

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 536 OF 2016

MANGAL SANJAY GAIKWAD
VERSUS
SANJAY CHANDU GAIKWAD

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Advocate for Petitioner : Smt. Chincholkar Surekha G.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: June 08, 2016
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PER COURT :-

1. The petitioner is aggrieved by the judgment and order dated 11.1.2016 delivered by the learned Sessions Judge, Nanded, by which, the Criminal Revision Petition No.124 of 2014, filed by the respondent was partly allowed.

2. This Court had issued notice to the sole respondent on 4.5.2016. Office remark indicates that the respondent has been served. No appearance has been entered by the respondent, either in person or through an Advocate, despite Court notice.

3. Learned Advocate for the petitioner submits that the petitioner had moved an application under Section 125 of the Code of Criminal Procedure, before the learned Judicial Magistrate F.C., Ardhapur, seeking maintenance from the respondent. It was contended that the petitioner's marriage was solemnized with the respondent by following the religious rites and rituals

in March 2002. She had cohabited with the respondent for a period of about three years and a male child was born out of the said wedlock. Thereafter, due to a matrimonial discord, the petitioner was driven out of her marital home. Considering the neglect and the sufferings being caused to her, she preferred MCA No. 9 of 2012, seeking maintenance from the respondent.

4. Learned Advocate for the petitioner submits that the respondent did not deny the factum of marriage and it was only in the cross-examination of the petitioner that she stated that a child marriage was performed with one Somnath Khandare. However, the said marriage did not lead to cohabitation and being a minor when the said child marriage was performed, the same cannot be termed as being a valid marriage in the eyes of law. It is further submitted that the marriage between the petitioner and the respondent was performed after she attained majority and by performing the religious rites and rituals.

5. It is further submitted that on the basis of the evidence, the trial Court concluded that the petitioner and the respondent had lived as husband and wife and a male child was begotten out of such relationship. Since the respondent did not dispute the marriage and did not contend that the petitioner was earlier married off in a child marriage, a defence subsequently taken without pleadings was unsustainable. It is, therefore, submitted that these findings on facts cannot be lightly set aside by any Court. By judgment dated 3.11.2014 the application for monthly

maintenance was allowed and the respondent was directed to pay maintenance of Rs.800/- to the applicant and Rs.700/- to the son, who was applicant No.2 before the trial Court.

6. It is submitted that the respondent preferred a Criminal Revision No.124 of 2014 under Section 397 of the Code of Criminal Procedure ("CrPC"). By the impugned judgment, the Revision was partly allowed and the maintenance granted to the petitioner was disallowed. The order of the trial Court awarding maintenance to the child was not interfered with by the revisional court.

7. The petitioner has placed reliance upon the judgment of the Honourable Supreme Court in the matter of Pyla Mutyalamma @ Satyavathi Vs. Pyla Suri Demudu and another [2011 (12) SCC 189], to support her contention that the issue of a legal marriage cannot be gone into by the Court under Section 125 of the CrPC. Specific reliance is placed upon the observations and conclusions of the Apex Court in paragraph Nos.9, 10, 13, 14 and 15 of the said judgment.

8. Learned Advocate, therefore, submits that the scope in the revision petition is not as wide as is in an appeal. The revisional Court should have only considered as to whether there is any perversity in the findings of the trial Court and should not have interfered with the said judgment only because a second view was possible. It is, therefore, prayed that the

impugned judgment be set aside and this petition be allowed.

9. I have considered the submissions of the learned Advocate and the observations of the Honourable Supreme Court in the judgment cited.

10. It is apparent that the respondent had neither pleaded that the petitioner was earlier married and there was no divorce, nor did he bring on record any evidence to indicate that the child marriage between the petitioner and Somnath Khandare resulted in cohabitation and which in turn resulted in the birth of applicant No.2 - child. In fact, the trial Court has concluded that applicant No.2 was a child begotten by the petitioner after she cohabited with the respondent. This conclusion has been accepted by the revisional Court.

11. In my view the revisional Court could not have ignored the fact that there was no pleading by the respondent before the trial Court that the petitioner was earlier married and since there was no divorce obtained by her from the said marriage, her marriage with the respondent was a nullity. Without pleadings before the Court, the revisional Court could not have upset the conclusions of the trial Court which were findings on facts.

