
(1985) 07 BOM CK 0028
In the Bombay High Court
Case No : Criminal Application No. 55 of 1984

Ranganath Hajare

APPELLANT

Vs

Dhondubai (Smt.) Hajare and Others

RESPONDENT

Date of Decision : 16-07-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 482

Citation : (1986) 2 BomCR 3

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : S.K. Shelke, app, V.G. Gangapurwala and S.T. Deo, for the Appellant; B.D. Deshmukh, for the Respondent

Judgement

Sharad Manohar, J.—This is an husband's petition u/s 482 of the Criminal Procedure Code, questioning the legality of the order of maintenance passed by both the courts below in favour of his wife, present respondent No. 1, and child, present respondent No. 2, granting them maintenance at the rate of Rs. 250/- and Rs. 150/- respectively per month.

2. The petition was filed by respondent-wife u/s 125 of the Criminal Procedure Code along with her minor son, respondent No. 2. Her contention, in short, was that after a fair and happy married life of 7 years, she was ill-treated and beaten severely by her husband. She was driven out of her house by him along with her son. He had married a second wife. Her obvious contention was that on this ground she is entitled to live separately and claim maintenance from her husband for herself and her minor son, who was 7 years old, at the time of filing of the application.

3. The application was opposed by the husband denying the allegation of ill-treatment or driving her out of the house. Even the allegation made about the second marriage was stoutly denied by the husband.

4. The parties led evidence before the learned Magistrate. The respondent-wife

examined herself. She also led evidence of some witnesses. But after examining the entire evidence the learned Magistrate did come to the conclusion that there was no legal evidence led by the applicant-wife proving either the factum of ill-treatment to her or the factum of her being driven out by the husband. The learned Judge held that beyond the bare word of the applicant-wife there was no evidence on record to support the allegation that the husband had ill-treated or abandoned his wife or had driven her out of his house. Likewise, the learned Magistrate was not at all satisfied about the veracity of the allegation of second marriage by the husband. The learned Magistrate found that the information of the second marriage was received by the applicant wife from her father; but the father was not examined by her at all, nor did she lead any other evidence to prove the factum of second marriage. The allegation of second marriage was, therefore, also equally held not to be proved by the learned Magistrate.

In spite of these findings, however, the learned Magistrate found that there was no evidence led by the husband to the effect that he had provided the wife with any maintenance. He, therefore, came to the conclusion that there was a "neglect" on the part of the husband in the matter of maintenance of his wife and child. The maintenance at the rate of Rs. 250/- per month to the wife and Rs. 150/- to the child was, therefore, awarded by the learned Magistrate.

5. In the revision application all these findings have been more or less accepted by the learned Addl. Sessions Judge and he also seems to have agreed with the view of the trial Court as regards the neglect on the part of the husband in the matter of maintenance of the applicant-wife. The revision application was, therefore, dismissed by him.

6. In the present application filed by the husband u/s 482 of the Criminal Procedure Code, Rule was issued initially as regards the petition as a whole and against both the respondents, that is to say against wife as well as the child. Mr. Gangapurwala, the learned Advocate appearing for the petitioner, however, stated before me at the very outset when the Rule came up for final hearing that it would not be possible for him to press the Rule against the child. The fact that the child is not living with the husband is not in dispute. Moreover, it is in dispute that there exists no evidence to the effect that the petitioner-husband made even any effort to get back the child nor there exists any evidence to show that the petitioner-husband made any effort to give any maintenance even to his child, forget his wife. Even if the child is living with his mother, the responsibility of the father to maintain his child continues and it cannot be said that the petitioner would be justified for getting it just because the child lives with his mother. It is the duty of every father to provide maintenance to the child of such a young age as of 7 years. Nothing is done by the present petitioner in that behalf. There would be, therefore, no justification for interference with the order of maintenance passed in favour of the child.

7. But so far as the applicant-wife is concerned, there was good deal of substance in Mr. Gangapurwala's contention that the basic thing required to be

proved by the applicant-wife cannot be said to have been proved by her in the instant case in order to justify the order of maintenance in her favour. Mr. Gangapurwala pointed out that neither of the courts has accepted the applicant wife's contention relating to her ill-treatment by her husband. Likewise, neither of the courts has come to the conclusion that she has made good her case that she was driven out of the matrimonial home by her husband. Both the courts have found that the reliable evidence that ought to have been produced by the applicant-wife was not produced by her. Mr. Gangapurwala also rightly pointed out that the plea relating to the second marriage was found by both the courts below not to be supported by any legal or reliable evidence. From the evidence it is clear that she has no personal knowledge of her husband's second marriage with any woman. Hawala was given by her about the information that she received from her own father as regards her husband's second marriage with one Mankarnabai. The real witness who can depose regarding this fact, therefore, would be her own father, provided, he had any personal knowledge about it. But, she did not even examine her father in support of this allegation although it is admitted that she is residing with her own father during the days of all these proceedings. The plea of second marriage by her husband, therefore, cannot be said to have been made good on the basis of the evidence as it stands.

