

(2005) 02 BOM CK 0068

In the Bombay High Court

Case No : Criminal Application No. 209 of 2002

Atmaram Tukaram Suradkar

APPELLANT

Vs

Sau. Trivenibai Atmaram Suradkar

RESPONDENT

Date of Decision : 14-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 482
Hindu Marriage Act, 1955 — Section 11, 12, 12(2), 13, 16
Penal Code, 1860 (IPC) — Section 494

Citation : (2005) CriLJ 2057 : (2006) 1 DMC 203 : (2005) 4 RCR(Civil) 169 :
(2005) 4 RCR(Criminal) 216

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : A.M. Ghare, for the Appellant; S.S. Dhengale, for the Respondent

Final Decision : Allowed

Judgement

S.T. Kharche, J.—By invoking the jurisdiction of this Court u/s 482 of the Code of Criminal Procedure Code, this petition takes an exception to the order dated 1-11-2001 passed by the learned Additional Sessions Judge in Criminal Revision Application No. 70/2000, where by the revision is allowed and the judgment and order dated 28-7-2000 passed by the learned Judicial Magistrate First Class in Misc. Criminal Application No. 1/1998 has been set aside and the applicant opponent was directed to pay maintenance amount of Rs. 500/- p.m. to the applicant wife from the date of application.

2. Trivenibai had filed miscellaneous criminal application bearing No. 1/1998 against her husband Atmaram claiming maintenance " Rs. 500/- per month u/s 125 of the Criminal Procedure Code on the contentions that she is his legally wedded wife and since last one year of the filing of application she was cohabiting with him. The opponent husband was serving in M.S.E.B. Akola and there developed love with her. She then went to Mangrulpir with him as he was transferred there and they lived as husband and wife in the house of one

Manohar Misal. Her husband had treated her properly initially for some days and thereafter he used to beat her asking her to bring money from her parents. Prior to six months of filing of application, the opponent drove her away from his house and refused to maintain her. The opponent husband is serving as lineman in M.S.E.B. and getting monthly salary of Rs. 4,000/-. The applicant wife is unable to maintain herself and, therefore, she claimed maintenance " R. 500/- per month.

3. The husband resisted the application by filing his written statement and contended that Trivenibai is not his legally wedded wife. According to him he got married with one Umabai in the year 1976 and he has two daughters from her. His wife Umabai is residing with him and the application filed by Trivenibai is liable to be dismissed. On consideration of the evidence adduced, the trial Court found that Trivenibai is not legally wedded wife of Atmaram and so she is not entitled to get maintenance. Consequently, the learned Magistrate dismissed the application. Being aggrieved by that order, a revision was carried by the applicant Trivenibai before the learned Additional Sessions Judge. The learned Additional Sessions Judge, on hearing the learned counsel for the parties, set aside the judgment and order passed by the Magistrate by which the misc. criminal application claiming maintenance was dismissed and directed that the petitioner husband to pay the amount of Rs. 500/- per month to his wife Trivenibai from the date of application. This order is under challenge in this petition.

4. Mr. Ghare, the learned counsel for the petitioner husband contended that Trivenibai has examined herself and in support of her contentions one Manohar (A.W. 2). The petitioner husband has examined himself and other two witnesses namely; Umabai Atmaram Suradkar (D.W. 2) and Dilipkumar Manohar Kulkarni (D.W. 3). He contended that Umabai has clearly stated in her deposition that her marriage with the petitioner was solemnized on 16-5-1976 and two daughters were born out of the valid wedlock and still Umabai is living with the petitioner. He contended that when the first marriage of Atamaram is subsisting, the subsequent alleged marriage with Trivenibai that too five years back probably in the year 1992 would be void. He contended that Trivenibai is the widow of Sakharam and one son is born to her during her valid wedlock with the said Sakharam and thereafter she claims to have married with petitioner Atmaram in the year 1992. He contended that in such a situation, the marriage between the petitioner husband and respondent Trivenibai is void and the learned Additional Sessions Judge has committed an error of law in granting maintenance " Rs. 500/- per month u/s 125 of the Code especially when it has not been established that she is his legally wedded wife. He therefore, contended that the impugned order is liable to be quashed.