12. The revisional jurisdiction of the revisional Court is akin to the revisional jurisdiction of this Court under Article 227 of the Constitution of India. The Apex court, in the matter of Shalini Sham Shetty Vs. Rajendra

Shankar Patil [2010 (8) SCC 329] and in the judgment delivered in the case of Radhey Shyam Vs. Chhabi Nath [(2015) 5 SCC 523], a revisional Court could interfere with the findings on facts only if the conclusions drawn by the trial Court were perverse and likely to cause gross injustice. Merely because a second view is possible, the revisional Court cannot interfere with the findings on facts. In fact, in the judgment of Shalini Shetty (supra) and Radhey Shyam (supra), the Apex Court has concluded that the observations of the said Court in the case of Surya Dev Rai Vs. Ram Chander Rai [2003(6) SCC 682] on the point discussed, was not good law.

13. The observations of the Honourable Supreme Court in the case of Pyla (supra), in paragraph Nos.9 and 10 read as under:-

"9. In fact, we also find sufficient substance in the plea that the High Court in its revisional jurisdiction ought not to have entered into a scrutiny of the finding recorded by the Magistrate that the Appellant was a married wife of the Respondent, before allowing an application determining maintenance as it is well-settled that the revisional court can interfere only if there is any illegality in the order or there is any material irregularity in the procedure or there is an error of jurisdiction. The High Court under its revisional jurisdiction is not required to enter into re-appreciation of evidence recorded in the order granting maintenance; at the most it could correct a patent error of jurisdiction. It has been laid down in a series of decisions including Suresh Mondal v. State of Jharkhand that in a case where the learned Magistrate has granted maintenance holding that the wife had been neglected and the wife was entitled to maintenance, the scope of interference by the

revisional court is very limited. The revisional court would not substitute its own finding and upset the maintenance order recorded by the Magistrate.

10. In revision against the maintenance order passed in proceedings under Section 125, Code of Criminal Procedure, the revisional court has no power to re-assess evidence and substitute its own findings. Under revisional jurisdiction, the questions whether the applicant is a married wife, the children are legitimate/illegitimate, being pre-eminently questions of fact, cannot be reopened and the revisional court cannot substitute its own views. The High Court, therefore, is not required in revision to interfere with the positive finding in favour of the marriage and patronage of a child. But where finding is a negative one, the High Court would entertain the revision, re-evaluate the evidence and come to a conclusion whether the findings or conclusions reached by the Magistrate are legally sustainable or not as negative finding has evil consequences on the life of both child and the woman. This was the view expressed by the Supreme Court in the matter of Santosh (Smt.) v. Naresh Pal : (1998) 8 SCC 447, as also in the case of Parvathy Rani Sahu v. Bishnu Sahu : (2002) 10 SCC 510. Thus, the ratio decidendi which emerges out of a catena of authorities on the efficacy and value of the order passed by the Magistrate while determining maintenance under Section 125, Code of Criminal Procedure is that it should not be disturbed while exercising revisional jurisdiction." (Emphasis supplied).

14. In so far as the jurisdiction of the court under Section 125 of the CrPC in relation to the factum of marriage is concerned, the observations of the Apex Court in the case of Payla (supra), in paragraph Nos.12 to 15 read as under:-

"12. It is no doubt true that the learned Judges in this cited case had been pleased to hold that scope of Section 125 cannot be enlarged by introducing any artificial definition to include a second woman not legally married, in the expression 'wife'. But it has also been held therein that evidence showing that the Respondent-husband was having a living spouse at the time of alleged marriage with the second wife, will have to be discharged by the husband. Hence, this authority is of no assistance to the counsel for the Respondent-husband herein as it is nobody's case that the Appellant-wife should be held entitled to maintenance even though the first marriage of her husband was subsisting and the Respondent-husband was having a living wife as there is no quarrel with the legal position that during the subsistence of the first marriage and existence of a living wife (first wife), the claim of maintenance by the second wife cannot be entertained. But proof and evidence of subsistence of an earlier marriage at the time of solemnizing the second marriage, has to be adduced by the husband taking the plea of subsistence of an earlier marriage and when a plea of subsisting marriage is raised by the Respondent-husband, it has to be satisfactorily proved by tendering evidence. This was the view taken by the learned Judges in Savitaben's case (supra) also which has been relied upon by the Respondent-husband. Hence, even if the ratio of this case relied upon by the Respondent-husband is applied, the Respondent-husband herein has failed to establish his plea that his earlier marriage was at all in subsistence which he claims to have performed in the year 1970 as he has not led even an iota of evidence in support of his earlier marriage including the fact that he has not produced a single witness except the so-called first wife as a witness of proof of his earlier marriage. This strong circumstance apart from the facts recorded herein above, goes heavily against the Respondent-husband.

