

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **16.07.2015**

CORAM:

THE HONOURABLE MR.JUSTICE **S.NAGAMUTHU**

CRL.RC.(MD)No.142 of 2012

M.Chinna Karuppasamy : Petitioner

Vs.

Kanimozhi : Respondent

PRAYER: Petition is filed under Section 397 r/w 401 of the Code of Criminal Procedure, to call for the records relating to the order dated 27.01.2012 made in Crl.R.C.No.22 of 2011 by the learned Principal District Judge, Ramanathapuram, set aside the same and confirm the order of the learned Chief Judicial Magistrate, Ramanathapuram, dated 21.09.2011 made in M.C.No.2 of 2010.

[Date of reserving the Judgment - 30.06.2015]

[Date of pronouncing the Judgment - 16.07.2015]

For Petitioner : Mr.G.R.Swaminathan
For Mr.S.Parthasarathy

For Respondent : Mr.G.Prabhu Rajadurai
Legal Aid Counsel

O R D E R

An interesting question, as to whether a woman, against whom a decree dissolving her marriage has been passed by the Civil Court on the ground of adultery, is entitled for maintenance under Section 125 of the Code of Criminal Procedure from her divorced husband, has arisen for consideration.

2. In this case, the respondent herein is the divorced wife of the petitioner. The marriage between them was celebrated on 01.02.1998, as per the Hindu Rites and Customs. Out of the said wedlock, they have got children also. Shortly, after sometime of the marriage, there arose misunderstanding between them and the marital life was not successful. The petitioner alleged that even prior to the marriage, the respondent was living a wayward life, which she continued even after her marriage. In short, according to the petitioner, the respondent was living in adultery. On the said ground, the petitioner filed H.M.O.P.No.571 of 2009, before the Family Court, Madurai, seeking divorce. The respondent remained ex-parte in the case. Consequently, the Civil Court granted decree for divorce dissolving the marriage, precisely on the ground that

the respondent was living in adultery. During the pendency of the said matrimonial dispute before the Family Court, the respondent filed M.C.No.2 of 2010 before the learned Chief Judicial Magistrate, Ramanahapuram, claiming maintenance under Section 125 of the Code of Criminal Procedure, [for brevity, "the Code"], at the rate of Rs.2,500/- per month.

3. Before the Chief Judicial Magistrate, the respondent herein alleged that the petitioner herein had developed illicit intimacy with his sister's daughter, by name, Muthulakshmi and the petitioner wanted consent from the respondent for marrying the said Muthulakshmi, as his second wife. Since the respondent was consistently refusing to give consent, she was harassed and sent out of the matrimonial home, she alleged. She further alleged that the allegation that she was living in adultery, as contended in H.M.O.P.No.571 of 2009, was utter false. She further alleged that despite the decree for divorce granted by the Civil Court, as the divorced wife, she is entitled for maintenance. She further contended that the petitioner is in Government Service with a monthly salary of Rs.15,000/- per month and therefore, he is liable to pay a sum of Rs.2,500/- to her towards her maintenance.

4. During the trial of the said case before the learned Chief Judicial Magistrate, the respondent herein examined herself as PW-1 and as many as three documents were exhibited, i.e., the statement made by the petitioner herein before the police in connection with an enquiry held into a petition presented by the respondent, a copy of the statement made by the respondent before the police and a copy of H.M.O.P.No.571 of 2009. On the side of the petitioner herein, he examined himself as RW-1, wherein he had reiterated his stand that the respondent was living in adultery and that she was not, therefore, entitled for maintenance. One Mr.Muthuramalingam was examined as RW-2, who has spoken about the panchayat held to resolve the matrimonial dispute between the petitioner and the respondent, in which, according to him, Sreethana properties were taken back by the respondent and she expressed her desire to live separately. According to him, EX-P1 is the written undertaking given by the respondent; EX-P2 is the acknowledgement for having taken back the Sreethana properties; EX-P3 is the LIC Policy and EX-P4 is the marriage invitation of Mrs.Muthulakshmi.