5. Mr. Dhengale, the learned counsel for the respondent wife contended that though the marriage of respondent Trivenibai with the petitioner Atmaram has been disputed, there is evidence on record to show that they lived as husband and wife for quite some time. He contended that for the purpose of Section 125,

Cri P.C. strict proof of performance of the marriage is not necessary. He contended that proof of marriage u/s 125, Cr.P.C. is, not as strict as required in cases of trial u/s 494 of the Indian Penal Code and once it is proved formalities of marriage were completed, Magistrate on prima facie can decide about maintenance in a summary procedure. In support of these submissions, he relied on Single Bench decision of this Court in the case of Sunita alias Kavita Vivekanand More v. Viveknand Shripati More 2001 Bom CR 232 and also on the Division Bench decision in the case of Santosh Vs. Naresh Pal, .

6. This Court has given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. In Sunita @ Kavita Vivekanand More (Sou.) Vs. Vivekanand Shripati More and Another, , it has been observed in para Nos. 9 to 11 as under :

"Firstly, it has to be highlighted that it is not only a question of maintenance to be given to the wife by the husband; what is at stake and what is involved, is the status of persons, namely, Sunita and Vivekanand. The fact of marriage , the subsequent cohabitation and desertion which are alleged the subsequent cohabitation and desertion which are alleged by the petitioner, are denied by the respondent No. 1 while the Judicial Magistrate, First Class, Akkalkot, after scanning the evidence, came to the conclusion that applicant had proved that she was the wife of Vivekanand, and ordered maintenance to be paid to her, the learned IV Additional Sessions Judge, went unnecessarily into the details with respect to the validity of the marriage between the parties. It is well settled that challenge as to the validity of marriage on the ground of nullity is not be made in the Magistrate's Court, when the proceedings are filed u/s 125 Cr.P.C. The Magistrate is not competent to decide the validity of marriage. The proper course in such case, is to grant maintenance, leaving the husband to establish invalidity of marriage in competent Court. Recourse can be conveniently taken to the Supreme Court judgment reported in Dwarka Prasad Satpathy Vs. Bidyut Praya Dixit and Another, , wherein the Supreme Court has laid down that the validity of the marriage for the purpose of summary proceeding u/s 125, Cr.P.C. is to be determined on the basis of the evidence brought by the parties, that the standard of proof of marriage in such proceedings, is not as strict as, is required in a trial of offence u/s 494 of the Indian Penal Code. It is further stated by the Supreme Court in this case that 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 u/s 125, Cr.P.C. and if from the evidence which is led, the Magistrate is prima satisfied with regard to the performance of marriage in proceedings u/s 125, Cr.P.C. which are of a summary nature, strict proof of performance of essential rites, is not required.

In (Veena Devi Vs. Ashok Kumar Mandal, , the Patna High Court has gone to the extent of saying that failure to name the Priest, who had participated in the marriage, could hardly be a ground for disbelieving factum of marriage. It has

further been held in the very same case that the proceedings u/s 125, Cr.P.C. are of a summary nature, and are not intended to determine fully and finally status and personal rights of parties and questions of marriage need not be decided like a Matrimonial Court."

7. There cannot be any dispute so far as the ratio laid down by the Supreme Court as well as this Court that the proof of marriage u/s 125, Cr.P.C. is not as strict as required in cases of trial u/s 494, IPC and once it is proved formalities of marriage were completed the Magistrate on prima facie fact can decide about maintenance in summary procedure.

8. However, the question whether the respondent wife is entitled to maintenance u/s 125, Cr.P.C. when the first marriage of the petitioner is subsisting is a vital question in these proceedings. In this context reference may be had to the Single Bench decision of this Court in the case of Indu Nimba Pawar v. Sumanbai Kadu Pawar 1996 (2) Mh LJ 817, wherein it has been held that :

