

HIGH COURT OF TRIPURA
AGARTALA

CRL. REV. P. NO. 16 OF 2008

Sri Dhananjoy Das,
S/o Sri Manoranjan Das,
resident of Vill. Gakulnagar,
P.S. Kumarghat, District North Tripura.

..... Petitioner

- Vs -

Smt. Archana Malakar (Das),
D/o Sri Nripendra Malakar,
W/o Sri Dhananjoy Das,
resident of Vill. Gakulnagar,
P.S. Kumarghat, District North Tripura.

..... Respondent

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. I. Chakraborty, Advocate

For the respondent : Ms. N. Guha, Advocate

Date of hearing : 27.11.2013

Date of judgment & order : 29.11.2013

Whether fit for reporting : YES

JUDGMENT & ORDER

On questioning the legality of the judgment and order dated 04.01.2008, delivered in Criminal Misc. 95/2007 by the Judge, Family Court, Kailashahar, North Tripura, this petition under Section

19 of the Family Courts Act, 1984 has been filed by the husband, Dhananjay Das, against whom the respondent, namely Smt. Archana Malakar (Das) has claimed for monthly maintenance allowance under Section 125 of the Cr.P.C., asserting her status as the wife of the petitioner herein.

2. The petitioner, by filing a written objection has disputed that the respondent is the wife of the petitioner. According to the respondent, the marriage between the parties took place 11 years back before the date of the filing of the petition under Section 125 of the Cr.P.C. For about one year the parties led their conjugal life peacefully, but thereafter, on ill-advice of the other inmates, the petitioner had started torturing the respondent physically and mentally on various pretexts. Even the petitioner has been alleged of torturing the respondent on demand of cash. All those allegations have been categorically denied by the petitioner.

3. According to the respondent, on 20.11.2001 the petitioner had driven her out from the matrimonial home and she could not return to the matrimonial home. When she heard that the petitioner had been contracting marriage with another woman, she informed the matter to the police. Later on, she had approached the Judge, Family Court, Kailashahar, North Tripura.

4. The Judge, Family Court, Kailashahar, North Tripura, by the impugned judgment, has directed the petitioner to pay a

monthly maintenance of ₹700 per month to the respondent. The vortex of the controversy is whether the respondent is the legally married wife of the petitioner.

5. From scrutiny of the records including the oral testimonies of the witnesses adduced by the respondent as well as the witnesses adduced by the petitioner, it has unwaveringly surfaced that there is no proof of marriage as such or on what day the said marriage, claimed by the respondent, had taken place and what are the rituals followed in the said marriage, even though it has been stated by the respondent that the marriage was solemnised in terms of the Hindu Rites and Customs. However, the father of the respondent, namely Sri Nripendra Malakar (PW.3) has stated that the marriage of her daughter was solemnised as per Hindu rites and customs. PW.3 has further stated that after five years, the petitioner had started torturing her daughter on demand of money. Another person, namely Sunil Malakar (PW.2) from the neighbourhood has stated that he had attended the marriage of the petitioner and the respondent, which was solemnised 11 years back as per Hindu rites and customs.

6. On the marital discord, there had been a village meeting and, thereafter, for few months the parties lived peacefully. The said meeting, according to PW.2, was held one year after the marriage. But, after few months of the said meeting, the petitioner drove out the respondent from her marital home.

7. The respondent was examined by the Judge, Family Court as PW.1, who has stated that for a period of one year she lived peacefully with the petitioner, but thereafter, on demand of money she was subjected to torture and on 20.11.2011 the petitioner drove her out from her matrimonial home. Since then she has been residing in her parents' house. In the year 2006, when she came to know that the petitioner was going to marry another girl, she lodged a complaint, but the petitioner had already married another girl from Machmara.

8. For rebutting that the petitioner and the respondent had lived together as husband and wife, the petitioner was examined by the Judge, Family Court, Kailasahar, North Tripura as the OPW.1, where he has denied the fact that he had married the respondent as per Hindu rites and customs.

9. Two other witnesses, namely Abinash Malakar (OPW.2) and Sudhangshu Das (OPW.3) have stated in the court that the respondent is known to them, but they cannot say anything about the relation between the petitioner and the respondent. Apart that, photocopy of a page of the Register of Residents (ROR) was filed in the court of the Judge, Family Court, Kailashahar, North Tripura by the respondent, but none of the PWs did admit the said document in the evidence. Even thereafter, the said document was considered by the Judge, Family Court for determining the status of the respondent.

