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Court : Kerala

Decided On : Jul-28-2006

Reported in : I(2007)DMC206; 2006(4)KLT125

Judge : R. Basant, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 125

Appeal No. : R.P.(F.C) No. 68 of 2004

Appellant : Selvan Singh

Respondent : Nagamani

Advocate for Def. : T. Rajasekharan Nair, Adv.

Advocate for Pet/Ap. : Saju S.A., Adv.

Disposition : Petition dismissed

Judgement :
ORDER

R. Basant, J.

1. What defences are and are not available to the children to resist the claim for maintenance under Section 125 Cr.P.C raised against them by their parents? This question arises for consideration in this revision petition directed against an order

passed under Section 125 Cr.P.C by the Family Court directing the petitioners to pay an amount of Rs. 350/- & Rs. 250/- respectively to the respondent herein - admittedly their father.

2. The relationship and status of the parties are not disputed. The claimant-father contended that he is unable to maintain himself and that the petitioners herein, his sons are refusing and neglecting to maintain him.

3. Various contentions were raised. The claimant-father is not unable to maintain himself. The petitioners-sons are not having sufficient means. The claimant-father had neglected and refused to maintain the petitioners herein during their minority and it was their mother who brought them up and educated them. The claimant-father was leading a licentious life discarding the mother of the petitioner. He was living along with two other ladies. The petitioners are willing to maintain the claimant, their father on condition that he lives with them. These appear to be the contentions raised before the Family Court.

4. Parties went to trial on these contentions. The claimant examined himself as PW1 and proved Exts.A1 to A8. The 1st petitioner/son examined himself as CPW1. His mother was examined as CPW2. A Pastor who claimed to be related to the petitioner was examined as CPW3 and the purpose of his examination was to indicate that the claimant was living with some other women. Exts.B1 to B20 were marked.

5. The Family Court on an anxious consideration of all these contentions came to the conclusion that though there are indications to show that the claimant-father is having some properties, that is not sufficient to hold that he is not a person unable to maintain himself. It was further found that both the petitioners are having sufficient means. The court found that the prior alleged, indifferent conduct of the father is no defence to a claim for maintenance by him. Finally the court found that an amount of Rs. 350/- & Rs. 250/- respectively from the petitioners herein can safely be accepted as the quantum of maintenance payable to the claimant. Accordingly the Family Court proceeded to pass the impugned order.

6. Counsel for the rival contestants have advanced arguments before me. The learned Counsel for the petitioners raised several contentions.

7. First of all it is contended that the claimant-father was indifferent to the petitioners' mother and the petitioners and that he had not discharged his duties as a dutiful father/husband. This contention is totally irrelevant as the legal status of the claimant as the father of the petitioners is admitted. Liability to pay maintenance under Section 125 Cr.P.C arises from the existence of the relationship and not from the manner in which duties arising from such relationship had been performed by the claimant. Even if it be assumed that the contention that the father was indifferent to his children earlier were correct, that is no defence in a claim under Section 125 Cr.P.C to turn down the claim of the claimant-father.

8. That the claimant is living with two other women is the next contention. Immoral or amoral behaviour of the claimant-father also, even if it is assumed to be true, unless that circumstance indicates his affluence and his ability to maintain himself is again no defence in a claim for maintenance by the father under Section 125 Cr.P.C. The provisions of Section 125 Cr.P.C do not recognize such a defence at all. The second contention must also hence fail.

9. Thirdly it is contended that the petitioners are willing to maintain the claimant father provided he resumes his residence along with them. This again is not a defence available to the children in a claim by the parent under Section 125 Cr.P.C. Law concedes such a defence to a husband when the claim is made by the wife. In no other circumstance, does the law recognize such a defence as a valid one to resist a claim for maintenance under Section 125 Cr.P.C.

10. The only relevant contention which I can see from the volume of materials that have been adduced and the elaborate impugned order is that the claimant is having sufficient means. He has come to the witness box and asserted that he has no income and that he is ailing and aged. The trial court which had the opportunity to see the witness appears to have accepted that assertion. I find no reason to disagree with that conclusion of the Family Court invoking the revisional powers of supervision and correction vested in this Court.

11. The precise and the crucial question is whether the claimant is unable to maintain himself. The burden to show that he is unable to maintain himself is certainly on the claimant. It is well settled that the burden of proof has to be ascertained by looking at the question as to which contestant would fail if there be no evidence to substantiate a particular assertion of fact. Inability to maintain himself must be established by the claimant and therefore the burden certainly is on the claimant to show that he is unable to maintain himself.

