Equivalent citations: 1981 CriLJ 110, ILR 1980 KAR 612, 1980 (2) KarLJ 158

Bench: M Patil

Haunsabai vs Balkrishna Krishna Badigar on 13/2/1980

ORDER

1. Being aggrieved by the order dated 16th November, 1978 passed by the Additional Sessions Judge, Belgaum, in Cr. Revision Petition No. 25/1978 setting aside the order dated 3rd July 1978, passed by the Principal Munsiff and J.M.F.C., Hukeri, in Misc. Petition No. 75/76, wife of the respondent has filed this revision.

2. The revision petitioner, wife of the respondent, made a petition under Section 125 of the Criminal Procedure Code claiming maintenance from the respondent, her husband, on the ground that he had ill-treated and driven out of the house and refused to maintain her in spite of being possessed of sufficient means to provide the maintenance. She also alleged, the respondent, her husband, had taken another wife in marriage. She claimed Rs. 150 per month as maintenance.

3. Respondent denied all these allegations and further contended the petitioner had gone to her parents house on her own and had not returned. He also offered to maintain her if she lived with him. Regarding the amount of maintenance claimed, he contended, it was exorbitant.

4. At the hearing of the petition, the petitioner examined herself as P.W. 1. She also examined her father as P.W. 2 and one Basappa as P.W. 3 and another Rajasekaragouda, Police Patil as P.W. 4. Respondent examined himself as D.W. 1 and Hussain Saheb as D.W. 2.

5. On the basis of the evidence before him, the learned Magistrate held, not only respondent had neglected and refused to maintain the petitioner, but he had sufficient means to provide maintenance. He negatived the stand taken by respondent and ordered to pay maintenance at the rate of Rs. 75 per month from the date of the order. Questioning the correctness of the said order, both the respondent and the petitioner preferred revision petitions before the Sessions Judge. The petitioner herein filed Criminal Revision Petition No. 40 of 1978 and the respondent filed Cr. Revn. Petn. No. 25 of 1978. The learned II Additional Sessions Judge to whom the revision petitions were made over for disposal heard the two revisions simultaneously and by a common judgment and order he allowed the Revision Petition No. 25/78 preferred by the respondent and dismissed the Petition No. 40/78 preferred by the petitioner. Being aggrieved the wife has come in revision to this court.

6. Mr. Thipperudrappa, learned counsel appearing for the petitioner argued, the learned Sessions Judge was wrong in interfering with the order made by the Magistrate on reappraisal of the evidence and the order made by the Sessions Judge, therefore, deserved to be set aside. He also submitted the amount of maintenance as awarded by the Magistrate was grossly inadequate and taking into consideration the rise of cost, at least minimum Rs. 150 per month were necessary for bare maintenance of the wife and the same deserved to be awarded. As against that, Mr. B. V. Deshpande, learned counsel appearing for the respondent argued, though ordinarily the revisional court will be slow to interfere with the order made by the Magistrate, but if the appreciation of the evidence is perfunctory and capricious, it is competent for the Sessions Judge to reappraise the evidence and the appreciation of the evidence by the Magistrate being perfunctory, the Sessions Judge had committed no error or illegality by reappraising the evidence and therefore the order passed by the Sessions Judge did not call for any interference. He also argued, the revision was liable to fail on another ground, namely, that the petitioner had neither averred in her petition nor adduced any evidence worth the name to show that she was unable to maintain herself.

7. In view of these contentions, the question that requires to be considered is whether the Sessions Judge had committed an error by reappraising the evidence and reversing the findings of the trial Magistrate.

8. As rightly pointed out by Mr. Deshpande even a cursory glance is sufficient to show that the learned Magistrate recorded no definite finding about the ill-treatment as alleged by the petitioner. He also did not record any definite finding about the alleged second marriage. Though the petitioner alleged ill-treatment by her husband, excepting her bare say, there was no evidence worth the name adduced to show that she was ever, ill-treated. A new ground of ill-treatment was tried to be made out at the enquiry by saying that the mother-in-law of the petitioner was a woman of bad character and she being in the keeping of one Basappa Pavadi, was compelling the petitioner to serve her paramour. This was not the allegation made in the petition. Here again, excepting her bare say, there was no evidence. The evidence on the other hand showed, while Basappa Pavadi was aged about 90 years and the mother-in-law of the petitioner was aged about 75 years. It is rather unimaginable that, at such an advanced age there would be anything like the one suggested by the petitioner. The petitioner, admittedly, did not attend the second marriage of her husband. She was unable to say how she came to know of the second marriage and who told her about it. None of the other witnesses examined on behalf of the petitioner stated about the factum of marriage. However, accepting the hearsay evidence, the learned Magistrate proceeded to observe :

"Though the second marriage was not conclusively proved by the petitioner, the circumstances will justify to show that a teacher who is serving in the villages who has led marital life only for 20 days after his marriage since 1969 is it ever possible for him to live abandoning his wife for so many years :"

It is nobody's case that the second marriage was performed stealthily; the magistrate, however, proceeded to observe :

"It is very difficult to prove the second marriage because such marriages will be celebrated or performed stealthily and nobody will support such type of marriages."

