

(1984) 04 GAU CK 0002

In the Gauhati High Court

Case No : Criminal Revision No. 289 of 1983

Shri Dulan Chandra Bora

APPELLANT

Vs

Smti. Bonalata Bora

RESPONDENT

Date of Decision : 23-04-1984

Acts Referred:

Constitution of India, 1950 — Article 14, 15(3), 16, 25(3), 37

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(1), 125(4), 127, 136

Citation : (1984) 2 GLR 396

Hon'ble Judges : T.N. Singh, J

Bench : Single Bench

Advocate : P.K. Goswami and U. Das, for the Appellant; K.P. Sen and D.C. Mahanta, for the Respondent

Final Decision : Allowed

Judgement

T.N. Singh, J.—Two questions charged with high-voltage socio jural potential are agitated in this case, Who is a "wife"? When is she "unable to maintain herself"? There questions arise in the context of Section 125 Code of Criminal Procedure Though it is for sociologists to decipher the enigma of the social phenomena the growing "awareness" and burgeoning "litigation" in this field should this Court merely reflect on this reality? No, it must face the interpretative crisis at the judicial level.

2. In the ;Instant case wife's application having been grand husband has petitioned this Court invoking its extra ordinary jurisdiction u/s 482 Code of Criminal Procedure challenging maintainability of the action. The Respondent claimed in her application, that she was married in 1965 at Goalpara to the Petitioner according to Hindu customary rites and articles valued at Rs. 4715/- were given in dowry besides a plot of and which her mother purchased for the Petitioner and a cash amount of Rs. 2,000/- which she also gave him for his business. The Petitioner had taken another Wife and through her he had a child, After the second marriage he started iil-treating her compelling her to leave his

house, As she was unable to maintain herself she claimed Rs. 500/- per month from, the Petitioner for her maintenance. She also asserted that the Petitioner's monthly income was between Rs. 1,000/- and Rs. 1,200/-. All these allegations were denied by the Petitioner in his written statement. He also asserted that he was a petty businessman earning not more than Rs. 300/- per month and further that the Respondent was able to earn her livelihood as she knew knitting and sewing.

3. Both sides adduced evidence and on behalf of the "wife" certain letters written to her by the Petitioner were also exhibited in the case. Learned Magistrate on a consideration of the evidence adduced in the case held that the ceremonial performance of the marriage as claimed by the Respondent was doubtful. However, he held that the evidence of D.Ws. 2 and 3 proved the fact that the Petitioner and the Respondent were living together for 8/9 years and this fact was also admitted in his cross-examination by the Petitioner. On this evidence he concluded that long co-habitation between the parties having been proved beyond all reasonable doubt strict proof of their marriage was not necessary to entitle the wife to an order u/s 125 Code of Criminal Procedure. He also held that ill-treatment and torture of the Respondent by the Petitioner was proved and that their relation became strained after the second marriage which had been amply proved. That the Petitioner got a child through his second wife, learned Magistrate held, was also proved. He also held that the Petitioner was carrying on business and had sufficient means. Therefore, he could not be relieved of the obligation to maintain the Respondent even though she was "able to earn back something through tailoring and tufting". Accordingly he allowed the application and ordered the petitioner to pay Rs. 200/- per month to the Respondent for her maintenance from the date of the petition. On a revision preferred to the Sessions Judge by the Petitioner the order was maintained. Learned Sessions Judge held that though there was evidence that the Respondent did some sewing tufting that may not give her any "regular income like service" and that income from such sources was always "uncertain". He reiterated the findings of the learned Magistrate that the parties lived together as husband and wife for a long period and, therefore, she is to be considered as a legally married wife of the Petitioner. This he did on a reappraisal of the evidence on record.

4. Learned Counsel for the Petitioner Mr. P.K. Goswami has very fairly placed before me all relevant decisions on which he could lay his hands on the interpretation of the word "wife" of Section 125 but I may refer first to the explanation appended to Sub-section (1) Section 125. It says that "wife" for the purpose of this Chapter (Chapter IX) "includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried". I may also mention that according to Section 23(1)(a) "If any person having sufficient means neglects or refuses to maintain his wife, unable to maintain herself", the Magistrate may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife. Sub-section (4) contemplates that no wife shall be entitled to receive an allowance u/s 125 if she

is living in adultery or if without any sufficient reason she refuses to live with her husband, Or if they are living separately by mutual consent.