12. In Rajathi v. C. Ganesan : 1999 CriLJ3668 the Supreme Court has held that when the claimant-wife takes the witness stand and asserts on oath that she is unable to maintain herself, that assertion on oath is sufficient to shift the burden to the husband to prove that she is having means and is not a person unable to maintain herself. That compassion of the law can certainly be imported when the claim is by the aged and ailing father. I have gone through the materials available. There are unmistakable indications and admissions to show that the claimant father had even subsequent to the present proceedings executed documents transferring title over certain properties which he had in favour of his children including the petitioners herein. I am in these circumstances satisfied that the assertion of such a claimant that he is unable to maintain himself can safely be accepted. He does not appear to me to be a person actuated by any oblique intent. If he were, he is unlikely to execute title deeds in respect of his properties to the petitioners herein during the pendency of the proceedings.

13. What are the properties which the petitioners claim to belong to the claimant and in his possession and from which he actually gets income The learned Counsel for the petitioners was requested to answer this pointed query.

14. The learned Counsel for the petitioners submits that the claimant has 1.76 acres of property which is the subject matter of litigation in O.S.68 of 2000 before the Subordinate Judge, Neyyattinkara. It is not disputed before me that in that case the defendants including the petitioners herein had raised a contention that the claimant father has no title or rights over the property and the property belongs to their mother-CPW2 in this case and her children. Of course, in the suit, the claimant has asserted his title. But in the light of the contention admittedly raised in

that suit, it is evident that he is not getting income actually from those properties. I may hasten to observe that if the petitioners had established that the claimant was having title, possession and earnings from that property, the position would have been different. Except to show that the claimant had raised such averments in the suit, there is no specific assertion even that the claimant is actually deriving income from such property. His assertions contra in the plaint notwithstanding, it is impossible to come to a specific conclusion that the claimant is actually earning income from those items of properties.

15. It is admitted before me that on the basis of the evidence available before the Family Court at the time when it passed the impugned order, the petitioners cannot contend that the claimant-father is actually in possession of any other items of property or is deriving income therefrom. A mere right to property cannot be reckoned as synonymous with 'ability to maintain oneself as understood in Section 125 Cr.P.C. The petitioners/children had not specifically and pointedly taken up a case that the claimant father is having any specific item of property from which he actually derives income.

16. The learned Judge of the Family Court perhaps was not absolutely correct in just stating that the claimant 'has got some landed properties in his possession and derives some income there from' (see para.28). But it is evident that the volume of evidence laid before him and the absence of specific pleas to that effect has misled the Family Court also.

17. It is to resolve this controversy that the learned Counsel for the petitioner was requested by me to specifically enumerate the properties over which according to the petitioners, their father has title, possession, rights and income. I get no better answers than what I have already referred to.

18. Though there is a contention that the petitioners do not have sufficient means, I find no merit or substance in that contention. They are married men having families and they are admittedly supporting such members of their families. If that be so, in respect of the claimant father alone, they cannot be held to be persons not having sufficient means.

19. The claimant has other children, male and female, it is indicated. It is not the law that the claimant must proceed against all his children. He has a choice and so long as his choice is not shown to be mala fide or with ulterior motive, the fact that he can look up to others also is no reason to non suit him, in a claim against some of the children alone. If he is satisfied that his married female children need not be proceeded against, the male children cannot reckon that as a ground on which they can claim absolution from liability. A brother of the petitioners is shown to be employed abroad. No claim has been staked against him by the claimant. That again is no reason to insist that the claimant cannot proceed against the petitioners without junction of that son also in the party array.

20. If that son were offering some meager assistance to the claimant, the claimant need not be expected to endanger his own position by staking a claim against such son also unnecessarily in this proceedings. In any view of the matter, the non junction of some other children is certainly not a sufficient reason to hold that the petitioners are not liable to pay maintenance to the claimant or that the claimant is not a person unable to maintain himself.

21. The quantum of maintenance directed to be paid - at the rate of Rs. 350/- & Rs. 250/- per mensem respectively is also found to be absolutely reasonable, modest and fair. There cannot be a valid contention against the quantum of maintenance fixed.

22. I do not in these circumstances find any merit in the challenge raised in the impugned order. If it is found later on that the claimant is actually in possession of properties and earning income from such properties - on the strength of the orders in legal proceedings which appear to have been initiated already, the petitioners shall certainly be entitled to seek alteration of the order of maintenance passed by the Family Court.

23. With the above observations, this revision petition is dismissed.

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