

(1985) 08 BOM CK 0033

In the Bombay High Court

Case No : Criminal Writ Petition No. 31 of 1985

Shivaji Raghunath Gaikwad

APPELLANT

Vs

Jijabai Shivaji Gaikwad and Another

RESPONDENT

Date of Decision : 09-08-1985

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 125, 397(3)

Citation : (1985) 2 BomCR 394

Hon'ble Judges : S.J. Deshpande, J

Bench : Single Bench

Advocate : R.R. Jethalia, for the Appellant; Gulam Mustafa, Advocate and S.G. Deshmukh, Assistant Public Prosecutor for respondent No. 2 for State, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Deshpande, J.—The writ petition has been filed by the husband challenging the concurrent orders passed by the two courts below in proceedings arising out of section 125 of the Code of Criminal Procedure, 1973.

2. The trial Magistrate granted Rs. 100/- per month by way of maintenance to the wife. The said order was confirmed by the learned Additional Sessions Judge on 15th September, 1984. The husband was the revision petition before the learned Additional Sessions Judge He was unsuccessful. After he was unsuccessful before the trial Magistrate as well as before the revisional Court, he has filed the present writ petition challenging the said orders under Article 227 of the Constitution of India.

3. In the matters of maintenance, the litigants have been granted by the Parliament a remedy to have a statutory relief u/s 125 of the Code and unsuccessful party in such a proceeding is provided with a revisional remedy and that remedy is complete. u/s 397(3) of the Code, a further application by a person who has moved the revisional Court is entirely barred. In this connection,

it may be useful to note that when the Parliament created the bar u/s 397(3) in the matters of further applications to be prosecuted before the High Court, it was aware of the provisions of Article 227 of the Constitution also. Article 227 itself does not vest any right in a person. It is a constitutional power of the High Court. It is a discretionary power with the High Court. It is not an appellate or a revisional power. It is a supervisory power and it is difficult that this power can be invoked except in exceptional circumstances when subordinate courts and tribunals, within their bounds and authority, have acted in contravention of some law or have violated some provision of law, which has resulted in grave miscarriage of justice. When the Code of Criminal Procedure banned the exercise of revisional jurisdiction by the High Court, it would indeed require a very exceptional case under Article 227 to interfere in the orders passed by the lower Court. Earlier, in Hemchandra Shridhar Nair Vs. Hemangi Hemchandra Nair and Another, , I had an occasion to consider this aspect and I had at that time expressed that the High Court while exercising power under Article 227 at the instance of an unsuccessful revision, petitioner should observed some self-imposed limitation and self restraint and should not entertain petitions as a matter of (Sic) course unless an exceptional ground is made out, otherwise power of superintendence would be meant for circumventing the State law. I am supported in this view by the judgment of the Supreme Court in Jagir Singh Vs. Ranbir Singh and Another, , to which my attention was invited by the learned Advocate for respondent No. 1. The Supreme Court in that decision at page 385 observed :

".....Where the statute (Criminal Procedure Code) banned the exercise of revisional powers by the High Court, it would indeed require very exceptional circumstances to warrant interference under Article 227 of the Constitution, since the power of superintendence was not meant to circumvent statutory law."

4. In addition to this, the powers of the High Court under Article 227 are also settled. Kindly see AIR 1975 1297 (SC) The powers are neither appellate nor revisional. Therefore, the High Court in the garb of exercise of this power cannot reappreciate or reassess the evidence on record even if the findings are erroneously recorded by the lower courts. It is on this short ground alone that this petition must fail. However, I have permitted the parties to argue the petition on merits.

