

Eswaran Vs. Pichayee and ors.

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Court : Chennai

Decided On : Feb-26-1998

Reported in : II(1998)DMC147

Judge : M. Karpagavinayagam, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 125(3) and 127(2)

Appeal No. : Cr. R.C. No. 871 of 1996 and CrI. M.P. No. 3875 of 1996

Appellant : Eswaran

Respondent : Pichayee and ors.

Advocate for Def. : S. Kanniah, Adv.

Advocate for Pet/Ap. : C. Rajagopalan, Adv.

Disposition : Revision dismissed

Judgement :

M. Karpagavinayagam, J.

1. This is a case, in which the unfortunate wife and two children of the petitioner, who are the respondents herein, have been driven from pillar to post in the process of claiming maintenance for them for the past nine years, from the

petitioner herein, who claims himself as a practicing Advocate and who never allowed them to get even a single pie, despite the orders passed by various Courts at various stages.

2. The petitioner, the husband, in a bid to continue his task, seeks the help of this Court, to see that no amount is ever paid to the respondents, the wife and children, till the end, through this revision, challenging the order in M.C. No. 4 of 1996 dated 25.4.1996 directing the petitioner to pay a sum of Rs. 200/- per month to the first respondent, the wife and Rs. 150/- per month to second and third respondents, the sons each. Insofar as the second respondent, first son is concerned, the award of maintenance was restricted from 13.4.1989, the date of application to 2.10.1991, the date on which he attained majority.

3. The facts leading to the presentation of this revision before this Court, as could be seen from the records, could be summarized as follows :

The petitioner Mr. Eswaran married the first respondent Pichayee at Shri Sabtharisheeswarar Swami Devasthanam at Thiruthalaiyur village on 31.7.1973. Even before the marriage the petitioner was moving closely with the first respondent, with the result, the first respondent became pregnant. Within three months from the date of marriage, that is, on 3.10.1973, the first son by name Premkumar, the second respondent herein was born. On 22.8.1980 the first respondent again delivered a male child, Rajeswaran, the third respondent.

4. Upto 1981 they lived together and thereafter, the first respondent alongwith her children, the other respondents were driven out from the matrimonial home. Since the petitioner deserted and neglected to maintain the respondents, efforts were taken to come to a settlement between the parties through Panchayatdars. However, all these ended in failure.

5. On 24.12.1987 the petitioner-husband sent a notice to the first respondent- wife to give consent for divorce on the ground of desertion. Then, on 8.8.1988 the petitioner filed a petition in H.M.O.P. No. 72 of 1988 under Section 13(l)(b) of the Hindu Marriage Act, before the Sub-Court, Trichy, requesting to pass a decree for divorce, on the ground that the first respondent's conduct was questionable and

she deserted the petitioner for the past several years.

6. On 14.3.1989 the first respondent filed a counter in the said H.M.O.P. stating that the marriage between her and the petitioner held on 31.7.1973 could not be dissolved, that she was beaten and driven out, that both the children were born to her through him, that after she was driven out with the children, the petitioner, who was summoned in a Panchayat, admitted the marriage and the paternity of the children and agreed to settle and land and house in favour of her and that subsequently, he did not keep up his promise.

7. She further stated in the counter that the petitioner married another woman second time and gave birth to some children.

8. When the above H.M.O.P. for divorce was pending, on 20.3.1989, the first respondent-wife sent a notice to the petitioner claiming maintenance. On 30.3.1989 the petitioner-husband sent a reply stating, that she is not entitled to maintenance and so, he need not pay the same.

9. Therefore, on 19.4.1989 the first respondent, the wife, for herself and on behalf of her two children, the second and third respondents filed a separate petition claiming maintenance from her husband in M.C. No. 15 of 1989 before the Judicial Magistrate, Musiri.

10. The petitioner, being an Advocate, practising in the local Court, requested for transfer of the said case to the Court of Judicial Magistrate, Kulithalai. Therefore, on 3.7.1989 the maintenance proceedings in M.C. No. 15 of 1989 on the file of the Judicial Magistrate, Musiri, was transferred to the Court of Judicial Magistrate, Kulithalai.

