

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.664 OF 2016

Palji Khimji Padaya ...Applicant

Versus

Ramila Palji Padaya
And Anr ...Respondents

....

Mr.Rajender Singh Salvja, Advocate for the Applicant.

Ms. Mansi Save, Advocate for Respondent No.1.

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CORAM : R. G. KETKAR, J.

DATE : 13th APRIL, 2017

P.C.

1. Heard Mr.Rajendra Singh Salvja, learned counsel for the applicant and Ms.Mansi Save, learned counsel for respondent No.1, at length.

2. By this application under Section 401 of Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'), the applicant has challenged the judgment and order dated 8.8.2016 passed by the learned Judge of the Family Court No.5, Mumbai below Exhibit-101 in Petition No.E-323/2012. By that order, the learned trial Judge allowed the petition filed by the respondent under Section 125 of Cr.P.C. and directed the applicant herein to pay Rs.3000/- per month each to the petitioner and minor

son Brijesh i.e. in all Rs.6000/- per month from the date of filing of the petition i.e. from 24.7.2012. The applicant is directed to pay maintenance of minor son Brijesh till he attains majority. The learned trial Judge also directed the petitioner to pay costs of Rs.5,000/- to the respondent.

3. In support of this Petition, Mr. Salvja submitted that the petition under Section 125 of Cr.P.C. is instituted by the respondent 11 years after the alleged marriage. He submitted that the respondent has claimed maintenance for minor son Brijesh. He invited my attention to the birth certificate wherein the name of father of Brijesh is shown as Palji Budha Pandaya. He submitted that the applicant's name is Palji Khimji Padaya. He also invited my attention to the cross-examination of the respondent-wife, wherein she admitted that the name of the petitioner is Palji Khimji Padaya and that she is studied upto 10th standard. Inviting my attention to her cross-examination, he submitted that the respondent has not established her marriage with the petitioner. He, therefore, submitted that the learned trial Judge was not justified in awarding maintenance.

4. Mr. Salvja also invited my attention to the cross-

examination of the respondent wherein she stated that as the person working in the BMC has typed wrong name of father of the child, she had gone to the Health Officer to correct name of father of son. He submitted that this fact is not supported by any documentary evidence. For all these reasons, he submitted that the learned trial Judge committed serious error in allowing the petition.

5. On the other hand Ms. Save supported the impugned order. She relied upon the decision of Andhra Pradesh High Court in ***Golla Seetharamulu v Golla Rathanamma and another, 1991 CriLJ 1533*** to contend that Section 125 of Cr.P.C. has not restricted period of limitation to claim maintenance. When the statute has not prohibited any wife to claim maintenance within any period of limitation, the applicant cannot contend that the wife has waived her right to claim maintenance due to long lapse of 10 or 12 years after she left his house. She further submitted that the respondent examined her mother as PW-5. Her evidence remained unchallenged. It is, therefore, not open to the petitioner to contend that the respondent is not his legally wedded wife. She, therefore,

submitted that no case is made out for invocation of powers under Section 401 of Cr.P.C.

6. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. On behalf of the applicant, it is contended that Brijesh is not son of the applicant. A perusal of paragraph-10 of the impugned order and in particular the questions asked to the petitioner in cross-examination clearly shows that the petitioner deposed that "I am not willing to go for medical test i.e. D.N.A. test to prove that 'Brijesh' is my son". The learned trial Judge dealt with this aspect and observed that as the applicant has denied paternity of the child Brijesh, the burden of proving the same is on him. The applicant did not take any steps for conducting D.N.A. test to disprove the paternity. In fact he refused to undergo D.N.A. test. The learned trial Judge, therefore, drew adverse inference by observing that from his refusal it can be ascertained that the medical test would have gone against him.

7. As far as the submission that respondent is not legally wedded wife of the applicant is concerned, a perusal of

paragraph-11 of the impugned order shows that the respondent examined her mother Deval Rana as PW-5. However, she was not cross-examined. The learned trial Judge, therefore, held that her evidence remained unchallenged. In view thereof, the submissions advanced by the applicant that Brijesh is not son of the applicant as also the respondent is not his legally wedded wife cannot be accepted. While fixing the amount of maintenance, the learned trial Judge has noted that the petitioner is working in Solid Waste Maintenance Department of B.M.C. and is getting salary of Rs.27,000/- excluding bonus of Rs.25,000/- per year. Considering these facts, the learned trial Judge has awarded maintenance of Rs.6,000/- per month to the respondent and her minor son Brijesh.

8. In the case of **Golla Seetharamulu** (supra), the learned Single Judge of Andhra Pradesh High Court has observed in paragraph-14 thus :

14. The word 'waive', according Chambers 20th Century Dictionary means, "to put away, reject, to abandon, forsake, to vacate, to resign; to outlaw (a woman - her status in the eyes of the law being such that the usual term was not applicable to her) (hist); to abandon (stolen goods); to give up voluntarily, as a claim or a contention (law) etc."

Simply because the wife has not claimed maintenance for a long period, it does not mean that she has completely abandoned her right or voluntarily given up her right to claim maintenance. In her application she pleaded that she has no other source of income and she is unable to maintain herself. She might be living with her parents to the utter humiliation of other ladies and without any courtesy and respect which a daughter is entitled to in her parental house if she is living quite happily and peacefully with her husband, with the only fond hope of reunion. But when all her hopes are shattered away, and when there is no other source of income and when she feels herself a burdensome to her parents or brothers, she has approached the Court claiming maintenance. Apart from that, S. [125](#) Cr.P.C. has not restricted the period of limitation to claim maintenance. When the statute has not prohibited any wife to claim maintenance with (within) any period of limitation, the petitioner is not entitled to plead that she has waived her right to claim maintenance due to the long lapse of 10 or 12 years after she left his house.”

9. In view thereof the submission advanced on behalf of the applicant that the application for maintenance under Section 125 of Cr.P.C. was made after 11 years of marriage is without any substance. Hence, no case is made out for invocation of criminal jurisdiction under Section 401 of Cr.P.C. Revision Application fails and the same is dismissed.

(R. G. KETKAR, J.)