

(1985) 10 GUJ CK 0036
In the Gujarat High Court

Ansuyaben Hemantsingh Jadeja

APPELLANT

Vs

Anirudhsinh Harisinh Zala and Another

RESPONDENT

Date of Decision : 03-10-1985

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 125
Evidence Act, 1872 — Section 114(g), 114(g)
Hindu Marriage Act, 1955 — Section 9

Citation : (1986) 2 GLR 1303

Hon'ble Judges : A.P. Ravani, J

Bench : Single Bench

Judgement

A.P. Ravani, J.—The petitioner-wife filed an application for maintenance on July 6, 1981, in the court of learned JMFC, Morbi, being Misc. Criminal Application No. 21 of 1982. She claimed maintenance for herself and on behalf of two minor children, namely, minor son Manharsinh and minor daughter Gayatri. It was alleged that before about nine years from the date of application the marriage between the parties took place as per the Hindu religion and caste custom of the parties. That one son Manharsinh and one daughter Gayatri were born out of the wedlock. Till sometime after the marriage she was treated well, but later on, she was being ill-treated by the paternal aunt and sister of the opponent-husband. Sometimes she was not even given food and was being kept in a position inferior to that of a servant. That in the month of November 1980 she was severely beaten by locking inside the house, her life was in danger. Even when there was heavy flood in Morbi, she was not allowed to go to her parent's place. As her life was in danger, her father had to take police help for securing her custody. She further alleged that the opponent was serving as a Treasury Officer and was earning salary of Rs. 800/- per month. According to her case, the opponent had income from agricultural land and from other property also. On these and other grounds she claimed maintenance at the rate of Rs. 300/- per month for herself and Rs. 100/- per month for minor son Manharsinh and Rs. 75/- per month for minor daughter Gayatri.

2. The opponent-husband appeared in the proceedings and resisted the same. It was inter alia contended that the petitioner-wife was not being ill-treated. That she was being kept in proper condition and the application was required to be rejected. Before the trial court, the petitioner-wife examined herself, her father and one witness. In her deposition she did state that the sister of the opponent and his paternal aunt were ill-treating her and she was not being given food. Her life was in danger and therefore, her father had to take help of the police and take her custody. She also stated that on account of the beating and ill-treatment by the opponent and his family members, there were injuries on her back and she was required to take medical treatment also. She gave the name of the doctor, also. This part of the evidence is supported by the deposition of her father Hemantsinh Gagubha, Exh. 17. Another witness examined was one Chakuba Karansinh, Exh. 16, the uncle of the petitioner. He was examined on the point that he had gone to village Sindhawadan for taking the petitioner to her parent's house. The opponent also led oral evidence. He examined himself and other witnesses. The trial court on appreciation of evidence came to the conclusion that the petitioner-wife had not been able to prove the ill-treatment and cruelty and therefore, she was not entitled to stay separate and claim maintenance for herself. However, the trial court directed the opponent to pay maintenance at the rate of Rs. 100/- per, month for minor son Manharsinh and Rs. 75/- per month for minor daughter Gayatri. The petitioner preferred Criminal Revision Application No. 21 of 1982 before the Court of Sessions at Rajkot. The learned Addl. Sessions Judge, who heard the revision application, rejected the same as per his order dated January 21, 1983. Hence this petition under Article 227 of the Constitution by the petitioner-wife-original application.

3. When the matter came up for hearing on earlier occasion, it appears that an attempt was made to bring about settlement between the parties. The Court (Coram: M.B. Shah, J.) had suggested to the petitioner to go to the house of the opponent for a period of at least one week. Accordingly on August 17, 1984, the petitioner-wife had gone to the house of the opponent-husband together with two minor children. Thereafter, it appears that the parties could not stay together and again the petitioner had come back to her parent's house.

4. As to what happened during the period of one week, both the parties have given different versions. The petitioner-wife has filed affidavit dated September 13, 1985 and has inter alia alleged that she was ill-treated and her son Manharsinh was kept by the opponent and the minor daughter who is dumb and lame was allowed to be carried with her. The allegations made by the petitioner in the affidavit have been denied by the opponent-husband in the affidavit dated September 19, 1985 filed by him. The counsel for the opponent-husband has submitted that when the parties take any action for settlement of the disputes pursuant to the suggestion made by the court or otherwise, such steps are taken always without prejudice to the rights of the parties to raise the contentions on merits. Further he has submitted that this is a petition under Article 227 of the Constitution and the subsequent events which have taken place during the

pendency of the proceedings in this High Court should not be taken into account. According to him, the Special Criminal Application under Article 227 of the Constitution should be decided on the basis of the record as it stood. Apart from the validity of otherwise of the contention so raised for the purpose of deciding this petition it is not absolutely necessary to go into the details of subsequent events. Therefore, while deciding this petition. I would not take the same into consideration.

