
(2016) 08 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 105 of 2003

Sou. Rakmabai Pandurang Sonavane

APPELLANT

Vs

Pandurang Ramkrishna Sonavane

RESPONDENT

Date of Decision : 26-08-2016

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 125

Citation : (2017) ALLMRCri 652 : (2016) 4 BomCR(Cri) 181 : (2016) 5 MhLJCrI 530

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

Bench : Single Bench

Advocate : None, for the Petitioner; Mr. Kayval Shah i/b. Mr. P.B. Shah, Advocate, for the Respondents No. 1

Final Decision : Disposed Off

Judgement

M.S. Sonak, J.—By this petition under Article 227 of the Constitution of India, the petitioner challenges judgment and order dated 10 November 2002 made by the learned II Additional Sessions Judge, Nashik, in criminal revision application no. 451 of 2001.

2. By the aforesaid impugned judgment and order, dated 11 October 2002, the Additional Sessions Judge (ASJ) has set aside the judgment and order dated 19 July 2001 made by the learned Judicial Magistrate First Class, Sinnar (JMFC) in criminal miscellaneous application no. 268 of 1999 awarding maintenance of Rs. 500/- per month to the petitioner from the date of institution of the application under section 125 of Cr.P.C. along with costs of Rs. 300/-. This judgment and order dated 19 July 2001 made by the JMFC came to be set aside by the impugned judgment and order dated 10 November 2002 by the ASJ solely on the ground that the respondent husband was already married and his first wife was living on the date of solemnization of marriage between the respondent husband and the petitioner wife. On this basis, the learned ASJ has concluded that the

petitioner was not the legally wedded wife of the respondent husband and consequently, was dis entitled to claim maintenance under section 125 of Cr.P.C.

3. Neither the petitioner nor her Advocate were present when the matter was called out. However, Mr. Kayval Shah appeared for the respondent no. 1 in defence of the impugned judgment and order.

4. Upon perusal of the impugned judgment and order as also the record, since it prima facie appeared that the view taken by the learned ASJ in the making of the impugned judgment and order was not quite consistent with the law laid down by the Supreme Court in case of Dwarika Prasad Satpathy v. Bidyut Prava Dixit & Anr. AIR 1999 SC 3348 and Badshah v. Urmila Badshah Godse & Anr. (2014) 1 SCC 188, the matter was adjourned to the afternoon session, in order to enable Mr. Shah, learned counsel for the respondent husband to consider the effect of such decisions and to make his submissions with regard to the same.

5. Mr. Shah, learned counsel for the respondent husband submitted that the material on record very clearly establishes that since the year 1966, the respondent was married to Anusayabai and from the wedlock they have three children i.e. two sons and one daughter. As such, Mr. Shah submitted that the so-called marriage between the respondent and the petitioner in the year 1973, is no marriage in the eyes of law and under no circumstances can the petitioner claim the status of legally wedded wife. Mr. Shah submitted that no amount of mere cohabitation, even though, the same has resulted in the birth of a son, is sufficient to confer status of "wife" upon the petitioner and to entitle her to claim maintenance under section 125 of Cr.P.C. Mr. Shah in support of such contentions relied upon the decisions in case of Smt. Yamunabai Anantrao Adhav v. Anantrao Shivaram Adhav & Anr. AIR 1988 SC 644 and Savitaben Somabhai Bhatiya v. State of Gujarat & Ors. (2005) 3 SCC 636.

6. In addition to the aforesaid, Mr. Shah, learned counsel for the respondent produced on record a zerox copy of judgment and decree dated 20 October 2010 made by the Civil Judge, Junior Division, Sinnar in Regular Civil Suit No. 5 of 2002 (Shri. Bharat Pandurang Sonawane v. Shri. Bhima Ramkrushna Sonawane & Ors.), in which the issue as to whether the petitioner is the legally wedded wife of the respondent has been answered against the petitioner. The regular civil suit no. 5 of 2002 had been instituted by Bharat Pandurang Sonawane, son of the petitioner and the respondent claiming certain rights, interest and share in the property of the respondent husband. On this basis, Mr. Shah submitted that it is quite clear that the petitioner is not the legally wedded wife of the respondent and therefore, dis entitled to claim any maintenance under section 125 of Cr.P.C. In the alternate, Mr. Shah submitted that under no circumstances can any award for maintenance be made for the period post 20 October 2010 on account of the categoric finding recorded by the civil court to the effect that the marriage between the petitioner and the respondent, was void.

