

K. Subair Vs. Asma and Others

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Court : Kerala

Decided On : Jun-27-2012

Reported in : 2012(3)KLT271; 2012(3)ILR(Ker)238; 2012(3)KLJ243

Judge : K.T. Sankaran & M.L. Joseph Francis

Appeal No. : OP (FC).NO. 70 OF 2011 (R)

Appellant : K. Subair

Respondent : Asma and Others

Judgement :

M.L. Joseph Francis, J.

1. This Original Petition (Family Court), under Article 227 of the Constitution of India, is filed by the respondent in C.M.P.No.748/10 in M.C.141/2008 on the file of the Family Court, Kasaragod. Respondents 1 to 4 herein were the petitioners in that C.M.P.

2. The facts of the case are briefly as follows :

Respondents 1 to 4 herein, being the wife and minor children of the petitioner, were the petitioners in M.C.141/08 on the file of the Family Court, Kasaragod. The said proceedings were initiated by them against the petitioner herein, claiming maintenance under Section 125 of the Criminal Procedure Code, 1973 (for short,

'Cr.P.C.'). In that M.C., the petitioners therein claimed Rs.4,000/- per month, as maintenance. The respondent in the M.C. filed counter. PW1 and RW1 were examined and Ext.A1 was marked before the Family Court. The respondent offered to pay maintenance at the rate of Rs.1,500/- per month each to the first and 4th petitioners. The Family Court observed that the second and third petitioners are with the respondent and they are looked after by him. Accepting the offer of the respondent, the Family Court allowed the M.C. in part and the respondent was directed to provide maintenance to the 1st and 4th petitioners at the rate of Rs.1,500/- per month each from the date of the order, i.e., 28.2.2009. Against the said order, the petitioners 1 and 4 filed R.P.(FC) No.263/09 before this Court and this Court, as per judgment dated 18.3.2010 set aside the order and remitted the matter back to the Family Court for fresh consideration, after affording opportunity to both sides to adduce documentary as well as oral evidence in support of their respective contentions and to dispose of the matter in accordance with law. As an interim measure, this Court directed the respondent to continue to pay the amount awarded by the Family Court as maintenance, at the rate of Rs.1,500/- per month each to the 1st and 4th petitioners, till a final decision is taken. After the remand, the petitioners filed C.M.P.748/10 before the Family Court, under Order VI Rule 17 of the Civil Procedure Code to amend the M.C. petition. The amendment sought for was to enhance the claim of maintenance, from Rs.4,000/- to Rs.20,000/- per month. That petition was allowed by the Family Court, as per order dated 13.10.2010. It is stated in the order that the fact that the enhanced claim was not put forward even in the R.P.(FC) before this Court, is not a ground to reject the prayer. It was also stated in the order that quoting of the provision as Order 6 Rule 17 CPC in a proceeding under Section 125(1) Cr.P.C. is not a ground to refuse the relief. Since the parties need not be driven to another round of litigation, in the interests of justice, that petition was allowed. Against that order, the respondent in the C.M.P. filed this O.P.(FC).

3. The main prayer in this Original Petition (Family Court) is to set aside the order dated 13.10.2010 in C.M.P.No.748/2010 of the Family Court.

4. Heard the learned counsel for the petitioner and the learned counsel for the respondents. Additional Director General of Prosecutions Adv.Sri.K.I.Abdul

Rasheed, Adv.Sri.K.P.Sudheer and Adv.Sri.Jennis Stephen assisted this Court as amicus curiae.

5. The learned counsel for the petitioner submitted that Order 6 Rule 17 of the Civil Procedure Code cannot be invoked in an application filed under Section 125 Cr.P.C. and that Cr.P.C. does not contemplate an application for amendment. The learned counsel for the petitioner submitted that since the case is remanded to the Family Court, the Family Court has no jurisdiction to allow the amendment of the petition in the absence of permission of this Court in the remand order. The learned counsel for the respondents supported the order under challenge.