5. Counsel for the opponent-husband submitted that there is a concurrent finding of fact by both the courts below. Therefore this Court should not exercise its power under Article 227 of the Constitution and should not interfere with the judgment and order passed by the lower courts rejecting the application for maintenance submitted by the petitioner-wife. It is true that the scope of the jurisdiction of this Court in a petition under Article 227 is very limited the same time even if there is concurrent finding which is based on mis-regarding of evidence or that there is error apparent on the face of the record and the approach adopted by the lower courts is perverse which has resulted into miscarriage of Justice, it would be the bounden duty of this Court to exercise its power under Article 227 and see that then ends of justice are served and not frustrated.

6. In the instant case, the trial court did not believe the evidence of the petitioner mainly on the ground that she had not examined the doctor Mr. Kotecha. According to her case, she had taken treatment from this doctor for the injuries which she received on account of the cruel treatment of the opponent and his family members. This ground has also weighed with the learned Addl. Sessions Judge. Both the courts below held that Dr. Kotecha from whom the petitioner had taken treatment and one Ranjitsinh, who had given information to the father of the petitioner, i.e. Hemantsinh, Exh. 17, should have been examined by the petitioner. The lower courts held that since the doctor as well as Ranjitsinh have not been examined by the petitioner, adverse inference should be drawn against the petitioner. Apparently, the lower courts have relied upon the provisions of Section 114(g) of the Evidence Act which read as under:

114. Court may presume existence of certain facts:

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume--

(a) to (f) xxx xxx xxx (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

The language of the section as well as that of illustration is imperative. That is to

say, the Court is not bound to raise presumption adverse to the petitioner even if the requirements of the section are fulfilled. However, in the instant case, both the lower courts have failed to consider as to whether all the requirements of the section have been fulfilled. The courts have not taken into consideration the common course of natural events and particularly human conduct in relation to the facts of the case. The lower courts ought to have seen that on the one side there was opponent who is serving as Treasury Officer and who is a landlord owning more than 32 acres of land. He appears to be an old-time Girasdar. In the facts and circumstances of this particular case the normal human conduct would be that from small village ordinarily no one would not come forward to say anything against such person. Ranjitsinh was good enough to inform the petitioner's father about the condition of the petitioner in the house of the opponent-husband but he would certainly not be willing to incur the wrath of the opponent by entering the witness box. "Similarly, it cannot be said that the doctor could have been examined by the petitioner. One who knows the realities of village life and has some idea of over-powering influence of Girasdars amongst the members of rural community would not find it difficult to come to a conclusion that it would have been impossible for the petitioner to secure the presence of the doctor as well as that of Ranjitsinh. In the instant case there is nothing on record to show that these two witnesses were available to the petitioner and yet she had not examined them. The important requirement of Section 114(g) of the Evidence Act is that it should be shown that the party is deliberately withholding the evidence. In this case this requirement has not been fulfilled at all. Therefore, both the lower courts have gravely erred in raising adverse inference against the petitioner and rejecting her evidence on this ground alone. Such type of approach has got to be stigmatised as perverse one. Her evidence should have been examined on the anvil of probabilities without in any way being influenced by the fact that the doctor and Ranjitsinh have not been examined by the petitioner.

7. In the instant case, the evidence of the petitioner-wife was to the effect that she was being ill-treated by the opponent and other family members of the opponent, namely, the sister and paternal aunt of the opponent. Right from the beginning, consistently it was the allegation of the petitioner that the paternal aunt and the sister of the opponent were ill-treating her and she was being treated in house as a maid-servant. It is an admitted position that in the house of the opponent, his sister Hansaba did stay together. As far as the paternal aunt of the opponent is concerned, this aspect appears to have been amply proved. In spite of the specific allegations made by the petitioner-wife in her application as well as in her deposition, both the courts below failed to take into consideration the vital fact and circumstance that the opponent-husband had not examined his paternal aunt and/or his sister. The courts below which were eager to draw adverse inference against the petitioner, did not even take into consideration the fact that the opponent had not made any attempt at all to examine his paternal aunt and his sister. As far as the petitioner was concerned, the doctor and

Ranjitsinh were not her family members. They were not under her control or were not easily available to her. But, so far as the opponent is concerned, his paternal aunt and his sister were very much there in his own house. At least his sister could have been examined, if not his paternal aunt. There is no explanation whatsoever why they have not been examined to controvert the allegation made by the petitioner. In absence of this evidence, the petitioner's case has got to be believed.

