

(2006) 11 GUJ CK 0097

In the Gujarat High Court

Case No : Special Criminal Appeal No. 1415 of 1997

Abdul Razak Haji Gulambhai Qureshi

APPELLANT

Vs

Johrabibi Haji Kalubhai Qureshi and Another

RESPONDENT

Date of Decision : 09-11-2006

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(1)

Citation : (2008) 2 DMC 341

Hon'ble Judges : D.H. Waghela, J

Bench : Single Bench

Advocate : M.T.M. Hakim, No. 1, for the Appellant; P.B. Majmudar, for Respondent Nos. 1-2, for the Respondent

Final Decision : Allowed

Judgement

D.H. Waghela, J.—The petitioner-husband has preferred the present petition under Article 227 of the Constitution against his divorced wife and her daughter, since he was aggrieved by the order of the learned J.M.F.C., Dabhoi awarding Rs. 200/- per month by way of maintenance to the daughter, and that order was upheld in revision.

2. The respondents had claimed maintenance from the petitioner under the provisions of Section 125 of the Code of Criminal Procedure. During the course of trial it was found and recorded as a finding of fact by the Trial Court that the petitioner had no access to the respondent - wife when the daughter was conceived. However, in view of the fact that the wife was, at the relevant time, allowed to live in the family of the petitioner and was divorced on 20.6.1987 after about two years of knowledge and even celebration of conception of a child by the wife, the daughter was ordered to be paid Rs. 200 by way of maintenance. The Revision Application of the petitioner, preferred from the said order, was rejected on the ground that the provisions of Section 125 of the Code of Criminal Procedure entitled even an illegitimate minor child to a reasonable

amount of maintenance. The revisional Court observed that the subject of legitimacy could only be decided by a competent Civil Court and the criminal Court had only to adjudicate on the basis of the evidence regarding birth of the child during subsistence of the marriage.

3. Learned Counsel Mr. M.T.M. Hakim vehemently argued that the respondent-wife who was divorced before the applications for maintenance were filed had not preferred any revision or appeal which amounted to admission and acceptance of the fact that the daughter was illegitimate and the wife was, at the relevant time, living in adultery. He further submitted that the child born out of illicit relationship of the wife, while the petitioner was abroad, was not entitled to maintenance from the petitioner who was the husband for the time being but certainly not the father of the child. He submitted that the provisions of Section 125 of Cr.P.C. entitled even an illegitimate minor child to maintenance from a person provided the child was a legitimate or an illegitimate minor child of that person; but a person cannot be saddled with the liability to maintain a child of someone else. He, therefore, submitted that both the Lower Courts had committed serious error of law in awarding maintenance to the respondent No. 2. The learned Counsel relied upon judgment of the Orissa High Court in Smt. Ahalya Bariha alias Barihani Vs. Chhelia Padhan, wherein His Lordship Justice A. Pasayat (as His Lordship then was) observed that, where maintenance is claimed for an illegitimate child from an alleged father, it is not enough that defendant would have been the father, but the Court has to find out that in all reasonability no one else could have been the father. It is also observed that the right of the child, legitimate or illegitimate, under the Code is an individual right of the child in his or on her own right, independent of the mother. When a woman claims maintenance on behalf of a minor child out of wedlock against his alleged putative father, the onus is on her to show that the child could only have been born through the alleged father under the circumstances of an exclusive relationship.

4. In view of the above clear factual position of the child having been born during the period of wedlock but without the father having access to the wife at the relevant time, the daughter could not have, in the eye of law, even the status of an illegitimate child of the petitioner. Both the lower Courts apparently lost sight of the word "his" occurring in Sub-clause (b) of Sub-section (1) of Section 125 of Cr.P.C. Therefore, an error of law apparent on the face of the record appears to have crept into the orders of both the lower Courts resulting into a unsustainable order which is required to be set aside. It is, however, also necessary to observe that, even in absence of any challenge to the findings of fact by the divorcee wife, the finding or the inference that the wife was "living in adultery" may not be taken as approved or confirmed by this Court.

5. In the above facts and circumstances, with the above observations, the petition is allowed and the impugned order dated 30.1.1997 in Criminal Misc. Application No. 179 of 1994 of the learned J.M.F.C, Dabhoi and the order dated

12.9.1997 in Criminal Revision Application No. 31 of 1997 of the learned Additional Sessions Judge, Vadodara are set aside. Rule is made absolute with no order as to costs.

Learned Counsel Mr. M.T.M. Hakim fairly stated that the amounts already paid to the respondents shall not be recovered from them.