

Dr. Ratan Chand Mathur Vs. Durga Devi

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Court : Rajasthan

Decided On : Feb-03-1987

Reported in : 1987(1)WLN651

Judge : Jas Raj Chopra, J.

Appeal No. : S.B. Cr. Misc. Petition No. 462 of 1984

Appellant : Dr. Ratan Chand Mathur

Respondent : Durga Devi

Judgement :

Jas Raj Chopra, J.

1. This petition is directed against the order of the learned Judicial Magistrate No. 4, Jodhpur dated 19-10-1984 whereby the learned lower court has held that the petitioner be sentenced to one month's imprisonment for every default of Rs. 100/- . In this case, Rs. 5,472/-were due against the petitioner as maintenance allowance and therefore, the petitioner has been sentenced to 54 months' imprisonment.
2. Aggrieved against this judgment, the petitioner has filed this petition.
3. The petitioner has submitted that after this case was remanded back this court vide its order dated 28-8-1984, he has filed an application before the learned lower

court under Section 125(3) Cr. PC signifying his desire to maintain his wife on the condition of her living with him. According to him, his application should have been enquired into by the learned Magistrate but the learned Magistrate has dismissed his request without enquiring into that application. He has further submitted that although he has contracted the second marriage but his second wife has expired and, therefore, now he wants to maintain his wife by keeping her with him. According to the petitioner, this order of the learned lower court is illegal and contrary to law. The petitioner has submitted that he has crossed the sexual age and, therefore, there is no question of his having sexual mentality towards his wife. According to the petitioner, the learned lower court has even failed to call his wife to enquire from her whether she is ready to live with him. He has submitted that the order under challenge is violative of Article 21 of the Constitution because no person can be deprived of life and personal liberty except according to the procedure established by law and it is his fundamental right to have his wife with him and if she denies her society to him then that will affect his life adversely. In support of his contention that an enquiry should have been held, he has placed reliance on a decision of the Allahabad High Court in *Laxmi Narain v. State* : AIR1959 All556 where in it has been observed as under:

The provision in Section 488(3) that the Magistrate may issue a warrant notwithstanding the husband's offer to maintain his wife, itself contemplates that the offer has been made before the issue of warrant. The surest way of ensuring that the husband has been afforded an opportunity of making such an offer before a warrant is issued by issuing a notice to him to show cause why a warrant should not be issued. The provision in Sub-section (6) to Section 488 also indicates thus a notice should be given to the husband and an enquiry should be made in his presence before issuing a warrant. The Magistrate must have evidence to satisfy himself that a warrant should be issued. An order passed by a Magistrate without issuing a notice and holding an enquiry is illegal.

4. The petitioner has submitted that the observations of the learned Magistrate about his mental sexual hunger and about the content of his wife that there is a danger to her life if she goes and lives with her husband is without basis. There is no evidence on record to substantiate these observations. However, he has

admitted that he contracted a second marriage and his second wife died in the year 1973 and so, he is now entitled to have the company of his first wife.

5. Mr. A.R. Mehta, learned Counsel appearing for the non-petitioner has submitted that the petitioner has not been paying maintenance since the year 1953 without intervention of the Court and even now, as per this petition, Rs. 5,472/- are in arrears upto 31-12-79 and after that, the arrears of 7 years amounting to Rs. 8,400/- have become due. This is his fourth case. His earlier three cases regarding limitation, maintainability of the petition and plea of payment have been rejected by this Court. According to him, this petition can only relate to the fact as to whether petitioner should be sent to prison, for non-payment of Rs. 5,472/- as the arrears of maintenance due against him, or not because in the petitions filed by the petitioner, no other plea was taken and this court while upholding the contention of the non-petitioner that Rs. 5,472/- are due to be paid to her by the petitioner has held that the petitioner is liable to be sent to the civil imprisonment but as the learned lower court has not specified the period of imprisonment, the case was remanded back only to specify the period of sentence and that has been done now. According to him, the petitioner has some issues from his second wife and he left the non-petitioner as early as in the year 1951 and his request to have her company in the year 1987 is not at all genuine. Moreover, when she has sought the relief of the arrest of the petitioner, she feels that if she goes to live with the petitioner, there is a danger to her life.

6. I have considered the rival submissions made at the Bar. It has been observed by this Court in SB. Criminal Misc. Petition No. 165 of 1984 (Dr. R.C. Mathur v. The State of Rajasthan and Ors.), decided on 29-8-84 that it has not been disputed that a sum of Rs. 5,472/- are due against the petitioner as maintenance allowance payable to his wife. The only point left before this Court was whether the order is defective because the period of sentence has not been specified therein. After the case was sent back to the learned lower court, it heard both the parties and came to the conclusion that the period of civil imprisonment should be 54 months because for each month's default, one month's simple imprisonment should be imposed. It is true that when the case was remanded back to the learned lower court, the petitioner moved an application that he is ready to

maintain his wife on the condition of her living with him. Ordinarily, such a request should have been enquired into but in this particular case, no enquiry was needed because of the explanation appended to Section 125(3) Cr. P.C. which provides that if a husband has contracted marriage with another woman or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him. It is admitted case of the petitioner that he has contracted the second marriage and his second wife died in the year 1973. These proceedings are pending against him from the year 1974 and he has made this request to maintain his wife on condition of her living with him in the year 1987 i.e. 13 years after the institution of these proceedings. More over the claim of arrears relates to a period upto 31-12-79. The question to maintain now has no bearing on these arrears. The law does not provide that the first wife has a right to refuse the company of her husband only till the period the second wife is alive. The words used in the explanation to the Section 125(3) Cr. PC are that if a husband has contracted the marriage with another woman, the wife has a right of refusing to live with her husband. So far as keeping the mistress is concerned, as soon as the husband leaves the mistress, the husband can claim the company of his wife.