5. On a review of the authorities cited at the bar it appears clear to me that the judicial trend is to give a liberal interpretation by which not only the legislative object or the provision is promoted but the constitutional imperatives are appropriately enforced. In this connection, I may first refer to the celebrated decision of their Lordships of the Supreme Court in *Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another*, wherein their Lordships observed that. Article 25(3) of the Constitution has "compelling, compassionate relevance in the context of Section 125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill-used wife and the derelict divorces. Notice is also taken by their Lordships of the provisions of Article 39 and indeed of Articles 37 and 38 as was to say that the Parliament had in view these constitutional imperatives while enacting these special provisions to help "women in distress cast away by divorce". In that case, the question was, whether a divorcee was entitled to invoke Section 125 because objection was taken that mutual consent to live separately in terms of Section 125(4) not having been proved the application was not maintainable, The contention was repelled and the Court held that a divorcee need not have proved mutual consent to live apart because "divorce painfully implies that the husband orders her out of the conjugal home".

6. I may now refer to the relevant decisions of this Court in dealing with the issue agitated in this petition. *Bai Tahira* (supra) was relied on by Lahiri, J. in 1981 CrL. L. J. 674 (*Boli Narayan v. Shiddheswari*) to hold that when "a woman who comes in the life of a man, gives herself to the man, takes the family-life of the man and the man uses her as such, recognises her as his wife, must come within the fold of the term ""wife", absence of ceremonial marriage notwithstanding" In that case, however, unlike in the instant case, the wife got recognition of the society as to her marital status and because of this fact Mr. Goswami tried to distinguish this decision. However, a constricted view of the provision appears to have been expressed by Das, J., in (1983) 1 G.L.R. 45, *Dharmibala v. Mani Ram*, wherein stress was laid on the proof of "legal marriage" and it was held that the husband cannot be saddled with any liability if such marriage was not proved by the applicant. I had also an occasion to deal with the purport of Section 125 Code of Criminal Procedure in *Niru Bala's* case (1984) 1 G.L.R. (NOC) 10. I observed therein that whatever may be the provision under personal law of the parties as respects other rights and duties, the obligation to maintain wife and minor children, who are unable to maintain themselves, flows from the right of the man to marry and set up a family as recognised in Article 16 the Universal Declaration of Human Rights which also provide that a family as a. Fundamental, Group Unit of the Society"" is entitled to protection and the State and this mandate was fulfilled by Section 125 ensuring that the wife and children are not beggared and, destituted. In *Niru Bala's* case (1983) 1 G.L.R. (NOC) 21 Division Bench of this Court held that presumption of validity of a marriage having earned early judicial recognition in this country became deeply

entrenched in our legal system. It was held that legislative Shift of the Hindu Marriage Act herein departing from the Satiric Law emphasis is laid on the element of "consent" in preference to "ceremonies" for the validity of a Hindu marriage.

7. I may refer to some other decisions which were placed before me by the learned Counsel. In AIR 1983 Madras 66 (A.T. Lakshmi Ambalam v. Andiammal) an extreme view is expressed, The Court held "that only because a woman lived with man as his wife for 12 years and had also borne him a child would not entitle her to maintenance as only a legally married wife is entitled to an order u/s 438 Code of Criminal Procedure (old). A similar view was expressed by the Mysore High Court in 1968 (1) Cr.L.J. 131 wherein the Court held that "wife" meant only a "legitimate" wife. However, it was further held that man and woman living together as husband and wife for more than 20 years and having children whom he acknowledged as his own would raise a rebuttable presumption that the woman was his legally married wife. A learned Single Judge, in Ishwar Singh Vs. Smt. Hukam Kaur, took the view that because the previous husband of the applicant, was alive her second marriage with the Respondent would not entitle her to claim maintenance u/s 488 Code of Criminal Procedure because such marriage would be illegal in view of the provisions of the Hindu Marriage Act. A Division Bench, in Banshidhar Jha Vs. Chhabi Chatterjee, held that u/s 488 a woman could claim maintenance from a person only if she was his legally wedded wife, Maintenance to the applicant was refused because there subsisted a valid legal marriage of the Respondent with another woman due to which her subsequent alleged marriage with the Respondent was considered to be void.

