the respondent and for a further declaration that the respondent is the father of the second petitioner. There is also a consequential prayer for maintenance to both. It is not in dispute that Pathumma was the wife of elder brother of Cholamarakkar and that she has two children born out of that wedlock. After the divorce, she was married to one Kunhalan Haji. According to Pathumma, since Cholamarakkar wanted her to live with him, he forced her to divorce Kunhalan Haji and marry him. Pathumma agreeing to the persuasion, married Cholamarakkar on the strength of a vakkalath executed by Cholamarakkar as he could not be expected to be personally present on that day. The allegations were totally denied by the respondent. We shall first tackle the question of maintenance of the child.

5. The word 'injury' is defined under Section 44 of the Indian Penal Code, which reads as follows:

Section 44: 'Injury'.- The word 'injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

'Injury' has been defined in the Blacks Law Dictionary (5th Edition) as 'any wrong or damage done to another, either in his person, rights, reputation or property; the invasion of any legally protected interest of another'. It is the case of the petitioners that dispute on the paternity of the second petitioner by the respondent has affected the reputation of the child and hence she could not get any marriage alliance and she is still remains unmarried. It is also indirectly pleaded that the child is hence unable to maintain herself. Placing heavy reliance on the observations in Noor Saba Khatoon v. Mohammed Quasim : 1997 CriLJ3972 , it is

submitted that under Section 125 Cr.P.C., an unmarried female child is entitled to get maintenance. The observation referred to above appears to get maintenance. The observation referred to above appears in paragraph 11 of the judgment of the Supreme Court and the same is extracted below.

Thus our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance under Section 125 Cr.P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier, and in case of females, till they get married, and this right is not restricted, affected or controlled by divorce wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under Section 3(1)(b) of the 1986 Act. In other words Section 3(1)(b) of the 1986 does not in any way affect the rights of the minor children of divorced Muslim parents to claim maintenance from their father under Section 125 Cr.P.C. till they attain majority or are able to maintain themselves or in the case of females, till they are married,

(emphasis placed by Counsel on the words underlined)

6. There cannot be any dispute that a legitimate or illegitimate child, who is not a married daughter, who is suffering from any physical or mental abnormality of injury and thus unable to maintain itself, is entitled to maintenance from the parent, in case the parent is having sufficient means. The loss of reputation is mental injury causing adverse impact on the capacity of a child to maintain itself. But the further question is even without any such mental injury, whether the daughter who is unable to maintain itself and who remains unmarried is entitled to claim maintenance based on the observation of the Supreme Court in Noor Saba Khatoon's case. In order to analyze the above position, it will be fruitful to refer to the position regarding maintenance in the old Code as appearing under Section 488. To the extent relevant, Section 488(1) Cr.P.C. reads as follows:

If any person having sufficient means neglects or refused to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a

monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

Whether legitimate or illegitimate, if a child is unable to maintain itself it was entitled to get maintenance in case the parent is having sufficient means, under the 1898 Code. In *Nanak Chand v. Chandra Kishore Aggarwal and Ors.* : 1970 CriLJ522 it has been held that the 'child' under Section 488 of the old Code does not mean a minor son or daughter. It is used in conjunction with percentage and the expression is not to be understood in terms of the age. Hence the children even after attaining majority, if unable to maintain themselves, were entitled to claim maintenance. When the Code was amended in 1973, the statute itself took note of the fate of children who are unable to maintain themselves even after attaining majority and introduced a provision in express terms under Section 125(1)(c). However, the entitlement under the 1973 Code is subject to certain restrictions in the case of those who attained majority: (1) the child is not a married daughter; (2) the child is unable to maintain itself on account of physical or mental abnormality or injury. Thus the physical or mental abnormality or injury leading to the inability to maintain itself is a precondition for a child who has attained majority and also in the case of an unmarried daughter to claim maintenance from the parents.