5. During the pendency of the trial of the maintenance case, the Civil Court granted decree for divorce in H.M.O.P.No.571 of

2009, on 12.03.2010. Having considered all the above evidences, the Trial Court, by order dated 21.09.2011 dismissed M.C.No.2 of 2010. Aggrieved over the same, the respondent filed a Revision before the learned Principal District and Sessions Judge, Ramanathapuram, in Cr.RC.No.22 of 2011. The learned Principal District and Sessions Judge, by order dated 27.01.2012, allowed the said revision, set aside the order of the Trial Court and directed the petitioner to pay a sum of Rs.1,000/- per month towards her maintenance. Challenging the said order, the petitioner is now before this Court with this Criminal Revision Case.

6. I have heard Mr.G.R.Swaminathan, the learned counsel appearing for the petitioner, Mr.G.Prabhu Rajadurai, the learned Legal Aid Counsel appearing for the respondent and I have also perused the records carefully.

7. In this Criminal Revision Case, the foremost contention of the learned counsel for the petitioner is that once if the Civil Court has granted decree for divorce on the ground that the wife was living in adultery, then, as per sub-Section 4 of Section 125 of the Code, she loses her right to claim maintenance from her former husband. The learned counsel would refer to sub-Section 4 of

Section 125 of the Code to substantiate the said contention. According to him, the term "adultery", as employed in sub-Section 4 of Section 125 of the Code, is applicable even to a divorced wife, whose marriage was dissolved on the ground of adultery. The learned counsel would further submit that so far as the ground of adultery is concerned, the disqualification arising out of the same is everlasting and the said disqualification will not cease to exist, after the woman has changed her course from the path of adultery. He would further submit that the decree, granted by the Civil Court, in the instant case, though is an ex-parte decree, binds the parties as well as the Criminal Court. Thus, according to the learned counsel, the respondent is not entitled for maintenance from the petitioner.

8. Mr.G.Prabhu Rajadurai, the learned counsel appearing for the respondent, would vehemently oppose this Criminal Revision Case. According to him, though an ex-parte decree of divorce granted by the Civil Court is binding on the parties, the same would not bind the Criminal Court, while considering the question of granting maintenance for the divorced wife. He would further submit that the term "adultery" is applicable only to a wife whose marriage is still in subsistence. In other words, according to the

learned counsel, after the divorce, the wife is at liberty to choose her own way of sexual life, which is her liberty and therefore, such intimacy with a man would not fall within the term "adultery", as referred to in the said provision. The learned counsel would, therefore, submit that sub-Section 4 of Section 125 of the Code is not applicable to a divorced woman, as the same is applicable only to a woman whose marriage is still subsisting.

9. I have considered the above submissions. As per sub-Section 1 of Section 125 of the Code, if any person having sufficient means neglects or refuses to maintain his wife unable to maintain herself, a Magistrate of the first class may upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife. Explanation 'b' appended to the above said provision states that the wife includes a woman, who has been divorced or has obtained divorce from her husband and has not re-married. It is too well settled that the Explanation appended to the main part of the enactment becomes a part and parcel of the said provision itself, [vide **Bengal Immunity Co Ltd., Vs. State of Bihar**, reported in **AIR 1955 SC 661 : 1955 (2) SCR 603**]. Therefore, a conjoint reading of sub-Section 4 of Section 125 of the Code with Explanation 'b' would make it

manifestly clear that a divorced woman, who has not re-married, is entitled for maintenance from her former husband.

10. Now, let us have a quick look into sub-Section 4 of Section 125 of the Code, upon which much controversy has been raised by the learned counsel on either side, which reads as follows:-

"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".

11. The term "wife", as employed in sub-Section 4 of Section 125 of the Code, shall undoubtedly include a divorced wife also. This is manifest from the Explanation, which states that for the purposes of this Chapter, wife includes a woman, who has been divorced. It is noticeable that this Explanation is not for the purpose of sub-Section 1 of Section 125 of the Code alone and it is

for the purpose of the whole Chapter IX, which includes sub-section 4 also. This provision speaks of three situations, i.e., living in adultery, or without any sufficient reason, if the wife refuses to live with her husband or if they are living separately by mutual consent. In the instant case, we need not go into the latter two situations, as we are concerned only with the first situation, i.e., living in adultery.

