

(1994) 01 BOM CK 0033

In the Bombay High Court

Case No : Criminal Application No. 313 of 1989

Sheshrao Ganpatrao Bhand

APPELLANT

Vs

Padminibai Govinda Akarge and another

RESPONDENT

Date of Decision : 27-01-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 482
Hindu Marriage Act, 1955 — Section 5

Citation : (1994) CriLJ 1558

Hon'ble Judges : M.S. Vaidya, J

Bench : Single Bench

Advocate : Ghulam Mustaffa, P.B. Varale, app, for the Appellant; A.G. Godhamgaonkar, for the Respondent

Judgement

1. Claiming herself to be the lawfully wedded wife of the present applicant, the respondent No. 1 filed in the Court of Judicial Magistrate, First Class, Kandhar, Criminal Miscellaneous Application No. 10/1984 on 10-1-1984 for maintenance allowance under S. 125 of the Code of Criminal Procedure, 1973. The learned Magistrate awarded her maintenance allowance at the rate of Rs. 300/- per month from the date of the application, in addition to some costs. The present applicant had carried the matter to the Sessions Court, Nanded in Criminal Revision Application No. 87/1985. The learned Additional Sessions Judge, who heard the matter, dismissed the Revision Application. Therefore, the present applicant has moved this Court under S. 482 of the Code of Criminal Procedure, for quashing the aforesaid orders passed by the Magistrate as well as the learned Addl. Sessions Judge.

2. The main contention urged on behalf of the applicant by Shri Ghulam Mustaffa, the learned counsel, was that the Courts below have depended upon inadmissible evidence and some impressions about what was contained in the evidence coupled with some guess work rather than on the facts on which have come on record. It was submitted that though the parties were, admittedly,

Hindus, it was nowhere stated to which Caste they belonged how the marriages could be performed in their community and how and when they were performed. It was, therefore, submitted that the decisions given by the Courts below have resulted into miscarriage of justice and that, therefore, interference at the hands of this Court was necessary. Mr. Ghulam Mustaffa was fair enough in submitting that it was necessary, in this case, to direct further inquiry into the matter and that he was, indeed, not asking for the total cancellation of the maintenance order that was passed by the learned Magistrate. It was his submission that the maintenance allowance at that rate may be continued as interim maintenance and the Court below may be direction to make proper inquiry into the matter with reference to certain relevant facts.

3. In order to appreciate the submissions made by Mr. Ghulam Mustaffa, the relevant facts may briefly be started as follows :

The present respondent No. 1 did not state in her application to which Caste did she belong and what were the requirements according to the customs, tradition etc. of her community for performing a valid marriage. The very first part of application made to the Magistrate averred that the marriage was performed according to the customs and the religion of the parties with rituals, such as, "Saptapadi". According to her, such marriage was performed 20 years before the date of presentation of the petition. It was here, further, contention that couple of years after her marriage, she gave birth to a son, by name, Vilas, who was studying in XII standard at the time of filing of the application under S. 125 of the Code of Criminal Procedure. The third averment made by the present respondent-wife was that, in the course of his service, the husband - Sheshrao was transferred to village Kandhar from village Malegaon and, at that time, she herself was unable to accompany him because of her illness. She averred, further, that, therefore, the husband had taken with him one Kaushalyabai, the sister-in-law of his brother Venkati Ganpati. She averred, further, that thereafter the husband developed illicit relations with her and, then, started neglecting the present respondent-wife and her son.

4. The present applicant - Sheshrao had refuted all these averments in his Written Statement (Exh. 8). According to him, the present respondent - Padminibai was not his legal wedded wife at all and that his lawfully wedded wife was Kaushalyabai. He did not state in the written statement what were the rituals that were performed at the wedding of Kaushalyabai with him, but he did aver that the same was performed according to the customs of the community and the religious rites. His contention was that as Kaushalyabai did not bear children for quite some time, he had engaged himself in a second marital tie with present respondent - Padminibai with "Gandharva" marriage. He denied the paternity of Vilas and contended that Padminibai had one child by name, Vilas, aged three years at the time of his marriage with her. According to him, his marriage with Padminibai was a void marriage at law and that, therefore, the present respondent Padminibai could not claim from him, according to law, any

