

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.2.2008

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THE HON'BLE MR.JUSTICE P.R.SHIVAKUMAR

CrI.R.C.No.1491 OF 2005

Marimuthu ... Petitioner

vs.

Janaki ... Respondent

Criminal Revision Case is filed against the order passed in M.C.No.4 of 2003 dated 2.9.2005 on the file of Judicial Magistrate No.2 of Ponneri.

For petitioner : Mr.C.R.Dhasarathan

For respondent : Mr.S.Parthasarthy

ORDER

This revision is directed against the order of the learned Judicial Magistrate No.2, Ponneri dated 2.9.2005 made in M.C.No.4 of 2003 directing the revision petitioner herein (husband) to pay maintenance to the respondent (wife) at the rate of Rs.500/- per month from the date of petition.

2. The respondent herein contending that her husband, namely the revision petitioner, neglected and failed to maintain her whereas she was not having sufficient means to maintain herself, filed the above said maintenance case praying for an order directing the revision petitioner to pay her maintenance at the rate of Rs.1,500/- per month.

3. The said petition was resisted by the revision petitioner herein on the ground that the respondent (wife) had withdrawn from the company of her husband without any justification and that subsequently there was a settlement between the parties, pursuant to which both of them mutually agreed to live separately. In order to support the defense case of the revision petitioner, he has relied on a document marked as Exhibit R.1 dated 21.10.2002.

4. The learned Judicial Magistrate No.2, Ponneri after considering the evidence both oral and documentary adduced on either side, came to the conclusion that the respondent herein (wife) was entitled to get maintenance from her husband (the revision petitioner herein), fixed the quantum of maintenance of Rs.500/- per month and passed an order directing the revision petitioner to pay such maintenance from the date of the petition filed under Section 125 Cr.P.C. before the said Magistrate.

5. Questioning the correctness and legality of the said order passed by the learned Judicial Magistrate No.2, Ponneri the present revision has been filed.

6. The learned counsel for the revision petitioner, drawing the attention of the Court to Sub Clause 4 of Section 125 Cr.P.C., contended that a wife who is living away from her husband by mutual consent between the husband and wife, would not be entitled to an order of maintenance under Section 125 Cr.P.C; that even if

an order of maintenance happened to be passed under Section 125 Cr.P.C. earlier in point of time and subsequently they continued to live separately by mutual consent, Sub Section 5 provided for cancellation of such an order of maintenance and that hence, the order of the Judicial Magistrate passed in utter disregard of the said provisions and Exhibit R.1 should be held discrepant, unsustainable in law and liable to be set aside in exercise of the revisional powers of this Court.

7. On the other hand, the learned counsel for the respondent contended that the mutual consent for separate living, as found in Sub clauses 4 and 5 of Section 125 Cr.P.C., to be effective and acted upon by the Court dealing with the petition under Section 125 Cr.P.C. should have been incorporated in a decree or order of a competent Court and otherwise the same would be ineffective.

8. The short point that arises for consideration in this revision is: "whether a mutual consent between the husband and wife evidenced by a document should have been incorporated in a decree or order of a competent Court to be recognized and acted by a Court dealing with a maintenance case under Section 125 Cr.P.C.?"

9. For the sake of convenience, sub Sections 4 and 5 of 125 Cr.P.C. are reproduced as hereunder:-

"(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, 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. (5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

10. A bare reading of the said sub Sections will make it clear that the said provisions did not require the incorporation of the mutual consent arrived between the parties for living separately in any decree or order of a competent Court to constitute a valid defense in a petition under Section 125 Cr.P.C. claiming maintenance. Therefore, this Court is not in a position to countenance the above said argument advanced by the learned counsel for the respondent (wife). As rightly pointed out by the learned counsel for the revision petitioner, the genuineness of Exhibit R.1 has not been disputed by the respondent. Of course, the said document which contains recitals to the effect that each of the parties to the said document was free to contract marriage with the person of his/her choice, the same cannot be construed to be a valid document bringing about the dissolution of marriage. However, clear recitals have been found in the said document evidencing mutual consent between the revision petitioner and the respondent to live separately. The relevant part of Exhibit R.1 is extracted hereunder:- VERNACULAR (TAMIL) PORTION DELETED

11. The said document was dated 21.10.2002. It clearly spells out the mutual consent of the parties to live separately. The learned Judicial Magistrate, without properly appreciating the said document and without applying the principle of law found in Sub-Section 4 of Section 125 Cr.P.C., has erroneously held that the respondent (wife) was entitled to maintenance. The said order passed by the learned Judicial Magistrate, which is against the spirit of the statute and passed in ignorance of the said statutory provision, is definitely infirm and discrepant. The non- application of the said statutory provision to the case on hand by the learned Judicial Magistrate will make his order unsustainable. This Court is satisfied that the said order has got to be set aside in exercise of the revisional powers of this Court.

12. In the result, the revision case succeeds and accordingly the same is allowed. The order of the learned Judicial Magistrate No.2, Ponneri dated 2.9.2005 passed in M.C.No.4 of 2003 is hereby set aside. M.C.No.4 of 2003 shall stand dismissed. Consequently, connected M.P.No.8952 of 2005 is closed. No costs. lan

To

The Judicial Magistrate No.2,

Ponneri.