

GURMIT KAUR
v.
SURJIT SINGH @ JEET SINGH

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NOVEMBER 28, 1995

[K. RAMASWAMY AND S.B. MAJMUDAR, JJ.]

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Code of Criminal Procedure, 1973 :

Section 125—Expression 'living separately by mutual consent'—Held : Relevant only during subsistence of marriage and not thereafter.

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Maintenance—Divorce agreement between husband and wife—Termination of marital status—Wife living separately by mutual consent—Held entitled to maintenance.

Pursuant to an agreement of divorce between the appellant-wife and the respondent-husband both were residing separately by mutual consent. The Magistrate allowed wife's claim for maintenance under Section 125 of the Code of Criminal Procedure, 1973 and granted a sum of Rs. 200 per month to the appellant and Rs. 100 per month to her minor son. On revision the Additional Sessions Judge held that the wife was not entitled to maintenance but affirmed the amount granted for minor son. The High Court enhanced the maintenance amount of the minor son to Rs. 150 and confirmed that the wife was not entitled to maintenance because she was residing separately by mutual consent.

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Allowing the appeal, this Court

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HELD : The concept of living separately by mutual consent arises so long as the marriage subsists and the parties agree to live separately by consent. During the subsistence of the marriage, if the parties agree to live separately by mutual consent, no party is entitled to lay any claim for maintenance from the other party. But in this case because of the divorce agreement between the parties, the marital relations have come to a terminus. The respondent had already contracted the second marriage and the first marriage has been put to an end. The appellant therefore becomes entitled to claim maintenance until she remains unmarried and is unable to maintain herself. The orders of the Additional Sessions Judge and the

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- A High Court to the extent of maintenance to the appellant are set aside and that of the Magistrate is confirmed. [741-B-D; F-G]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1593 of 1995.

- B** From the Judgment and Order dated 2.8.91 of the Punjab & Haryana High Court in Crl. Misc. No. 13582/M of 1990.

R.K. Kapoor, P. Verma, S.K. Srivastava and Anis Ahmed Khan for the Appellant.

- C** Neelam Kalsi and Vimal Dave for the Respondent.

The following Order of the Court was delivered :

Delay condoned.

- D** Leave granted.

- E** The appellant was married to the respondent in the year 1971. She filed an application under Section 125, Code of Criminal Procedure, 1973 (for short "the Code") for maintenance on July 21, 1988. The learned Magistrate by order dated February 28, 1990 granted a sum of Rs. 300 per month, i.e., Rs. 200 to the wife and Rs. 100 to his minor son with effect from the date of the order. On revision, the learned Additional Sessions Judge, Kapurthala held that the wife was not entitled to the maintenance and granted Rs. 100 per month only in favour of the son. By its order dated July 2, 1991, the High Court confirmed the same on the ground that the
- F** appellant was residing separately by mutual consent and that, therefore, she is not entitled to the maintenance. The maintenance to the son was enhanced to Rs. 150 per month. Thus this appeal by special leave.

- G** We have seen the agreement for divorce by mutual consent under which the parties have settled their terms. The parties have not challenged the validity of the agreement of divorce. Therefore, we proceed on the premise that it is a valid agreement and the appellant has stated thereunder that due to irrecoverable differences between her and her husband, she has no objection to the divorce and she has no claim or any demand from him. She has also stated that the respondent is at liberty to marry anyone of his
- H** choice. He accordingly married another lady.

Section 125(4) of the Code provides as under :

"No wife shall be entitled to receive an allowance 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."

The concept of living separately by mutual consent arises so long as the marriage subsists and the parties agree to live separately by consent. In other words, during the subsistence of the marriage, if the parties agree to live separately by mutual consent, no party is entitled to lay any claim for maintenance from the other party.

In view of the divorce agreement referred to hereinabove, the marital relations have come to a terminus. By virtue thereof, the respondent had already contracted the second marriage. In other words, the first marriage has been put to an end. The appellant thereby became entitled to claim maintenance and will continue to do so, so long as she remains unmarried and she is unable to maintain herself.

It is contended that the appellant is having two kanals of land and that, therefore, she is not totally dependent on the respondent. This aspect of the matter was considered by the learned Magistrate and after due consideration, he awarded the sum of Rs. 200 towards maintenance to the appellant and Rs. 100 to the minor son. Therefore, the mere fact that she is having two kanals of land is not a sufficient ground to disentitle her to receive maintenance.

The appeal is accordingly allowed. The orders of the Additional Sessions Judge and the High Court to the extent of maintenance to the appellant are set aside and that of the Magistrate is confirmed. In other words, the appellant and her minor son are entitled to Rs. 200 and 150 per month respectively in terms of the order of the learned Magistrate and the High Court for maintenance of the son.

T.N.A.

Appeal allowed.