6. The learned Advocates, who assisted this Court as amicus curiae cited various authorities to show that there is no illegality in the order under challenge.

7. The main object behind the enactment of the Family Courts Act, 1984 (for short, 'the Act') is the establishment of Family Courts to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

8. Under Section 2(d) of the Family Courts Act, "Family Court" means, a Court established under Section 3 of the Act. Section 3 of the Act states that for the purpose of exercising the jurisdiction and powers conferred on a Family Court by the Act, the State Government, after consultation with the High Court and by notification shall establish for every area in the State comprising a city or town whose population exceeds one million, a Family Court.

9. Section 7 is the provision which defines or confers the jurisdiction on the Family Court which reads as follows:

7. Jurisdiction - (1) Subject to the other provision of this Act, a Family Court shall

(i) have and exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(ii) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends. Explanation - The suits and proceedings referred to in this Sub-section are suits and proceedings of the following nature, namely -

(a) a suit or proceedings between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship:

(e) a suit or proceeding for a declaration as to the legitimacy of any person:

(f) a suit or proceeding for maintenance

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall have and exercise

(i) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure 1973 (2 of 1974); and

(ii) such other jurisdiction as may be conferred on it by any other enactment.

10. Section 8 excludes the jurisdiction of all other Courts to deal with all such matters in respect of which jurisdiction has been conferred on the Family Court under the Act. It also provides that every suit or proceeding of the nature referred to in Section 7 will stand transferred to the Family Court wherever a Family Court is established. Section 10 prescribes the procedure to be followed by the Family Courts.

11. It is thus:

10. Procedure generally - (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

Section 18(2) specifically provides that an order passed by the Family Court under Chapter IX of Cr.P.C. shall be executed in the manner prescribed for the execution of such order by that Code, viz., Criminal Procedure Code. Rule 3 of the Family Courts (Kerala) Rules, 1989 provides that all proceedings instituted before Family Court shall be by way of petition, however, in respect of application under Chapter IX of Cr.P.C., the provisions of that Code will apply.

12. A perusal of the relevant provisions of the Act would clearly show that Family Court is a court established with jurisdiction of different nature. Jurisdiction exercisable by the District Court and other Subordinate Civil Courts is to be exercised in accordance with the Code of Civil Procedure and jurisdiction exercisable by the Magistrates - a Criminal Court as per Section 6 of the Code of Criminal Procedure, under Chapter 9 of the Code of Criminal Procedure is to be exercised in accordance with the provisions of that Code.

13. A Constitution Bench of the Supreme Court, in the decision reported in *Narayan Row v. Ishwarlal* (AIR 1965 SC 1818) defined the two expressions, 'civil proceedings' and 'criminal proceedings', as follows :

".....The expression 'civil proceeding' is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed...."

The provisions of Chapter IX of the Cr.P.C. are provisions specifically incorporated into the Code with the aim of preventing vagrancy. Going by the observations of the Supreme Court, it has to be held that a proceeding under Section 125 Cr.P.C. is a criminal proceeding, even though it may not be a proceeding initiated with respect to an offence and with a view to get the respondent punished for an offence. Keeping in view of the above decision and the provisions of the Act already mentioned, a Full Bench of this Court, in the decision reported in *Satyabhama v. Ramachandran* [1997(2) KLT 503 (FB)] held that the Family Court acts as a Criminal Court and not as a Civil Court while disposing of applications filed under Section 125 of the Cr.P.C. in exercise of its jurisdiction under Section 7(2)(i) of the Act.

14. Following that Full Bench decision of this Court, another Full Bench of this Court in the decision reported in *Peter v. Sara* [2006(4) KLT 219 (FB)] held that proceedings under Section 125 Cr.P.C. for maintenance before Family Court is criminal in nature. In view of the above decisions, there cannot be any doubt that in a proceedings under Section 125 Cr.P.C. before the Family Court, the provisions of Cr.P.C. would apply. Therefore, the provisions under Order VI Rule 17 C.P.C. cannot be made applicable for amendment of a petition in a proceeding

under Section 125 of the Cr.P.C.