11. The learned Judicial Magistrate, Kulithalai took the case on file in M.C. No. 25 of 1989. On 16.11.1989 the petitioner-husband filed a counter in the above case contending that already he had filed a petition in H.M.O.P. No. 72 of 1988 before the Sub-Judge requesting to dissolve the marriage, that the marriage between him and the first respondent, which took place on 31.7.1973 was performed out of compulsion and that the children were not born to him, but bom due to her contact

with some other man and as such, she is not entitled to maintenance.

12. Thereafter, on 12.1.1990 he filed a petition in Crl. M.P. No. 167 of 1989 before the Judicial Magistrate, Kulithalai, requesting for the blood test of the children to be compared with the blood of the petitioner and the first respondent.

13. On 11.6.1990 the petitioner was directed by the lower Court to deposit the amount required as fee for the test to be conducted in the Institute at Guindy.

14. In pursuance of the order, the petitioner and the respondents were sent to the Institute, for blood test on two occasions. Since a letter was received from the Forensic Science Department that the paternity test could not be undertaken for want of essential chemicals, the required test was not conducted.

15. Since the maintenance proceedings were pending for a long time, the wife filed a petition for interim maintenance in M.P. No. 446 of 1991 before the learned Judicial Magistrate, Kulithalai. On consideration of the merits of the said petition, after hearing both parties, by the order dated 2.5.1991 he allowed the claim of the wife directing the husband to pay Rs. 250/- per mensem as interim maintenance and however, rejected the said claim made on behalf of the children.

16. The petitioner-husband, having aggrieved over the order of interim maintenance in favour of the wife, filed a revision in Crl. R.C. No. 31 of 1991 before the Sessions Court at Trichy. The learned Sessions Judge by the order dated 28.8.1992, while dismissing the revision, reduced the amount of Rs. 250/- into Rs. 150/- per month as interim maintenance.

17. As against this order, the petitioner filed a petition under Section 482, Cr. P.C. in Crl. O.P. No. 1223 of 1993 before this Court on 5.2.1993 and the same was admitted. The above petition came up for final disposal on 19.1.1995. After hearing both parties, this Court dismissed the petition and directed the lower Court to dispose of the maintenance petition within six months.

18. Thereafter, the maintenance proceedings in M.C. No. 25 of 1989 on the file of the Judicial Magistrate, Kulithalai was transferred to the Court of Judicial Magistrate, Thuraiyur, who took the case on file in M.C. No. 4 of 1996 on

11.3.1996.

19. While the maintenance proceedings were pending, the petitioner filed a suit in O.S. No. 138 of 1996 on the file of the District Munsif's Court, Thuraiyur, for declaration that the first respondent is not his wife and the other respondents were not born to him. While the said suit was pending, the enquiry was commenced before the learned Judicial Magistrate, Thuraiyur in the maintenance proceedings and all the witnesses on both sides were examined till 23.4.1996.

20. After hearing both sides, the learned Judicial Magistrate, Thuraiyur, by his order dated 25.4.1996 allowed the maintenance application in M.C. No. 4 of 1996 and passed an award directing the petitioner to pay Rs. 200/- per mensem from the date of the application to the wife, the first respondent herein and Rs. 150/- for the second respondent till the date of his attaining majority and Rs. 150/- for the third respondent from the date of the application. This order is under the challenge in this revision before this Court.

21. Mr. Rajagopalan, the Counsel for the petitioner would press into service the following submissions, in order to show that the impugned order is liable to be set aside:

(1) The petitioner, even before the enquiry was commenced in the maintenance proceedings, filed an application for blood test and the same was allowed. In fact, the petitioner was directed to deposit the amount and accordingly, the amount was deposited. However, without subjecting to the blood grouping test and without giving an opportunity to the petitioner to prove that the children were not born to the petitioner by means of blood test, the learned Magistrate hurriedly passed an award of maintenance, which is illegal.

(2) The Civil Court passed a decree in the suit for declaration that the wife is not a legally wedded wife and the children were not born through him. This finding is binding on the Criminal Court. Therefore, the impugned order passed by the learned Judicial Magistrate granting maintenance to the respondents would not be valid in law.