"In the present case it is an admitted case that the wife had an earlier marriage. According to her she took divorce from her husband and married the petitioner subsequently. The learned counsel for the petitioner contended that when there is no valid divorce of the first marriage, the alleged second marriage of the wife is a void marriage as per Section 5 of the Hindu Marriage Act and hence the wife of a void marriage is not a wife at all and her status is that of a mistress or a concubine and such a person cannot claim maintenance u/s 125, Criminal Procedure Code. On the other hand, the learned counsel for the respondents 1 to 3 contended that the Court need not pronounce on the validity of the marriage in this proceeding and it is for the husband to take necessary action by approaching a Civil Court to get a declaration that the marriage is illegal or void and placed reliance on a decision of this Court reported in 1988 Mh LJ 1135 : 1989 Cri LJ 675, Malan v. Balasaheb which has been referred to above on another point. In this case though the husband admitted the marriage, he pleaded that he was forced to undergo the marriage. It was in those circumstances the High Court observed that it is for the husband to prove the allegations of force etc. and get a declaration from a Civil Court that it is a void marriage. That means in that case there was serious dispute between the parties about the allegations made by the husband and hence it was observed that it cannot be decided in a summary proceeding u/s 125, Criminal Procedure and the parties should approach the competent Civil Court. In fact a clear observation is made in that judgment that a woman whose marriage is void cannot get the status of a legally wedded wife and hence she is not entitled to maintenance u/s 125, Criminal Procedure Code."

9. In the present case there is no dispute that Umabai (D.W. 2) is the first wife of the petitioner Atmaram and her evidence would reveal that she married with him on 16-5-1976 and they are living together and two daughters were born to them out of that valid marriage and the names of the daughters are, Sobha and Sangita. Similarly, the respondent wife has clearly stated in her report which was recorded in Marathi that;

vankts 1 o"kkZiklwu vkRekjkeph cnyh >kY;kus eyk eaxGwjihjyk ?ksmqv vkyk-R;kph iRuh lKs- mek o rks lku[kkl ;aFks jkgrks o eyk felkG ls okM;kr HkkM;kus [kksyh d#u fnyh gksrh-

10. Thus, it is undisputed position now that Umabai is first wife of Atamaram and there is no evidence to show that the marriage between them has been dissolved by a decree of divorce obtained u/s 13 of the Hindu Marriage Act, 1955 from the competent Court. There is no provision in the Act enabling the parties to come to an agreement that the marriage should be dissolved out of the Court, therefore, it is obvious that prima facie the alleged marriage of the respondent wife with the petitioner would not be legal. It is admitted fact that the husband had first wife Umabai and said Umabai has been examined as witness on behalf of the husband and there has been no decree of divorce between Atmaram and Umabai and consequently in view of this situation, it is clear that the respondent wife would not be entitled to the maintenance u/s 125, Cr.P.C.

11. Useful reference may be made to the decision of Supreme Court in the case of Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another, , wherein there is a clear dictum that if the marriage is void, the woman would not be entitle to claim maintenance u/s 125, Cr.P.C. It has been observed by the Apex Court as under :

"Clause (i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. The plea that the marriage should not be treated as void because such a marriage was earlier recognised in law and custom cannot be accepted. By reason of the overriding effect of the Act as mentioned Section 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a party of that Law inconsistent with any provision of the Act. Such a marriage cannot also be said to be voidable by reference to Section 12. So far as Section 12 is concerned, it is confined to other categories of marriage and is not applicable to one solemnised in violation of Section 5 Clause (i). Sub-section (2) of Section 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a Court in a proceeding specifically commenced for the purpose. The provisions of Section 16 also throw light on this aspect. Section 16(3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Sections 11 and 12. It is also to be seen that while the Legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar

protection in respect of the mother of the child.

The expression "wife" used in Section 125 of the Code should be interpreted to mean only a legally wedded wife. The word "wife" is not defined in the Code except indicating in the Explanation to Section 125 its inclusive character so as to cover a divorce. A woman can-not be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must, therefore, be given the meaning in which it is understood in law applicable to the parties. The marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is, therefore, not entitled to the benefit of Section 125 of the Code."