13. We may further take note of an important legal aspect as laid down by the Supreme Court in the matter of *Jamuna Bai v. Anant Rai* (paras 4, 5 and 8), that the nature of the proof of marriage required for a proceeding under Section 125, Code of Criminal Procedure need not be so strong or conclusive as in a criminal proceeding for an offence under Section 494 IPC since, the jurisdiction of the Magistrate under Section 125 Code of Criminal Procedure being preventive in nature, the Magistrate cannot usurp the jurisdiction in matrimonial dispute possessed by the civil court. The object of the section being to afford a swift remedy, and the determination by the Magistrate as to the status of the parties being subject to a final determination of the civil court, when the husband denies that the applicant is not his wife, all that the Magistrate has to find, in a proceeding under Section 125 Code of Criminal Procedure, is whether there was some marriage ceremony between the parties, whether they have lived as husband and wife in the eyes of their neighbours, whether children were borne out of the union.

14. It was still further laid down in the case of *Sethu Rathinam v. Barbara* that if there was affirmative evidence on the aforesaid points, the Magistrate would not enter into complicated questions of law as to the validity of the marriage according to the sacrament element or personal law and the like, which are questions for determination by the civil court. If the evidence led in a proceeding under Section 125 Code of Criminal Procedure raises a presumption that the applicant was the wife of the Respondent, it would be sufficient for the Magistrate to pass an order granting maintenance under the proceeding. But if the husband wishes to impeach the validity of the marriage, he will have to bring a declaratory suit in the civil court where the whole questions may be gone into wherein he can contend that the marriage was not a valid marriage or was a fraud or coercion practiced upon him. Fortifying this view, it was

further laid down by the Supreme Court in the matter of Rajathi v. C. Ganesan : AIR 1999 SC 2374 also, that in a case under Section 125 Code of Criminal Procedure, the Magistrate has to take prima facie view of the matter and it is not necessary for the Magistrate to go into matrimonial disparity between the parties in detail in order to deny maintenance to the claimant wife. Section 125, Code of Criminal Procedure proceeds on de facto marriage and not marriage de jure. Thus, validity of the marriage will not be a ground for refusal of maintenance if other requirements of Section 125 Code of Criminal Procedure are fulfilled.

15. *When the Appellant's case is tested on the anvil of the aforesaid legal position, it is sufficiently clear that the Appellant has succeeded in proving that she was the legally married wife of the Respondent with three children out of which one had expired while the other two who are major and well-settled. It has further been proved that the Respondent-husband started deserting the Appellant-wife after almost 25 years of marriage and in order to avert the claim of maintenance, a story of previous marriage was set up for which he failed to furnish any proof much less clear proof. Thus, it was not open for the High Court under its revisional jurisdiction to set aside the finding of the trial court and absolve the Respondent from paying the maintenance of Rs. 500/- per month to the Appellant-wife."*

15. In the instant case, it cannot be ignored that the respondent has not denied that he got married to the petitioner. It is not the case of the respondent that the petitioner is not his legally wedded wife or that she is not his first wife.

16. The Honourable Apex Court has thus concluded that when a couple lived as a husband and wife in the eyes of their neighbours and when children were born out of such union, the Court vested with the jurisdiction under Section 125 of the CrPC should normally grant maintenance as there is a presumption of marriage between the two. This aspect has been rightly dealt with by the trial Court in this case. However, in the absence of pleadings by the respondent, with regard to an earlier child marriage of the petitioner and cohabitation in the said marriage, the revisional court, in its limited jurisdiction, should not have caused an interference in the judgment delivered by the trial Court only because a different view could be taken.

17. In the light of the above, this petition succeeds. The impugned judgment dated 11.1.2016, delivered by the revisional Court, is quashed and set aside. Criminal Revision No.124 of 2014 stands dismissed. Needless to state, the judgment of the trial Court dated 3.11.2014, in MCA No.9 of 2012 is sustained.

(RAVINDRA V. GHUGE, J.)

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