(3) During the course of enquiry, the petitioner filed a petition in order to show that the first respondent-wife is already employed in the District Noon Meal Scheme Center and she has got sufficient means to maintain herself, requesting the Court to issue summons to the Regional Officer, Noon Mean Centre, Trichy, to produce documents which would reveal that the first respondent is employed there. This application was also dismissed. Due to the failure to give opportunity to summon the relevant records to prove the case of the husband, the impugned order suffers with the incurable infirmity.

22. In support of the above submissions, he cited several authorities, which could be dealt with later.

23. Arguing contra, Mr. S. Kanniah learned Counsel appearing for the respondents, would also cite the various authorities in support and justification of the impugned order.

24. I have given my anxious consideration to the submissions made by the respective Counsel and gone through the records called for from the lower Court.

25. At the outset, I shall mention that the perusal of the lower Court records and other documents filed before this Court in this revision would give a shocking revelation. The facts culled out from the lower Court records and the adjudication done by the various Courts earlier including this Court would reflect several disquieting and disturbing features.

26. The petitioner, who is stated to be a practising Advocate both in Civil and Criminal Courts in Trichy District, has from the beginning resorted to the process of indulging in the act of suppressing vital materials before the lower Courts at various levels and this Court as well. The consistent attitude of the petitioner, which reflects his mind in not giving respect and regard for the law as well as the Courts. Therefore, before considering the grounds of revision urged by the Counsel for the petitioner, it is better to refer those agonising and anguishing factors, which are as follows:

(i) The petitioner, in the year 1988 filed a petition in H.M.O.P. No. 72 of 1988 against his wife before the Sub-Court, Trichy claiming for divorce on the ground of desertion. While the said O.P. was pending, the wife filed a petition for maintenance against the husband, the petitioner on 19.4.1989. During the pendency of the said maintenance proceedings, the petitioner filed a suit in O.S. No. 138 of 1996 on the file of the District Munsif's Court, Thuraiyur seeking for declaration that the first respondent was not his wife and the children were not born to him.

The prayer in H.M.O.P. No. 72 of 1988 and the prayer in O.S. No. 138 of 1996 filed in different Courts would reveal that the petitioner claimed two contradictory reliefs from two different Civil Courts at two different stages. The unfortunate thing is that the petitioner did not mention about the pendency of the H.M.O.P. filed in 1988 in O.S. No. 138 of 1996.

(ii) On 19.4.1989, the wife, the first respondent herein filed a petition claiming maintenance for herself and for the children in M.C. No. 15 of 1989 before the Judicial Magistrate, Musiri. At the instance of the petitioner, who is practising in the lower Court, the case was transferred to the learned Judicial Magistrate, Kulithalai and re-numbered as M.C. No. 25 of 1989 on 3.7.1989.

Again, the case was transferred on 11.3.1996 to the file of Judicial Magistrate, Thuraiyur, who took the case on file in M.C. No. 4 of 1996. The witnesses were examined on 28.3.1996, 11.4.1996 and 23.4.1996. While the examination of the witnesses were going on, the petitioner-husband on 3.4.1996 filed a suit in O.S. No. 138 of 1996 before the District Munsif for the declaration. There is no reason as to why the petitioner filed such a suit before the District Munsif, when the maintenance proceedings already commenced and about to be concluded.

Moreover, in the said suit the petitioner has not mentioned about the fact that already the maintenance proceeding has reached the concluding stage. The wife being the defendant filed the counter and written statement on 4.7.1996 and 15.11.1996. On 11.2.1997 the first respondent was not present. On the said date the District Munsif decreed the Suit ex parte after examining the petitioner. He did not mention in the deposition about the conclusion of the maintenance

proceedings by the order dated 25.4.1996.

In fact, the prayer in the suit is for declaration and permanent injunction restraining the Judicial Magistrate from continuing the maintenance proceedings. Thus, the fact that the adjudication in maintenance proceedings pending before the Magistrate had already been over has been suppressed, while the ex-parte decree was passed on 11.2.1997.