5. The learned Advocate for the petitioner contended that the courts below have committed an error of jurisdiction, because there is no finding with regard to the sufficient means, which is a statutory requirement u/s 125 of the Code. Section 125 of the Code opens with these words: "(1) If any person having sufficient means neglects or refuses to maintain (a) his wife, unable to maintain herself, or....." To the extent it is required, I have quoted the section. The contention of the learned Advocate for the petitioner was that there is no finding that the petitioner has sufficient means and there is an admission of the wife herself that the petitioner-husband has no property at all and he is not having sufficient

means, so that he can escape the obligation to pay the maintenance u/s 125 of the Code. I am afraid that this contention is not well-founded. If we look to the right of a wife to claim maintenance, it arises on account of her status as being wife. Under Hindu law, a husband is morally bound and under an obligation to maintain the wife irrespective of whether he possesses property or not. It is true that this particular section 125 of the Code grants a statutory right and when the statutory requirements mention that he must have sufficient means, this expression must be construed in the background of the provisions of the Hindu Law itself. A husband who is under a moral obligation to maintain his wife cannot disown his liability or decline to perform the obligation by refusing to maintain on the ground that he has no sufficient means.

6. The question of sufficient means again is a question of fact. In the courts below, this question seems to have been answered on the basis of evidence. It is disclosed from the evidence that the husband petitioner had sold away some 13 acres of land and some land, which is standing in the name of his father, belongs to him as a tenant. If these facts are disclosed by the judgments of the courts below, the findings made by the courts below in regard to sufficient means do not appear to have been vitiated by any illegality. In my judgment, therefore, on facts it cannot be said that this is a case where the courts below were ignorant of this statutory requirement and on no evidence they have based their findings.

7. It was contended by the learned Advocate for the petitioner that he is a labourer and as such a wage earner and that the wife herself is earning Rs. 3 to 4 per day. On the basis of this admission, it was contended that the quantum of maintenance which is granted should be completely set aside and he should be held to have no sufficient means at all. This is a matter of appreciation of evidence and I do not think that this Court would be justified under Article 227 to review this evidence. There was oral evidence on the record and on the basis of that evidence, if the learned magistrate and the learned Additional Sessions Judge thought that it was sufficient to believe that the husband was having sufficient means and he was having an earning capacity, it is difficult to upset this finding on the ground that it is perverse or vitiated by any error of law.

8. The learned Advocate for the husband then contended that he has been giving an offer to the wife to come to stay with him and this offer is quite genuine and he is prepared to take the wife with him even today and it is the refusal of the wife which is really the foundation for the claim of maintenance. I am afraid that this offer, which is given, has not been discussed by the courts anywhere. There is no issue as such framed by the courts in regard to the said offer. Unless the offer is found to be genuine, this would not be a defence to refuse maintenance u/s 125 of the Code. So, this contention of the husband has to be rejected on this ground.

9. Looking to the merits of the claim, I find that the courts below have framed necessary points for determination and they are : (1) whether it is proved that the respondent has refused or neglected to maintain his wife ? (2) whether it is

proved that the petitioner is not able to maintain herself ? and (3) whether it is proved that the respondent has sufficient means to maintain his wife ? All these three issues are primarily issues of facts and if they have been answered by the two courts below on facts and evidence, it is not possible for this Court to interfere even if it is found that the evidence relied on by them may not be that strong and sufficient as this Court may think. In view of this legal position, it is not possible to interfere in the orders passed by the two courts below in this case.

10. It may be mentioned here that the powers of this Court are again very limited in this regard and we may easily refer to a latest judgment of the Supreme Court in this regard in Mohd. Yunus Vs. Mohd. Mustaqim and Others, , where the Supreme Court has again emphasised that a mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited to seeing that an inferior Court or Tribunal functions within the limits of its authority and not to correct an error apparent on the face of the record, much less an error of law. If this is the position in law, I do not find that any case is made out by the petitioner to enable this Court to interfere or any exceptional ground is pointed out which may call for interference in order to avoid serious miscarriage of justice. This is a simple case of a husband who has been ordered by the courts below to pay maintenance at the rate of Rs. 100/- per month to his wife. If he has no sufficient means, there are ways by which he can resist such warrants if they are likely to be issued against him. For the present, I do not think that the orders suffer from any infirmity, much less any error apparent on the face of the record or any error of law as such. Therefore, these orders cannot be interfered with by this Court.

11. In the result, this petition must fail. It is dismissed. Rule is discharged with no order as to costs.