

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2576 OF 2005

Sou. Kusum Shivkumar Agarwal and Anr.	..	Petitioner
Vs.		
Shri Shivkumar G. Agarwal	..	Respondent

None present.

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CORAM : M.S.SONAK, J.
DATE : 3rd DECEMBER, 2015.

P.C.:

1. In pursuance of the order dated 8th October, 2015, the Registry has issued notice to the petitioners. Despite the same the petitioner is not present. Rather than dismissing this petition for non prosecution it would be appropriate if the same is taken up for final disposal.
2. The challenge in this petition is to the Judgement and Order dated 9th September, 2005 in Criminal Revision Application No. 765 of 2004 made by the Sessions Judge, Pune reversing the judgment and order dated 2nd November, 2004 made by the JMFC Pimpri who had awarded maintenance of Rs.500/- per month each to the petitioner nos 1 and 2.
3. The JMFC by judgement and order dated 21st November, 2004 upon consideration of the material on record had awarded maintenance of Rs.500/- to each of the petitioners. The Sessions Judge Pune vide the impugned Judgement and order dated 9th September, 2005 has set aside the JMFC order dated 21st November, 2004.

4. Perusal of the impugned judgment and order made by the Sessions Judge indicates that the Sessions Judge has transgressed the scope of Revisional jurisdiction. The Session Judge has purported to re-assess the material on record as if he was sitting in an appeal over the decision of the JMFC.

5. There is no dispute that the petitioner and respondent were legally wedded. The defence of the respondent that there was no legal marriage cannot be accepted. Witnesses were examined to prove the factum of marriage. From out of the wedlock the parties have three children, two sons and one daughter. From the suggestions put on behalf of the respondent in the course of cross examination, it is clear that even respondent has accepted the factum of marriage. The Honorable Apex Court in case of *Dwarika P. Satpathy Vs. Bidyut Prava Dixit and anr* [AIR 1999 SC 3348] has held that the validity of the marriage under section 125 of the Cr.PC is to be determined on the basis of evidence brought on record by the parties. The standard of proof in such proceedings is not the same as the standard to be applied in a trial for offence under section 494 of Indian Penal Code. If the claimant in a proceeding under section 125 of the Cr.PC succeeds in showing that she and respondent were living as Husband and Wife, the court can presume that they were legally wedded.

6. In this case the respondent has not seriously disputed the paternity of the children. In this context it is once again appropriate to refer to the observations of the Honorable Apex Court in *Dwarika P. Satpathy Vs. Bidyut Prava Dixit and anr* (Supra). The Honourable Apex Court has observed that when there is no dispute as to the paternity of children, it is hardly upon to the husband to contend that marriage ceremony was not appropriately performed and therefore there is no legal and valid marriage. It is to be noted that order passed in an application under section. 125 of

the Cr.PC does not finally determine the civil rights of the parties and said section has enacted with a view to provide summary remedy for wife and children to obtain maintenance.

7. There is ample material on record which establishes that the petitioners are unable to maintain themselves. The Revisional Court has exceeded its jurisdiction in attempting to re-assess evidence on record and substitute its opinion for the opinion of the JMFC. The finding of fact recorded by the JMFC cannot be said to be vitiated by perversity. The JMFC has not even erred in principle. In these circumstances the impugned judgement and order dated 9th September, 2005 is required to be set aside and is hereby set aside. The Judgement and order dated 2nd November, 2004 made by the JMFC is hereby restored.

8. Rule is accordingly made absolute in this petition in terms of prayer clause (b). There shall be no order as to costs. The Registry is directed to send an authenticated copy of this order to both the petitioner as well as respondent as indicated in the cause title within a period of 15 days from today. This is necessary because neither of the parties have appeared before in this court either by themselves or through their Advocates.

(M.S.SONAK, J.)