

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

Criminal Revision No. 78/2004

Mohd. Din Vs. Shabnam Akhtar

Coram :

Hon'ble Mr. Justice Gh. Hasnain Massodi, JUDGE

Appearing Counsel :

For the Petitioner (s) : Mr.V.R. Wazir, Advocate

For the Respondent(s) : Mrs. Surinder Kour, Adv.

Whether approved for reporting in

i) in Press/Journal/Media : Yes/No

i) Whether to be reported in

Digest/Journal : Yes/No

Inherent jurisdiction of the Court under section 561-A Cr.P.C is being invoked to seek quashment of the order of the learned Additional Sessions Judge, Doda dated 26-8-2004 whereby the learned Additional Sessions Judge, Doda has dismissed the revision petition, assailing the order of learned Judicial Magistrate Ist Class (JMJC), Doda directing the petitioner to pay maintenance allowance of Rs. 600/- per month to his wife – respondent herein.

The undisputed facts are that the petitioner married the respondent, where-after the parties lived as husband and wife for some time. However, the

relation between the parties got strained and the respondent, constraining her to live with her parents. The respondent on 1-7-2002, filed an application under Section 488 Cr.P.C in the Court of Judicial Magistrate Ist Class, Doda, pleading therein that the petitioner in June, 2001 after making demand for dowry, turned down the respondent from his house. It was alleged that the petitioner making use of Special Task Force Personnel of the state police, outraged the modesty of respondent and dragged the respondent to his house and that the respondent was constrained to lodge a Criminal Complaint alleging commission of offence punishable under sections 342/354/367/109 RPC against the petitioner and Personnel of Special Task Force. The respondent averred that the petitioner avoided to pay any maintenance allowance to her despite his having recurring income of Rs. 4974/- per month in addition to income from agriculture produce. The respondent prayed for grant to maintenance allowance of Rs. 2000/- per month – the amount, according to respondent, the petitioner was in a position to pay.

The petitioner resisted the application inter alia on the grounds that the respondent had left marital home of her own and on the instigation of

her father, who was keen to see respondent divorced by the petitioner. The petitioner admitted to be a Class -IV employee and expressed his desire to live with the respondent as her husband and discharge his marital obligations.

The learned Trial Magistrate after affording the parties opportunity to adduce evidence in support of their respective stands and on appraisal of the evidence brought on the file, allowed the application and directed the petitioner to pay maintenance of Rs. 600/- per month to the respondent .

The petitioner aggrieved of the order dated 23-12-2003, filed revision petition in the Court of Additional Sessions Judge, Doda. The order of maintenance was assailed on the ground that the order was passed without proper appreciation of evidence . It was insisted that the respondent had failed to prove that the petitioner had neglected the respondent. It was pleaded that the respondent had not stepped in the witness box and that the respondent had not given any response to the genuine offer made by the petitioner to take respondent to his marital house and live with the petitioner as his wife. The Revisional Court not impressed by the grounds urged in the revision petition, dismissed the revision petition vide order

dated 26-8-2004.

The learned Additional Sessions Judge placing reliance on the law laid down in (1990) JKLR 36 held that the respondent had a just ground for her refusal to live with the petitioner. The Courts below took notice of the fact that the petitioner had another wife with whom the petitioner was residing and the respondent was within her rights to refuse to live with the petitioner in presence of his second wife.

The petitioner now seeks quashment of orders dated 23-12-2003 and 26-8-2004 on the grounds, identical to the grounds set up before the Revisional Court. It is insisted that both the Courts have failed to apply their mind and appreciate the evidence available on the file in right perspective. It is pleaded that the aforesaid orders are illegal, unwarranted and contrary to the law and thus liable to be set aside; that both the Trial Court and the Revisional Court failed to appreciate that the respondent failed to prove that the petitioner neglected or refused to maintain her. It is averred that absence of respondent from the witness box was sufficient to throw out her case and hold her to be dis-entitled from claiming maintenance from the petitioner. It is pleaded that the respondent by admitting to be second wife of the petitioner, made it necessary for the Courts below to

examine legality of her marriage with the petitioner in presence of petitioner's Ist wife, and that the Courts below by ignoring to deal with this aspect of the case and further more not recording satisfaction that the petitioner had neglected or refused to maintain the respondent, made the impugned orders liable to be quashed.

Heard.