Furthermore, the impugned order awarding maintenance dated 25.4.1996 has been challenged by the petitioner in the present revision in July, 1996 itself. The above revision after numbered came up before this Court on 5.2.1997. Thereafter, the above case was periodically adjourned.

Thus, it is clear that on the date when ex-parte order was passed on 11.2.1997, the revision against the maintenance order is pending, before this Court. However, the pendency of the revision has not been brought to the notice of the District Munsif in his deposition on 11.2.1997.

Despite the pendency of the revision, the petitioner on suppressing the fact of final order having already been passed by the Magistrate and the revision having already been filed before this Court, managed to obtain the judgment and decree for declaration and permanent injunction restraining the further proceedings in the maintenance case in M.C. No. 4 of 1996. Virtually, the petitioner obtained order of injunction encroaching the jurisdiction of the lower Court as well as this Court, which is quite unfortunate.

(iii) During the pendency of the maintenance proceedings, the wife filed a petition for interim maintenance in M.P. No. 446 of 1991. After hearing both parties, the learned Judicial Magistrate ordered interim maintenance of Rs. 250/- per month by the order dated 2.5.1991. This was challenged by the petitioner in the revision before the Sessions Court in Crl. R.C. No. 31 of 1991. On 28.8.1992 while dismissing the revision, the learned Sessions Judge reduced the interim maintenance Of Rs. 250/- into Rs. 150/-.

The petitioner having aggrieved over that order came t j this Court under Section 482, Cr. P.C. and filed an application in Crl. O.P. No. 1223 of 1993. On 5.2.1993 this Court admitted the petition and ordered conditional stay in Crl. M.P. No. 661 of 1993 directing the petitioner to pay Rs. 3,450/-, the arrears of maintenance to be deposited on or before 8.3.1993. Though it was agreed before this Court on behalf of the petitioner that the arrears amount would be paid as per the conditional order, the said order has not been complied with. Even though the main petition in Crl. O.P. No. 1223 of 1993 was admitted on 5.2.1993, and despite the failure of the petitioner to deposit the amount as per the conditional order, the matter came up for final disposal only after two years, that is, on 19.1.1995. This Court on hearing both the Counsel appearing for the respective parties, dismissed the application by confirming the order of the Sessions Court and directed the lower Court to dispose of the trial in maintenance case within six months from the date of receipt of that order.

It is painful to see that this aspect of having filed the revision against the order of maintenance in the Sessions Court and the disposal of the said Crl. O.P. filed under Section 482, Cr. P.C. by this Court against the order of the Sessions Court has not been mentioned before this Court either in the affidavit filed by the petitioner or in the list or chronological events filed by the Counsel for the petitioner.

Furthermore, there is no explanation as to why the conditional order passed by this Court has not been complied with. There is also no details as to whether those amounts of interim maintenance have ever been paid at all. This Court is able to find out the earlier proceedings before this Court only through the records called for from the lower Court.

Neither the Counsel for the petitioner nor the records produced by the petitioner would say anything about the same. In fact, Mr. Rajagopalan, who is appearing at present for the petitioner, did appear in those proceedings also. When such is the situation, I am not able to see the reason as to why these facts have not been given in the chronological events filed by the Counsel for the petitioner.

The most paining factor is that though the petition filed under Section 482, Cr. P.C. by the petitioner against the order of the Sessions Court arising out of the interim maintenance was pending for about two years, the Counsel for the petitioner did not think it fit to advise the petitioner to comply with the conditional order passed by this Court. Even if the petitioner, who is an Advocate, has not cared to obey the direction of this Court for the reasons best known to him, the Counsel for the petitioner, in my view, should have advised the petitioner to comply with the order.

If in the opinion of the Counsel that the non-compliance of the order was due to inability, the Counsel at least ought to have brought to the notice of the Court about the earlier proceedings arising out of the interim maintenance and given reasons for such non-compliance. The non-compliance as well as the non-furnishing of the reasons for the same by the petitioner as well as the Counsel for the petitioner would not be, in my opinion, befitting to their status.

