

Ghasitu Vs. Smt. Durga Devi

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Court : Himachal Pradesh

Decided On : Sep-28-1979

Reported in : 1980CriLJ885

Judge : T.U. Mehta, C.J.

Appellant : Ghasitu

Respondent : Smt. Durga Devi

Judgement :

ORDER

T.U. Mehta, C.J.

1. The petitioner who is the husband of the respondent has filed this revision application against the order of maintenance passed by the Court of the Judicial Magistrate Kangra at Dharamsala under Section 125 of the Cr.P.C. in case No. 214/76 of his file. The point involved in this revision application is whether the 'explanation' saying that if 'A husband has contracted marriage with another woman, it shall be considered a just ground of wife's refusal to live with him' applies only to Sub-section (3) of Section 125, or covers within its ambit even the original order of maintenance passed under Sub-section (1) of that section.

2. Short facts of the case are that the petitioner Ghasitu Ram performed his second marriage with respondent Smt. Durga Devi in the year 1939-40. At that time his previous wife was also living with him. The petitioner and the respondent

lived together for some time. The contention of the respondent wife is that she was often maltreated by the petitioner husband and ultimately two years before the institution of these proceedings for maintenance under Section 125, Cr.P.C. she was beaten and driven out. As against this, the contention of the petitioner husband is that since last about 35 years, the respondent wife has deserted him, and has gone away to her parents' place, and has not returned back to him in spite of repeated attempts on his part. Thus the case of the petitioner husband is that he has not neglected or refused to maintain the respondent. The petitioner has also drawn the attention of the Court to the fact that even during the course of the original proceedings, he made an offer to receive her and is still willing to receive her back to his house and to maintain her.

3. The learned Magistrate who has tried this petition, has come to the conclusion that the respondent wife has not been able to prove satisfactorily that she was driven out by the petitioner husband about two years before the institution of the proceedings. He has further recorded his finding that the version of the petitioner husband that the respondent wife left his house since last about 35 years prior to the institution of the proceedings, should be accepted.

4. During the course of the original proceedings, a contention seems to have been raised that even if it is believed that the respondent wife left the house of the petitioner husband about 35 years before the institution of these proceedings, the said action of the respondent wife to refuse to live with her husband was completely justified in view of the fact that the husband had already contracted marriage with another woman who was living with him. This contention of the wife has found favour with the learned Magistrate and hence this revision application.

5. The main contention which was raised on behalf of the husband by his learned Advocate was that the learned Magistrate was not legally justified in applying the provisions of the explanation to the main proceedings of the maintenance conducted under Sub-section (1) of Section 125 of the Code, because the explanation obviously applies to Sub-section (3) of that Section which contemplates the execution of the order of maintenance already passed under Sub-section (2). In other words the argument advanced was that the question

whether the wife had a just ground for her refusal to live with her husband is the question which would arise to be considered only when the order of maintenance passed by the learned Magistrate under Sub-section (1) is sought to be executed and not before that.

6. For the above contention, reliance was placed on several decisions including the decision given by Patna High Court in Subhagi Devi v. Murli Pradhan reported in AIR 1968 Pat 139, wherein the following pertinent observations are found to have been made by a learned single Judge of that High Court:

I am, therefore, of the opinion that at the stage when the Magistrate is considering whether an order under Sub-section (1) should be passed or not, it is not relevant to consider whether there is just ground for the wife to refuse to live with him. What the Magistrate had to consider at this stage is whether the husband, though possessed of sufficient means, has neglected or refused to maintain his wife, and not whether the wife has just ground for refusing to live with her husband, because, there may be cases where the husband does not neglect or refuse to maintain his wife even though she may have just ground for refusing to live with him. To put it shortly, the jurisdiction of the criminal court to make an order of maintenance against a person having sufficient means arises only upon proof of neglect or refusal on his part to maintain his wife. In the absence of such proof as in the instant case, it is not open to the Magistrate to make any order of maintenance under Sub-section (1) of Section 488.

This decision was given when the provisions of the old Code of Criminal Procedure were in existence. But that aspect of the matter would not make any difference in view of the fact that even under the provisions of Section 488 of the old Code of Criminal Procedure the explanation, similar to the one at present found under Section 125, was already there. The Patna High Court while taking the above view has placed reliance upon the decision given by Calcutta High Court in Smt. Bela Rani Chatterjee v. Bhupal Chandra Chatterjee reported in : AIR1956 Cal134 , wherein it is held that the mere fact of a second marriage, cannot ipso facto, establish such neglect or refusal within the meaning of Sub-section (1) of Section 488, Cr.P.C. for a man may marry a second time and still not

refuse to maintain his first wife.

7. I find myself unable to accept the above referred Patna view as correct interpretation of Section 125 Cr.P. C. It is undoubtedly true that the explanation, which says that if a husband has contracted a marriage with another woman, it shall be considered to be a just ground for his wife's refusal to live with him, is attached to the second proviso to Sub-section (3) of Section 125 and arises out of the same, because, this second proviso says that if the husband offers to maintain his wife on condition of her living with him, and if she refuses to live with him, the Magistrate should consider the ground for refusal stated by her, and should thereafter pass proper orders after considering whether the wife's refusal to live with her husband is based on a just ground. Thus even though there would be no difficulty in holding that the explanation is attached to and arises from, this proviso, if Section 125 is read as a whole, there would be absolutely no scope for any doubt that this explanation governs the whole of the Section 125 with the result that at the time of considering the question whether the husband has neglected or refused to maintain his wife as contemplated by Sub-section (1), the Court would; be justified in considering whether wife's refusal to live with her husband was based on a just ground or not. The reason for taking this view is that if after the order of maintenance is passed, and at the stage when it is sought to be executed the wife can reject the husband's offer to reside with him on a ground which can be considered to be just, there is no reason why even before the said order is passed, the wife would not be entitled to show that she had a just ground to refuse to go and reside with him.