7. It has been held in AIR 1960 Punjab 221 that a wife who refuses to live with her husband on account of his remarriage is, therefore, not prevented by Sub-section (4) from claiming maintenance allowance under Sub-section (1). In AIR 1953 Nag 133, it has been observed that it has to be regarded as just ground for her refusal to live with him since his remarriage. It has been observed in (1973) 2 Cut WRI 161 that if the wife is living separate from her husband on account of his second marriage or keeping a mistress in the house and if the husband does not maintain her, then that would amount to neglect or refusal to maintain, entitling the wife to an order for maintenance from the court. In (1978) Pun. LJ (Cr.) 20, it has been held that second marriage even if it is with the consent of the first wife is sufficient for her refusal to live with the husband. Likewise, Andhra Pradesh High Court has held in 1980 Cr. LJ 376 that the second marriage by a husband is a valid ground for the wife's refusal to live with him even though a decree for restitution was previously obtained by him against her but could not be executed and hence, he contracted a second marriage.

8. In this case, the petitioner is not living with his wife since 1951. Their Lordships of the Supreme Court have held in AIR 1974 SC 1488 that if the husband marries another wife it would be a good ground for the refusal of the wife to live with the husband. The argument of the petitioner Dr. R.C, Mathur about the applicability of Article 21 of the Constitution is quite curious. It is no body's fundamental right that if a man contracts the second marriage, still he can ask his first wife to live with him. The denial of the society by the wife in such circumstances cannot be held to jeopardise the life of any body nor it affects the liberty and, therefore, this argument has no legs to stand.

9. The petitioner filed an application after the arguments were heard and concluded. In this application, he has stated that he should be afforded legal aid in view of the Supreme Court judgment in AIR 1986 SC 991. This ruling does not help him. He is already represented by a lawyer. His Lawyer has appeared before the Court and has submitted that the case will be argued by the petitioner himself and that was the request precisely made by the petitioner on 12-1-1987 and that is how, he has argued this petition. As the petitioner is represented by a lawyer, who has not withdrawn his power so far he needs no legal aid.

10. The petitioner has further submitted that the file of Criminal Misc. Petition No. 20 of 1974 be summoned. This request was made by him in this context that the learned Magistrate while passing the order of maintenance under Section 488 Old Cr. P.C. has held that such a maintenance is payable by him till he retires and after that, the order can be modified. He was at liberty to furnish the certified copy of that order. No such pleading was taken by him when the case came up earlier before this Court against the order passed by the learned Magistrate. Rather, this Court has observed that the petitioner had admitted that Rs. 5,472/- are due against him towards the maintenance payable to non-petitioner Smt. Durga Devi. Now, it is too late for him to challenge that.

11. The petitioner has further submitted in his application that this is a past-heard case of K.S. Lodha, J. Actually, the case was listed before K.S. Lodha, J. for issuing some interim order. It has not been marked as a part-heard case by K.S. Lodha, J. and, therefore, this request does not appear to be genuine. No such

request was made by the petitioner when the case was listed before me as well as before the Hon'ble M.C. Jain, J.

12. The petitioner has also a grouse against the counsel for the non-petitioner. This is not the appropriate forum to settle that grouse. If the petitioner has been threatened by a counsel, he should make a complaint to the Bar Council about the behaviour of an Advocate. In this view of the matter, the application filed by Dr. R.C. Mathur, after the arguments were heard and concluded has no force and it is hereby rejected.

13. It is not in dispute that a sum of Rs. 5472/-are due against the petitioner towards maintenance payable to the non-petitioner up 31-12-1979. The learned lower court has sentenced the petitioner to 54 months imprisonment. I feel that this sentence is too harsh and so, a composite sentence for this entire amount should be passed.

14. In the result, this petition has partly succeeded. IT be order of the learned lower court that Rs. 5472/- are due to non-petitioner Smt. Durga Devi as maintenance from the petitioner Dr. Ratan Chand Mathur, is upheld. However, the sentence of 54 months imposed against the petitioner for nonpayment of the aforesaid amount of maintenance by the learned lower court is reduced to 12 months simple imprisonment. It is further ordered that if the petitioner Dr. Ratan Chand Mathur deposits the amount of arrears maintenance of Rs. 5,472/- at any time during the period of his custody, he may be released forthwith or if he deposits this amount prior to his being taken into custody, he may not be arrested.

15. The record of this case be sent to the learned lower court for proceeding with the matter in accordance with law.