(iv) The impugned order awarding maintenance was passed on 25.4.1996 by the learned Judicial Magistrate, Kulithalai. As mentioned earlier, the petitioner filed a revision in this Court and the same is pending from July, 1996 onwards. When this matter came up before me on 5.2.1997, the Counsel asked for adjournment and accordingly, the case was adjourned. Ultimately, Mr. Loganathan, who appeared earlier in this revision for the petitioner, on 31.3.1997 argued the case for admission and undertook to pay the arrears of maintenance within a week. After recording his undertaking, the matter was adjourned. Or. 9.4.1997 when the matter came up Mr. Loganathan, represented that no payment was made as per the undertaking, since Civil Court passed an ex- parte decree on 11.2.-1997 granting injunction in criminal proceedings in M.C. No. 4 of 1996.

He further submitted that the petitioner is making arrangement to engage some other Counsel. This would show that even the Counsel for the petitioner, who gave undertaking to pay arrears on behalf of the petitioner, was not allowed to fulfil the undertaking, by the petitioners. That is how, the Counsel who appeared earlier has been changed and a fresh vakalat has now been given to the present Counsel Mr. Rajagopalan, who appeared for the petitioner in the earlier proceedings as referred above.

(v) The wife on securing the award of maintenance dated 25.4.1996, filed a petition for enforcement of order of maintenance in Crl. M.P. No. 681 of 1996 before the Judicial Magistrate, Musiri, under Section 128, Cr. P.C. In the said proceedings, the petitioner mentioned in his counter about the ex-parte order in the suit dated 11.2.1997 for declaration and injunction. On the basis of this, the petition filed by the wife was dismissed by the Judicial Magistrate on 20.3.1997. Even in this counter, the petitioner has not brought to the notice of the Executing Court about the pendency of the revision before this Court challenging the maintenance proceedings, out of which the execution proceedings in Crl. M.P. No. 681 of 1996 would arise.

27. The above factors would reveal that the petitioner has never come with clean hands either before the learned Judicial Magistrate or before the learned District Munsif or before this Court. Moreover, the past history would also go to show that he never used to give respect for the orders of this Court. This Court could not but feel anguish over the consistent attitude of the petitioner, who is a practising Advocate and who is expected to render assistance to the Court.

28. However, regardless of the above features, this Court is conscious of the fact that it is called upon only to decide the propriety, correctness and legality of the impugned order passed by the lower Court in M.C. No. 4 of 1996, in the light of the submissions made by the Counsel for the petitioner in this revision.

29. The first ground of attack on the impugned order by the Counsel for the J petitioner is the failure to give an opportunity for conducting blood test. It is contended by the Counsel that having allowed the application for blood test and directed the petitioner to deposit the amount, the learned Magistrate ought not to have refused the permission later for conducting the blood test.

30. No doubt it is true that on 11.6.1990 Crl. M.P. No. 167 of 1989 filed by the petitioner was allowed. In pursuance of the said order, it is to be noted that the petitioner and the respondents were sent for the blood test. But, due to want of chemicals, the test was not conducted then. Subsequently, on receipt of a letter from the Forensic Science Department, again the petition was posted for enquiry. On 29.5.1991, on the date of the enquiry, as seen from the records, the petitioner

was not present, when the matter was called in the forenoon. It was passed over and again in the afternoon the Magistrate called the matter. However, the petitioner was absent even in the afternoon. Therefore, the learned Judicial Magistrate had dismissed the application by giving reasons. The lower Court's order is as follows:

'xxx xxx xxx xxx xxxx'

31. Admittedly, the above order dated 29.5.1991 had not been challenged. The examination of the witnesses commenced from 6.2.1996 onwards and ended on 23.4.1996. During this period also the petitioner never took steps for blood group test. Therefore, it cannot be contended, in the light of the above fact situation, that the opportunity had been denied.

32. Moreover, as laid down by the Apex Court, the parties cannot be compelled for subjecting themselves for blood test in the proceedings under Section 125, Cr. P.C. It is held in *Goutam Kundu v. State of West Bengal*, : 1993 CriLJ3233 , as follows :

'From the above discussion it emerges :

- (1) that Courts in India cannot order blood test as a matter of course;
- (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained;
- (3) there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act;
- (4) the Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman;
- (5) No one can be compelled to give sample of blood for analysis.'

