

(1981) 08 BOM CK 0038

In the Bombay High Court

Case No : Criminal Application No. 1848 of 1980

Dattu Murlidhar Jagtap

APPELLANT

Vs

Babi Bai Dattu Jagtap and Another

RESPONDENT

Date of Decision : 28-08-1981

Acts Referred:

Constitution of India, 1950 — Article 227

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

Citation : (1982) 2 BomCR 26

Hon'ble Judges : S.P. Kurdukar, J

Bench : Single Bench

Advocate : A.V. Savant, for the Appellant; A.H. Vaishnav and Public Prosecutor, for State of Maharashtra-respondent No. 2, for the Respondent

Judgement

S.P. Kurdukar, J.—Learned Advocates appearing for the parties to this petition have informed me that they have no objection to this petition being heard at Aurangabad. In view of this consent given by the parties through their Advocates, I proceed with the case.

2. This petition under Article 227 of the Constitution of India is filed by the petitioner-husband (hereinafter referred to as "the husband") challenging the concurrent orders passed by the courts below in the proceedings arose u/s of the Code of Criminal Procedure, 1973. It is alleged by the respondent-wife (hereinafter referred to as "the wife") that on November 4, 1977, she filed an application u/s 125 of the Code of Criminal Procedure claiming maintenance from the husband. It is common ground that the marriage between the parties took place in the year 1972. It is alleged by the wife that the husband started ill-treating her as she did not bear a child. It is further stated that the relations between the parties became strained and, therefore, the husband started ill-treating the wife. The husband is owning five acres of lands which are bagayati lands and getting an annual income of Rs. 2,500/- from the said lands. It is, therefore, prayed by the wife that she may be awarded maintenance at the rate

of Rs. 100/- per month.

3. The husband contested this application denying the allegation of ill-treatment as well as any strained relations on account of not getting a child. It is alleged by the husband that he has been always ready and willing to maintain the wife. On the contrary, it is alleged by the husband, that the wife does not like to live with him and after few days of the marriage she left the matrimonial house voluntarily and inspite of his efforts to get her back she refused to come back. It is then alleged by the husband that at the time when the wife left the house, she had taken away with her valuable ornaments costing about Rs. 2,500/-. It is further alleged by the husband that the application of the wife is false and, therefore, the same rejected.

4. Both the parties led oral and documentary evidence before the trial Court. The learned Judicial Magistrate, First Class, Paithan, by his judgment and order dated June 30, 1980 granted the application of the wife and ordered the husband to pay a sum of Rs. 40/- per month by way of maintenance to the wife. The husband thereafter preferred Criminal Revision Application No. 113 of 1980 to the District Court at Aurangabad, and the learned Additional Sessions Judge by his judgment and order dated November 17, 1980, dismissed the said revision application and confirmed the order passed by the trial Court. It is against these concurrent orders passed by the Courts below that the husband has filed this petition under Article 227 of the Constitution and u/s 482 of the Code of Criminal Procedure.

5. Shri Savant, learned Advocate for the husband, firstly submitted that the petition as it stands today does not contain the necessary averments as required under Clause (a) of sub-section (1) of section 125 of the Code of Criminal Procedure and, therefore, the petition of the wife be rejected. Shri Savant then submitted that on the evidence on record it is clear that the husband himself has been earning a very meagre sum of Rs. 40/- to Rs. 60/- per month and the said income cannot be said to be sufficient means as contemplated in sub-section (1) of section 125 of the Code of Criminal Procedure casting any duty upon the husband to pay maintenance to the wife. Shri Savant, therefore, submitted that on these legal submissions this petition must succeed and the original application filed by the wife should be rejected.

6. Shri Vaishnav, learned Advocate appearing on behalf of the wife, opposed these contentions. Shri Vaishnav took me through the petition filed by the wife in the trial Court for maintenance u/s 125 of the Code of Criminal Procedure. After going through the petition Shri Vaishnav could not persuade me to hold that the wife has pleaded in her petition that there is any pleading as required under Clause (a) of sub-section (1) of section 125 of the Code of Criminal Procedure. Realising this difficulty, Shri Vaishnav submitted that in the interest of justice the wife should be given an opportunity to put in the necessary pleadings and further submitted that this would not cause any injustice to the husband. Shri Vaishnav, therefore, submitted that in the event of this Court likely to accept the

submission of Shri Savant, the petition be remanded back to the trial Court with permission to the wife to amend the original application with reference to the provisions of section 125 of the Code of Criminal Procedure.

7. At the outset, I must state that there is some force in the submissions of Shri Savant. But, however, while exercising the jurisdiction under Article 227 of the Constitution I must not forget that my order would oppress either of the parties and may cause harm and injustice to the parties. I, therefore, find that the interest of justice the petition should be remitted back to the learned trial Magistrate by giving an opportunity to the wife to amend her petition in accordance with the provisions of section 125 of the Code of Criminal Procedure.

8. Shri Savant, learned Advocate for the husband, placed reliance upon the judgment of this Court reported in *Shrimati Kamlabai Keshav Kagal v. Shri Keshav Pandharinath Kagal*, 1979 Bom.C.R. 169. A similar question arose before this Court in the above referred case and *Jahagirdar, J.*, held that since the wife has failed to plead the requirement of Clause (a) of sub-section (1) of section 125 of the Code of Criminal Procedure, she is not entitled for any relief and consequently the learned Judge rejected the application. The matter arose before *Jahagirdar, J.*, in a criminal revision application. But however, the petition filed before me is under Article 227 of the Constitution wherein I feel that in the interest of justice, instead of dismissing the petition, it would be in the interest of justice to remit the matter back to the trial Court.

9. The view which I have taken in the matter before me, it is not necessary for me to refer to the other arguments advanced by Shri Savant in this petition. Both the parties will be at liberty to amend their pleadings if they deem fit in accordance with the provisions of law.

10. Shri Savant also relied upon several other decisions wherein the wife has failed to plead the requirements of Clause (a) of sub-section (1) of section 125 of the Code of Criminal Procedure, and the courts have either rejected the application or remitted back the matter to the trial Court after permitting the wife to amend the petition. In my opinion, it is needless to refer to all these authorities as I am of the opinion that in order to do justice between the parties, the case should be remanded back to the trial Magistrate for disposal in accordance with law.

11. I, therefore, set aside the orders passed by the courts below and remit the matter back to the Judicial Magistrate, First Class, Paithan, who will dispose of the petition as early as possible. The wife will be at liberty to amend the petition if she deems it necessary and fit to do so. In the event of the amendments being made by the wife, the husband will be at liberty to amend his written statement. Both the parties will be at liberty to lead such evidence as they deem fit.

12. In the result, the petition partly succeeds. The rule is made partly absolute and the matter is remanded back to the trial Magistrate for disposal in accordance with law. Having regard to the circumstances of the case, there shall

be no order as to the costs throughout.