10. Mr. I. Chakraborty, learned counsel appearing for the petitioner has submitted that there is no proof of marriage. Even the proof of living together is shrouded by suspicion inasmuch as the statement of PW.2 as regards the length of living together does not tally with the statement of the PW.1 and PW.3. Unless it is established that the respondent is the legally married wife of the petitioner, she does not have any status to get the monthly maintenance allowance from the petitioner. In support of this, he has relied on a decision of the apex court in **Savitaben Somabhai Bhatiya Vs. State of Gujarat**, reported in **AIR 2005 SC 1809**, to contend that unless it is established that the respondent is the wife of the petitioner, she cannot claim any maintenance from the petitioner. He has further submitted that the petitioner had rebutted the presumption of marriage by adducing evidence. Mr. Chakraborty, learned counsel appearing for the petitioner has also relied on **Vimala (K.) Vs. Veeraswamy (K.)**, reported in **(1991) 2 SCC 375** and **Upendra Sarma Vs. Pranati Baishya**, reported in **(2013) 1 GLR 22.**

11. **Vimala (K.) (supra)** has no relevance in the present context. However, in **Upendra Sarma (supra)**, the Gauhati High Court has held that, since the person who was claiming the monthly maintenance allowance, referred in that judgment as the 1st party, "*was not a legally wedded wife of the present petitioner could not have therefore been directed to pay maintenance to the 1st party*

herein. According to Section 7 of the Hindu Marriage Act, 1955, a Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto and, where such rites and ceremonies include the Saptapadi i.e. the taking of seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete and binding when the seventh steps is taken".

12. Ms. N. Guha, learned counsel appearing for the respondent has submitted that while appreciating the challenge as brought before this court, the court cannot oblivious of the very object and purpose of incorporating Section 125 of the Cr.P.C. in the statute. She has further submitted that the respondent has successfully established that she had lived with the petitioner as husband and wife. Even if the marriage has not been strictly proved by way of leading evidence in respect of observance of the religious rituals in terms of Section 7 of the Hindu Marriage Act, 1955, presumption of marriage can be taken by this court in favour of the respondent.

13. While appreciating the contentions of the learned counsel for the parties, a reference may profitably be made to **Sumitra Devi Vs. Bhikan Choudhary**, reported in **AIR 1985 SC 765**, where it has been held that a technical approach may not be adopted while considering the question of marriage. In **Sumitra Devi (supra)**, the apex court has further held that "*there is no*

doubt that in order that there may be a valid marriage according to Hindu Law, certain religious rites have to be performed. Invoking the fire and performing Saptapadi around the sacred fire have been considered by this Court to be two of the basic requirements for a traditional marriage. It is equally true that there can be a marriage acceptable in law according to customs which do not insist on performance of such rites as referred to above and marriages of this type give rise to legal relationship which law accepts".

14. There cannot be any controversy that the object and purpose of Section 125 of the Cr.P.C. is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. But, for coming within the province of consideration under Section 125 of the Cr.P.C., the respondent was obliged to discharge the onus of proving that she was the wife of the petitioner. It is the crystallised position of law that the legally married wife may claim maintenance under Section 125 of the Cr.P.C. and in Section 125 of the Cr.P.C., the 'wife' has been defined for a very narrow purpose, which includes a woman who has been divorced by a husband or who has obtained a divorce from her husband and has not remarried. But, this definition is not comprehensive. The word 'wife' would mean for purpose of Section 125 of the Cr.P.C., the 'legally married wife' inclusive of woman who has been divorced by a husband but has not remarried. As such, when the fact of marriage is questioned by either of the

parties, the other party has to discharge the onus of proving the marriage or to prove the basis for drawing presumption of marriage.

15. In **Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit & Anr.**, reported in **(1999) 7 SCC 675**, the apex court has observed as under :

"If the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouses, and in such a situation, the party who denies the marital status can rebut the presumption. Undisputedly, marriage procedure was followed in the temple, that too, in the presence of idol of Lord Jagannath, which is worshipped by both the parties. Appellant contended before the learned Magistrate that the said marriage was performed under duress and at the point of knife, he was required to exchange garlands. That contention is not proved by leading necessary evidence. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu rites in the proceedings under Section 125 Cr.P.C." [Emphasis added]

16. In **Dwarika Prasad Satpathy (supra)**, the apex court has approved **Santosh Vs. Naresh Pal**, reported in **(1998) 8 SCC 447**, where it had been contended that the wife had not proved that she was the legally married wife as her first husband was living and there was no dissolution of marriage. In **Santosh (supra)**, the apex court has held that :

"In a proceeding for maintenance under Section 125 Cr.P.C. the learned Magistrate was expected to pass appropriate orders after being *prima facie* satisfied about the marital status of parties. It is obvious that the said decision will be tentative decision subject to

final order in any civil proceedings, if the parties are so advised to adopt".