In view of what is stated above, the first ground urged by the learned Counsel for the petitioner fails.

33. The second ground is that the subsequent decree passed by the Civil Court is binding on the Criminal Court and that therefore, the order of maintenance is not enforceable. In order to substantiate the said ground, the Counsel for the petitioner has cited the following decisions :

(1) Bhagwant Singh v. Surjit Kaur, ;

(2) Krishna Pal v. Ashok Kumar, 1982 HLR 478;

(3) State of Mysore v. Nagappa, AIR 1968 Mys 12; and

(4) K.N. Nachiappa Chettiar v. K.R. Sundaram, 1982 Cri. L.J. 149.

34. In order to see whether these decisions would be applicable to the present case, this Court has to necessarily reiterate the facts of the case to a certain extent.

35. The wife filed an application for maintenance in the year 1988. After the enquiry is over by examining all the witnesses, the learned Judicial Magistrate, on consideration of the materials placed before him, awarded the maintenance by his order dated 25.4.1996. Against this order, as pointed out earlier, the petitioner filed this revision before this Court in July, 1996 and the matter was argued before this Court for admission on 5.2.1997 itself.

36. It is seen from the documents, the ex-parte order for declaration and injunction was passed on 11.2.1997. The fact remains that in the mean time, the wife on entering appearance in the suit filed a counter and a written statement. Since she was not present on 11.2.1997, the learned District Munsif, on the very same day, after examining the petitioner as PW 1, passed an ex-parte decree.

37. In view of the fact that the decree though ex-parte was passed subsequently, the petitioner under Section 127(2), Cr. P.C. has necessarily to file an application before the Court in which the maintenance order has been passed, for cancellation or modification or variation. Section 127(2) provides thus :

'Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.'

38. In view of the wordings in the section, the order of maintenance will operate till it is vacated or cancelled under Section 127(2), Cr. P.C. In other words, until the original order under Section 125, Cr. P.C. is exempted, its validity survives.

39. In *Bhupinder Singh v. Daljit Kaur*, : 1979 CriLJ198 , this position has been settled. The relevant observation is this :

'Section 125 is a provision to protect the weaker of the two parties, namely, the neglected wife. If an order for maintenance has been made against the deserter it will operate until vacated or altered in terms of the provisions of the Code itself. If the husband has a case under Section 125(4), (5) or Section 127 of the Code it is open to him to initiate appropriate proceedings. But until the original order for maintenance is modified or cancelled by a higher Court or is varied or vacated in terms of Section 125(4) or (5) or Section 127, its validity survives.'

40. In view of the above observation, unless the petitioner filed an application before the Court, which passed an order awarding maintenance under Section 127(2), Cr. P.C., to cancel the said award or the strength of the Civil Court decree, it cannot be submitted that the moment the decree is passed, the order of maintenance is cancelled.

41. Section 127(2) would specifically provide that the Magistrate before making the order of cancellation or variation, shall consider whether such a decree has been passed by a competent Civil Court and the decision taken in the decree would necessarily touch upon the finding by the Criminal Court, so as to cancel or vary the award of maintenance. Till it is done, the order awarding maintenance holds good, which is enforceable under law.

42. Incidentally, yet another interesting question arises in this case. As narrated earlier, the ex-parte decree was passed by the District Munsif not only for

declaration but also for injunction restraining the Criminal Court from going on with the maintenance proceedings. The question is this : Whether Civil Court has got jurisdiction to grant such an injunction restraining the maintenance proceedings before the Magistrate ?

43. The above question has already been discussed and answered in various decisions of this Court as well as the other High Courts. In Krishnammal v. Mahadeva Iyer, 1973 L.W. (Crl.) 266, it is held that 'the Civil Court has no jurisdiction to set aside or vary an order passed by the Criminal Court under Section 488, Cr. P.C., though 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), Crl. P.C to cancel or vary its own order in accordance with the decision of the Civil Court.'