8. The learned Additional Sessions Judge has observed that, "to our surprise the applicant has not examined Ranjitsinh for the reasons best known to her". Now it may be noted that the case of the petitioner and particularly that of her father in deposition before the court was that the information regarding the danger to the life of the petitioner was given by said Ranjitsinh. Even if said Ranjitsinh is not examined and even if adverse inference, as held by the lower courts, is permissible to be drawn, then the result will not be that the entire case of ill-treatment and cruelty deposed to by the petitioner and her father be discarded. Both the courts below have jumped to the conclusion that since Ranjitsinh has not been examined, the story regarding ill-treatment and cruelty to the petitioner is false. While doing so, the courts below have failed to take into consideration the following aspects of the case:

(1) That the custody of the petitioner-wife was required to be taken by her father with the help of the police, There is no reason to disbelieve this part of the case put forth by the petitioner and her father, Ranjitsinh's evidence, at the most would have thrown light on made communication of information and the nature thereof.

(2) There is clear evidence of the petitioner that she was being ill-treated by the opponent and by the paternal aunt and sister of the opponent. Why after about eight years of married life she would invent such story?

(3) That there was a married life for a considerable time and two children were born out of the wedlock Ordinarily there would not be any reason whatsoever for a married woman having two children and having stayed at the place of her husband for a period of about eight years to concoct a story of ill-treatment and beating. Beating to such an extent that her life itself was in danger and her father was required to take the help of police to secure her custody.

9. The lower courts have not taken into consideration these circumstances and have not taken into consideration the fact that there was no reasonable explanation whatsoever from the opponent as to why he did not examine his paternal aunt and on his sister to controvert the evidence of the petitioner and as to what was the reason why the petitioner-wife was forced to adopt such an unusual course? Having regard to the social background of Hindu Society and rural life it may well be presumed that a wife would not leave her marital home, unless an impossible situation is created at her matrimonial house.

10. The lower courts have held that the petitioner was taken away by her father

and therefore, it was not the opponent who refused or neglected to maintain her. This is nothing but a perverse way of looking at the matter. The petitioner's father was not keen to take the petitioner at his house. Her father had not come to the opponent to take the petitioner with him in ordinary course. He was required to take the help of the police. Through the D.S.P., the police authorities at Wankaner were informed to give help to the petitioner's father. The police authorities had to see that safe custody of the petitioner be given to the petitioner's father. Therefore simply because the petitioner's father came to take custody of the petitioner from the opponent, it can never be said that the opponent had not refused or had not neglected to maintain her. It was he (the opponent-husband) and his family members who had created an impossible situation for the petitioner. In such a situation unless there was danger to her life, she would not have called her father to take her away. The natural conduct of a married wife having two children and who had lived with her husband for about eight years would be that only as a last resort she would leave her matrimonial house. This is not a case of an urban elite society girl, in whose case it may be said that on the ground of minor trouble or quarrels, she may leave her husband's house.

11. The learned Addl. Sessions Judge has given too much importance to one sentence which occurred in the cross-examination of the petitioner-wife. The petitioner-wife said to the effect that she was not ready to go and reside with the opponent on any condition. This statement made by the petitioner-wife should have been read in proper context and in the background of her apprehension that her life was in danger at the place of the opponent. A woman who found herself in a helpless position and could save her life because of the timely help of the police and could escape from the jaws of death, would certainly not be willing to go again at the same place and put her life in danger. This background has not been taken into consideration at all by the learned Addl. Sessions Judge. The learned Addl. Sessions Judge has observed:

Thus, it appears to me that the say of the opponent is true that the applicant No. 1 does not like to reside at Sindhavadar in the joint family and she desires to live separate at Rajkot or at any other place, so that she can enjoy the separate life. She may be thinking like that and there can be no objection, but that is no ground for claiming the separate maintenance when wife claim maintenance u/s 125 then she has to prove that the opponent has refused or neglected to maintain her.

This approach adopted by the learned Addl. Sessions Judge is also grossly erroneous, and perverse. In the instant case, the learned Addl. Sessions Judge ought to have borne in mind that the main source of the trouble was the paternal aunt and sister of the opponent husband. Therefore, the petitioner-wife was amply justified in insisting that she would not stay in the joint family at Sindhavadar. Thus, the lower courts have not taken into consideration the fact that central points of trouble were the paternal aunt and sister of the opponent.