Since the appreciation of evidence by the Magistrate was perfunctory and capricious and the finding regarding the second marriage on the basis of which mainly the Magistrate proceeded to make an order for maintenance was based on hear-say evidence, therefore, the learned Sessions Judge was perfectly justified in reappraising the evidence and recording his own findings both on the question of cruelty and the alleged second marriage. He has found the petitioner had failed to prove the alleged cruelty and neglect and refusal on the part of the husband-respondent. He has also found the petitioner had failed to prove the second marriage, as alleged. There is no denial of the fact that the respondent also offered to maintain the petitioner, if she lived with him. The petitioner having failed to prove the second marriage as alleged by her and there being not any evidence to show the respondent was living with any woman by name Shantha, there were no justifiable reasons for the petitioner to refuse to live with him. Therefore, the Sessions Judge was perfectly right in allowing the revision petition and dismissing the petition for maintenance filed by the petitioner herein.

9. As rightly pointed out by Mr. B. V. Deshpande, the revision of the petitioner has also to fail for the simple reason that the petitioner neither averred nor adduced any evidence worth the name to show that she was unable to maintain herself.

10. Section 125 of the Criminal Procedure Code provides for a speedy remedy regarding the maintenance to a wife, who is unable to maintain herself. The expressions used in clause (a) of sub-section (1) of Section 125 make it clear that if a husband having sufficient means neglects or refuses to maintain his wife who is enable to maintain herself then the Magistrate of the First Class may, upon proof of such neglect or refusal, order the person so neglecting or refusing, to make a monthly allowance for the maintenance of his wife. The expressions "unable to maintain" have been introduced in the amended provisions of Criminal Procedure Code, 1973, Such expressions were not used in the corresponding Section 488 of the old Cr.P.C. In Manmohan Singh v. Mahindra Kaur, (1976 Cri LJ 1664) (All), pointing out the difference and departure from

Section 488 Cr.P.C. 1898 and the provisions of Section 125 of the Criminal Procedure Code, 1973, the Allahabad High Court has held under Section 125(1)(a) the maintenance allowance cannot be granted to every wife who is neglected by her husband or whose husband refused to maintain her but it can only be granted to a wife who is unable to maintain herself. Since the petitioner in the said case did no allege in her petition that she was unable to maintain, it was held the order made by the Court below deserved to be set aside on that ground.

11. In Zubeda Bi v. Abdul Khader, (1978 (2) Kant LJ 143) : (1978 Cri LJ 1555) this Court also took a similar view, and held :

"Where the wife claims maintenance under Section 125, she must positively aver in her petition that she is unable to maintain herself in addition to the facts that her husband has sufficient means to maintain her and that he has neglected to maintain her."

Mr. Thipperudrappa, learned counsel appearing for the petitioner referred to a decision in Abdul Munaf v. Salima, (1978 (2) Kant LJ 453) : (1979 Cri LJ 172) of this Court and argued, attachment of the word 'unable' to the word 'wife' in Section 125(1)(a) of the new Code did not make any difference. All that was intended by use of such expression was that a speedy remedy was available to the wife who is unable to maintain herself to prevent vagrancy. Therefore, the fact that the petitioner did not aver in the petition that she was unable to maintain herself, and did not state so in her evidence, is no ground to reject the petition.

12. It appears, the decision relied upon by Mr. Thipperudrappa has no bearing on the question of law as now raised in this case. Such a contention as raised in this revision did not arise for consideration there. The contention advanced there was that the wife was educated SSLC, healthy and able bodied woman, but was refusing to work and it had therefore to be presumed that she was able to maintain herself Considering that contention, Nesargi, J. observed :

"When the object of the two provisions, i.e., in the two Codes is the same, I am of opinion that the attachment of the word 'unable' to the word 'wife' in Section 125(1)(3) of the new Code does not make any difference. It only means that the speedy remedy is available to a wife who is "unable to maintain herself" so that there should be prevention of vagrancy."

13. Proceeding further, his Lordship also further observed :

"The fact that she has refused to earn for herself may be take into consideration while considering the quantum of maintenance that the husband is liable to contribute towards her maintenance, as is the view expressed by the Supreme Court. But, merely because she refused to earn, it does not mean that she is not at all entitled to maintenance when the clear terms of Section 125(1)(a) of the new Code read with Explanation (b) to Section 125(1)(a) are looked into."

14. The question as raised now in this revision did not arise for consideration there whether it was necessary for the wife to aver positively and prove that she was unable to maintain herself as contemplated under Section 125(1)(a) of the new Code.

15. It cannot also be said that the expressions 'unable to maintain' used by the Legislature in its wisdom were superfluous or they were of no importance as was tried to be maintained by Mr. Thipperudrappa. I do not think the Legislature would have unnecessarily used such expression when they were not in the old Code. In view of the various social measures and the changed conditions of the society, the Legislature in its wisdom has probably thought it necessary that maintenance to a wife as provided under Section 125, Cr.P.C. should be provided only to a wife who is unable to maintain herself or has no sufficient means to maintain herself. The law as it stands has to be enforced, though it may in some cases work hardship on the wives. The petitioner herein having failed to aver positively in her petition and substantiate it from the witness box that she was

unable to maintain herself, the petition will have to fail.

16. In the result and for the reasons stated above, the revision is liable to be dismissed and it is accordingly dismissed.

17. Revision dismissed.