7. In *Noor Saba Khatoon's* case, the Supreme Court considered the liability of a Muslim father to pay maintenance to his children under Section 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 vis-a-vis the entitlement to claim maintenance under Section 125 Cr.P.C. The contention was that liability of a Muslim father was only to provide maintenance for a period of two years from the birth of the children. It is in that context, the Supreme Court held that beyond the age of two years also, the children born to Muslim parents who are unable to maintain themselves are entitled to claim maintenance under Section 125 Cr.P.C. The issue as to the right to claim maintenance under Section 125 Cr.P.C. The issue as to the right to claim maintenance after attaining majority but before marriage of female children did not arise before the court and hence not considered also. We find that the question was considered by a Single Bench of

this Court in *Muhammed v. Kunhayisha* : 2003(3)KLT106 wherein it has been rightly held as follows:

The language of Section 125, according to me, does not at all permit a construction that the status of a major daughter as an unmarried person can by itself be construed as 'physical or mental abnormality or injury' sufficient to bring her case within the sweep of Section 125(c). Whatever be the religion of the parties, the language of the Statute does not permit an unmarried major daughter to be brought within the purview of Section 125(c) on that sole reason/ground of her being an unmarried daughter. She has to prove further that she is unable to maintain herself and such inability to maintain herself is attributable to physical or mental abnormality or injury, if any, which she is afflicted with. If the intention of the Legislature were to grant maintenance to unmarried female children, solely on the ground that they are unmarried female children, nothing prevented the Legislature from making express provisions imposing liability on the parents to provide maintenance to their female children till they are married. Their disability - if that be one, of remaining unmarried alone was definitely not reckoned by the Legislature as sufficient to entitle them claim maintenance under Section 125 Cr.P.C. That evidently is the reason why the Parliament which must be presumed to have been conscious of the rights of the unmarried daughters under the Hindu and Mohammedan personal law (statutory and customary) to claim maintenance from their parents till they are married, did not choose to confer such right on them under Section 125 Cr.P.C. Under Section 125 Cr.P.C. a major unmarried daughter is not entitled to claim maintenance from her parents unless her inability to maintain herself is attributable to her physical or mental abnormality of injury and that her mere status as an unmarried daughter - whatever be her religion-does not entitle her to claim maintenance under Section 125 Cr.P.C.

However, the said decision does not deal with the evolution of Section 125. As we have already discussed above, placing reliance on *Nanak Chand's* case, while enacting 1973 Cr.P.C., a deviation is consciously made by the Parliament from 1898 Code. Coming to 1973 Code, unless the child satisfies the precondition of the inability being on account of any physical or mental abnormality or injury, the child who has attained majority and an unmarried daughter are not entitled to get

maintenance. The married daughter has been expressly excluded also from the claim for maintenance from parents; it is the husband who is to maintain her. Therefore, the observation in Noor Saba Khatoon's case regarding the entitlement for maintenance to unmarried daughters of a Muslim parent will not help the petitioners. That observation regarding entitlement of the females for maintenance till they are married can only be read and understood as entitlement for maintenance in the case of female children till they are married, in case they are unable to maintain themselves on account of any physical or mental abnormality or injury.

Learned Counsel appearing for the respondent inviting attention to Article 141 of the [Constitution of India](#) submits that law declared by the Supreme Court is binding on all courts. We have not quarrel with the proposition and we cannot have also. But the question is whether the Supreme Court has declared the law with regard to entitlement of unmarried daughters to claim maintenance for the only reason that they are not married.

8. As we have already held above, Section 125 Cr.P.C. gives an unambiguous picture regarding entitlement of unmarried daughters restricting the scope of inability to maintain themselves on account only of mental or physical abnormality or injury. Placing reliance on the decision of the Supreme Court in *Lt. Col. P.R. Chaudhary v. Municipal Corporation of Delhi* : (2000)4SCC577 , it is further contended that interpretation of law even by way of any obiter by the Supreme Court cannot be brushed aside on the mere assertion that it does not confirm to statutory provisions. The observation of the Supreme Court in Noor Saba Khatoon's case regarding entitlement for maintenance to unmarried daughters is not an interpretation of law by the Supreme Court on the scope and ambit of Section 125 Cr.P.C. The Supreme Court only considered the entitlement of Muslim children who are unable to maintain themselves beyond the age of two years. In that context, laying down the law that the liability to pay maintenance under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is not limited to two years of age, the Supreme Court held that in the case of children, they are entitled to claim maintenance till they attain majority in case they are unable to maintain themselves and in the case of females, till they are married

meaning thereby that in the case of those married daughters, the liability is only of their husbands and in the case of those unmarried, the parents are liable till they are married if such unmarried children are unable to maintain themselves on account of any physical or mental abnormality or injury. The observation made by the Apex Court is thus not the interpretation of law by the Supreme Court on the point. Any observation made by the Supreme Court interpreting the legal provision and laying down the legal position is certainly binding on all courts in India. But a general observation made without reference to the statutory provision has no binding value. It will be profitable to refer to the decision of the Supreme Court itself on such observations, in *Director of Settlements A.P. and Ors. v. M.R. Apparao and Anr.* : [2002]2SCR661 . The relevant portion as appearing at paragraph 7 of the judgment reads as follows:

A judgment of the Court to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An 'obiter dictum' as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case.