7. As noted earlier, the JMFC, by detailed judgment and order dated 19 July 2001

had upheld the claim of the petitioner for maintenance and proceeded to award maintenance of Rs. 500/- per month in her favour. In doing so, the JMFC had evaluated the entire material on record, both oral as well as documentary. In particular, the JMFC had accepted the factum of marriage between the petitioner and the respondent on basis of documents that school leaving certificate of son Bharat, in which the name of the respondent was indicated as the father; marriage invitation card concerning the marriage of Bharat, which reflected the same position. There is substantial evidence on record on the aspect of cohabitation between the petitioner and the respondent and they lived as husband and wife. The half hearted defence that the petitioner was also married to some other person, though raised, has not been established by the respondent husband. Most importantly, there is nothing in the material on record to suggest that the petitioner married the respondent with knowledge of his earlier marriage with Anusayabai.

8. The learned ASJ making the impugned order has not disturbed the finding of fact recorded by the learned JMFC as to the factum of marriage between the petitioner and the respondent. However, the learned ASJ has proceeded to hold that since the respondent was already married to Anusayabai in the year 1966 and since, Anusayabai expired only in the year 1987, the marriage between the petitioner and the respondent was in violation of section 5(1)(i) of the Hindu Marriage Act, 1955 and consequently void. In doing so, the learned ASJ has relied upon the decision of the Supreme Court in case of Yamunabai (supra).

9. The purpose and object of enactment of section 125 Cr.P.C. needs neither any reference nor reiteration at this stage. While dealing with applications under section 125 of Cr.P.C., we are required to be conscious that we are dealing with the application of a destitute wife or helpless children/parents, who seek some maintenance, often for the purposes of survival. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society.

10. The Supreme Court in case of Badshah (supra) has approved the following eloquence of Prof. Madhava Menon:

"It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself

operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."

11. The Supreme Court in case of *Badshah* (supra) has held that the provisions of maintenance would definitely fall in the category of provisions aimed at empowering the destitute and achieving social justice of equality and dignity of the individual. Therefore, whilst dealing with the cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is a need of the hour. The Supreme Court adds that law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purposes of the law.

12. The Supreme Court in paragraphs 18 to 22 in case of *Badshah* (supra) has observed thus :

"18. The Court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision-"libre recherche scientifique" i.e. "free Scientific research". We are of the opinion that there is a non-rebuttable presumption that the Legislature while making a provision like Section 125 Cr.P.C., to fulfil its Constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from *Shah Bano* to *Shabana Bano* guaranteeing maintenance rights to Muslim women is a classical example.

19. In *Rameshchandra Daga v. Rameshwari Daga*, the right of another woman in a similar situation was upheld. Here the Court had accepted that Hindu marriages have continued to be bigamous despite the enactment of the Hindu Marriage Act in 1955. The Court had commented that though such marriages are illegal as per the provisions of the Act, they are not 'immoral' and hence a financially dependent woman cannot be denied maintenance on this ground.

20. Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in *Heydon's Case* which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction of *ut res magis valeat quam pereat*, in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife.

21. The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field all though, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.

22. In taking the aforesaid view, we are also encouraged by the following observations of this Court in *Capt. Ramesh Chander Kaushal v. Veena Kaushal*:

"9. ?....The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause ? the cause of the derelicts."

