
(2016) 09 BOM CK 0159

In the Bombay High Court

Case No : Criminal Writ Petition No. 388 of 2005

Rajdhar Shivdas Koli

APPELLANT

Vs

Sau. Khatubai @ Laxmibai Rajdhar Koli

RESPONDENT

Date of Decision : 21-09-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125
Hindu Marriage Act, 1955 — Section 7

Citation : (2017) ALLMRCri 733

Hon'ble Judges : V.K. Jadhav, J.

Bench : Single Bench

Advocate : Mr. P.S. Patil, Advocate, for the Petitioner; Mr. M.S. Deshmukh, Advocate, for the Respondent

Final Decision : Allowed

Judgement

V.K. Jadhav, J.—Being aggrieved by the judgment and order passed by the 1st Adhoc Additional Sessions Judge, Dhule, dated 30th April, 2005, in Criminal Revision Application No. 98/2001, original opponent-husband has preferred this criminal writ petition.

2. Brief facts giving rise to the present writ petition are as follows :

Respondent-wife has filed application under section 125 of Code of Criminal Procedure for grant of maintenance against petitioner-husband. It has contended in the said application that she is the legally wedded wife and the marriage took place in Gandharva form 4 years prior to filing of said application for grant of maintenance. It is further stated in the application that after the marriage for initial period, she was treated well but thereafter she was subjected to ill-treatment on account of non-fulfilment of unlawful demand made by petitioner-husband and his family members. She was subjected to beating and even though she was pregnant, for want of medical aid, her pregnancy was aborted. She was finally driven out from the house by petitioner-husband. Since respondent-wife is residing with her parents she has no source of income and she is unable to

maintain herself. It has also stated in the application that petitioner-husband is working as driver on tractor and his yearly income is more than Rs. 1,00,000/-. Thus, she is claiming grant of maintenance at the rate of Rs.1,500/- per month.

Petitioner-husband has strongly resisted said application by filing his say. petitioner-husband has contended that respondent-wife is not his legally wedded wife and she has no any right to claim maintenance from him. Thus, petitioner-husband denied all the allegations made against him in the said application for grant of maintenance. Both the parties adduced their oral as well as documentary evidence in support of their rival contentions.

Learned Judicial Magistrate, First Class, Shirpur, by order dated 28th February, 2001, in Criminal M.A. No. 214/1998, rejected the application however, granted liberty to the applicant to approach the competent Civil Court and get declaration about validity or otherwise of the marriage and that, in the said proceeding, she can also claim interim maintenance and also future maintenance from petitioner-husband.

Being aggrieved by the same, respondent-wife preferred Criminal Revision Application No. 98/2001 and the learned 1st Adhoc Additional Sessions Judge, Dhule, by order dated 30th April, 2005, partly allowed the revision application and quashed and set aside the order passed by the Magistrate thereby directing the present petitioner-husband to pay Rs.300/- per month as maintenance from the date of filing of the revision application to the respondent-wife along with cost of Rs. 500/-. Hence, this writ petition.

3. Learned counsel for petitioner-husband submits that respondent-wife had filed said application for grant of maintenance with the averments in the application itself that she had performed marriage with petitioner-husband in Gandharva form. Furthermore, respondent-wife has admitted in her cross-examination that her first husband Chabu Soma Koli and her marriage with said Chabu Koli is still in existence. Learned counsel admits that there is no legal divorce between respondent-wife and said Chabu Soma Koli. It is also an admitted fact that one Chotibai is the wife of petitioner-husband and said marriage is still subsisting. Learned counsel submits that the Trial Court has therefore rightly recorded finding in negative and thereby held that the applicant failed to prove that she is legally wedded wife of petitioner-husband. Learned counsel submits that during the pendency of revision, for the first time, respondent-wife has produced divorce deed before the Sessions Court and the same is accepted as additional evidence. However, the date 01.07.1998 is mentioned on the said document. Learned counsel submits that on 08.06.1998, respondent-wife has filed application for grant of maintenance before the Magistrate. Thus, on the date of application, marriage of respondent-wife with said Chabu Koli was subsisting and therefore, it cannot be said that she is the legally wedded wife of petitioner-husband. Learned counsel further submits that on the basis of evidence adduced by respondent-wife even if it is assumed that petitioner-husband was treating her as wife, the principle of estoppel cannot be pressed service to defeat the

provisions of section 125 of the Code of Criminal Procedure and, only legally wedded wife can claim maintenance from her husband. Learned counsel also submits that the Trial Court has given opportunity to the respondent-wife to approach Civil Court, however, till this date, applicant-wife has not approached the Civil Court seeking declaration about validity or otherwise of the marriage. Learned counsel submits that the approach of the Court is erroneous and is thus liable to be quashed and set aside.

