

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.2121 OF 2005

1. Sou. Shantabai Bhimrao Bauchkar,	]	
2. Kum. Jayashree Bhimrao Bauchkar.	]	... Petitioners

Versus

1. Bhimrao Pandu Bauchkar,	]	
2. The State of Maharashtra.	]	... Respondents

Mr. Swapnil Patil for Petitioners.

Mr. Ruturaj Pawar a/w Mr. S. S. Patwardhan for Respondent No.1.

CORAM :- M. S. SONAK, J.

DATE :- DECEMBER 09, 2015

P. C. :-

1. The challenge in this petition is to the Judgment and Order dated 28/03/2005 made by the 2nd Ad-hoc Additional Sessions Judge, Kolhapur ('ASJ') by which the learned ASJ has set aside Judgment and Order dated 25/03/2004 made by the learned JMFC, Panhala, awarding maintenance of Rs.500/- per month to each of the petitioners. The petitioner no.1 claims to be the wife of respondent no.2 and the petitioner no.2 is their daughter. The learned ASJ has not interfered with the award of maintenance to petitioner no.2. However, the learned ASJ has denied maintenance to the petitioner no.1 after recording a finding that the respondent no.1 was already married and further marriage with the petitioner no.1 was not a legal marriage, rather, the same was void.

2. Mr. Swapnil Patil, learned Counsel for petitioners, has submitted that the remedy under Section 125 of Code of Criminal Procedure, 1973 ('Cr.P.C.') is a summary remedy and the same is not intended to affect the civil rights of the party. Therefore, in matters of this nature, it is sufficient if the claimant prima facie satisfies the Court that the claimant and the respondent have lived as husband and wife. There is no requirement of even proving the essential ceremony which normally go with a marriage. In this regard, Mr. Patil relied upon the decision of this Court in the case of ***Dwarika Prasad Satpathy Vs. Bidyut Praya Dixit and Another***¹. Mr. Patil submitted that the learned ASJ has not appreciated this provision in law but instead, transgressed the bounds of revisional jurisdiction, therefore, the impugned Judgment and Order made by the learned ASJ warrants interference.

3. Mr. S. S. Patwardhan, learned Counsel for respondent no.1, has submitted that maintenance under Section 125 of Cr.P.C. can only be granted to the legally married wife. In this case, the respondent no.1 was never legally married to the petitioner no.1. In this case, a legal marriage was not at all competent as the respondent no.1 was already married and his spouse was very much alive. In this regard, reliance was placed upon the decision of the Hon'ble Apex Court in the case of ***Savitaben Somabhai Bhatia Versus State of Gujarat and Others***².

¹ AIR 1999 SC 3348

² (2005) 3 SCC 636

4. Rival contentions now fall for my determination.

5. The learned JMFC, in the present case, had considered the defence of the respondent no.1 and recorded a finding on fact that the petitioner no.1 was indeed the legally wedded wife of the respondent no.1. There was both oral and documentary evidence produced on record by the petitioner no.1. There is virtually a concurrent findings of fact recorded by both the learned JMFC as well as learned ASJ, in the matter of paternity of petitioner no.2. The findings of fact recorded by the learned JMFC can neither be said to be vitiated by perversity or in excess of jurisdiction. The learned JMFC has rightly placed reliance upon the decision of the Hon'ble Apex Court in the case of ***Dwarika Prasad Satpathy*** (*supra*) and therefore, it cannot be said that the learned JMFC had erred in principle.

6. Despite the aforesaid, the learned ASJ has set aside the Judgment and Order dated 25/03/2004 made by the learned JMFC, without being conscious that it was called upon to exercise only revisional jurisdiction and not appellate jurisdiction. There is, therefore, jurisdictional error in the impugned Judgment and Order. That apart, the Hon'ble Apex Court, in the case of ***Dwarika Prasad Satpathy*** (*supra*), has held that the validity of the marriage for the purpose 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 the Code 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. In this case, the burden was clearly upon the respondent no.1 to rebut the presumption and at least for the purpose of summary proceedings under Section 125 of Cr.P.C., it cannot be said that the respondent no.1 has succeeded in rebutting such presumption.