The main plank of the petitioner's case is that absence of the respondent from the witness box was fatal to the application for maintenance and that the application merited to be dismissed on this ground alone. From the perusal of the record, it transpires that the respondent examined two witnesses to substantiate her case. The respondent did not step in the witness box. The learned Trial Court placed reliance on the witnesses' examination by respondent to arrive at the conclusion that the petitioner though possessed of sufficient means, had neglected and refused to maintain the respondent, who was unable to maintain herself. The status of the party to the proceedings when appearing in the witnesses box, is nothing but that of any other witness examined in support of the case. There is no rule of universal application that failure of a party to appear in the witness box must invariably lead to dismissal of the

case set up by such party, irrespective of other evidence brought by such party on the file. The case set up by the party before the Court may succeed on the strength of evidence brought on the file even if the party himself /herself fails to appear in the witness box. It is for the Court to assess and evaluate in each case having regard to the facts and circumstances peculiar to the case, the fall out of failure of a party to stand in the witness box. Cases can be visualized where having regard to the pleadings of the parties, the Court is not persuaded to accept a case in the event the party projecting the case does not appear as a witness . However, in a case like the present one, where admissions fundamental to the proceedings are made by the opposite party, failure of a party to appear in the witness box may not have any fatal consequences for the case set up by such party in the Court. In the case in hand, the petitioner in his objections admitted the respondent to be his legally wedded wife. The petitioner further admitted that the respondent was living separately from the petitioner with her parents. It was also admitted by implication that the respondent has no source of income to fall back upon and was thus, unable to maintain herself . The petitioner also made bold admission that the

petitioner was Class-IV government employee and thus, had recurring income as pleaded in the application. In presence of such admission by the petitioner, the absence of respondent from the witness box, cannot be held to be fatal to the respondent's case.

In view of the pleadings of the parties, the only question left to be determined by the Trial Court was, whether the respondent had just ground to live away from the petitioner and spurn his offer to go to marital home.

It has been observed in *Shail Kumari Vs. Krishen Bhagwan Pathik* reported as (2008) 9 SCC 632 :

“ Again, maintenance is a right which accrues to a wife against her husband the minute the former gets marriage to latter. It is not only a moral obligation but is also a legal duty cast upon the husband to maintain his wife. Hence, whenever a wife does not stay with her husband and claims maintenance, the only question which the court is called upon to consider is whether she was justified to live separately from her husband and still claim maintenance from him ? If reply is in affirmative, she is entitled to claim maintenance.....”

In the case in hand, the learned Magistrate as

well as Revisional Court alive to the legal mandate, answered the said question in affirmative and held the respondent be justified to live separately and to be entitled to get maintenance. The Courts below found the petitioner to have the second wife and held the respondent to have just ground for not going to live with the petitioner at the place where the petitioner already had family and was living with the second wife.

The argument that as the respondent had contracted marriage with the petitioner, when the petitioner was already married, the respondent is to be presumed to have waived her right to refuse to live with the petitioner in presence of Ist wife, cannot be pressed into service to dis-entitle the respondent from the right to get maintenance from the petitioner. When the petitioner notwithstanding his meagre resources decided to contract second marriage, the petitioner is expected to have been alive to the legal mandate to give equal treatment to both the wives and that if the petitioner had arranged residential accommodation for his first wife, the petitioner was bound to provide similar separate accommodation for second wife. The petitioner by insisting that the respondent should come to live with the petitioner under the same roof where the petitioner is living

with his former wife, cannot be held genuine and bona fide offer. This apart, the tactics adopted by the petitioner to drag the respondent from her house, allegations of abduction, outrageous assault levelled in the application, which have gone un-controverted, by itself constitute a just ground for the respondent not to give any positive response to the so called offer made by the petitioner.

The argument that the respondent had failed to prove that the petitioner neglected or refused to maintain the respondent, is equally specious and untenable. Not only does the evidence adduced by the respondent support the case that respondent had neglected and refused to maintain the respondent, but the petitioner in his objections has nowhere claimed to have provided any maintenance in cash or kind to the respondent, after the respondent started to live separately from the petitioner.

In the circumstances and for the reasons discussed above, no ground is made out to exercise inherent jurisdiction under Section 561-A Cr.P.C. The petition is as such meritless and deserves to be dismissed.

The petition is, accordingly, dismissed. Record be sent down. The parties to appear before the Court below on 25.02.2010.

(Gh. Hasnain Massodi)

Judge

Jammu:

RSB,Secy.

10.02.2010.