[Emphasis supplied]

13. In *Dwarika Prasad (supra)*, the Supreme Court has held that the validity of the marriage for purposes of summary proceeding under Section 125, Cr.P.C. is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceeding is not as strict as is required in a trial of offence under Section 494 of the I.P.C. If the claimant in proceedings under section 125 of Cr.P.C. succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouses, and in such a situation, the party who denies the marital status can rebut the presumption. Once it is admitted that the

marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu rites in the proceedings under section 125 of Cr.P.C. From the evidence which is led if the Magistrate is *prima facie* satisfied with regard to the performance of marriage in proceedings under section 125 Cr.P.C., which are of summary nature, strict proof of performance of essential rites is not required. It is to be probed that the order passed in an application under section 125 Cr.P.C. does not finally determine the rights and obligations of the parties and the said section is enacted with a view to provide summary remedy for providing maintenance to a wife, children and parents.

14. Although, Dwarika Prasad (*supra*) did not deal with a case of a second marriage, the decision is important to emphasise the purpose and object behind enactment of section 125 of Cr.P.C. and the consequent approach to be adopted by the Magistrates in dealing with, in a summary manner, the applications under section 125 of Cr.P.C. The decision is also important because it lays down once the claimant in a proceeding under section 125 of Cr.P.C. succeeds in showing that she and the respondent have lived together as husband and wife, the court can presume that they are legally wedded spouses, and in such a situation, the party who denies the marital status has to rebut the presumption. Thus, the onus is upon the husband to rebut the presumption that there was no legal marriage in the situation in which we are presently concerned. This is because there is ample evidence on record, which has in fact been accepted by both the JMFC as well as ASJ to the effect that the petitioner and the respondent have been living as wife and husband for sufficiently long periods and further, from out of said cohabitation even a son has been born to them. As noted earlier, even if it is considered that the respondent has established the *factum* of the first marriage with Anusayabai in the year 1966, it cannot be said that the respondent has discharged onus of establishing that his marriage with the petitioner was after the petitioner had full knowledge about the existence of marriage with Anusayabai. Therefore, unless such onus was discharged by the respondent husband, applying the dictum in the case of Badshah (*supra*), there was no question of the respondent avoiding the liability to pay maintenance under section 125 of Cr.P.C.

15. In paragraph 13.2 of the decision in the case of Badshah (*supra*), the Supreme Court has distinguished the decisions in the case of Yamunabai (*supra*) and Savitaben (*supra*) and restricted their application only in those circumstance where a woman married a man with full knowledge of the first subsisting marriage. In such circumstances, the Supreme Court has held that the second wife should know that there is an embargo under the Hindu Marriage Act and therefore she has to suffer consequences thereof. Thus construed, the impugned judgment and order made by the learned ASJ cannot be sustained.

16. The judgment and decree dated 20 October 2010, was not even in existence when the learned ASJ made a impugned judgment and order on 11 October

2002. In any case, there is no question of non suiting the petitioner on the basis of such a subsequent development. As held in case of Badshah (supra), the respondent cannot be permitted to take advantage of his own wrong and to say that the petitioner is not entitled to maintenance under section 125 of Cr.P.C., even though, there is no material on record to establish that the petitioner married the respondent with full knowledge about the subsistence of his first marriage with Anusayabai. In Badshah (supra), under similar circumstances, the Supreme Court has held that at least for purposes of section 125 of Cr.P.C. , such wife is required to be treated as a legally wedded wife of the respondent. In support of such reasoning, the Hon"ble Supreme Court has adopted a purposive interpretation by reference to "social justice adjudication" or "social context adjudication" rather than the usual "adversarial approach". The learned ASJ in making the impugned judgment and order, having failed to apply "social context adjudication" or "social justice adjudication" approach, the impugned judgment and order warrants interference.

17. For the aforesaid reasons, the impugned judgment and order dated 11 November 2002 is hereby set aside. The judgment and order dated 19 July 2001 made by the learned JMFC is hereby restored. Consistent with the same, the respondent is directed to pay maintenance at the rate of Rs. 500/- per month to the petitioner with effect from the date of application under section 125 of Cr.P.C. The arrears to be cleared within a period of three months from today.

18. Rule is made absolute. Respondent to pay costs assessed at Rs. 7,500/- within a period of three months to the respondent wife.