7. Further, the Hon'ble Apex Court, in the case of ***Dwarika Prasad Satpathy*** (*supra*), has held that after a person has not disputed the paternity of the child, it would hardly lie in the mouth of such party to contend in proceeding under Section 125, Cr.P.C. that there was no valid marriage as essential rites were not performed at the time of said marriage. The Hon'ble Apex Court has further held that the provision under Section 125 is not to be utilized for defeating the rights conferred by the Legislature to the destitute women, children or parents who are victims of social environment.

8. In the case of ***Vimala (K.) Versus Veerswamy (K.)***³, the Hon'ble Apex Court, while dealing with the contention of the husband that second marriage with the applicant-wife was void on the ground of her first marriage was subsisting, held that the provision under Section 125 of the Cr.P.C. is meant to achieve a social purpose and therefore, the law which disentitles the second wife from receiving

³ (1991) 2 SCC 375

maintenance from her husband under Section 125, Cr.PC, for the sole reason that the marriage ceremony though performed in the customary form lacks legal sanctity can be applied only when the husband satisfactorily proves the subsistence of a legal and valid marriage particularly when the provision in the Code is a measure of social justice intended to protect women and children. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. The Hon'ble Apex Court has further held that when an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept-mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage.

9. It must be noted that the provisions under Section 125 of Cr.PC. do not determine and are not intended to determine the civil rights and obligations of the parties. The decisions under Section 125 of Cr.PC. are obviously tentative decisions subject to any final order in any civil proceeding, if the parties are so advised to adopt. This is what was held by the Hon'ble Apex Court in the case of ***Santosh w/o Naresh Pal Vs. Naresh Pal***⁴, in the context of contention that the wife had not proved that she was legally married wife because her first husband was living and there was no dissolution of her marriage. In the case of ***Dwarika Prasad Satpathy*** (*supra*), the Hon'ble Apex Court has held that where from the evidence which is led before the Magistrate, the Magistrate is *prima facie* satisfied with regard to the

4 (1998) 8 SCC 447

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.

10. Applying the aforesaid principles, it is clear that the respondent no.1 has not been able to make out a case that the marriage between himself and the petitioner no.1 was not legal and valid, because the petitioner no.1 was allegedly his second wife.

11. In the case of **Savitaben** (*supra*), it has been held that the expression 'wife' referred to under Section 125 of the Cr.P.C. means only 'legally married wife'. In the present case, the learned JMFC, on the basis of material on record, had clearly returned a finding that the petitioner no.1 was the legally wedded wife of the respondent no.1. The learned ASJ, by purporting to re-assess the material on record, has substituted a different finding. Such jurisdiction of re-assessment of evidence was not at all vested in the learned ASJ. Therefore, it cannot be said that the approach of the learned JMFC was, in an manner, contrary to the dictum of the Hon'ble Apex Court in the case of **Savitaben** (*supra*). That apart, it is required to be noted that yet another bench of the Hon'ble Apex Court, in the case of **Chanmuniya Versus Virendra Kumar Singh Kushwaha and Another**⁵, upon consideration of several other decisions, including the decisions in the case of **Dwarika Prasad** (*supra*) and **Savitaben** (*supra*), has expressed an opinion that an expansive interpretation should be given to term 'wife' to include even those cases where a man and woman

⁵ (2011) 1 Supreme Court Cases 141

had been living together as husband and wife for a reasonably long period of time and strict proof of marriage should not be a pre-condition for maintenance under Section 125 of Cr.P.C., so as to fulfill true spirit and essence of beneficial provision of maintenance under Section 125. The Hon'ble Apex Court has itself said that such an interpretation would be a just application of the principles enshrined in the Preamble to our Constitution, namely, social justice and upholding the dignity of the individual.

12. Therefore, upon cumulative consideration of the aforesaid facts and circumstances, as also the law on the subject, the impugned Judgment and Order dated 28/03/2005 made by the learned ASJ is hereby set aside and the Judgment and Order dated 25/03/2004 made by the learned JMFC is hereby restored. Rule is made absolute in terms of prayer clause (b). The respondent no.1 shall pay costs of Rs.5,000/- (Rupees Five Thousand Only) to the petitioner no.1 within a period of four weeks from today.

(M. S. SONAK, J.)