44. Inderaje Malinga Naika v. Marati Kaveri, ILR XXXMadras 400, a Division Bench of this Court would hold as follows :

'No suit will lie for an injunction to restrain proceedings under an order made by a Magistrate under Section 488 of the Code of Criminal Procedure.'

45. In Ranjit Kumar v. Swaha Rani, , the Calcutta High Court has held as follows :

'The matter can be viewed from another angle/Under Section 41 of the Indian Evidence Act the judgment and decree passed in the said civil suit is a conclusive proof of the fact that the opposite party has been divested of her legal status of a wife but not of the reasons for which she has been so divested. Under Section 125(5) of the Code the Magistrate can cancel an order of maintenance on proof that any wife, in whose favour an order has been made under that section, is living in adultery, or that without sufficient reasons she refused to live with her husband or that they were living separately by mutual consent. In the instant case the contention was accopted by the Civil Court while passing the decree. If the petitioner intended to have the order of maintenance cancelled on that ground it could be only on proof of the said fact. Needless to say, the fact was required to be proved independently in a proceeding for that purpose as under Section 41 of the Evidence Act the fact of desertion, on which the decree of divorce is rested will

not be a conclusive proof.'

46. Despite the settled law, it is unfortunate on the part of the learned District Munsif to have granted such an order of injunction, which will not hold good in law. However, in this case, the award of maintenance dated 25.4.1996 is still valid in law, since it is not yet cancelled under Section 127(2), Cr. P.C.

47. Admittedly, till date there is no such application filed by the petitioner under Section 127, Cr. P.C. Moreover, under the said section the question, whether the maintenance order is liable to be cancelled or not, has to be considered only by the Court, which passed the maintenance order. This cannot be decided by the Executing Court in the petition filed by the wife requesting for the enforcement of the maintenance order, as held in : 1979 CriLJ198 (supra). The Executing Court is merely to consider whether the order of maintenance has been passed under Section 125, Cr. P.C. If any order of cancellation is brought to the notice of the Executing Court under Section 127(2), then the Executing Court cannot enforce the award of maintenance.

48. The Civil Court decree would not have the effect of the order under Section 127(2), Cr. P.C. which could be passed only by the Court which awarded maintenance. In this case, it is brought to the notice of this Court that when the first respondent herein filed E.P. No. 681 of 1996 on 17.5.1996 requesting for the enforcement of the maintenance order dated 25.4.1996, the Executing Court dismissed the petition on 20.3.1997 merely on the ground that during the pendency of the execution proceedings before the said Court, the Civil Court passed an ex- parte decree on 11.2.1997. Though the revision has not been filed against this order by the first respondent herein, since, in my opinion, the said order is patently illegal, I feel that I shall invoke the suo motu revisional power in this revision to set aside the said order. So, in the light of the view taken as referred above, the second ground urged by the Counsel for the petitioner also fails.

49. Yet another ground urged on behalf of the petitioner is that his request to summon the Regional Officer, District Noon Meal Scheme, in order to establish that the wife, the first respondent herein, is working there, had been rejected.

50. It would be relevant in this context to note that a separate application was filed for the said relief in Crl. M.P. No. 1929 of 1996 on 18.4.1996 and the same was heard by the lower Court from both the parties. On merits, it is seen, the said application was dealt with and dismissed by the lower Court on 18.4.1996 itself in a separate order. If really, the petitioner had aggrieved over the same, he would have very well approached the appropriate Forum to challenge the said order. Admittedly, there is no revision against the said order.

51. Moreover, even in the said order passed in Crl. M.P. 1929 of 1996 dated 18.4.1996, I am not able to find any illegality because even according to the wife, she is working in the Noon Meal Centre. The case of the wife is, by adducing relevant materials before the lower Court, that though she was working in the Noon Meal Centre, the income derived from that job being a meagre amount would not be sufficient to maintain herself and her children. In such a situation, the said application was considered and dismissed.

52. Therefore, in the light of the above discussion with reference to the points submitted by the Counsel for the petitioner, I am of the considered opinion that the petitioner has not made out any case in this revision in his favour.