In the instant case, the entitlement of an unmarried daughter after attaining the age of majority and belonging to Muslim community was not an issue either raised or decided by the court and hence the observation under reference has no authority as a binding precedent.

9. The next question to be analyzed, in the facts as pleaded in the claim for maintenance, is whether the second petitioner is entitled to claim maintenance. As we have already stated above, unless it is established that the inability to maintain herself is on account of the physical or mental abnormality or injury, she will not be entitled to claim maintenance. From the pleadings, we find that more stress is

given to the mental injury leading to the situation of the child remaining unmarried, on account of the dispute on paternity. That is not the requirement. Unless it is pleaded and established before the court that on account of such mental injury, the child is unable to maintain itself, she cannot maintain a valid claim before the court for maintenance. Since the Family Court has not addressed the issues in the proper perspective, we set aside the order in M.C. No. 413/2002 and remit the matter to the Family Court for fresh consideration, in accordance with law. We make it clear that it will be open to the parties to amend the pleadings and adduce fresh evidence.

10. As far as the declaration regarding paternity is concerned, the main contention is that D.N.A. test conducted as ordered by the Family Court is not foolproof. When the matter was before us, on 23-01 -2008 we passed the following order:

The appellant in M.F.A. No. 985/2002 is not satisfied with the D.N.A. test already conducted. The 1st respondent in M.F.A. No. 985/2002 has no objection even for undergoing another D.N.A. test; if the expenses are met by the appellant. In the nature of the disputes, raised by the appellant we are of the view that a fresh test can be conducted at Hyderabad under the supervision of an Advocate Commissioner deputed from this Court. An amount of Rs. 50,000/- will be the approximate expenses, including travel and boarding of the parties. Accordingly we direct Sri. Cholamarakkar to deposit an amount of Rs. 50,000/- towards such expenses within two weeks from today.

Thereafter, it was submitted before us that the first respondent is not interested in going for another test. In this context, it is also to be noted that Exhibit A2 birth certificate still contains the name of Cholamarakkar as the father. The birth was registered on 07.12.1977, three days after the birth of the child. In such circumstances, we have no hesitation in confirming the declaration granted by the Family Court on the paternity of the second petitioner.

11. As far as the declaration regarding marriage is concerned, we find that the first petitioner has miserably failed in establishing her case before the court. She has no consistent case regarding the factum of the alleged marriage. In 1981 she maintained the position that the marriage took place in 1976. But before the Family

Court, according to her, the marriage took place on 07.02.1974, The person in whose favour the written authorization was executed for entering the contract of marriage namely, Kollencheri Alikutty, being the most competent person to speak of the marriage, was not examined. Before the Family Court, there was no evidence for the authorization given to Alikutty. Exhibit A1 marriage certificate was issued on the basis of the entry in Exhibit X1 register. However, according to Abdul Khader Musliar, Khasi of Juma Masjid, Karinkappara, there was no practice of maintaining marriage register in the Masjid. Exhibit X1 register only shows the amount received at the time of marriage for payment to the Khasi and other employees of the Masjid. When those details are given, the name of the bridegroom and bride is also entered in the register. That register contains other account also. The Family Court further found that the register itself was not kept properly. There is no chronological order for the entries and the disputed entry itself is suspected to be mutilated by spreading ink. Going thus through the evidence, there is every reason to sustain the finding of the Family Court that the entry in Exhibit X1 is not genuine. All that apart, the only person available on the side of the first petitioner at the time of the alleged marriage, admittedly, is one Aboobacker and he too was not examined.

12. In view of the above factual matrix, we are of the view that the Family Court is justified in entering the finding that there is no valid marriage between the first petitioner and the respondent. Therefore, we confirm the said finding.

In the result, M.F.A. 985/2002 filed by Cholamarakkar is dismissed. M.F.A. No. 114/ 2002 filed by Pathumma and Bushra is partly allowed to the extent of declaration that Cholamarakkar is the father of the second petitioner-Bushra. The order in M.C. No. 413/2002 on the file of the Family Court, Manjeri, impugned in R.P.(FC) No. 99/2003, is set aside and the case is remitted to the said court with a direction to dispose of the same, expeditiously. The parties will appear before the court on 29.09.2008.