

(1984) 10 BOM CK 0008

In the Bombay High Court

Case No : Criminal Writ Petition No. 463 of 1983

Shravan Nathu Kannor

APPELLANT

Vs

Anjanabai Shravan Kannor and another

RESPONDENT

Date of Decision : 09-10-1984

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(5)

Citation : (1985) 2 BomCR 495 : (1984) MhLj 1015

Hon'ble Judges : S.N. Khatri, J

Bench : Single Bench

Judgement

1. This is a husband's petition under Art. 227 of the Constitution, challenging the order of the learned Additional Sessions Judge, Nasik, passed under S. 125 Cr.P.C. in revision, directing him to pay a monthly allowance of Rs. 50/- to the respondent 1 who is his wife.

2. Most of the facts are no longer in dispute. The parties married each other around 1967, when the wife was still a minor. The wife came to reside with the husband about the year 1974. As they could not pull on well together she went back to her parents. There was some litigation between the parties, which was amicably settled. Thereafter the wife again joined the husband under the marital roof. However, after 8 or 10 days' stay with him she again went back to her parents. Thereafter in July 1977 the wife preferred an application to the learned Judicial Magistrate, First Class, Malegaon, under S. 125 Cr.P.C. for fixation of maintenance. Apart from the plea of refusal and neglect to maintain her, the wife also alleged that the husband had contracted a second marriage or was living with a mistress. The husband denied all these allegations. Here it may be stated that although he had not raised a specific plea in his reply that she was living in adultery with one Mahadu Pira, evidence was sought to be led on the issue. The learned Magistrate, however, rejected the application of the husband for adjournment of the case for adducing evidence on this aspect.

3. The learned Magistrate held that the wife had failed to prove that the husband had neglected to maintain her. He also negatived her plea that the husband had taken a second wife or was keeping a mistress. Eventually the learned Magistrate dismissed the wife's petition, without considering the husband's allegations of her living in adultery. In revision, disagreeing with the learned Magistrate, the learned Additional Sessions Judge found that the husband had neglected to maintain the wife and that she was unable to maintain herself, although he had sufficient means to provide maintenance to her. The learned Magistrate's finding was however confirmed that the second marriage of the husband or his living with a mistress was not proved. The learned Judge considered the question of the wife's living in adultery and recorded a negative finding on the point. Eventually he allowed the revision and directed the husband to pay a monthly allowance of Rs. 50/- to her.

4. Now in this proceeding under Article 227 of the Constitution of India, Shri Sali for the husband contends that the learned Magistrate was wrong in refusing reasonable, opportunity to his client to adduce evidence on the question of the wife's living in adultery. Neither side challenges the other findings as finally confirmed by the Sessions Court. I am thus called upon to decide upon the sole contention raised by Shri Sali. When the matter had earlier come before my brother Kantharia J., he had given a direction to send for the record and proceedings. Shri Sali has taken me through the record and I am satisfied that there is substance in his contention. I may mention here that pursuant to an interim order made by me on 11th September 1984, the husband had deposited in the learned Magistrate's Court a sum of Rs. 1,200/- by way of arrears of maintenance for the wife. For the reasons that follow, I am remanding this case to the learned Magistrate for recording of evidence on the question of wife's adultery and for fresh disposal of the case.

5. At the outset, I may refer to a preliminary objection taken by Shri Agarwal, the learned Counsel for the wife, that any indulgence in favour of the husband at this stage will amount to a gross abuse of the process of Court, and that as such the Court should not exercise its discretion in his favour under Art. 227 of the Constitution. According to Shri Agarwal, the husband had not set up any case that the wife was living in adultery at the time she filed the petition. He adds that the facts relating to this question arose only in January 1979, that is, about two years after the petition was filed, and as such the proper course for this Court will be to dismiss this petition, and direct the husband to move the learned Magistrate under S. 125(5) Cr.P.C. for cancellation of the maintenance order. I fail to see how the course suggested by Shri Agarwal will serve the interests of justice, particularly when as the following discussion will show that there is prima facie substance in the husband's allegations.

6. Reverting to the facts of the case, it will be seen that the wife moved the learned Magistrate under S. 125 Cr.P.C. in July 1977. It was in January 1979 that the facts relating to her living in adultery came to light. According to the

husband, the wife has had illicit relations with one Mahadu Pira and eventually she eloped away with him in the first week of January 1979. The wife's father Bhika Bhila Patil moved the police by making an application on 13th January 1979, alleging that his daughter had illicit relations with Mahadu and that she had run away with him. On the basis of this application, the police took steps to recover back the custody of the wife and eventually entrusted her to "Mahila Sudhar Ashram". During the investigation carried out by the police, the statement of the wife came to be recorded by a Head Constable. It is pertinent to note that in this statement she has admitted in so many words that she has had illicit relations with Mahadu for three years.