12. It is the contention of the learned counsel for the respondent that the term "adultery" is referable only to a wife whose marriage with her husband still subsists. The term "wife" for the purpose of the entire Chapter has been explained whereas, the term "adultery" has not been defined anywhere in the Code. However, it is defined in Section 497 of the Indian Penal Code. A question arose as early as in the year 1897 itself as to whether the definition of the term "adultery" as made in the Indian Penal Code could be imported to the Code of Criminal Procedure for the purpose of Section 488 of the Code of Criminal Procedure, 1898. The matter was referred to a Full Bench in **Gantapalli Appalamma Vs. Gantapalli Yellayya**, reported in **1897 ILR 20 Mad 470**, wherein the Full Bench, in a unanimous decision, has held as follows:-

The term 'adultery' is used in that Section in the ordinary sense, that is, a married man having sexual connection with a woman who is not his wife. It appears to me that this construction is not affected by the last words of Section 4 of the Criminal Procedure Code, but is consistent with it.

13. As held by the Full Bench, the term "adultery" as employed in sub-Section 4 of Section 125 of the Code should receive a liberal interpretation to give its ordinary sense, i.e., a married woman having sexual connection with a man, who is not her husband. For the purpose of sub-Section 4 of Section 125 of the Code, the term "wife" cannot be confined only to the wife whose marriage is still subsisting, in view of the Explanation of the term "wife" for the purpose of the entire Chapter. Therefore, even after a decree for divorce is granted, if the wife wants to retain her right to claim maintenance from her former husband, she is expected to continue to maintain the same discipline, as she was expected to maintain during her marital ties, after the snapping of the marital ties also. In other words, during the subsistence of the marriage, the wife cannot live in adultery and in the event she lives in

adultery, she loses her right to claim maintenance from her husband; similarly, even after the divorce, if she continues to maintain the same discipline, she will continue to retain the right to claim maintenance from her former husband. If she commits any breach of the said obligation and starts living in adultery, i.e., having sexual relationship with another man, she will lose her right to claim maintenance.

14. The very object of introducing the Chapter IX in the Code for maintenance of wife, children and parents is to rescue them from destitution by extending monetary assistance. Even after the divorce, the law takes care of her that she should not end up in destitution and that is the reason why, according to the Explanation, she is entitled for maintenance from her erstwhile husband, even after such divorce. Since the man carries the obligation to maintain his divorced wife, the woman also carries the obligation not to live in relationship with another man. If she commits breach and starts to live in relationship with another man, she will suffer disqualification from claiming maintenance, as dealt with in sub-Section 4 of Section 125 of the Code. If she wants and starts to live in relationship with any other man, she may be entitled for maintenance from him and not from the former husband.

15. Mr.G.Prabhu Rajadurai, the learned counsel has placed reliance on the Judgment of the Hon'ble Supreme Court in **Rohtash Singh Vs. Ramendri [Smt] and others**, reported in **2000 (3) SCC 180**. That was a case, where the husband had obtained a decree of divorce under Section 13 of the Hindu Marriage Act, 1955, on the ground that the wife had deserted him. When the divorced wife claimed maintenance under Section 125 of the Code, the husband took the plea that as per sub-Section 4 of Section 125 of the Code, she is not entitled for maintenance. While negating the said plea of the husband, the Hon'ble Supreme Court, in Paragraph Nos.10 and 11, has held as follows:-

10. Claim for maintenance under the first part of Section 125 CrPC is based on the subsistence of marriage while claim for maintenance of a divorced wife is based on the foundation provided by Explanation (b) to sub-section (1) of Section 125 CrPC. If the divorced wife is unable to maintain herself and if she has not remarried, she will be entitled to maintenance allowance. The Calcutta High Court had an occasion to consider an identical situation where

the husband had obtained divorce on the ground of desertion by the wife but she was held entitled to maintenance allowance as a divorced wife under Section 125 CrPC and the fact that she had deserted her husband and on that basis a decree for divorce was passed against her was not treated as a bar to her claim for maintenance as a divorced wife. (See: *Sukumar Dhibar v. Anjali Dasi*.) The Allahabad High Court also, in the instant case, has taken a similar view. We approve these decisions as they represent the correct legal position.

