

Sandha Vs. Narayanan

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Court : Kerala

Decided On : Feb-16-1999

Reported in : II(1999)DMC411

Judge : K.A. Mohammed Shafi, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125 and 125(4); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 488(4)

Appeal No. : Crl. R.P. No. 22 of 1996

Appellant : Sandha

Respondent : Narayanan

Advocate for Def. : P.V. Kunthikrishnan, Adv.

Advocate for Pet/Ap. : Sunny Mathew, Adv.

Disposition : Revision allowed

Judgement :

K.A. Mohammed Shafi, J.

1. The 1st petitioner in M.C. No. 106/93 on the file of the Family Court, Kozhikode is the revision petitioner.

2. The revision petitioner alongwith her three children filed the M.C. before the Family Court claiming maintenance from the respondent under Section 125 of the Criminal Procedure Code. The Family Court after trial by order dated 16.2.1995 directed the respondent to pay maintenance to petitioners 2 to 4, children of the 1st petitioner and the respondent at the rate of Rs. 200/- to petitioners 2 and 3 and at the rate of Rs. 150/- to the 4th petitioner per month from the date of the award and disallowed the claim for maintenance made by the 1st petitioner by accepting the contention of the respondent that the 1st respondent is not entitled to maintenance as she is living in adultery. This revision petition is filed by the 1st petitioner challenging the finding that she is not entitled to maintenance from the respondent.'

3. The facts that the marriage between the revision petitioner and the respondent was in the year 1981, petitioners 2 to 4 in the M.C. were born in that wedlock and they were living happily till the date of 1992 are admitted. The petitioner has contended that subsequently the respondent began to ill-treat her and at last left her house asking her to get Rs. 25,000/- from her father and thereafter the respondent neglected to maintain the revision petitioner and the children.

4. But the respondent has contended that the revision petitioner has been living in adultery and on 17.8.1992 she was caught red-handed by him in a compromising position with a neighbour one Babu. According to him, every day he goes to his work in the morning and returns in the evening and on that day when he returned at about noon as he was not well, he found the revision petitioner and that Babu in a compromising position inside his house. He has also contended that hearing the hue and cry the neighbours gathered and R.Ws. 2 and 3 had also seen the revision petitioner and Babu naked and in such a compromising position. He further contended that on that day itself he left the revision petitioner in her house. Therefore, according to him, the revision petitioner is not entitled to any maintenance from him under Section 125 of the Criminal Procedure Code since she is living in adultery.

5. The lower Court accepted the case of the respondent that the revision petitioner is living in adultery and negatived her claim for maintenance from the, respondent.

6. The revision petitioner has contended that the allegation made by the respondent is a cock and bull story created by him with the help of his neighbours and friends in order to escape from his liability to pay maintenance to the revision petitioner and therefore, the lower Court is in manifest error in finding that she is not entitled to maintenance from the respondent. The Counsel for the revision petitioner vehemently submitted that even if the case of the respondent that the revision petitioner has committed an act of adultery as alleged by him is accepted for the sake of arguments, that single act of adultery will not disentitle the revision petitioner from claiming maintenance from the respondent under Section 125 of the Cr.P.C.

7. It is clear from the evidence of RWs 1 to 3 that apart from contending that the revision petitioner has committed an act of adultery and she was caught red-handed, the respondent has not adduced any evidence to establish that the revision petitioner was living in adultery. Sub-Section (4) of Section 125 is an exception to Section 125(1) of the Cr.P.C. which lays down that the wife is not entitled to receive any maintenance from her husband under Section 125 if she is living in adultery. It has to be noted that the provisions of Section 125(4) disentitle the wife from claiming maintenance from her husband if she is living in adultery and not if she has committed adultery.

