

(2014) 11 GUJ CK 0020
In the Gujarat High Court

Case No : Criminal Appeal (Against Conviction) No. 1535 of 2008 and Criminal Misc. Application No. 5631 of 2012 in Criminal Appeal No. 1535 of 2008

Hemlataben Jaydeokumar Nayak

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-11-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125

Citation : (2014) 11 GUJ CK 0020

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Advocate : M.J. Buddhbhatti, Advocate for the Appellant; Rakesh R. Vyas, Advocate and Jirga Jhaveri, APP, Advocate for the Respondent

Judgement

S.G. Shah, J.—Heard learned advocate Mr. M.J. Buddhbhatti for the appellants and learned APP Ms. Jhaveri for the respondent No. 1. Learned advocate Mr. Rakesh Vyas for respondent No. 2 is not present. Even respondent No. 2 - Jaidevkumar Amrutlal Nayak is not present, though he was directed to remain present before the Court by order dated 8.10.2014 by Co-ordinate Bench of this Court (Coram: Hon"ble Mr. Justice R.M. Chhaya).

2. Learned advocate Mr. Buddhbhatti has pointed that the appellants have filed the application for maintenance since appellant No. 1 is wife and appellant No. 2 is minor son of respondent No. 2 at the relevant time on 4.5.2005 and same was partly allowed by impugned judgment and order dated 23.10.2007. The appellants have prayed to grant an amount of maintenance to the tune of Rs. 1500/- for each of them in such application, whereas by impugned judgment, the Family Court No. 2, Ahmedabad has while allowing the application partly, directed the respondent No. 2 to pay an amount of Rs. 750/- towards maintenance to appellant No. 1 and an amount of Rs. 500/- towards maintenance to appellant No. 2 u/s. 125 of the Cr.P.C. Learned advocate Mr.

Buddhbhatti has rightly pointed out that there is no reason for the Family Court to restrict the maintenance from the date of application i.e. 4.5.2005 till 28.11.2006. The appellants have filed an affidavit as her evidence i.e. deposition before the trial Court. It is settled legal position that affidavit for evidence as deposition in chief is to be filed only at relevant stage when the matter is ready for adducing evidence and generally after filing of reply by the other side. However, if we peruse the impugned judgment, unfortunately, the Family Court has not assigned even a single line that how and why maintenance should not be awarded from the date of application and it should be paid only from the date of filing of such affidavit on record. Unfortunately, the impugned judgment is only one page, wherein the Family Court has not assigned any reason and has not discussed evidence on record for its conclusion. Even the earning activity and income of the husband is also not disclosed at all in the impugned judgment. Instead of discussing or scrutinizing the impugned judgment, since the entire judgment is in one page and one paragraph, it would be appropriate to reproduce herein, which specifically confirms that the Family Court has only taken into consideration the admission by the respondent that he is ready and willing to pay Rs. 1000/- towards maintenance and that he has to maintain his widow sister and sister-in-law and their children. The only disclosure against the present appellant No. 1 is regarding her previous marriage with an allegation that she has not disclosed it.

"The applicant - wife has preferred this petition under Section 125 of the Criminal Procedure Code claiming maintenance from her husband, claiming that he has deserted her. She has claimed sum of Rs. 3,000/- i.e. Rs. 1,500/- for herself and Rs. 1,500/- for the child. Looking to the averments made by the husband that he is ready and willing to take his wife to the matrimonial home but the wife is reluctant to go to the matrimonial home. She was made to understand that if the husband is ready and willing to cohabit, she might not be entitled to any maintenance. The husband was ready and willing to give Rs. 1000/- p.m. to the wife. The husband has conveyed that he has many mounts to feed. He has widow sister and two children who are staying in the village. He has to maintain them. He has a widow sister-in-law and her children. Despite that he has to maintain his own son. It is his case that the wife has deserted him and not he. May that as it may be. The destitute wife is entitled to Rs. 750/- for herself and Rs. 500/- for the child from the date of the filing of the affidavit. The husband has contended that in his reply that she was earlier married and that fact has been suppressed. May that as it may be. I have not decided to pass order on merits. While awarding maintenance under Section 125, as no strict proof of marriage is required. Time has passed as the matter was being taken for reconciliation. I have not entered into the facts of the case as this petition is being a petition under Section 125 of the Criminal Procedure Code and as I am not passing the order on merits and without going into the facts. Only this order is passed on the fact that the wife does not wish to cohabit with the husband and the husband has agreed to pay Rs. 1,000/- to the wife."

3. However, the reference of the impugned judgment which is reproduced herein above, makes it clear that the Family Court No. 2, Ahmedabad has not taken care of the matter in accordance with law inasmuch as it has failed to appreciate the entire evidence on record and the relevant issue of desertion of the wife as well as the earning capacity of the husband. On the contrary, the trial Court has considered the difficulty of the husband alone. In view of such facts and circumstances, it would be appropriate to remand back the matter for proper consideration by the Family Court so as to avoid a position when any of the litigants may have to file appeal before the higher Court, if entire appeal is decided on merits of the evidence, which is available in record and proceedings in the form of paper-book. However, at the same time, considering the facts and circumstances, though the impugned judgment is required to be quashed and set-aside, instead of totally quashing and setting-aside that order, it is modified, whereby the amount of maintenance, which is awarded by the trial Court is to be treated as interim maintenance and it would be effective from the date of filing of application i.e. 4.5.2005. Thereby, respondent No. 2 has to make the payment of Rs. 750/- towards maintenance of appellant No. 1 - wife from 4.5.2005 till disposal of Criminal Misc. Application No. 1161 of 2005 by the Family Court and similarly, he has to pay Rs. 500/- towards maintenance of appellant No. 2 - Dhaval Jaidevkumar Nayak from 4.5.2005 till law permits.

4. Since the evidence is over before the Family Court, now, it would be appropriate for the Family Court to decide the application afresh, appreciating the evidence on record and assigning the reasons for its decision on or before 31.1.2015.

5. In view of above, Criminal Appeal is allowed to the aforesaid extent. In view of order in Criminal Appeal, Criminal Misc. Application No. 5631 of 2012 does not survive and stands disposed of.