Therefore, when she found that life in the joint family where other members of the family were harassing her, was unbearable and could not be tolerated, she was certainly entitled to stay separate and claim maintenance.

12. The learned Addl. Sessions Judge has made much about the deposition of the father of the petitioner to the effect that the petitioner was ready to live at Rajkot. If the evidence is read in proper context, the father of the petitioner stated so on account of the quarrelsome atmosphere in the house of the opponent. Therefore, there is nothing wrong if the father of the petitioner-wife suggested that both the spouses should stay separate from the joint family. In the facts and circumstances of the case, it cannot be said that the offer made by the opponent-husband was genuine and reasonable. The assertion made by the petitioner-wife that it was not possible to stay together with the opponent in his joint family, appears to be quite reasonable, particularly in view of the fact that her own life was in danger and her custody was required to be taken with the help of police.

13. The learned Addl. Sessions Judge has rightly observed in para 8 of the judgment that the opponent is a man with means. He is serving as Treasury Officer in the District Treasury. At that time his salary was roughly about Rs. 750/- per month. He holds 32 acres and 14 gunthas of land. The say of the petitioner is that the income of the opponent would be roughly about Rs. 50,000/- per annum. This may be an exaggeration. But when the opponent is the owner of agricultural land to the extent of 32 acres and 14 gunthas of land, it would be reasonable to infer that over and above his salary income, he would have earnings of at least Rs. 32,000/- per year (At least one thousand rupees per acre per annum). This would mean that his total earning "would roughly be about Rs. 3500/- per month. The learned Addl. Sessions Judge has observed in para 9 of the judgment that there is no dispute with regard to the fact that applicant No. 1 (i.e. petitioner-wife) is unable to maintain herself. On this point no argument is raised on behalf of the opponent. Therefore, when it is held that the petitioner is entitled to stay separate and claim maintenance the natural corollary is that the opponent should be directed to pay maintenance to the petitioner-wife. The petitioner-wife has claimed Rs. 300/- per month. Having regard to the family background of the petitioner, both of whom belong to Girasdar community and having regard to the fact that the opponent is a landlord and old-time Girasdar, and as the petitioner herself is required to live the life as per the status of the family, the amount of Rs. 300/- per month claimed by her is eminently just and proper and the same is required to be granted. In fact, the amount claimed by her is rather on lower side. Hence, the amount as claimed by her is required to be granted.

14. Counsel for the opponent-husband has produced a copy of the judgment in proceeding under Hindu Marriage Act delivered by the Court of Assistant Judge, Rajkot at Morbi. He has submitted that in the civil proceedings it is held that the petitioner-wife is not entitled to stay separate. Therefore, it should be held that

in the summary proceedings u/s 125 of Cri. P. Code also she is not entitled to claim maintenance. Be it noted that the aforesaid judgment is delivered in Hindu Marriage Petition No. 8 of 1982 and 10 of 1982. H.M.P. No. 8 of 1982 was filed by the opponent-husband u/s 9 of the Hindu Marriage Act for restitution of conjugal rights. H.M.P. No. 10 of 1982 was filed by the petitioner-wife, praying for judicial separation. After recording evidence and after hearing the parties, the learned Assistant Judge, who decided the cases, dismissed the petitions filed by both the parties. That is to say, the petitioner-wife has been denied the prayer for judicial separation and the opponent-husband has been denied decree for restitution of conjugal rights. In this view of the matter, it cannot be said that the petitioner-wife is disentitled to claim maintenance in criminal proceedings. Moreover, one does not know whether this judgment has become final or not. On this point, counsel for the opponent-husband who has produced the judgment on record, was not in a position to say as to whether the judgment has become final or not. In this view of the matter, the decision in the civil proceedings under the Hindu Marriage Act does not tilt the balance either way.

15. In the result, the special criminal application is allowed. The judgment and orders passed by the learned Addl. Sessions Judge, Rajkot (Criminal Revision Application No. 21 of 1982) and learned J.M.F. C, Morbi (Misc. Criminal Application No. 62 of 1981) rejecting the claim of maintenance of the petitioner-wife (original applicant No. 1) are quashed and set aside. The rest of the judgment and orders regarding grant of maintenance to the minor children passed by the lower courts are not disturbed. The opponent-husband, i.e. Anirudhsinh Harisinh Zala, is directed to pay to the petitioner-wife Rs. 300/- (Rupees three hundred only) per month as and by way of maintenance from the date of application, i.e. from July 6, 1981. Rule made absolute to the aforesaid extent.