8. The phrase 'living in adultery' used in Section 488(4) of the Cr.P.C, 1898 which is akin to Section 125(4) of the present Cr.P.C. has been considered by various High Courts in India and have taken the uniform view that living in adultery denotes a continuous course of conduct or living in the state of quasi permanent union with the adulterer. In the decision in *Ma Mya Khin v. N.L. Godenho*; AIR 1936 Rangoon 436, the Rangoon High Court has observed as follows: Emphasis must be laid upon the words 'living in adultery'. The words used are not 'committed adultery' and there is clearly a great distinction between 'committing adultery' and 'living in adultery'. 'Living in adultery' denotes a continuous course of conduct and not isolated acts of immorality. One or two lapses from virtue would be acts of adultery but would be quite insufficient to show that the woman was 'living in adultery', which means, so far as I understand the expression, that she must be living in the state of quasi permanent union with the man with whom she is

committing adultery.

9. In the decisions in *Lakshmi Ambalam v. Andiammal*, AIR 1938 Mad. 66 and *Kista Pillai v. Amirthammal*, AIR 1938 Mad. 833, the Madras High Court has held that living in adultery is something different from leading an unchaste life and unless the wife is actually living in adultery at or about the time of the application, she is not disentitled to obtain maintenance and continued adulterous conduct and not occasional lapses from virtue constitutes sufficient reason for refusing maintenance.

10. In the decision in *Subramaniam v. Pannakshiammal*, AIR 1958 Mysore 41, a Division Bench of the Mysore High Court after adverting to various decisions of several High Courts in India from ILR 30 Mad. 332 (D), *Patala Atchamma v. Patala Mahalakshmi*, held that 'it is not a stray act or two of adultery that disentitles a wife from claiming maintenance from her husband; but it is a course of continuous conduct on her part by which it can be called that she is living an adulterous life that takes away her right to claim the said maintenance.'

11. In the decision in *Nesamma v. Hentri*, 1961 KLT 964, this Court after considering the decisions of several High Courts has held that an-occasional lapse from virtue, or immoral conduct long before the time maintenance is applied for does not disentitle a wife for relief under Section 488 of Cr.P.C. 1898 and observed as follows:

'The provision that the wife is disentitled to maintenance if she is 'living in adultery' means that the husband can withhold his aid only when her adulterous conduct has continued for some length of time suggesting thereby that she has found another albeit less honourable haven from the chill winds of penury.'

12. In the decision in *Mercy v. Varghese*, 1968 KLT 154, this Court has held that 'living in adultery means something different from leading an unchaste life. One or two lapses from virtue would be acts of adultery but would be quite insufficient to show that the woman was living in adultery.'

13. In the decision in *Kasthuri v. Ramasxvamy*, 1979 CrL. L.J. 741, while construing the phrase 'living in adultery' used in Section 125 of the CrL.P.C, the Madras High Court has observed that 'The term 'living in adultery' has now been consistently held to mean an outright adulterous conduct where the wife lives in a quasi-permanent union with the man with whom she is committing adultery.'

14. In the decision in *Narayanan Nair v. Karthiyayini*, 1983 MLJ (CrL.) 115 the Madras High Court has observed as follows:

'As already stated, even assuming for a moment,.that the respondent had committed adultery with Kunni Raman on that day, it does not affect the merits of the case for maintenance, because it was only a single incidence and it cannot be construed as 'living in adultery'. There is no evidence on the side of the husband that after that incident she has been continuously living with her paramour.'

15. It is clear from the consistent view taken by the various High Courts referred to above that the phrase 'living in adultery' used in Section 125 of the present Cr.P.C. and in Section 488(4) of the Cr.P.C, 1898 contemplates a continuous course of conduct on the part of the wife with the adulterer or paramour as the case may be and a single act of unchastity or a few lapses from virtue will not disentitle the wife from claiming maintenance from her husband under Section 125 of the Cr.P.C.

16. The Counsel for the respondent relying upon the decision of this Court by a Single Judge in *Benta Wilson v. Wilson*, 1988 (2) KLT 597=1 (1989) DMC 79, argued that the determination whether the woman is living in adultery cannot be on a numerical basis and it cannot be contended that there is a limit beyond which it will become adultery and until then it will not. Therefore, according to him, in view of the fact that the revision petitioner had sufficient opportunity to continue her adulterous living since the respondent leaves the house in the morning and returns in the evening, the fact that the respondent found the revision petitioner in a compromising position on that particular day establishes from the facts and circumstances of the case that the revisionpetitioner was living in adultery in this case.

