

(2001) 03 BOM CK 0098

In the Bombay High Court

Case No : Criminal Application No. 1056 of 1997

Kaushalyabai Dinkar Mule

APPELLANT

Vs

Dinkar Mahadeorao Mule

RESPONDENT

Date of Decision : 07-03-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 482
Evidence Act, 1872 — Section 116

Citation : (2001) 2 DMC 580 : (2001) 3 RCR(Criminal) 745

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : Bharti Dangre, apps, G.D. Vaidya, for the Appellant; S.W. Waghmare, for the Respondent

Final Decision : Allowed

Judgement

R.K. Batta, J.—The applicant had filed proceedings for maintenance u/s 125, Cr.P.C. The Judicial Magistrate, First Class, Umrer vide judgment dated 16.10.1995 had come to the conclusion that the applicant had proved that the respondent No. 1 refused and neglected to maintain her; she was subjected to cruelty and, therefore, she resided separately from the respondent No. 1; that the applicant had proved that she had no source of income and she was unable to maintain herself. It appears that the respondent No. 1 had relied upon the Divorce Deed in which the present applicant had relinquished her claim to maintenance. The case of the applicant in respect of this divorce was that the same was obtained by force by the respondent No. 1. The Magistrate answered the issue relating the said Divorce Deed being obtained by force, in the negative and in view of the clause in the Divorce Deed by which the applicant had given up her right of maintenance, the Magistrate dismissed the application for maintenance. This order was challenged by the applicant before the Sessions Court, Nagpur and the Sessions Judge, Nagpur concurred with the finding of the Magistrate that the Divorce Deed was not obtained by force. He, therefore, refused to interfere in the matter. The applicant has approached this Court u/s

2. Learned Advocate for the applicant urged before me that the respondent No. 1 has failed to establish any claim relating to divorce and, as such, the Divorce Deed is illegal, Besides this, it is urged that the Divorce Deed was obtained by force and the same is not registered. Learned Advocate for the applicant relying upon a judgment of the Kerala High Court in Sadasivan Pillai Vs. Vijayalakshmi, , urged that relinquishment of claim of maintenance in the Divorce Deed is against the public policy and such an agreement cannot be enforced in view of Section 23 of the Indian Contract Act.

3. Learned Advocate for respondent No. 1 drew my attention to Section 29(2) of the Hindu Marriage Act, 1955 which reads that nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act. When learned Advocate for respondent No. 1 Was asked as to what evidence is on record to establish custom, learned Advocate for the respondent No. 1 only referred to findings on points 4 and 5 recorded by the Magistrate and the findings of the Sessions Court in paragraph 4 of its judgment. There is no whisper in either of the two judgments of the Courts below in respect of evidence relating to custom. Learned Advocate for respondent No. 1 relied on the two judgments of this Court in Shrawan Sakham Ubhale Vs. Sau. Durga Shrawan Ubhale and others, , and Suresh Channappa Shete v. Lata Suresh Shete, (2000) 3 Mh. LJ 307 . In Suresh Channappa Shete v. Lata Suresh Shete (supra), the customary divorce as reflected in the Divorce Deed, had been proved. The other rulings relied upon by the learned Advocate for respondent No. 1 viz. Shrawan Sakham Ubhale v. Durga Shrawan Ubhale (supra), does not deal with the customary divorce though it deals with the question as to whether wife is entitled to maintenance when she chooses to live separately by mutual consent and voluntarily surrenders her right of maintenance. It is observed in the said judgment that term "wife" used in Section 125(l)(a) includes a divorcee who is not remarried, under Explanation (b) to Sub-section (1) of Section 125, Cr.P.C. and it was held that contracting out of the right u/s 125, Criminal Procedure Code is not prohibited. In this judgment, reliance was placed on the judgment of the Apex Court in Captain Ramesh Chander Kaushal Vs. Mrs. Veena Kaushal and Others, , wherein it was observed that right of divorced wife to maintenance continues even after divorce unless parties make adjustments and come to terms regarding the quantum of right to maintenance. Therefore, it was held in Shrawan Ubhale (supra), that legal right of maintenance can be given up and contracting out of right u/s 125, Cr.P.C. is not prohibited.