11. Learned counsel for the petitioner then submitted that once a decree for divorce was passed against the respondent and marital relations between the petitioner and the respondent came to an end, the mutual rights, duties and obligations should also come to an end. He pleaded that in this situation, the obligation of the petitioner to maintain a woman with whom all relations came to an end should also be treated to have come to an end. This plea, as we have already indicated above, cannot be accepted as a woman

has two distinct rights for maintenance. As a wife, she is entitled to maintenance unless she suffers from any of the disabilities indicated in Section 125(4). In another capacity, namely, as a divorced woman, she is again entitled to claim maintenance from the person of whom she was once the wife. A woman after divorce becomes a destitute. If she cannot maintain herself or remains unmarried, the man who was once her husband continues to be under a statutory duty and obligation to provide maintenance to her.

16. Placing much reliance on the said Judgment, the learned counsel contended that sub-Section 4 of Section 125 of the Code is not applicable to a divorced wife. But, the said Judgment cannot be generalized so as to make it applicable to the case of a divorced wife living in adultery also. So far as the desertion is concerned, sub-section 4 states that if the wife, without any sufficient reason, refuses to live with her husband, then, she is not entitled for maintenance. The Hon'ble Supreme Court took the view that after a decree of divorce is granted, it is not possible for the wife to live with her husband and therefore, according to the Hon'ble Supreme

Court, sub-Section 4 of Section 125 of the Code is applicable only to a wife whose marriage is in subsistence. But, so far as adultery is concerned, in my considered view, the above Judgment cannot be made applicable, because even after the decree of divorce, the divorced wife carries the obligation not to live in relationship with any other man.

17. In **Smt.Vanamal Vs.Shri H.M.Ranganatha Bhatta**, reported in **1995 [5] SCC 299**, the Hon'ble Supreme Court was confronted with a similar situation. That was a case, where a decree for divorce was obtained by mutual consent under Section 13(b) of the Hindu Marriage Act, 1955. In the said case, when the wife claimed maintenance, the Hon'ble Supreme Court has held that sub-Section 4 of Section 125 of the Code is applicable only to a wife whose marriage is still in subsistence and the same is not applicable to a divorced wife by mutual consent. Here again, a divorced wife cannot live with her former husband and there is no question of her taking the consent of her former husband to live separately. That is the reason why, the Supreme Court has held that for a divorced wife sub-section (4) of Section 125 of the Code of Criminal Procedure is not applicable. Thus, this Judgment is also not applicable to living in adultery by her.

18. This can be analyzed from a different angle also. Admittedly, as per sub-section 4 of Section 125 of the Code, if a woman lives in adultery, whose marriage is still subsisting, she is not entitled for maintenance from her husband. Suppose, a decree for divorce is granted on the ground of her living in adultery, can it be said that the said disqualification of which she was suffering from all along, during the subsistence of the marriage, will cease to exist, because of the decree for divorce?. The prudent answer to this question shall be an emphatic - "No". The decree obtained by the husband for divorce on proving the adulterous life of the wife cannot give a license to her to continue to live in illicit relationship and to get her right to claim maintenance revived. Therefore, I conclude that a divorced wife, who lives in adultery, viz., living in illicit relationship with man other than her former husband is disqualified from claiming maintenance, under Section 125 of the Code. Sub-section 5 of Section 125 of the Code is also applicable to such a wife, who is living in adultery, after an order under Section 125 of the Code has already been made. The above conclusion of mine is fortified by a Judgment of the Andhra Pradesh High Court in **Pola Venkateswarlu Vs. Pola Lakshmi Devi Pola**, decided on **07.10.2004**, wherein the Andhra Pradesh High Court has held as follows:-

"As per Section 125(4) of the Code, the first respondent - wife is not entitled to receive any allowance from the petitioner-husband since divorce has been granted on the ground of her living in adultery. Both the trial Court and the revisional Court, having adverted to the decree granted in M.C.No.294 of 2004, on the file of the Family court, Bangalore, committed an error in granting maintenance to the first respondent - wife. If the error is allowed to be committed, it amounts to miscarriage of justice".

19. In the instant case, the decree granted by the Civil Court is an ex-parte decree on the ground that the wife was living in adultery and the said ex-parte decree though binding on the parties, is not binding on the Criminal Court, it is contended. In order to substantiate the said contention, the learned counsel has made reliance on the Judgment of this Court in **K.Senthilanathan Vs. Jaichitra**, [Crl.RC.No.771 of 2010, decided on **02.08.2010**. A close reading of the said Judgment would go to show that the learned Judge has not laid down any law on the above legal issue. He has made only a passing remark and therefore, the same does not take the shape of a binding precedent.