17. As already noted even though it is contended by the respondent that the revision petitioner has been living in adultery, apart from alleging and adducing evidence to prove that she was found indulged in sexual intercourse with one Babu on one occasion, there is nothing on record even to suggest that she has been continuously indulging in sexual intercourse with Babu or anybody else so as to establish that she is living in adultery as contemplated under Section 125(4) of the Cr.P.C. In the decision reported in 1988 (2) KLT 597 relied upon by the Counsel for the respondent also it is held that the question to be considered is whether the adulterous act complained of is a sporadic one or whether it is a way of life with the woman and it is not the number of times when the offence is committed, that determines that fact.

18. Therefore, it is clear that the evidence adduced by the respondent in this case to establish that the revision petitioner has been living in adultery which disentitles her from claiming maintenance under Section 125(4) of the Cr.P.C. falls short of the standard prescribed under law. Hence the lower Court was in manifest error in disallowing the claim for maintenance made by the revision petitioner against the respondent under Section 125 of the Cr.P.C.

19. The Counsel for the respondent relying upon the decision in *Pathumma v. Muhamtned*, (1986) 2 SCC 585, argued that this Court cannot interfere with the finding arrived at by the lower Court on a question of fact under Section 125 of the Cr.P.C. based on the evidence on record by exercising its revisional jurisdiction under Section 401 of the Cr. P.C. and substitute its own finding.

20. This argument advanced by the Counsel for the respondent is besides the point involved in this case. The revision petitioner has not canvassed before this Court to re-appraise the evidence and to enter its own finding on evidence as against the finding arrived at by the lower Court. But the petitioner has only contended that the finding arrived at by the lower Court accepting the evidence on record is contrary to the settled position of law and illegal and being a question of law can be considered by this Court by exercising its revisional jurisdiction under Section 401 of the Cr. P.C. Therefore, this contention raised by the respondent is also not tenable. Hence in reversal of the finding of the lower Court I find that the

revision petitioner is entitled to maintenance from the respondent under Section 125 of the CrI.P.C.

21. The next point to be considered is what is the quantum of maintenance to which the petitioner is entitled from the 'respondent. The lower Court has found that there is nothing to show that the revision petitioner has got means of her own for her maintenance and the respondent's case that she is an agricultural worker getting Rs. 35/- per day is not at all substantiated by any material evidence. From the evidence on record it is clear that the above finding arrived at by the lower Court is based on proper appreciation of the evidence on record. No evidence is adduced by the respondent in this revision petition also to prove that the revision petitioner has got any means of her own for her livelihood.

22. Though the revision petitioner had alleged that the respondent is doing contract work by employing 5 to 8 workers and is getting a monthly income of Rs. 6,000 / - and also he has got properties yielding an income of Rs. 7,000 / - per mensem, the lower Court found that the revision petitioner has not established those allegations. After considering the respondent's contention that he is a daily labourer getting Rs. 50/- to 55/- per day and he is an able bodied and healthy person, the lower Court found the respondent will be earning at least Rs. 1,500/- per month with daily wages of Rs. 75/-. That finding of the lower Court with regard to the income of the respondent appears to be fair and sound considering the evidence on record. The lower Court has directed the respondent to pay Rs. 200/- each to petitioners 2 and 3 and Rs. 150/- to the 4th petitioner per mensem as maintenance. Considering the means of the respondent and the needs of the revision Petitioner, I find a direction to pay Rs. 300/- per mensem as maintenance to the revision petitioner by the respondent will be just and proper in this case. Hence this revision petition is allowed and the respondent is directed to pay maintenance to the revision petitioner at the rate of Rs. 300/- per mensem for 16.2.1995, the date of the order passed by the lower Court, over and above the maintenance awarded to the children-petitioners 2 to 4 in the by the lower Court.