17. In **Dwarika Prasad Satpathy (supra)**, what has been emphasised is that, if there is semblance of marriage it would adequate for the Magistrate to pass an appropriate order of maintenance. But, how the semblance of marriage is to be proved? In other words, what would be the degree of proof? From a close reading of **Dwarika Prasad Satpathy (supra)**, it appears that the apex court has considered two elements for *prima facie* satisfaction or for purpose of having the basis of presuming the marriage, viz. (1) living together as the husband and wife and (2) the procedure of marriage, which may not be even complete as per Hindu rites.

18. The apex court in **Savitaben Somabhai Bhatiya (supra)** has observed in uncertain terms as under :

13. In Dwarika Prasad Satpathy v. Bidyut Prava Dixit and Anr. (AIR 1999 SC 3348) it was held that the validity of the marriage for the purpose of summary proceedings under Section 125 of the Code is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 of Indian Penal Code, 1860 (in short the 'IPC'). If the claimant in proceedings under Section 125 succeeds in showing that she and the respondent have lived together as husband and wife, the Court has to presume that they are legally wedded spouses, and in such a situation one who denies the marital status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe as to whether the said procedure was complete as per the Hindu rites, in the proceedings under Section 125 of the Code. It is to be noted that when the respondent does not dispute the paternity of the child and accepts the

fact that marriage ceremony was performed though not legally perfect, it would hardly lie in his mouth to contend in proceedings under Section 125 of the Code that there was no valid marriage as essential rites were not performed at the time of said marriage. The provision under Section 125 cannot be utilized for defeating the rights conferred by the legislature on the destitute women, children or parents who are victims of social environment. The provision is a measure of social justice and as noted above specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. [Emphasis added]

19. In the present case what has surfaced is that as regards the procedure of marriage there is no evidence, but there is some evidence which demonstrates that the respondent and the petitioner had lived together as husband and wife. Living together as husband and wife provides the necessary basis for presumption of marriage unless it is rebutted. No doubt, the petitioner has made attempt to rebut, but after reading the depositions of OPWs. Nos. 2 and 3 it surfaces that they were completely reluctant to say about the nature of relation the petitioner and the respondent was maintaining. Even they have not invested a single word as to whether the respondent and the petitioner were living together or not. But, PWs. 2 and 3 have categorically stated that the respondent and the petitioner were living together as husband and wife even though there is some contradictions apparent on their statements as indicated before.

20. The manner in which a photocopy of the ROR (Register of Residents) has been read into without its introduction in the evidence is absolutely untenable in law. Anybody can create such

document and place the same before the court. It is the duty of the court to insist for the original document and if the original one cannot be submitted for any reason the due process for admitting the secondary evidence must be followed. There cannot be exception for the summary proceedings like the proceeding of the Family Court. Else there would be always a convenient space for practising fraud upon the court. Justice is abhorrent of fraud. Thus, the due caution has to be exercised in the judicial process. As such, the photocopy of the ROR is discarded from consideration. In this case, no marriage has been admitted by the petitioner rather the respondent has admitted that the petitioner had married one woman from a village called Machmara and she had informed the said incident to the police, but no evidence whatsoever in that regard has been placed in the records.

21. In view of **Savitaben Somabhai Bhatiya (supra)**, where the apex court has stated that if the claimant in the proceeding under Section 125 of the Cr.P.C. succeeds in showing that she and the respondent have lived together as husband and wife, the court has to presume that they are legally wedded spouses, this Court is not inclined to interfere with the impugned judgment and order. But, this observation shall have no bearing as regards the marital status of the respondent, as this 'tentative' observation is made based on the presumption which is always rebuttable. For the petitioner could not rebut the presumption in the

proceeding before the Family Court, he cannot be estopped from rebutting such presumption by adopting a proceeding before the Civil Court as observed in **Santosh (supra)**, where the apex court has stated that such decision in a proceedings under Section 125 of the Cr.P.C. is a tentative decision subject to final order in any civil proceedings. In the civil proceeding if it is proved that there had been no valid marriage or in other words the respondent is not the legally married wife of the petitioner, a right shall accrue in favour of the petitioner to seek alteration of the impugned judgment and order under Section 127(2) of the Cr.P.C.

22. With this observation, this petition stands dismissed.

Send down the LCRs forthwith.

JUDGE