
(1993) 12 AHC CK 0011
In the Allahabad High Court
Case No : C.M. Writ Petition No. 6353 of 1991

Ram Ji Giri @ Ashok Giri

APPELLANT

Vs

Suman Giri and Others

RESPONDENT

Date of Decision : 16-12-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 125

Citation : (1994) 2 DMC 19

Hon'ble Judges : S.K. Verma, J

Bench : Single Bench

Advocate : S.K. Varma, for the Appellant; Standing Counsel, for the Respondent

Judgement

S.K. Verma, J.—Through this writ petition under Article 226 of the Constitution of India the order dated 5.8.1989 passed by the VI Additional Munsif Magistrate granting maintenance of Rs. 200/- per month in favour of opposite party No. 1 and the order dated 13.2.1991 passed by III Additional District & Sessions Judge rejecting the revision filed by the petitioner are sought to be quashed through a writ of certiorars.

The learned Counsel for the parties have been heard as length.

2. The impugned order of the learned Magistrate u/s 123 Cr.P.C. has been challenged firstly on the ground that the Magistrate has not given any finding of fact as to whether the petitioner was possessed of sufficient means and had actual income of a certain amount out of which Rs 200/- were allowed as maintenance. Secondly it has been challenged on the ground that there is no finding of fact regarding neglect by the petitioner of opposite party No. 1. Thirdly the order has been challenged on the ground that there is no finding of fact as to whether opposite party No. 1 had any income or she was incapable of maintaining herself. Fourthly the around of challenge is that there was no finding of fact regarding the offer of the petitioner that he was ready to maintain and willing to live with opposite party No. 1 as husband and wife.

3. Regarding the first ground a perusal of the impugned order passed by the learned Magistrate would indicate that he has recorded a finding of fact that the petitioner is a healthy and able-bodied person and that he has house tractor and some other agricultural land. The question whether a hereon has means or not to maintain his wife was considered in Dhani Ram Vs. Mst. Ram Dei, and it was held by this Court that the word "means" includes earning capacity. Hence when a man is healthy and able-bodied he must be taken to have the means to support his wife. In this decision In Re: Kandasami Chetty, was relied. In yet another decision of this Court, Maya Ram v. Smt. Sambatia 1964 ALJ 936) it was upheld that it is not necessary that before maintenance allowance could be fixed the exact income earned by the husband should be ascertained else the decision would be termed as arbitrary. It was further held that the word "means" in Section 488 Cr.P.C. (old) does not signify only the visible means such as current income gained from a definite employment or real property If a man is healthy and able-bodied, he must be deemed to have the means to support his wife unless he proves that owing to ill-health or accident or disease, he is disabled to effectively use his earning capacity. In vet another decision of this Court, Ved Nath Misra v. Smt. Yashoda Misra (1986 Ald CrI. Cases 164). where maintenance was claimed by wife against husband who was student and not earning but depended upon his father, maintenance granted by Courts below for wife and daughter was reduced from Rs. 125/- to Rs. 100/- per month. In other words maintenance can be allowed against even a student who is not earning because after marrying if he is healthy and able bodied he would be deemed to have earning capacity to maintain his wife. There is thus no scope for interference so far as this finding recorded by the learned Magistrate is concerned.

4. Regarding the second ground of challenge the order of the learned Magistrate indicates that after discussion of evidence available the learned Magistrate has come to a definite conclusion that the petitioner created such circumstances which compelled the opposite party No. 1 to live with her father. It is true that the allegation of the wife that there was a second marriage contracted by the petitioner has not been believed by the Magistrate concerned. However, it has been found as a fact that because of demands of dowry the lady was being harassed and she was forced to leave the house of husband. Even this ground is therefore, without force.

5. Regarding the third ground once again the order of the learned Magistrate indicates that after discussion of the learned Magistrate indicates that after discussion the Magistrate came to the conclusion that the opposite party No. 1 is not able to maintain herself. She has stated that her father is a poor person and he is unable to maintain her. It is true that the opposite party No. 1 did not aver before the Trial Court that she does not have any means to maintain herself but she stated that she was unable to maintain herself and her father was also unable to maintain her as he was a poor man. The circumstances regarding these facts have also been considered by the Magistrate concerned. There was an attempt on behalf of petitioner to indicate that the opposite party No. 1 was

well educated and has taken BTC training and she could maintain herself by tuition or by teaching. The learned Magistrate has rightly observed that the exact level of education of the opposite party No. 1 has not been proved through cogent evidence and that even if for arguments sake it is taken that she can maintain herself in future by taking some job, there was no reliable evidence to show that she was actually earning something through tuition or teaching, even this ground therefore fails and is without force.

6. Regarding the fourth ground relating to offer of the husband to maintain the wife, no categorical finding had been recorded either by the Magistrate concerned or by the learned Addl. District & Sessions Judge hearing the revision. However, it cannot be doubted that after discussion the Trial Court has come to the conclusion on the basis of facts that the opposite party No. 1 has been compelled to live with her father on account of demands of dowry and circumstances created by the petitioner. This finding indicates that the offer of the husband to maintain the wife is not genuine. This Court had occasion to examine this aspect in *All Hasan v. Smt. Zamina* and Anr. 1986 ACC 157 In that case also the husband had made an offer in paragraph 10 of the written statement to maintain the wife and no finding was given by the Courts below regarding the same. It was held that an offer by the husband to keep his wife with him must be bona fide. Last minute offer is open to scepticism as it is put forward with no other object than to ward off the obligation. Frequently such offers are made to defeat the claim. In the present case there is allegation that the wife has been neglected and is living with her father since long and the petitioner has contracted second marriage in May, 1987. In other words there is evidence to show that the wife was living with her father since long and no serious attempt was made either to take her back or to provide maintenance to her. There are also allegations from the side of the opposite party No. 1 that several times messages were sent to the petitioner for "bedai" but the petitioner and his parents refused to take her back. The learned Magistrate has also recorded a finding that whereas the petitioner was duty bound to maintain his wife, he created such circumstances before the lady that she was forced to live with her father. It appears, therefore, that the plea that the husband is ready to maintain his wife was taken in the written statement and subsequently before the Revisional Court only with the object of warding off the obligation and therefore the offer is not genuine.

7. The learned Counsel for the petitioner has placed reliance on *Budharam Kosta v. Pitarbhai* and Anr. [1984(1) Crimes 517]. In that decision however, the Trial Court had held the offer of the husband to maintain the wife to be genuine. The facts in the present case are different.

8. In writ jurisdiction the Court is not sitting as an Appellate or a Revisional Court. The petitioner has to show that there has been some failure of justice because of lack of jurisdiction or malafides or perversity in recording the findings.

9. A writ, or certiorari is restricted to the "no evidence" Rule and cases of

perverse findings of facts. It could only be restricted to errors on the face of record. A question of fact can be reviewed as an error of Law, as when there is no iota of evidence, or no legal evidence, or when the finding is perverse, or when the decision of the Tribunal on a question of fact is based on material which is irrelevant to the enquiry or if it is based on mere conjectures and surmises, or if the finding of fact is based on erroneous application and interpretation of law, or when the finding affects the jurisdiction of the Tribunal, or when the finding affects constitutional provisions.

10. In the present case as per discussion made above these propositions do not obtain. Hence the writ petition is dismissed.

11. The stay order if any is vacated.

12. There is no order as to costs.