53. On the contrary, Mr. Kanniah, the Counsel for the respondents would submit that the Trial Court on an elaborate consideration of the evidence of the witnesses examined on behalf of the wife and Exs. P1 to P8 and the evidence let in by the husband, the petitioner, has given clear reasons for coming to the conclusion that the wife as well as the children, the respondents are entitled to maintenance.

54. Ex. P5 is the proceedings in H.M.O.P. No. 72 of 1982 filed by the petitioner for divorce. Ex. P8 is the reply sent by the husband to the wife for the demand for maintenance. In both these documents, the petitioner admitted the marriage. RW 2, who was examined on the side of the petitioner, would also admit the marriage' between the petitioner and the first respondent.

55. It is the case of the petitioner that the wife was living in adultery. In a case of adultery, it is well established law that the husband has to prove the same by examining independent witnesses. In this case, no such material had been

adduced. On the other hand, the first respondent proved the birth of the two children, the other respondents through Exs. P2 and P3. In these documents, the petitioner's name is mentioned as the father.

56. On a careful consideration of all these materials, the lower Court correctly found that the respondents are entitled to maintenance as referred above, as the Apex Court would hold in *Pathumma & Anr. v. Muhammad*, : 1986 CriLJ1070 , the factual conclusions, arrived at by the lower Court in Section 125 proceedings, on the basis of the evidence available on record, cannot be disturbed in the revision in the absence of any serious illegality.

57. Even according to the wife, her consistent stand from the beginning was that she became pregnant prior to marriage and only after three months from the date of marriage the first child was born through the petitioner. Taking advantage of this submission by the first respondent, it is contended on behalf of the petitioner that the first respondent's character was bad and that the marriage was performed between the petitioner and the first respondent without disclosing the pregnancy to the petitioner.

58. This cannot be, in my view, a ground to hold that the finding by the lower Court is wrong, as held in *Johnson v. Jayapushparani & Anr.*; , though the pregnancy was caused prior to the marriage, if the access between the husband and wife prior to the marriage is proved, it could be taken that the child was born to them and the said child could be considered as legitimate child.

59. Therefore, in the light of the foregoing discussion, I am of the considered opinion that the none of the contentions urged by the Counsel for the petitioner does have any substance and the same are liable to be rejected and accordingly they are rejected.

60. The incidental question that would arise in this case is, whether it is necessary for the first respondent to approach the Executing Court by filing another application, in view of the decision of this Court mentioned in the earlier paragraphs for setting aside the order of dismissal in execution proceedings.

61. My emphatic answer is 'not necessary'. When a similar situation arose before this Court in Crl. R.C. No. 463 of 1996, Yoosuf Rawther v. Ashref & Anr., I had an occasion to hold that this Court could direct the husband to pay all the arrears that would accrue till date.

62. In that view of the matter, though the order of dismissal of the execution petition in E.P. No. 681 of 1996 dated 20.3.1997 has not been challenged by the first respondent herein, I set aside the said order, since I could correct the illegality by invoking the revisional jurisdiction of this Court.

63. With reference to the arrears of maintenance amount, it is held in Shanmugham v. Andal, 1989 LW 513, by this Court, that if the application filed under Section 125(3), Cr. P.C., claiming arrears of maintenance is within the period of limitation, the Court can pass an order directing payment of the entire arrears of maintenance upto the date of such an order.

64. In view of the legal position, as settled by this Court, I direct the petitioner to pay the entire arrears of maintenance till date to the respondents, as they are entitled as per the findings of the lower Court.

65. With these observations, the revision is dismissed. Consequently, Crl. M.P. No. 3875 of 1996 stands dismissed.

Criminal Revision Case No. 871 of 1996

When the matter was posted for judgment today, the Counsel appearing for the petitioner was absent in the forenoon. The Counsel for the respondent was present. So, the matter was passed over and again taken up at 2.15 p.m. However, at 2.15 p.m., the petitioner's Counsel remained absent. The matter was passed over in order to give an opportunity to the petitioner to seek time for payment. Since he is not available, this Court is constrained to pass an order directing the petitioner to pay the arrears of the amount till date within two months from today.

Post the matter on 27A1998 for verification about the payment.

