
(1995) 12 BOM CK 0004

In the Bombay High Court

Case No : Criminal Writ Petition No. 217 of 1987

Indu Nimba Pawar

APPELLANT

Vs

Sou Sumanbai Kadu Pawar and Others

RESPONDENT

Date of Decision : 14-12-1995

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(1)
Hindu Marriage Act, 1955 — Section 13(1)

Citation : (1996) 3 BomCR 606 : (1997) 2 DMC 33 : (1996) 2 MhLj 817 :
(1997) 1 RCR(Criminal) 50

Hon'ble Judges : R.G. Vaidyanatha, J

Bench : Single Bench

Advocate : P.N. Joshi, for the Appellant; Premji B. Sawant, for respondents 1 to 3, R.Y. Mirza, Assistant Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

R.G. Vaidyanatha, J.—This is a husband's petition challenging the order granting maintenance dated 30-3-1988 in Criminal Revision Application No. 250 of 1987 on the file of 3rd Additional Sessions Judge, Nashik. Heard both the sides.

2. The first respondent-wife and two minor children, respondents 2 and 3, filed a petition for maintenance against the petitioner u/s 125 Cr.P.C. in Maintenance Application No. 34 of 1985 in the Court of Judicial Magistrate, First Class, Satana. After recording evidence, the learned Magistrate held that the marriage between the parties is not proved and accordingly dismissed the petition by his order dated 22-5-1987.

Then the wife and children carried the matter in revision before the learned Sessions Judge. After reappreciating the evidence, the learned Sessions Judge came to the conclusion that the marriage between the parties has been duly proved and that the present respondents 2 and 3 are the children born to petitioner and first respondent. Accordingly, the learned Sessions Judge allowed

the revision application and granted maintenance at the rate of Rs. 75/- per month to the wife, Rs. 50/- to the two children from the month of May 1987. Being aggrieved by that order, the husband has come up with the present petition.

3. The learned Counsel for the petitioner has questioned the correctness and validity of the order of the learned Sessions Judge. It was argued that the marriage between the petitioner and the first respondent is not proved and they are not husband and wife and therefore, the learned Sessions Judge was wrong in granting maintenance to the first respondent. Similarly, it was argued that the respondents 2 and 3 are not the children of the petitioner and hence they are not entitled to any maintenance. It was also argued that the alleged marriage between the petitioner and the first respondent is a void marriage, and therefore, the first respondent is not entitled to any maintenance. On the other hand, the learned Counsel for the first respondent contended that strict proof of marriage is not necessary in a proceeding u/s 125 Cr.P.C. It was argued that the marriage has been duly proved and the parties have lived together for many years and two children are born and there is a presumption in favour of the validity of the marriage. It was, therefore, argued that the order of maintenance may be confirmed and it is open to the husband to get a declaration from a competent Civil Court that the marriage is void.

4. As far as the factum of marriage is concerned, the learned Sessions Judge has considered the evidence of the wife and her brother. He has also taken into consideration the evidence of one doctor in whose clinic the parties had been admitted after the accident. The medical evidence discloses that the parties had described themselves as husband and wife. In view of these facts, the learned Sessions Judge held that the petitioner and the first respondent are husband and wife. He also recorded a finding that the respondents 2 and 3 are born after this marriage and they are the children born to the petitioner.

In my view, the finding of fact recorded by the learned Sessions Judge is not open to challenge before the High Court in a proceeding under Article 227 of the Constitution of India, under which the present petition is filed. The scope of interference by this Court is limited. This Court cannot be expected to reappreciate the evidence and give a different finding of fact.

As rightly argued by the learned Counsel for the respondents in a proceeding u/s 125 Cr.P.C. strict proof of marriage is not necessary. He relied on *Shri Narain Sharma Vs. The State*, , and *Sou. Malan Vs. Balasaheb Bhimrao Gawade* and another, in support of his contention that strict proof of marriage is not necessary.

No doubt, the learned Counsel for the petitioner relied on *Sumitra Devi Vs. Bhikan Choudhary*, , where the Apex Court has pointed out that there was no sufficient evidence regarding the formalities of marriage and hence remanded the matter to the learned Magistrate for fresh disposal according to law.

The trend of decisions is that in a proceeding u/s 125 Cr.P.C. which is a summary

remedy, strict proof of marriage is not necessary. What the Court has to see is whether there is semblance of marriage, whether the parties lived together as husband and wife and whether they can be called as husband and wife as per their conduct etc.

In the present case, the learned Sessions Judge has recorded a finding of fact that the petitioner and the first respondent are married and lived together and two children are born to them. I do not find any infirmity or illegality in the appreciation of evidence by the learned Sessions Judge. Even if another view is possible, by reappreciating the evidence, it is no ground for this Court to take a different view.

Even after holding that the marriage has been duly proved, the question will arise whether it is a valid marriage.

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 Cr.P.C. 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 Mah.L.J. 1135, *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 Cr.P.C. 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 Cr.P.C.