maintenance allowance in her capacity as a legally wedded wife. Though the present respondent - Padminibai was silent in her application about any deed of divorce etc. between herself and present applicant - Sheshrao, it was contended in the written statement that under a registered deed dated 24-2-1972. Padminibai was divorced at the Sub-Registry at Kandhar. He maintained, therefore, that as the marital tie was already broken, Padminibai had no right whatsoever to claim any maintenance allowance. He had pleaded in the written statement itself that the original divorce deed was misplaced during the rainy season and he had undertaken to produce the same, if the same was traced. The name of the alleged first husband of Padminibai was not disclosed in the written statement nor was it stated, whether or not, he had divorced Padminibai or he was not living at all. The other parts of the written statement denied the other averments regarding the source of income etc. It was, however, contended that at the time of the divorce, an amount of Rs. 5000/- was paid to Padminibai as a lump sum alimony and that it was out of those funds that she had purchased two pieces of land with which she was able to maintain herself.

5. It will be, thus, seen that as the present applicant - Sheshrao had denied that the marriage between him and present respondent - Padminibai was not performed according to the customs of the community and according to the religious rites prevailing in the community. It was obligatory on the part of the present respondent to prove her own case. Neither the respondent nor the present applicant have disclosed in their respective pleadings to which particular community did they belong and what were really the rites to be performed according to the religious rites and the customs of the community for solemnising the marriage between them. A stray averment in the Application (Exh. 1) in the original proceeding that the marriage was solemnised with all the rituals inclusive of "Saptapadi" could not really mean that "Lajjahoma" and "Saptapadi" which were necessary for solemnisation of a Hindu marriage, were really necessary according to the customs and rites prevailing in the community to which the parties belonged.

6. It is pertinent to note in this context that, when the present applicant Sheshrao deposed about the necessary rituals he spoke of one Shevanti (presumably, Seemant Poojan). Antarpith and Mangal Ashtaka. He did not refer to "Saptapadi" at all as the rituals which was necessary for solemnising the marriage in his community. Witness Eknath who stepped the witness box after present applicant - Sheshrao, was a cousin brother of Kaushalyabai and, according to him all ceremonies were performed in the marriage of Kaushalyabai including Saptapadi and they were performed by one Venkati Brahmin. Thus, according to him a Brahmin was present and he had performed the ceremonies including Saptapadi, but she did not refer to performance of any "Homa". As against this, the present respondent Padminibai narrated the rituals performed in her marriage as follows :-

According to her prior to the marriage, there was "Shevanti" and, thereafter, the

marriage was performed in a "pandol" with "Antarpath" and garlanding. She also told that "Mangalsutra" was put on her person by the present applicant - Sheshrao and, then, seven steps were taken around the fire. She elaborated on this point, further, in her cross examination by describing the ceremonies, namely, that the bridegroom was first taken for Shevanti, then to the Pandol and, then the "Akshdas" were offered. She said that the Brahmin chanted the "Mangal Ashtakas" and, thereafter, "Akshadas" were sprinkled on the bride and the bridegroom. She narrated, further, that thereafter the bride and the bridegroom garlanded each other and, then, they took seven steps around the fire. She told, further, that all these ceremonies were performed as per the directions of the Narayan Brahmin. Narayan was not examined in the Court. The witness who claimed as a person present at the time of their wedding was, Nagnath Ganpati, a man aged 70 years, who was a professional "Jangam" i.e. a Priest usually called for solemnizing the marriages among the "Lingayats". There was no reference to him in the evidence of the present respondent - Padminibai and he said in his deposition that he had performed the ceremonies under the directions of one Narayan Brahmin. From this entire evidence, it cannot be gathered which according to the customs and traditions of the community to which the parties belong, where the necessary ceremonies required for validity solemnising the marriage. Thus, not only that there was no pleading of either of the parties, but the witnesses who had deposed to the ceremonies also had not stated in specific terms what were the requirements according to the customs and traditions of the community for solemnising a valid marriage. The entire evidence and the cross-examinations in that behalf have, thus, gone astray without even ascertaining, whether or not, in the community to which the parties belong, "Saptapadi" and "Lajjahoma" were usually performed at all or, were necessary at all, according to the traditions of the community.