4. Learned counsel for petitioner, in order to substantiate his submissions, placed reliance on following three cases :

(1) Savitaben Somabhai Bhatiya v. State of Gujarat and others Reported in AIR 2005 Supreme Court 1809

(2) Jaishree w/o Premnath Gavandar & another v. State of Maharashtra and another Reported in 2013 BCI(0) 972

(3) Yamunabat Anantrao Adhav v. Anantrao Shivram Adhav Reported in 1988 AIR(SC) 644.

5. Learned counsel for respondent-wife submits that the voters list Exh. 45 is produced before the Trial Court and it appears that name of respondent-wife is entered at Sr. No. 27. It transpires from said entry in the voters list that respondent is the wife of petitioner-husband. Furthermore, on the basis of the complaint lodged by respondent-wife, criminal case for offence punishable under section 498A of the Indian Penal Code was instituted against petitioner-husband and his family members and the said case was disposed of in terms of compromise. Compromise terms are produced before the Court vide Exh. 26. Recitals in the said compromise deed clearly indicate that respondent is the legally wedded wife of petitioner-husband and he had accepted her as his wife. Furthermore, divorce deed is also produced on record and it appears from the contents of the divorce deed that respondent-wife obtained divorce from her former husband on 01.07.1998 i.e. when Criminal M.A. No. 214/1998 was pending before the Magistrate. Learned counsel submits that in the facts and circumstances of the case, learned 1st Adhoc Additional Sessions Judge, Dhule has rightly taken a view and accordingly granted maintenance at the rate of Rs.300/- per month to respondent-wife. Learned counsel submits that no interference is required and the writ petition is liable to be dismissed.

6. Respondent-wife has filed Criminal M.A. No. 214/1998 for grant of maintenance before the Magistrate with averment in the application itself that she had performed marriage in Gandharva form with petitioner-husband. Needless to say here that Gandharva form of marriage is nothing but garlanding each other without performing any rite and rituals. As per section 7 of the Hindu Marriage Act, 1955, Hindu marriage is solemnised in accordance with the customary rites and ceremonies of either parties thereto and, in view of subsection 2 of section 7, when such rites and ceremonies include the Saptapadi, the marriage becomes complete and binding when the seventh step is taken. It

is not the case of respondent-wife that it is the custom in their community to perform marriage in Gandharva form alone. On the other hand, the marriage is performed in Gandharva form when the earlier marriage is subsisting. On the basis of other evidence i.e. voters list and complaint filed under section 498A of the Indian Penal Code, at the most it can be said that petitioner-husband was treating the respondent as his wife. However, the scope of wife for the sake of provisions of section 125 of the Code of Criminal Procedure cannot be enlarged to include unlawful marriage.

7. In case of Savitaben Somabhai Bhatiya v. State of Gujarat and others reported in AIR 2005 Supreme Court 1809, in paragraphs 16 and 17 the Hon"ble Supreme court has made following observations :

16. But it does not further the case of the appellant in the instant case. Even if it is accepted as stated by learned counsel for the appellant that husband was treating her as his wife it is really inconsequential. It is the intention of the legislature which is relevant and not the attitude of the party.

17. In Smt. Yamunabai's case (supra) plea similar to the one advanced in the present case that the appellant was not informed about the respondent's earlier marriage when she married him was held to be of no avail. The principle of estoppel cannot be pressed service to defeat the provision of Section 125 of the Code.

8. In view of above discussion and in the light of the ration laid down by the Supreme Court, the judgment and order passed by the learned 1st Adhoc Additional Sessions Judge, Dhule is liable to be quashed and set aside. I find that the approach of the Magistrate is proper, correct, legal and more logical. Learned Magistrate has granted opportunity to the wife to approach the competent Civil Court and get declaration about validity or otherwise of the marriage. Accordingly I proceed to pass the following order :

ORDER

1. Criminal Writ Petition is hereby allowed.
2. Judgment and order passed by the 1st Adhoc Additional Sessions Judge, Dhule dated 30th April, 2005, in Criminal Application No. 98/2001 is hereby quashed and set aside.
3. Judgment and order passed by the Judicial Magistrate First Class, Shirpur, dated 28th February, 2001 in Criminal M.A. No. 214/1998 stands confirmed.
4. Rule is made absolute in above terms. Writ petition is accordingly disposed of.