
(1993) 02 GUJ CK 0050
In the Gujarat High Court

Arunaben Vrajlal Davda

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 17-02-1993

Acts Referred:

Constitution of India, 1950 — Article 227, 227
Criminal Procedure Code, 1973 (CrPC) — Section 125, 125
Evidence Act, 1872 — Section 106

Citation : (1993) 1 CivCC 581 : (1993) 2 GLR 1080

Hon'ble Judges : A.N. Divecha, J

Bench : Single Bench

Judgement

A.N. Divecha, J.—The petitioner has invoked the extra-ordinary jurisdiction of This Court, for questioning the correctness of the award of. maintenance at the rate of Rs. 200 per month made by the learned Additional Sessions Judge of Amreli on 12th July, 1989 by his judgment and order in Criminal Revision Petition No. 25 of 1987. Thereby the learned Additional Sessions Judge modified the order passed by the learned trial Magistrate awarding maintenance to her at the rate of Rs. 110 per month. According to the petitioner her claim for maintenance at the rate of Rs. 400 per month ought to have been accepted in full.

2. The facts giving rise to this petition are not many and not much in dispute. The petitioner herein moved the Court of the Judicial Magistrate (First Class) at Bagasra u/s 125 of the Criminal Procedure Code, 1973 ("the Cr. P.C" for brief). It came to be registered as Misc. Criminal Application No. 11 of 1986. She claimed maintenance at the rate of Rs. 400 per month. Respondent No. 2 herein resisted that maintenance application by filing his reply at Exh. 7 on the record of the case. After recording evidence and hearing the parties, by his judgment and order passed on 30th April, 1987 in Misc. Criminal Application No. 11 of 1986, the learned trial Magistrate awarded maintenance to her at the rate of Rs. 110 per month. Aggrieved thereby, the petitioner carried the matter in revision before the Sessions Court of Amreli. Her revisional application came to be registered as Criminal Revision Petition No. 25 of 1987. It appears to have been assigned to the

learned Additional Sessions Judge of Amreli for hearing and disposal. After hearing the parties, by his judgment and order passed on 12th July, 1989 in Criminal Revision Petition No. 25 of 1987, the learned Additional Sessions Judge of Amreli partly accepted the revisional application and raised the amount of maintenance from Rs. 110 per month as fixed by the trial Court to Rs. 200 per month. That also did not satisfy the petitioner fully. She has therefore invoked the extra-ordinary jurisdiction of This Court under Article 227 of the Constitution of India for questioning the correctness of the award passed by the learned Additional Sessions Judge in his impugned judgment and order.

3. It may be mentioned that the learned Additional Sessions Judge has found respondent No. 2 herein (the husband of the petitioner) to have concealed and suppressed his real income from the Court. After recording this finding, the learned Additional Sessions Judge came to the conclusion that the income of the husband could be Rs. 1200 per month. It may be mentioned at this stage that the petitioner in her evidence deposed to the effect that her husband's income was to the tune of Rs. 1500 per month. What was the income of the husband was certainly within his special knowledge. It was his duty to have disclosed to the Court his correct income. In fact the burden to prove his income which was within his special knowledge was on him in view of Section 106 of the Evidence Act, 1872 ("the Act" for brief). If a party in possession of the best evidence within his special knowledge does not produce the best evidence before the Court, an adverse inference can be drawn against such party in view of the ruling of the Supreme Court in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, . In that case the adverse inference would be to accept the other side's case in that regard in toto.

4. The unreported ruling of This Court in Criminal Revision Application No. 215 of 1983 decided on 25th January, 1984 buttresses the view that I have taken in this case. Sitting as a single Judge, the view taken by This Court in the aforesaid unreported ruling would be binding to me. Even otherwise, I am in respectful agreement with it.

5. In the instant case, as aforesaid, the petitioner in the trial Court deposed that her husband's income was to the tune of Rs. 1500 per month. It was found by the learned Additional Sessions Judge that the husband has concealed and suppressed his real income from the Court. In that case, the learned Additional Sessions Judge was justified in drawing an adverse inference against him with respect to his income. The learned Additional Sessions Judge however erred with respect to the quantum of income that he assumed. In that case, the learned Additional Sessions Judge ought to have fixed the income of the husband at Rs. 1500 per month as deposed to by the wife in her evidence. This is obviously an error in exercise of his jurisdiction by the learned Additional Sessions Judge.

6. The ruling of the Supreme Court in the case of Mohd. Yunus Vs. Mohd. Mustaqim and Others, as relied on by Shri Patel for respondent No. 2 is of no assistance in the instant case. It is true that the Supreme Court has ruled that

Article 227 of the Constitution of India cannot be used for correcting mere errors of law made by the lower Courts. As observed by me earlier, the learned Additional Sessions Judge applied me wrong principle of law to the facts of the case. This would be an error in exercise of his jurisdiction. Article 227 can certainly be invoked for correction of jurisdictional errors including errors in exercise of jurisdiction. I am therefore of the opinion that the aforesaid ruling of the Supreme Court in the case of Mohd. Yunus (supra) is of no assistance to respondent No. 2 in the present case,

7. The unreported ruling of This Court in Special Criminal Application No. 249 of 1984 decided on 30th April, 1988 Sulochanaben P. Patel V. Bhailaibhai S. Patel some portion of which is extracted in 1988 (1) GLH 38 will not assist respondent No. 2 in the present case for the simple reason that This Court therein has ruled that it would not be proper for the High Court to exercise its powers under Article 227 of the Constitution of India unless a question of jurisdiction is involved or a compelling reason exists. As pointed out hereinabove the learned Additional Sessions Judge has applied an incorrect principle of law to the facts of the case and, even at the cost of repetition, I reiterate that it was an error in exercise of his jurisdiction. The existence of a compelling reason can be said to be that the petitioner is deprived of her due maintenance by application of a wrong principle of law. In that view of the matter, the aforesaid unreported ruling of This Court is of no help to respondent No. 2 in the instant case.

8. If the respondent's income is found to be Rs. 1500 per month, the petitioner should be held entitled to Rs. 400 per month in view of the fact the respondent has to rear two children borne out of the wedlock. Even if the income of the husband is assumed to be Rs. 1200 per month, as assumed by the learned Additional Sessions Judge, for the purpose of fixing maintenance, the unit system could have been resorted to. The respondent has to rear two children and he has to provide maintenance to his wife. For an adult person 2 units may be taken and for each child 1 unit may be taken. In that case, Rs. 1200 will have to be divided in 6 units. For the purpose of each unit there would be Rs. 200. With the wife claiming 2 units from the income, she would be entitled to Rs. 400 by way of maintenance. The quantum of maintenance fixed at Rs. 200 per month by the learned Additional Sessions Judge has not taken into consideration this aspect of the case. That is again an error in exercise of his jurisdiction calling for interference with it by This Court in exercise of its powers under Article 227 of the Constitution of India.

9. In the result, this petition is accepted. The award of maintenance at the rate of Rs. 200 per month made by the learned Additional Sessions Judge in favour of the petitioner under the impugned judgment and order is modified from Rs. 200 per month to Rs. 400 per month from the date of the application, that is, 3rd July, 1986. Rule is accordingly made absolute however with no order as to costs on the facts and in the circumstances of the case.