8. If this is the position of the record as found by both the courts below, normally, it would be difficult to hold that a case is made out by the applicant-wife for separate residence and maintenance. Under our legal system the normal rule is that the husband and wife shall have to stay together. The wife is entitled to be maintained by her husband; but in return she has to stay with him, live in a matrimonial home and perform her matrimonial obligations. She cannot claim separate maintenance from him if she does not perform her own obligation of residing with her husband and give her matrimonial services to her husband. Both the husband and wife shall have a home of their own, either jointly with their parents or exclusively by themselves. But no wife can say, in our present legal system, that she will live away from her husband as per her own sweet Will and still mulct (sic) maintenance from him. A question can be readily asked to her in that case as to for what purpose the husband had married her and as to why he should be burdened with the liability to maintain her, if she was wanting to live independent life of her own. Unless the husband has made a common matrimonial home impossible for his wife, the wife is not entitled to live separately and still claim maintenance from him. If she chooses to live separately on account of her own whim, may be that the law may be helpless. At the most the law will give a decree to the husband for restitution of conjugal rights. But she may ignore even such decree and all that will follow is that the husband will be exonerated from his liability to spend rupees and paise for maintenance of his wife. The point is that for claiming maintenance separately from her husband, the condition precedent is that the wife must have made out a case for separate residence and she cannot ask for separate residence unless the separate residence is enjoined upon her by her husband himself. If the wife chooses to

stay away from her husband out her own volition, the husband will be under no duty to go on paying her for her maintenance and if he refrains from paying such maintenance it cannot be said that he is guilty of "neglecting" his wife. It is the wife's own neglect to give a matrimonial home to her husband that has resulted in her own predicament. The predicament of which she complained before the Court, in such a case, is the result of the matrimonial wrong committed by herself and it is the deeply entrenched principle of law, in our legal system, that no person can be allowed to take advantage of his own wrong.

9. In support of the contention that the wife is entitled to live separately even without any justification and still claims maintenance from her husband, reliance was sought to be placed upon the judgement of the Supreme Court in the case of Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another, . In that case the fact was that the wife had been divorced by her husband. The question of her duty of living with her husband in a matrimonial home, therefore, did not arise. u/s 125 of the Code, a divorced wife is entitled to claim maintenance from her husband until she remains chaste or remains unmarried. It was in the context of these facts that the Supreme Court held that when the husband had refrained from paying her any maintenance, the divorced wife who was from the very nature of things entitled to live separately or rather, was bound to live separately was entitled to make him fork out the amount of maintenance through the compelling officer of the Court. The right of the wife to claim maintenance from her erstwhile husband, u/s 125 of the Criminal Procedure Code not be questioned in that case. In that case the divorced wife contended that she had been living separately from her husband since the date of her divorce and that no maintenance was paid by her husband to her although she was chaste and unmarried. The husband did not step into the witness-box for denying those allegation. It was in the context of these facts that the Supreme Court observed as follows :

"Section 125 requires, as a sine qua non for its application, neglect by husband or father. The Magistrate's order proceeds on neglect to maintain; the Sessions Judge has spoken nothing to the contrary; and the High Court has not spoken at all. Moreover, the husband has not examined himself to prove that he has been giving allowances to the divorced wife. His case on the contrary, is that she has forfeited her claim because of divorce and the consent decree. Obviously, he has no case of non-neglect. His plea is his right to ignore. So the basic condition of neglect to maintain is satisfied. In this generous jurisdiction, a broader perception and appreciation of the facts and their bearing must govern the verdict not chopping little logic or tinkering with burden of proof."

The ruling is clearly distinguishable in the context of the facts of the present case. This is not a case of a divorced wife which means that the right of the wife to live separately from her husband does not arise. She has not made good her case of her right to reside separately from her husband. She cannot, therefore, ask for maintenance from him u/s 125 of the Code.

In this view of the matter, normally speaking I would have been inclined to allow

this petition and make the rule absolute so far as the wife was concerned; but after having gone through the entire evidence, I am of the opinion that this case has got to be considered not only from legal point of view but also from human view point. The present case has also got certain peculiar features. The first one has already been narrated by me above. It is that although the husband owns his child, respondent No. 2, admittedly he has shown no keenness to give maintenance to the child at all nor has he proved that he ever paid any maintenance to his child. His indifferent attitude towards his child is quite intriguing and inexplicable unless the wife's plea that he has married a second wife or that he is living with another woman is accepted.