20. Similarly, the learned counsel has relied on yet another Judgment of a learned Single Judge of this Court in **Sundararajan Vs. Ashok Kumar**, reported in **(I) 1992 DMC 488**, wherein in Paragraph No.15, it has been held as follows:-

"The above Judgment would show that the learned Subordinate Judge has made a very formal matter out of it. The petitioner is not an eye witness to the alleged adultery. The first respondent from her childhood had been living with her sister and PW-2 is shown as guardian even in the SSLC., Book, produced by her here. Naturally, the wedding invitation Ex-P2 also produced by her here, is in his name. The oral evidence of the petitioner in the divorce O.P. proved nothing, so far as the adultery was concerned. EX.A1 in the divorce O.P is the marriage invitation, EX-P2 here, A.2 is a notice issued by the petitioner's counsel to the respondent and A.3 is the postal acknowledgement signed by the first respondent. It is on this material, that the learned Subordinate Judge holds that the allegation of adultery made in the petition is found true in the light of the evidence of

PW-1 and documents Exs.A1 to A3. In Ex.R.2, there is no reference to the counter filed by the first respondent and its contents. No issues have been framed. The evidence of the petitioner is neither summarized nor discussed for being either accepted or rejected. Nor are the contents of the documents referred to. Neither of the Courts below had held that the first respondent was guilty of adultery. Rightly, the Courts below declined to act upon this *exparte* decree of divorce. They had instead, appreciated the evidence adduced before them on this aspect and the learned Sessions Judge has given a positive finding, that there is no basis for holding that the respondent is not guilty of adultery with PW-21 find no illegality or error in the learned Sessions Judge holding so. The first respondent therefore, is entitled for maintenance as found by the learned Sessions Judge".

21. I have carefully gone through the said Judgment. But, I express my regret that I am unable to concur with the said view taken by the learned Single Judge. In my considered view, with due respect, the view expressed by the learned Judge, is *per incurium*,

as it is in direct conflict with the statutory provisions contained in Section 41 of the Indian Evidence Act, 1872, which reads as follows:-

"41. Relevancy of certain judgments in probate, etc., jurisdiction.-A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof

that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order, or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property".

22. In view of Section 41 of the Indian Evidence Act, 1872, if once the decree for divorce is granted on the ground of adultery, such finding is relevant for deciding the issue of adultery in the present case. This Court cannot sit in an appeal over the said decree for divorce granted by the Civil court, when the same has not been challenged by the aggrieved party. There can be no difference between a decree on contest and an ex-parte decree,

since, like a decree on contest, an ex-parte decree is also a decree passed on proof of the claim made by means of sufficient evidence. It is well known that though simply because the defendant has remained ex-parte, the Court shall not grant decree, unless the claim made in the plaint is proved, by means of evidence either oral or documentary or both. In the case on hand, therefore, there can be no doubt that the decree for divorce granted by the Civil court in favour of the petitioner is sufficient proof that the respondent was living in adultery. When once such a decree is in force, it is not possible for this Court to take a different view contrary to the decree granted by the Civil court. Therefore, I hold that besides, oral evidence let in, in this case, the decree granted by the Family Court clearly goes to prove that the respondent is living in adultery and thus, she suffers from the disqualification to claim maintenance from the petitioner.

23. In view of the foregoing discussion, I hold that the learned Principal Sessions Judge was not right in reversing the order of the Trial Court and therefore, the order of the learned Principal Sessions Judge impugned in this Criminal Revision Case is liable to be set aside.

24. In the result, this Criminal Revision Case is allowed, the order, dated 27.01.2012, made in Crl.R.C.No.22 of 2011, passed by the learned Principal District Judge, Ramanathapuram, is set aside and that of the order of the learned Chief Judicial Magistrate, Ramanathapuram, dated 21.09.2011, made in M.C.No.2 of 2010, is restored.

16.07.2015

Index :Yes/No
Internet :Yes/No
NB

S.NAGAMUTHU, J.

NB

To

- 1.The Principal District Judge, Ramanathapuram.
- 2.The Chief Judicial Magistrate, Ramanathapuram.

**PRE-DELIVERY ORDER MADE IN
CRL.RC.(MD)No.142 of 2012**

DATED - 16.07.2015