12. However, useful reference could be made to the Division Bench decision of this Court in the case of Bajirao Raghoba Tambre Vs. Tolanbai (Miss) and Another, , wherein it has been observed that; "A woman whose marriage is void cannot get the status of a wife and therefore if the marriage of the parties is void by reason of contravention of Section 5(i) (iv) and (v) of the Hindu Marriage Act, the woman is not competent to apply for maintenance u/s 125, Criminal Procedure Code which merely speaks of a "wife". The second wife whose marriage is void in view of Section 5(i) of the Hindu Marriage Act cannot thus apply for maintenance u/s 125 of the Code. The meaning of "wife" cannot be extended to the case of a void marriage. In the absence of a clear intention in the provision itself and having regard to the background in which the provisions of Section 125, Criminal Procedure Code, 1973 were enacted, a woman cannot claim maintenance under the section unless she proves that she is the legally wedded wife of defendant against whom she brings the action. While construing provisions of Section 125, Criminal Procedure Code it is not proper to introduce the concept arising out of the provisions of Section 25(1), Hindu Marriage Act. While Section 25(1) is intended for parties who are Hindus. Section 125, Criminal Procedure Code is secular in character and applies to persons belonging to all religions. The jurisdictions contemplated by Section 25(1), Hindu Marriage Act and of Section 125, Criminal Procedure Code are distinct and specified. It is not possible to assign different meaning to the word "wife" for persons belonging to different religions or governed by different personal laws. An extended meaning cannot therefore be given to the word "wife" in Section 125, Criminal Procedure Code on the basis of Section 25(1), Hindu Marriage Act."

13. The Division Bench decision of this Court is squarely applicable to the facts and circumstances of the present case because in that case the facts were somewhat identical. In that case the petitioner-husband was married to one Dwarkabai on 4-7-1961 and during the subsistence of this marriage, the petitioner married the respondent No. 1 Tolanbai on 5-9-1966. On 1-9-1975 Tolanbai filed an application u/s 125 of the Code alleging inter alia that the petitioner beat her and drove her out of the house and, therefore, she has been staying with her parents who are poor, and she has no means of livelihood. On taking into consideration the scope of Section 5(i) and (iv) and (v) of the Hindu

Marriage Act, this Court ruled that if the first marriage of the husband was subsisting, then woman who subsequently marries with that person, would not get a status of wife and the marriage would be void.

14. The law position that emerges is that the provisions of Section 5(1) and 11 of the Hindu Marriage Act render the position of lady married with a person who had his spouse living at the time of second marriage to be that of a kept mistress and not that of a married wife and such lady is not entitled to claim maintenance u/s 125 of the Code. Even though a woman married without knowing about the previous marriage of the husband, the woman does not acquire legal status of wife and is not entitled to claim maintenance.

15. The learned counsel for the respondent relied on the decision of the Apex Court in the case of Rameshchandra Rampratapji Daga Vs. Rameshwari Rameshchandra Daga, , wherein in para 22 it has been observed that; "The facts of the present case fully justify grant of maintenance both to the wife and the daughter. The evidence of the wife has been believed by the Courts below and according to us rightly so. From circumstances preceding and attending the marriage, it can safely be inferred that the present husband must have made reasonable enquiries about the previous marriage of the present wife. The wife's version is natural and inspires belief that the document of Chor Chithhi was shown and given to the husband. It is proved from the photocopy of the foil of Registration placed on record. According to the wife, the husband did receive the document of Chor Chithhi but has not produced it before the Family Court. It is argued that it is open to the wife, if the document was registered, to get a copy from the Registration Office. Even if that was possible, we find no ground to disbelieve her version that the fact of her previous marriage was not concealed from the present husband. The husband is an advocate. His falsehood went to the extent of denying his second marriage and calling his wife only to be a governess of his children from the first wife. He unsuccessfully denied even the parentage of daughter Puja, born through him. He failed to lead any evidence on the illegitimacy of the child. After the second marriage the parties lived as husband and wife and they had a considerably long married life of about nine years from 1981. In such a situation, the Family Court and High Court were fully justified in holding that the wife deserves to be granted maintenance u/s 25 of the Act."

16. On close scrutiny of the present case, this Court does not find any force in the submissions of the learned counsel for the respondent and on facts it is quite clear that the decision of the Apex Court has no bearing on the facts and circumstances of the present case.

17. In the present case, the learned Additional Sessions Judge has committed an error in granting maintenance to respondent Trivenibai whose marriage is void, and therefore, the impugned order has resulted into miscarriage of justice and requires interference by this Court. The impugned order passed by the learned Additional Sessions Judge granting maintenance to respondent Trivenibai cannot

be sustained in law, and, therefore, the same is set aside. Consequently, the petition is allowed.