The second peculiar feature is that although in the Appellate Court as well as in this Court, the husband has made unequivocal statement that he is prepared to take his wife back. At the stage of hearing of the maintenance application and even at the time of the hearing of this petition he had admitted in so many words that before the filing of the application for maintenance, there were compromise talks between the parties. He stated that in these compromise talks he had made offer that he would pay maintenance to his wife and child at the rate of Rs. 400/- per month but subject to the condition, which condition he admitted himself, that the wife should stay not with himself but with his father. Admittedly the father and son (husband) were not staying together. If the husband was anxious about letting bygones to be bygones and was keen to start the matrimonial home once more again, it is inconceivable that he would put such a condition upon his wife that she should stay with his father and not with himself. This condition gives some basis for the wife's plea that her husband has already interested himself in another woman which accounts for the fact that he wants his wife and child to live away from him. Mr. Deshmukh and Mr. Shelke, appearing for the wife and the State respectively were right in inviting my attention to this important aspect of the matter which has not been taken into by either of the Courts below.

10. Mr. Deshmukh further argued, with quite some force, that this is a case where the wife had led a happy married life with her husband for almost 7 years. He conceded the position that so far as the beating given to her and the ill-treatment meted out to her were concerned, no direct evidence of any independent witness as such could be led by the wife. But he pointed out that from the very nature of things, such things are confidential matters, taking place within the four walls of a house. A dutiful wife does not go about advertising these facts to her friends and neighbours. In our Indian Society, it is not unknown that wives try to conceal these facts because wives' publishing of such facts offends their own self respect. In these circumstances, if the wife is not in a position to lead evidence of independent witnesses, it would not be proper to make much capital out of it although it is equally true and a wife's mere bare word should not entitle her to claim payment of maintenance from her husband on the ground of cruelty or ill-treatment. The point is that sometimes it may be her bare word; but if the bare word is corroborated by some strong circumstantial evidence, the Court would be entitled to believe her.

11. In the instant case the conduct of her husband is so inexplicable that the Court's eyebrows have got to be raised on the question as to why the husband wants his wife to be away from her. The entire question about the second marriage by him or about his having "other woman" should be examined by the Court in the context of these facts and circumstances.

12. In these circumstances, Mr. Deshmukh submitted that this is a fit case where the matter should be set back for re-trial and both the parties should be given opportunity to prove their own case. Mr. Deshmukh contended that the difficulty found by the Court below in believing the wife was that she did not lead evidence of her father and other independent witnesses for proving her various contentions. Mr. Deshmukh wanted opportunity to be given to her to lead evidence in that behalf although he conceded that if no satisfactory evidence was led by her it would be impossible for him to sustain the order of maintenance on the evidence as it stands. He stated that if the opportunity was given to the applicant-wife to lead evidence in this matter, it would be in the fitness of things that opportunity should be given even to the husband to prove that he was always ready and willing to take back his wife and the reasons why he did not give maintenance to the wife and child were that the wife obstinately refused to stay with her husband.

I must say that Mr. Gangapurwala was perfectly within his right not to accept this offer and I must say that he has not agreed to any such order being passed by this Court. To my mind, in the context of the peculiar facts of this case, it would be in the interest of justice that the order to this effect should be passed by me.

13. I, however, make it clear that at the time of the hearing of the petition, at the very outset, Mr. Gangapurwala had stated before the Court that his client was always ready and willing to take his wife back that he had made statements to the effect in his examination-in-chief and that he was making the statement once again in this Court. Time was given to him to file affidavit in that behalf and it must be stated that the necessary affidavit has been filed by the petitioner in this Court disclosing his readiness and willingness to take back his wife and child in the matrimonial home.

14. Under these circumstances, the revision application is allowed. So far as respondent No. 1 wife is concerned the entire matter is sent back to the trial Court for re-hearing. The trial Court shall give opportunity to the applicant wife to lead evidence once again on the question of ill-treatment and desertion as also on the question of second marriage by her husband or even on the question as to whether he is residing with any other woman.

Likewise, the petitioner husband should be given opportunity to lead evidence on the question that he was always ready and willing to take back his wife and that her living away from him was the result of her own obstinacy and not the result of any wrong committed by himself. After hearing both the parties on these questions and after examining their evidence in this behalf, the learned Judge

shall pass appropriate order in accordance with law.

15. However, it is made clear that during the pendency of the said proceedings, the husband shall pay Rs. 150/- to the wife (instead of Rs. 250/- as directed earlier by the trial Court) till the date of the final order passed by the trial Court. The question of quantum of maintenance to be paid by the husband to the wife shall be considered by the trial Court once again; but in any event the amount shall not exceed Rs. 250/- per month. If it is held by the trial Court that the applicant-wife is entitled to maintenance and if any order is passed by him in that behalf, the amount of maintenance paid by the husband pursuant to this order shall be taken by the Court into account.

16. The Rule is, therefore, made partly absolute as mentioned above.