15. The 2nd proviso to Section 125 of Cr.P.C. for grant of interim maintenance during the pendency of proceedings was inserted in the Cr.P.C. by the Criminal Procedure Code Amendment Act, 2001 (Act 50 of 2001) which came into effect from 24.9.2001. Before that amendment, there was no provision in Section 125 Cr.P.C. for granting interim maintenance.

16. In the decision reported in Smt.Savitri v. Govind Singh Rawat (1985(4) SCC 337), it was held :

"It is true that there is no express provision in the Code which authorises a Magistrate to make an interim order directing payment of maintenance pending disposal of an application for maintenance. The Code does not also expressly prohibit the making of such an order."

In paragraph 5 of that decision, it was further observed :

Chapter IX of the Code contains a summary remedy for securing some reasonable sum by way of maintenance, subject to a decree, if any, which may be made in a civil Court in a given case provided the Personal Law applicable to the person concerned authorises the enforcement of any such right to maintenance. The Code, however, provides a quick remedy to protect the applicant against starvation and to tide over immediate difficulties. Chapter IX of the Code does not in reality create any serious new obligation unknown to Indian social life.

In paragraph 6, it was further held :

Every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim 'ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist.) Vide Earl Jowitt's Dictionary of English Law 1959 Edn. P. 1797). Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary

intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration.

17. In the decision reported in *Shail Kumari Devi and another v. Krishan Bhagwan Pathak* [(2008)9 SCC 632], at paragraph 22, it was held :

So far as 'interim' maintenance is concerned, it is true that Section 125 of the Code as it originally enacted did not expressly empower the Magistrate to make such order and direct payment of interim maintenance. But the Code equally did not prohibit the Magistrate from making such order. Now, having regard to the nature of proceedings, the primary object to secure relief to deserted and destitute wives, discarded and neglected children and disabled and helpless parents and to ensure that no wife, child or parent is left beggared and destitute on the scrap-heap of society so as to be tempted to commit crime or to tempt others to commit crime in regard to them, it was held that the Magistrate had 'implied power' to make such order.

18. In the present case, had the Family Court dismissed the petition for amendment, petitioners could have withdrawn their original application under Section 125 of the Cr.P.C. or allowed the same to be dismissed for default and the petitioners could have filed a second application for maintenance under Section 125 Cr.P.C. claiming a higher amount as maintenance and this procedure would only have entailed further lapse of time and incurring further costs.

19. Section 127 Cr.P.C. empowers the Magistrate to alter or modify the order of maintenance on account of (i) change in the circumstances of the party paying or receiving maintenance or (ii) any decision of a Civil Court. The party entitled to alteration of orders can always move the Magistrate when there is a change of circumstance. If, during the pendency of proceedings under Section 125 Cr.P.C., there is a change in the circumstance, which entitles the petitioner to claim enhanced maintenance and for that purpose, the amendment petition is filed for enhanced quantum of maintenance already claimed, we are of the view that there is no prohibition in allowing that amendment petition. Since there has been no specific prohibition in the Cr.P.C. for allowing the petition for amendment in the

proceedings under Chapter IX and as such, the Family Court cannot be said to have committed any jurisdictional error in allowing the amendment sought for by the petitioners in the M.C. proceedings.

Moreover, there is no restriction in the remand order of this Court prohibiting amendment of the petition. Both parties will get ample opportunity to substantiate their contentions by adducing further evidence. Therefore, no prejudice will be caused to the petitioner in this Original Petition (Family Court) by allowing the amendment. Accordingly, this O.P.(FC) is dismissed, as it is without any merits. We record our deep appreciation for the valuable assistance rendered by all the counsel, including the amicus curiae.

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