7. On this background if it is noted that applicant's witness Nagnath Ganpati, appears to be only a chance witness, then, there is hardly any evidence on record except the bare words of the parties as to the rituals that were allegedly performed at the wedding in dispute. True it is that the very fact that the present applicant-husband had pleaded in his written statement a deed of divorce could mean an admission of subsistence of a marriage between him and the present respondent - Padminibai. But, when it is noted that admission was coupled with an affirmation that Padminibai was only a wife by "Gandharva" it could hardly be presumed on the basis of that admission, that Padminibai was admitted to be a lawfully wedded wife of the present applicant - Sheshrao. That was a fact which had to be proved with reliable evidence. As already stated above, the evidence about those rituals appears very weak and shaky.

8. The learned Magistrate who decided the matter relied on his judgment on two rulings :-

In *Muhammed v. Sulekha*, 1981 Cri LJ 40, it is observed that there is no hard and fast rule as to the manner in which a disputed marriage has to be proved

either for the purpose of S. 125 of the Code of Criminal Procedure, or otherwise. Marriage can be proved by admission of parties, evidence of eyewitnesses who were present during the marriage ceremony, presumption from conduct of the couple living as husband and wife for a substantial and continuous period or opinion expressed by conduct of persons who had special means of knowledge on the subject or otherwise. If, in fact, a marriage is proved or where it is proved that the marriage ceremony has been gone through, the Courts will presume that such marriage is legal marriage. Where it is proved that some of the ceremonies usually observed on such occasions have been performed, the Courts may presume that the marriage ceremony have been duly completed. If the woman has a child and the father acknowledges the child as his, the Courts may presume that she has status of his wife." These observations appear to have been read by the learned Magistrate to mean that on existence of certain facts, the Courts could presume a lawfully performed marriage even when the same was denied specifically by the rival side. The observations really indicate the several ways in which marriages may be proved. They do not, indeed, constitute an authority on the point that by itself evidence of reputation is enough to prove a valid marriage where a spouse is out to deny the time of marriage as well as the manner in which the marriage was performed. The observations indicate how a marriage may be presumed but they do not speak of the validity of marriage in the facts and circumstances as they exist in a present case.

9. The second ruling which was relied upon by the learned Magistrate was a ruling of a single Judge of Orissa High Court reported in Saudamini Dei Vs. Bhagirathi Raj, . The very head note of the report of the case shows that the facts and circumstances of the case indicated that the man and the woman lived together as husband and wife and were treated as such by the community and the man treated the woman as his wife. This is only one of the illustrations of the several ways in which a marriage may be proved in a given case. The observations in this ruling to the effect that in a summary proceeding under S. 125 of the Code of Criminal Procedure, while granting maintenance to the wife it was not necessary to go into the intricacies of law to find that there was a valid marriage, do not appear to have been warranted by the rulings to which we may advert now.

Dated : 27th January, 1994.

10. A Division Bench of the Bombay High Court has held in Bajirao Raghoba Tambre Vs. Tolanbai (Miss) and Another, , that a woman whose marriage is void could not get the status of a wife and therefore if the marriage of the parties is void by reason of contravention of S. 5(i)(iv) and (v) of the Hindu Marriage Act, the woman is not competent to apply for maintenance under S. 125 of the Code of Criminal Procedure, which merely spoke of "wife". The second wife could not thus, apply for maintenance under S. 125 of the Code because the meaning of "wife" could not be extended to the case of a void marriage.

11. The correctness of this view questioned before a Full Bench of this High Court

in *Yamunabai Adhav v. Anantrao Shivram Adhav*, 1982 MLJ 871 : 1983 Cri LJ 259 . But the aforesaid decision was confirmed by the Full Bench. The matter was, further, carried to the Supreme Court in *Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another*, and the Full Bench view was confirmed pointing out and laying down that the expression "wife" used in S. 125 of the Code of Criminal Procedure, should be interpreted to mean only a legally wedded wife. It was also observed that the word "wife" was not defined in the Code, except indicating in the explanation to S. 125 of the Code its inclusive character so as to cover a divorce. But, then, a woman could not be a divorcee unless there was a marriage in the eye of the law preceding that status. It was, therefore, held that the expression must, therefore, be given the meaning in which it is understood in the law applicable to the parties, and the marriage of a woman in accordance with the Hindu rites with a man having a living spouse was a complete nullity in the eye of law and she was, therefore, not entitled to the benefit of S. 125 of the Code. Similar was the view taken by the Supreme Court also in *Bakulabai v. Gangaram*, 1988 MLJ 330. The position in law is, therefore, now settled that a woman claiming to be a wife and claiming on that basis the right of maintenance allowance u/s 125 of the Code of Criminal Procedure, must prove that her marriage with the alleged husband was a lawful marriage. There is no support for the view, now, that in a proceeding under S. 125 of the Code of Criminal Procedure, the intricacies regarding the marriage need not be gone into because, the very existence of that right depends upon the proof or otherwise of the marriage.