7. It is clear from the record and proceedings of the case that the recording of evidence commenced in the matter as late as in January-February 1981. There is on record an application dated 30th January 1981 filed by the husband for issue of summons to the Superintendent of Mahila Sudhar Ashram and the Sub-Inspector of Police concerned for production of the statements recorded during the aforesaid investigation. There is also on record an application dt. 31st January 1981 for issuance of summons to Mahadu, Tanaji and two other witnesses. The evidence of the husband was partly recorded on 6th April 1984, on which date he again moved the Magistrate by an application Exhibit 23 for issuance of summons to the Head Constable to produce papers in the investigation, containing material admissions of the wife and other witnesses. He preferred still one more application on 9th April 1981 Exhibit 24 for issuing summons to Mahadu Pira. The learned Magistrate rejected both these applications mainly on the ground that the matter was very old and therefore could not brook further delay in disposal.

8. The aforesaid facts which emerge out undisputed from the record of the case itself, leave no doubt that the plea of adultery became available to the husband only in 1979, when the wife is alleged to have eloped with Mahadu. That the husband was serious about taking this plea, is more than evident from his conduct of repeatedly applying to the Magistrate for issuing summons for procuring attendance of material witnesses and production of documents. It is not as if the husband alone is to be blamed for the delay in disposal of the case. A perusal of the Roznama bears out that the matter was adjourned several times for about three years, for reasons not always connected with the convenience of the husband as such. As there is prima facie substance in the contention of the husband, the learned Magistrate clearly erred in not affording him reasonable opportunity to lead evidence on a serious issue.

9. The learned Additional Sessions Judge had recorded a finding against the husband on the issue of adultery, mainly for the reasons, namely that the material date for determining the issue is the date on which the wife files the application and secondly that one instance of deflection from the path of virtue does not amount to living in adultery. Both these reasons are ill-founded. It is difficult to agree with the learned Judge's first reason that if a wife starts living

in adultery after filing of her petition, that factor cannot be taken into consideration by Magistrate while making the final order under S. 125 Cr.P.C. If the facts constituting the plea of wife's living in adultery occur during the pendency of the petition, naturally the Magistrate cannot turn a Nelson's eye to them, and proceed to pass an order in favour of the wife, leaving the unfortunate husband to move the Magistrate for cancellation of the Order under S. 125(5) Cr.P.C. If we read sub-ss. (4) and (5) of S. 125 together in harmony with each other, it will be evident that in a given case the question of the wife's living in adultery, will have to be determined in the context of the date on which the Magistrate actually hears to this category. There is thus no bar to the learned Magistrate's entertaining the husband's plea of adultery.

10. As a proposition of law, there can be no quarrel with the learned Additional Sessions Judge's view that one instance of lapse from the path of virtue, will not amount to wife's living in adultery. There has to be a course of continuous adulterous conduct on the part of the wife. Here, as I have already adverted to above, according to the husband, the wife has herself admitted during the investigation that she has had illicit relations with Mahadu Pira for three years before her actual elopement with him. It is not possible or proper for me to adjudge today for good whether this admission was really made by the wife. But if it was indeed made by her, it will naturally merit serious consideration at the hands of the learned Magistrate, while deciding the various facts of the "adultery" plea. The learned Additional Sessions Judge clearly fell into a grave error in ignoring this aspect. His finding on the question of the husband's plea of "adultery" is thus vitiated by serious misapprehensions of law as well as fact.

11. I am for all these reasons not impressed by Shri Agarwal's submission that this Court should at the moment confirm the Sessions Court's order, with liberty to the husband to move the Magistrate for cancellation of the order. For the aforesaid reasons, I hold that it will be necessary to set aside the orders of both Courts below. The case will have to be remanded to the learned Magistrate with a direction to give both sides an opportunity to give their say on the question of the wife's living in adultery. Thereafter the learned Magistrate will give reasonable opportunity to both sides to lead evidence on the above restricted issue. To remove any possible doubt, it is made clear that findings of the learned Additional Sessions Judge on all other points are hereby confirmed. It will not be open to the parties to reagitate them. After recording the additional evidence adduced by the parties, if any, the learned Magistrate shall proceed to give a finding on the point whether the wife is living in adultery and then finally dispose of the case in the light of his finding on this point. The learned Magistrate should give top priority to this case and dispose of it within four months of receipt of the record, as far as possible. In the meanwhile the husband shall continue to deposit Rs. 50/- per month from October 1984 onwards in the learned Magistrate's Court, which the wife will be entitled to withdraw.

12. In the result, the petition is allowed. The orders of the Courts below are set

aside and the matter is remanded to the learned Magistrate for fresh disposal in accordance with law in the light of the directions given above. Parties to appear before him on 1st November 1984. Rule made absolute accordingly.

13. Petition allowed.