8. It cannot be gainsaid that even during the main proceedings of maintenance conducted under Sub-section (1), it is open to a husband to show that he is prepared to take his wife with him, and to maintain her, provided she agrees to reside with him, as is done by the petitioner husband in this case. In fact, in every petition of maintenance a husband is entitled to make such an offer with a view to show that he does not intend, or has never intended, to neglect his wife. As observed by Hegde J. in *II. Syed Ahmad v. Naghath Parveen Taj Begum* reported in AIR 1958 Mys 128, the Court has uniformly accepted the view that a husband can in an application under Section 488 Cr.P.C. take a plea that he is willing to

maintain his wife if she lives with him. The High Court of Punjab has endorsed this view in *Smt. Ranjit Kaur v. Avtar Singh* reported in AIR 1960 Punj 221, and has rejected the contention that the proviso enabling the husband to make an offer to his wife to live with him, which is attached to Sub-section (3), cannot be invoked with regard to the proceedings under Sub-section (1), in the following words:

If this argument of the learned Counsel is accepted, it would mean that in an application under Section 488 Cr.P.C. for fixation of maintenance the Court is not entitled to take into consideration the offer made by the husband to maintain his wife on the condition of her living with him even if such an offer is made in good faith and even though the wife has no just cause to stay away from her husband. This, as was observed by Hegde, J. in *Syed Ahmed v. N.P. Taj Begum* would make the whole section look ridiculous.

Now, if once it is believed that in the main proceedings conducted under Sub-section (1) of Section 125, the husband can make an offer to his wife to maintain her provided she resides with him, it is difficult to hold that it is not open to the wife to reject such an offer on a just ground. It is, therefore, apparent that the Explanation in question though attached to the second proviso of Sub-section (3), becomes applicable even when the main proceedings under Sub-section (1) are under consideration.

9. There is one more reason for taking the above view. This reason is provided by the words of Sub-section (4), which is in the following terms:

No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

It is obvious that this Sub-section (4) governs the whole of Section 125 for the grant of maintenance because it provides for certain conditions which would disentitle the wife to receive the maintenance from her husband. One such condition is that if she refuses to live with her husband without sufficient reasons, she would not be entitled to any maintenance. This condition pre-supposes the willingness of the husband to keep the wife with him, and maintain her. It is,

therefore, apparent that the husband can show such willingness even during the proceedings conducted under Sub-section (1) of Section 125, and the wife can refuse to reside with the husband for sufficient grounds. The grounds which are 'just', are always 'sufficient'. In *Ramji Malviya v. Smt. Muniii Devi Malviya* reported in : AIR1959 All767 , the Allahabad High Court has taken such a view. In a recent decision by a Division Bench of the Allahabad High Court, reported in : AIR1971 All138 *Mehrunnisa v. Noor Mohamad*, it was held that Sub-section (4) of Section 488, which was *pari materia* with Sub-section (4) of Section 125, is to be read not only with Sub-section (1) and Sub-section (5), but also with Sub-section (3). In this connection reference may also be made to the decision given by the Supreme Court in *Deochand v. State of Maharashtra* reported in 1974 Cri LJ 1089 wherein without discussing the question whether the explanation attaches only to Sub-section (3), the Supreme Court has applied it even to the main proceedings under Sub-section (1) of Section 488 of the old Code.

10. In view of the above position, I need not cite several decisions of High Courts in India taking the view that mere fact that husband has contracted a second marriage *ipso facto* entitles the wife to claim separate residence and maintenance under Section 488, and that the proof of neglect or refusal by the husband to maintain is not necessary. Such a view has been taken in many cases including the case of *Mohorunnissa v. Abdul Salam* reported in 1974 Cri LJ 78 (Andh Pra), and I would not hesitate to endorse it.

11. A contention was raised by the learned Advocate of the petitioner husband that the explanation applies in cases wherein the husband is found to have contracted second marriage after marriage with the wife with whom the dispute under Section 125 of the Code arises. I do not find any justification for taking such a view because on plain reading of the 'explanation' it is evident that in all cases where a husband has contracted marriage with another woman whether before or after his marriage with the woman who claims maintenance under Section 125, the explanation applies with full force. It was contended that the wife who marries a particular person after knowing that he had already married woman who was residing with him, would not be entitled to any maintenance under Section 125 without proof of neglect or refusal for the simple reason that she has connived at

the existence of another woman with her husband. This argument is not justified looking to the intention of the legislature in framing the section. Obviously the section was enacted to give protection to the females who from the weaker section of our society, and intention of the legislature in enacting the explanation was to preserve the dignity of the woman whose husband is found living with another woman. Therefore, in such cases any of the wives of the husband who has indulged in polygamy can refuse to live with him and claim maintenance and separate residence.

12. In view of this, I find no force in this revision application which is hereby dismissed.

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