12. Coming, then, to the evidence of the respondent No. 1, it is to be noted that she did not state in her deposition anything to indicate, whether or not, she belonged to a community in which according to the customs and traditions of the community, "Saptapadi" and "Lajjahoma" were really necessary for solemnisation of a marriage. It was not her case in the deposition that any Brahmin himself had performed the rituals. Her version in the cross-examination was to the effect that the effect that the ceremonies were performed as per the directions of Narayan Maharaj and her witness Nagnath claimed that it was he who performed the rituals. Nagnath Ganpati who on his own admission, not a Brahmin but he was a "Bala-jangam". It is doubtful, whether or not, such a Priest could perform "Homa" and "Saptapadi" ceremonies for the parties at all. Indeed if at all the parties to the marriage did not belong to the regenerated classes, there could hardly have been any custom, tradition or law requiring them to perform "Lajjahoma" and "Saptapadi". Under such circumstances, it is doubtful, whether or not, such rituals were really performed. However, the evidence of Padminibai coupled with the admissions given by the present petitioner in his deposition could indicate that some ceremony for solemnisation of the marriage was really performed and it was not the case of the parties that they had not done anything whatsoever to get into the marital tie. It is, therefore, necessary to ascertain the community to which the parties belong, what were the usage and customs in the community to which they belong for

solemnisation of marriage and, whether or not, in the light of that, the marriage of the present petitioner with respondent No. 1 was performed according to law.

13. There is on more point which can go to the root of the matter. In para 7 of the written statement of the present petitioner, he had contended before the learned Magistrate that the present respondent No. 1 had a husband prior to her marriage with the present petitioner. Nothing is, however, indicated in evidence as to whether or not, whether such a husband was still living or, whether or not, the respondent No. 1 was a divorcee or, whether or not, she had no husband at all. All that the present respondent No. 1 said about this in her deposition was that she was not a divorcee from her first husband. The present petitioner tried to contend in his evidence that one Madhavrao was her first husband, but that also is not substantiated. The learned Magistrate should have given more attention to this fact and averment and should have recorded a specific finding on the point.

14. The learned Magistrate who decided the matter had referred in his judgment to the deed of divorce between the present petitioner and present respondent No. 1 which was admitted in evidence at Exh. 49. Mr. Ghulam Mustaffa rightly contended that the aforesaid document was wrongly admitted in evidence and was relied upon profusely by the Courts below for drawing certain inference against the present petitioner. True, it is that the present petitioner had placed in his written statement about the execution of the said document by the respondent No. 1. However, the respondent No. 1 had categorically denied in her deposition that she was a divorcee. In her cross-examination, the respondent No. 1 had denied that she had ever gone to the Sub-Registry's office and that a divorce was brought about by mutual consent of the present petitioner and the respondent No. 1. She was questioned about the two witnesses who were shown in the said divorce deed as identifying witnesses and she had told that Motiram Irba was the brother-in-law of the present petitioner and that she did not know anything about the second person, by name, Dattopant. Despite this version given by her in her deposition, no effort was made by the present petitioner to prove that the aforesaid deed of divorce was executed by the present respondent No. 1. Even the present petitioner had not deposed in his deposition that the divorce deed was executed in his presence by the present respondent No. 1. Motiram was examined as witness No. 5, but he utterly failed to prove the execution of the divorce deed by the present respondent No. 1. All that he said was that it was decided between the parties that the divorce deed may be obtained from the present respondent No. 1 and that, accordingly, a divorce was obtained in the Registrar's Office. No formal proof was tendered for proof of the divorce deed. Only a clerk by name, Lathkar, was examined as a witness for the present petitioner to prove that the document was registered in the Sub-Registry. It was certainly erroneous on the part of the Courts below to rely upon the divorce deed, the execution of which was not formally proved according to law before the trial Court. Again, for the validity of a divorce deed it was necessary to aver, plead and prove that the parties belong to some caste or

community in which such mutual divorce was permissible according to law. Unless that fact was averred, pleaded and proved, it was not possible to say that the divorce could be effected by the spouses by mutual consent privately by executing only a deed or divorce. Both the Courts below were oblivious of these considerations.