8. On a survey of the authorities cited at the Bar, I am of the opinion that giving a restricted meaning to the word "wife" would certainly defeat the object of the provision and would indeed run counter to the constitutional imperative though, apparently, with some courts such interpretation has found favour. For, by providing an effective and speedy remedy the legislature intended to relieve "women in distress" and as in "Bat Tahira (supra)" the compelling compassionate relevance "of the object of Section 125 must be so read. Though Bai Tahira was the case of a divorcee and the Explanation refers explicitly merely to the case of divorce, the decision does project the interpretative crisis and at the same time also resolution of the conflict stating that benefit of doubt in such cases belongs to the "ill-used wife and the derelict divorcee". According to me, therefore, it is the right of a "woman" to a dignified living which is protected u/s 125; she must not be pushed to the abyss of vice to be irretrievably lost to humanity, if the man, who enjoys the company of a woman preferring services to him like a "wife", living with him under the same roof, setting up a "conjugal home" with him with the intention of founding a "family", is granted the legal license treat her like chattel, where and when shall be found worth of the "human person? Does such "conjugal life" cannot an inferior existence because," only religious and societal sanctions can, indeed because of the "law" metamorphosis two

human lives? Will never the "woman" become a "wife" unless the marriage tie or knot binds the two lives? If subsistence or pre-existence of the tie or knot had been the condition-precendent for invoking Section 125, why have "divorcees" been cared for? That the ill-used "woman" cannot be deprived of the benevolent soothing succor of Section 125 is by Sub-section (4) itself underwritten in it as it lays emphasis explicitly on companionship between the two which is also, projected by the words "has not regretted" used in the concerned Explanation (b) of Sub-section (1) used in relation to a divorce.

9. I may usefully recapitulate in this connection that Article 15(3) refers to the right of a "woman" to special protection and Article 39(a) postulates that the State in making laws shall ensure that "men and women equally" have adequate "means to livelihood". The man who had set up a conjugal home in installed therein his life's partner with the object of founding a family must share with his partner and progeny, dependent on him for their existence, the bread he earns. However, Whether in the course of the their conjugal life, the two had any progeny and indeed, possibly, for that reason they failed to obtain societal recognition for their conjugated existence are factors which are foreign, in my opinion, to the "compelling compassionate relevance" of Section 125. They cannot defeat the right of the "woman" to prefer claim thereunder if it is established that she lived with the "man" with the intention to found a family and she did not forsake his company of her own volition, as to terminate the relationship. It must, therefore, be stressed that their companionship should not be of an ephemeral complexion or duration. A chance encounter followed by spells of libidinous adventures would not, per se, establish a relationship manifesting intention of the couple to found a family with concomitant responsibilities and mutual obligations. There must exist between the two a stable relationship manifested by a course of positive conduct binding them by humane obligations. In this context a pertinent question arises What makes a marriage tie sacred? Is it not the vow of fidelity which inculcated in each marriage partner a sense of mutual trust and responsibility? Should therefore, absence of sacred fire or of other artificial and imposed ceremonies and sanctions rob the natural bond of human compassion and companionship its sanctity because such bond is not the product of a conventional marriage? Indeed, what a "marriage" truly is must be understood to answer this question. I extract below, therefore. Without albeit, adopting or accepting the whole of it, an oft-quoted adjural exposition of the term, albeit from a vintage-viewpoint:

Besides the procreation and education of children marriage has for its object the mutual society, help and comfort, that the one ought to have of the other both in prosperity and adversity. Marriage is the most solemn engagement which one human being can contract with another. It is contract formed with a view not only to the benefit of the (parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civilised society.

(Shelford of Marriage and Divorce (1841), p. 3, quoted in *Weatherley v.*

Weatherley (1946) 2 All ER 111).

10. Why I that absence of societal recognition should not debar the woman to claim equality in the matter of livelihood it is because it cannot shut ray eyes to this social realities indeed, projected in the Basic Statute itself. It is because I see that our society has. undeniably, inbuilt inhibitions which may deny its due to a conjugated life, withholding recognition to conjugated existence. Our plural society still inheres strains of tribal loyalties, is still unable to free itself from the inexorable dogmas, of caste, creed and religion which is reflected in the position that it does not clam our for, but clam ours against, an uniform and common Civil Code for all citizens throwing to the wind the constitutional mandate of Article 14. Stratification in our. society runs along lines demarcacating among other economic, social and cultural "backwardness" though inhabiting many parts of: our land there are ethnic groups of people who live in "natural state" unaffected by such prejudices, They must not, by law, be robbed of their blissful life and existence, If national integration must mean anything in .terns of Article 51 A(e) nobler values which inform their lives must also inform the value system of national laws not only to integrate such groups into the national main stream but also to being the latter itself closer to the emerging stream of international human rights jurisprudence. Extent legit concepts of a "marriage", "such as "valid" "void" and "void able" tend to deny the benefit of the humane provision of Section 125 to a large section of our people which could not be the intention of the legislature, Therefore; emphasis on social recognition must be eschewed. The "husband"" must discharge as a "man" his humane obligation to the "woman"" whom he accepted by his conduct as his ""wife", as his life"s companion to found a family. He will thus be upholding truly societal interest to care for the "family"" as its "fundamental group unit". State, must, therefore, enforce humane obligation for promoting a healthy national as well as international order. This, according to me, is the message of Articles, 15(3), 39(a), 44, 51(c) and 51A(e) which must inform the provisions of Section 125 Code of Criminal Procedure to uphold the "dignity of the woman" and hen fight to a dignified living.

