

(1983) 01 BOM CK 0029

In the Bombay High Court

Case No : Criminal Writ Petition No. 520 of 1982

Meharunnishabai (Smt.) and Another

APPELLANT

Vs

Abdul Razak Mohammed Ayub and Another

RESPONDENT

Date of Decision : 20-01-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125
Penal Code, 1860 (IPC) — Section 497

Citation : (1983) 1 BomCR 473

Hon'ble Judges : S.C. Pratap, J

Bench : Single Bench

Advocate : N.H. Kachare, P.P., Rajiv S. Mohite, for the Appellant; A.A. Omer, for the Respondent

Final Decision : Allowed

Judgement

S.C. Pratap, J.—This petition is directed against the order dated January 13, 1982 passed by the learned Additional Sessions Judge, Nasik, in Criminal Revision Application No. 181 of 1981.

2. Petitioner No. 1 had filed in the Court of the Judicial Magistrate, First Class, Malegaon, Criminal Miscellaneous Application No. 30 of 1979 for maintenance for herself and petitioner No. 2 her minor child, under the provisions of section 125 of the Code of Criminal Procedure. The learned trial Magistrate by his order dated May 28, 1981 allowed the said application and directed respondent No. 1 herein to pay to petitioner No. 1 and petitioner No. 2 Rs. 50 /- per month respectively as maintenance with effect from the date of filing of the said application. This order was challenged by respondent No. 1 in revision application before the Sessions Court, Nasik. The learned Additional Sessions Judge, hearing the said revision, allowed the same, set aside the learned trial Magistrate's order and rejected the petitioner's application for maintenance. Hence this petition under Article 227 of the Constitution.

3. Hearing Mr. Rajiv S. Mohite, learned Counsel for the petitioners, Mr. A.A. Omer,

learned Counsel for respondent No. 1, and Mr. N.M. Kachare, learned Public Prosecutor for the State, and going through the judgments of the two Courts below, I find myself unable to agree with the reasoning and conclusions of the learned Additional Sessions Judge disentitling the petitioners from any order of maintenance.

4. Maintenance was sought to be denied to the petitioners on the ground that petitioner No. 1 was not the wife of respondent No. 1 and petitioner No. 2 was not the child born to petitioner No. 1 of respondent No. 1. The same two grounds were reiterated before me by respondent No. 1's learned Counsel Mr. Omer. On the scanty material as it presently stands before this Court in the instant proceedings u/s 125 of the Code of Criminal Procedure, it is not possible to accept these contentions. Moreover, the very first sentence of respondent No. 1 in his examination-in-chief is to the effect that petitioner No. 1 in his wife adding thereafter that she started residing with him after fifteen days of their marriage. Contention is that though that is the evidence of respondent No. 1 and though that may be a fact as such, the marriage referred to by respondent No. 1 and the status of a wife sought to be given by respondent No. 1 to petitioner No. 1 was not in law legal and valid. Now, obviously that cannot be a question which can be satisfactorily heard and adjudicated by a Court dealing with section 125 proceedings particularly in the face of respondent No. 1's own evidence in the present proceedings that petitioner No. 1 is his wife. One will, therefore, have to proceed to decide the instant maintenance proceedings on the assumption that petitioner No. 1 is the wife of respondent No. 1.

5. It is difficult to appreciate the approach of the learned Additional Sessions Judge cancelling the order of maintenance on the ground of adultery. On the very facts alleged by the husband, respondent No. 1, his wife, petitioner No. 1, is supposed to have had sexual intercourse with some other person prior to her marriage. In the face of this position, there could have been, in terms of the definition of adultery in section 497 of the Penal Code, no question at all of petitioner No. 1 being guilty of adultery as such. It is nowhere the case of respondent No. 1 that petitioner No. 1 was living in adultery after marriage. His vehement attack has been on her sexual life prior to marriage. In the face of this position, there was no question of cancelling the learned Magistrate's order of maintenance u/s 125 of the Code of Criminal Procedure. Mr. Omer learned Counsel, invited my attention to a decision of the Kerala High Court in Abdul Rahimankutty Vs. Aysha Beevi and Another, . Going through the same, one finds the facts therein altogether different from the facts herein. Besides, there was considerable evidence in the said case led by either side. Still further, some of the admitted facts in the said case made it easier for the Court to adjudicate the dispute in questions. There can be no dispute of the legal position sought to be expounded in the said case that where consent to a marriage has been obtained by force or fraud, such a marriage is invalid unless ratified after the coercion has ceased or the duress has been removed, or when the consenting party, being undeceived has continued the assent. In the instant case, material on record, as

it presently stands, is totally short of coming to any finding either on the question of force or fraud as contended to by respondent No. 1. As indicated, respondent No. 1's own case on oath in the present proceedings has been that petitioner No. 1 is his wife. As indicated the present proceedings will, therefore, have to be considered as decided on the assumption that respondent No. 1 and petitioner No. 1 are husband and wife of each other.

6. On the question of quantum of maintenance, I find no reason to interfere with the quantum fixed by the learned trial Magistrate and rightly confirmed by the learned Additional Sessions Judge.

7. It may be observed that the present proceedings recorded herein can be construed only in the extremely limited context of a summary proceeding for maintenance u/s 125 of the Code of Criminal Procedure. Nothing herein stated or observed can in the least affect the rights and liabilities of either of the parties in any matrimonial proceedings as such instituted by one against the other. If any such proceedings are instituted, the same will have to be decided on their own merits and in accordance with law irrespective of the observations made in the present proceedings and irrespective of the order passed in the present proceedings.

8. In the result, this petition is allowed. The impugned order dated January 13, 1982 passed by the learned Additional Sessions Judge, Nasik, in Criminal Revision Application No. 181 of 1981 is set aside and quashed and the order dated May 28, 1981 passed by the learned trial Magistrate in Criminal Misc. Application No. 30 of 1979 is restored and confirmed.

9. Rule earlier issued on this petition is made absolute.