15. One of the contentions of the present petitioner was also that Kaushalyabai was the first wife of the present petitioner and that his marriage with the present respondent No. 1 was performed during the subsistence of his marriage with Kaushalyabai with her consent. Witness No. 3 Narayan Hanumanta, who claimed to be a cousin brother of Kaushalyabai, was examined to prove the marriage of the present petitioner with Kaushalyabai and he told in his cross-examination (which was recorded in the year 1985) that Kaushalyabai was, then, about 30 to 35 years old. He told, further, that Kaushalyabai was 10 or 12 years of age at the time of her marriage with the present petitioner. It may also be noted, in this context, that respondent No. 1 Padminibai herself also claimed to be a woman of about 38 years of age, when she preferred the present petition for maintenance and when she deposed in the Court of the Magistrate on 31-8-1984. According to the witnesses for the rival side, both the marriages, namely, the marriage with Kaushalyabai as well as marriage with the present respondent No. 1, had taken place about 21 years ago. That means, Kaushalyabai was about 10 to 12 years at that time and the present respondent No. 1 was about 15 to 16 years of age. Thus, both of them appear to be approximately of the same age group and very little could be inferred on the basis of their respective ages in the context of the decision of the issue, who was the first wife. The inferences drawn by the learned Magistrate on the basis of ages of the parties do not, therefore, appear to be very sound.

16. Thus on considering the evidence on record in details, one has got to come to the conclusion that for whatever reasons it may be, the parties had gone to trial with inadequate pleadings and with inadequate material that was required for the decision of this case. Under, such circumstances, mere evidence of reputation, or, for that matter, mere admission on the part of the present petitioner that present respondent No. 1 was his wife by "Gandharva" could hardly prove the points which were necessary to be decided for arriving at a conclusion in this case.

17. The paternity of the child by name, Vilas, is also disputed. It was, in this context, that Mr. Ghulam Mustaffa relied upon the observations for the Supreme Court in Sumitra Devi Vs. Bhikan Choudhary, which are included in para 5 of the AIR report. The Supreme Court also had found there that the lawyers of the parties and the original Court had not devoted proper attention to the relevant issues and that, therefore, the case had ended in a manner which could hardly be said to be just and proper. While praying for remand of the matter to the Court of the Magistrate, the learned counsel for the present petitioner fairly submitted that a considerable time has been wasted in the litigation between the

parties. But, even at the end of such a long period this Court was unable, for want of proper material on record, to decide the relevant issues. It was, therefore, submitted, quite fairly, that the orders which were passed by the Courts below regarding maintenance allowance should be passed by this Court, not as a final relief to any party but, by way of interim relief to the present respondent No. 1 at least, till the matter was decided, again, by the Court of the first instance. In the circumstances of the case we find no other go but to adopt, in the interest of justice, the aforesaid course and to direct the remand of the matter to the Court of the first instance.

18. Therefore, we quashed and set aside the impugned orders passed by the Courts below and direct that to the Court of Judicial Magistrate, First Class at Kandhar should consider for fresh decision the matter in the light of the considerations indicated in this order and such other points as may be legally raised by the parties before him. The parties should be given an opportunity to lead adequate evidence on the points involved and, then, the matter should be disposed of according to law. In the meanwhile, we direct that the present petitioner shall pay to the present respondent No. 1 a maintenance allowance at the rate of Rs. 300/- (Rupees three hundred) per month from the date of this order till the decision of the matter in the Court of the Magistrate. Further orders for interim relief, if required, may be passed then by the Court which will be seized of the matter thereafter.

19. With these directions, the Criminal Application is disposed of Rule made partly absolute.

20. Order accordingly.