In the present case, there is no question of any disputed facts. On admitted facts, the wife had a husband who is very much living. In fact, the first husband had been examined as a witness on behalf of the wife. There has been no decree of divorce between the wife and the first husband as provided in the Hindu Marriage Act. Section 13 of the Act provides as to how a party to a marriage can get a decree for divorce. It mentions certain grounds on which alone a husband or wife can approach the Court and get a decree for divorce. By Amendment in 1976, section 13-B was introduced whereby the parties can obtain divorce by

mutual consent and even this can be done by filing an application before the Court as per the prescribed procedure.

There is no provision in the Hindu Marriage Act enabling the parties to come to an agreement that the marriage should be dissolved out of Court. Therefore, the question whether the alleged agreement between the wife and the first husband about divorce is a valid one and whether the wife's marriage with the petitioner is a valid marriage are all questions which cannot be decided in a proceeding u/s 125 Cr.P.C. It is a matter which has to be decided by the Competent Civil Court. In view of these admitted facts viz. that the wife has a first husband who is living and there is no decree of divorce through the Court under the provisions of the Hindu Marriage Act, I feel that the question should be left open so that the parties can approach a Competent Civil Court and get a declaration whether the marriage is valid or void. Since prima facie the marriage appears to be void, I feel that the wife could not be entitled to get maintenance in this case, except however giving an opportunity to her to approach a Civil Court and get a declaration that her marriage is still valid in law. It is also open to the husband to approach the Civil Court and ask for a declaration that the marriage between him and the first respondent is void in law. Till such a declaration is given by a Competent Civil Court and in view of the admitted facts, I hold that the wife is not entitled to claim maintenance in this proceeding.

5. The learned Counsel for the respondents 1 to 3 invited my attention to a decision reported in Dharamabai (Smt.) Mun Vs. Shripat Mun, , where it is pointed out that when husband and wife were living together for 25 years there is presumption of a valid marriage. In that case also the wife had a first husband. It was pointed out that though the wife lived with the second husband for 25 years, the first husband had not taken any action. The wife had alleged that there was a divorce between her and her first husband.

In my view, the said decision has no application to the facts of the present case. That was a case where the marriage had taken place during 1939-40 that is much prior to Hindu Marriage Act. The alleged divorce was prior to 1939. But now we have a statute which clearly says that divorce can be obtained only in a prescribed manner. Therefore, the question involved in the present case is whether the alleged divorce between the wife and the husband is valid under the provisions of the Hindu Marriage Act, 1955. Such a question did not arise for consideration in the above decision. Hence in my view the said decision cannot be applied to the facts of the present case.

The learned Counsel for the respondents also referred to Laxmibai Vs. Ayodhya Prasad alias Ramadhar, . In that case, the validity of the marriage was in question since the husband had a first wife living. It was observed by the High Court that for granting interim maintenance u/s 24 of the Hindu Marriage Act, the validity of the marriage need not be considered. Hence in my view, the said decision has no application to a case where we are concerned with the final order of maintenance to be granted to a wife u/s 125 Cr.P.C. Sometimes interim

maintenance may have to be granted on prima facie consideration irrespective of the validity of the marriage. But in the present case we are not concerned about granting interim maintenance.

6. As far as children are concerned, a clear finding of fact is recorded by the learned Sessions Judge that they are born to the petitioner and the first respondent. Even if it is held that the marriage is not valid, then the children will become illegitimate. Even in such a case the children are entitled to claim maintenance. Section 125(1)(b) Cr.P.C. clearly provides that both legitimate and illegitimate minor child is entitled to claim maintenance from the father. Therefore, irrespective of the question whether the marriage is valid or not, in view of the finding recorded by the learned Sessions Judge, the children viz., respondents 2 and 3 are entitled to claim maintenance till they attain majority. Therefore, that finding of the learned Sessions Judge will have to be confirmed.

As far as the wife is concerned, in view of the prima facie conclusion reached by me. The order of maintenance granted to the wife will have to be set aside with liberty to either party to approach a Competent Civil Court and get a declaration about validity or otherwise of the marriage. In such a proceeding, the wife can also claim interim maintenance and also future maintenance from the husband. Whatever observations I have made regarding the validity of the marriage between the petitioner and her first husband is only for the limited purpose of granting relief in this case. These observations should not influence the Civil Court while deciding the question after permitting the parties to adduce evidence.

At this stage, the learned Counsel for the respondents 1 to 3 seeks enhancement of the maintenance to the minor children. The learned Counsel for the petitioner opposes the same. No revision application is filed by the minor children for enhancement of maintenance. Hence in the petition filed by the husband this Court cannot enhance the maintenance. However if there is change of circumstances like the cost of living, children becoming older and attending school etc., it is always open to the children to move the learned Magistrate for alteration of maintenance as provided in section 127 Cr.P.C.

7. In the result, the writ petition is partly allowed. The order of the learned Sessions Judge dated 30-3-1988 is partly set aside. The award of maintenance at the rate of Rs. 75/- per month to the wife Sumanbai is set aside. However the order of the Sessions Judge granting maintenance to the two children respondents 2 and 3 at the rate of Rs. 50/- per month is confirmed. The petitioner is, granted two months time to pay the entire arrears of maintenance to respondents 2 and 3, failing which they are entitled to execute the order and recover maintenance.