11. In this view of the matter, I have no doubt that on the findings of both courts below the application of the Respondent was maintainable, as she was a "wife" "within the meaning of the term used in Section 125 Code of Criminal Procedure It is true hat in the instant case evidence of societal recognition of conjugated existence of parties is absent. The fact however remains that there is preponderance of evidence, as discussed by the courts below, suggesting that the Respondent and the Petitioner lived together in a "conjugal home"" for many long years Respondent"s intention to conjugate with the Petitioner to set up such a home is also proved as she left her job in Arunachal Pradesh to settle down to a conjugal life with the intention to found a family. This fact is also established that the Petitioner himself recognised the Respondent as his "wife" as proved by the letters to which both courts have referred. Mr. Goswami tried to impugn admissibility of these documents but the short answer to his objection is applied

by, Sections 136 and 167 of the Evidence Act because objection as to admissibility had to be taken at the earliest stage and this question cannot be agitated in a petition u/s 482 Code of Criminal Procedure. Unfortunately during the long course of co-habitation, the parties were not blessed with any issue and indeed it is for that reason perhaps that the Petitioner took a second wife. That fact itself would not in my (sic) demolish either the presumption of legitimacy of marriage arising from long co-habitation or the presumption inspired by constitutional mandates (national and international) that a "woman" who shared the joys and sorrows of a "man" and gave him conjugated company for long years to become a partner in his mundane pursuits and, therefore, had depended on him for her mundane existence, could not be destitute and consigned to a bleak and vacant future.

12. I am now left to deal with the second question but, happily the answer there is provided by the decision of their Lordships of the Supreme Court in AIR 1975 SC 86 Bhagwan Dutt v. Smt. Kamcia Devi, wherein their Lordships rejected the objection that the expression "unable to maintain herself" was a condition- precedent to apply u/s 125. As I do not consider it necessary to refer to the other decisions cited on this point I may only indicate that I respectfully agreed with the view expressed in a Bench Decision of the Karnataka High Court that burden lies on the husband to prove that the wife was able to maintain herself (see, 1981 CrL L.J. 184 Malar v. Baburao), However, at para 22 of the report in Bhagawan Dutt the broader issue itself is discussed and the court: approved the decision of Kerala High Court on this point reported in P.T. Ramankutty Achan Vs. Kalyanikutty, The Kerala High Court has held "A wife can file a petition u/s 488 (old) irrespective of the question whether she is able or unable to maintain herself". Their Lordships, however, in dealing with another aspect of the same issue, held as follows:

* * * the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments.

Their Lordships held that any other construction would be pervasive of the primary purpose of the Section and encourage Indicative wives having ample income and means of their own, misuse the section as a punitive weapon against their husbands.

13. In the instant case, as alluded, although both courts note of the fact that the Respondent (wife) had some income, in quantifying the maintenance payable by the Petitioner that has not been taken into consideration. It is true that learned Sessions Judge has observed that the income which the wife might be having was "uncertain" ; it was nevertheless incumbent on him to come to a conclusion on the evidence on record if that uncertain income should be totally left out of

consideration. say so because it is also his finding that the business of the Petitioner was not "very good" and therefore, whether he ought to be saddled with a continuing or recurring liability of Rs. 200/-per month to maintain the Respondent was a fact which needed further consideration. In this view of the matter, I consider it appropriate to remand the case to the learned Sessions Judge who will deal with this aspect of the matter in the light of observations hereinabove made and then dispose of the revision application. It shall be open to him on a consideration of the evidence on record to confirm or reduce the amount of monthly maintenance granted by the learned Magistrate the Respondent. However, it is necessary in this context to make it clear further that the order so passed by him shall not foreclose the right of the Respondent to take proceedings at any time u/s 127 Code of Criminal Procedure if and when she chooses to do, I say so because the quantification of the maintenance two years is apt to lose the relevance with the spiraling inflation.

14. In the result, this application is allowed to the extent indicated above and the case is remanded to the learned Sessions Judge, Goalpara, with above observations. Let the records be transmitted to his court forthwith to enable him to dispose of the matter expeditiously, if possible, within two months of the receipts of the records by him.

15. My judicial sojourns first at Imphal and then at Agartala made it difficult for me to pronounce this judgment earlier and I am availing to-day the earliest opportunity of doing so which the intervening holidays had also so long denied me.