4. Learned A.P.P. urged before me that the custom is required to be specifically pleaded and is required to be established by leading cogent and reliable evidence and in this connection, reliance has been placed on paragraph 7 of the judgment of the Allahabad High Court in Paras Nath Kurmi v. Sessions Judge, Mau, 1998 A

LJ 1084. Learned A.P.P. has also relied upon the judgment of the Apex Court in *Vanmala v. H.M. Ranganatha Bhattia* (1995) 2 Mh. LJ 740 , and especially paragraph 7 thereof. In this case it was held that where parties had obtained divorce by mutual consent u/s 13-B of the Hindu Marriage Act and divorced wife had not remarried but was otherwise entitled to maintenance, same could not be denied by resorting to Section 125(4), Cr.P.C. Learned A.P.P. also placed reliance on the judgment of the Karnataka High Court in *Malayaiah Vs. Smt. G.S. Vasantha Lakshmi and others*, . In this ruling after considering the scope and ambit of Section 125(4), Cr.P.C, it was held that where parties are living separately by mutual consent, wife is not entitled to maintenance.

5. The crucial question which is required to be determined in the case under consideration is, whether the Deed of Divorce under which the applicant is said to have given up her claim for maintenance has either the backing of law or custom. The respondent No. 1 had not taken any plea whatsoever in the reply filed by him to the application u/s 125, Cr.P.C. that the Deed of Divorce had sanction of law and custom. No evidence of whatsoever kind was led by respondent No. 1 that the Deed of Divorce is backed by custom. In the absence of any proof of custom or that the Deed of Divorce is legally valid, the Divorce Deed has no value in the eyes of law. Once we find that the Divorce Deed is invalid, it obviously follows that any relinquishment made under invalid Divorce Deed cannot be enforced in law. In the light of this, it is not necessary to deal with further controversy on the subject. The Divorce Deed being illegal, has no effect and the relinquishment of maintenance, thereunder, is of no consequence.

6. I have already pointed out that the Magistrate had found that the respondent No. 1 had refused and neglected to maintain the applicant and that he had subjected her to cruelty and, therefore, she was residing separately from the respondent No. 1, and that the applicant had no source of income to maintain herself. The applicant had led evidence to suggest that the respondent No. 1 was earning Rs. 25,000/- per annum. There was no specific denial of respondent No. 1 during cross-examination, but the respondent No. 1 did not disclose his income. Of course, in his deposition, the respondent No. 1 had stated that he was getting Rs. 20/- to Rs. 25/- per day. Except for saying that he was earning Rs. 20/- to Rs. 25/- per day, there is no material to accept his contention. In the facts and circumstances, I am of the opinion that maintenance amount of Rs. 500/- (Rupees five hundred only) should be awarded in favour of the applicant from the date of applicant, that is to say, from 1.3.1995.

7. In *Kamlabai Khanderao Thete v. Khannadarao Murlidhar Thete* 1990 Mh. LJ 198, it has been laid down by learned Single Judge of this Court that the normal rule is to grant maintenance from the date of application and not from the date of order and it is only when there are very exceptional circumstances for valid reasons, it is open to a Magistrate to grant maintenance from subsequent date. These observations are part of para 10 which reads as under :

"This takes me to the other question whether the learned Magistrate was justified

in not granting maintenance to the daughter from the date of the application. The learned Magistrate came to the conclusion that respondent No. 1 was not responsible for the delay in deciding the matter and that, therefore, by necessary implication, it means that he was not obliged to maintain her during the pendency of the application. The learned Magistrate forgot to take note of the fact that during this period when the proceeding was delayed respondent No. 1 did not pay anything to her. She was equally faultless, as she too was not responsible for the delay. The normal rule is to grant maintenance from the date of the application, and not from the date of the order. It is only when there are very exceptional circumstances, for valid reasons, it is open to a Magistrate to grant maintenance with effect from subsequent date."

8. In *Kedari Shankarrao Shinde v. State of Maharashtra* (1992) 1 Mh. LR 359, a learned Single Judge of this Court has reiterated the position by stating that when a destitute wife comes to the Court and if it is held that she is entitled for separate maintenance, in normal circumstances, the order should be from the date of application, unless there are reasons for departing from this common practice. It is also pointed out that duration of the litigation is not within the powers of the litigant and, therefore, entitlement of the maintenance should not be left to the uncertain date of disposal of litigation.

9. In *Nachhattar Singh Vs. Harjinder Kaur and Another*, , it has been observed that the jurisdiction is vested in the Trial Court to award the maintenance from the date of the order or from the date of the application. It has to be exercised in a reasonable manner keeping in view the facts and circumstances of the case. It is further pointed out that the special reasons need not be recorded but reasons for arriving at the conclusion have to be given since the provision has been enacted to help the destitute wife or children so as to prevent vagrancy by compelling a person to support his wife and child by providing cheap and speedy remedy. I have absolutely no reason to take different view of the matter and I record my respectful concurrence with the view of the learned Judges in the rulings.

10. The costs of litigation shall be throughout borne by respondent No. 1 and the total costs are quantified at Rs. 2,000/- (Rupees two thousand only). The application is accordingly allowed in aforesaid terms.