Veena Devi Vs. Ashok Kumar Mandal

Veena Devi Vs. Ashok Kumar Mandal

SooperKanoon Citation : sooperkanoon.com/128694

Court : Patna

Decided On : Sep-13-1999

Judge : G.S. Chaube, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 125

Appeal No. : Cri. Revn. No. 421 of 1998

Appellant : Veena Devi

Respondent : Ashok Kumar Mandal

Advocate for Def. : V.P. Singh, Adv.

Advocate for Pet/Ap. : Jai Prakash, Adv.

Disposition : Application allowed

Judgement :

G.S. Chaube, J.

1. This is an application under Section 19(4) of the Family Courts Act, 1984 by way of revision against order dated 19.11.1998 of the Principal Judge of the Family Court at Dhanbad, whereby and where under prayer of the petitioner seeking maintenance from the sole O.P. (opposite party) has been rejected.

2. The petitioner had presented an application under Section 125 at Dhanbad seeking a sum of Rs. 1,000/- per month by way of maintenance from the opposite party on the ground that she was married to the latter according to Hindu rites and customs on 9.8.1978. However, when she could not bear any child to the opposite party through the wedlock for a period of about three years, the latter started torturing her. Consequently, she was forced to make a written complaint in the ''desertion cell' of the Deputy Commissioner, Dhanbad, sometime in 1982 against the opposite party. That complaint was registered in the 'desertion cell' as Misc. Case No. 73/82. During the pendency of that proeeding, a compromise was arrived at, but the same did not materialise as the opposite party declined to excuete a bond for not torturing her in future. However, in the month of August, 1984, a compromise was arrived at between them and she went to live at the matrimonial home with the opposite party. However, in 1987, she was again driven away from the matrimonial home. Consequently, she started living with her father. After retirement of her father, she resides with her brother. According to her, in the meantime, the opposite party has married another woman named Anupam Devi without divorcing her. She has stated that the opposite party is a Govt. servant employed as a clerk in the department of Rural Engineering Organisation at Katihar and was drawing a salary of Rs. 5,000/- per month. In spite of having such income he was neglecting to maintain her. Since she was not capable of maintaining herself, she presented the application for direction to the opposite party to pay to her the amount churned.

3. On service of notice of the application, the opposite party appeared before the Principal Judge, Family Court and filed his show cause denying the allegation. According to him, the petitioner was never married to him. As a matter of fact, in 1978 when his father died, a negotiation for marriage of the petitioner with him had started by her father, but as the girl was not approved by him and his mother, the negotiation failed and the marriage could not be solemnized. Aggrieved by the failure of the negotiation for the marriage of the petitioner with him, the relatives of the petitioner threatened solemnisation of the marriage with the petitioner forcibly. To achieve their goal, they laid out all sorts of threats. However, the marriage was not solemnized. Therefore, the petitioner and her relatives adopted the attitude of black-mailing him by filing petition in the 'desertion cell' of the Dy. Commissioner,

Dhanbad as also in the department of his employment with all sorts of false allegations. However, after inquiry, the petitions so filed were dismissed. In his show cause he has further asserted that, as a matter of fact, he was married to one Anupam Devi of Katihar on 27.6.1985 and he is residing with her and the children born during the said wedlock. On such assertion, the opposite party pleaded for dismissal of the application of the petitioner. In support of their respective pleas, the parties adduced (sic.) and by the learned Principal Judge, Family Court, the following four points were formulated for determination :

(i) Is the petitioner lawfully wedded wife of the opposite party?

(ii)Is the petitioner unable to maintain herself?

(iii) Has the opposite party having sufficient means neglected to maintain the petitioner?

(iv) Is the petitioner entitled to claim maintenance from the opposite party and, if so, to what extent?

4. On consideration of the evidence adduced by the parties, the learned Principal judge, family Court has held that the petitioner is not the legally married wife of the opposite party and that her marriage with the opposite party never solemnized; having no occasion to live together as husband and wife. Relying on the evidence of the petitioner and her brother who was examined as A.W. 1 to the effect that in course of the proceeding the petitioner was employed as a teacher in a private school and was getting a salary of Rs. 300/-- per month, the learned Principal Judge of the Family Court held that she was not unable to maintain herself. even though the witnesses had stated that she had lost the job three months prior to coming to the witness box. As the two points respecting the marriage of the petitioner with the opposite party and inability of the petitioner to maintain herself were decided against her, the learned Principal Judge came to the conclusion that the opposite party was not neglecting to maintain the petitioner as he was not liable to maintain her even though he was earning a 'carry home salary' of Rs. 5,500/- per month.

5. Aggrieved by such findings of the Principal Judge, Family Court, Dhanbad and the resultant dismissal of her application, the petitioner has filed this revision application invoking the revision jurisdiction of this Court.

6. Mr. Jaiprakash, learned Counsel for the petitioner, has assailed the impugned order of the learned Principal Judge on the ground that by insisting too much on the proof of performance of the rituals, like 'Saptpadi' and invocation of sacred fire, the learned Principal Judge has fallen error in appreciating the true spirit of the proceeding. According to him, the learned Principal Judge was not exercising the jurisdiction of a Matrimonial Court for pronouncing judgment on the question of validity or otherwise of the marriage before (between ?) the parties. The provision of Section 125, Cr.P.C is meant for protection of the destitute women and children and such decision being always subject to the decision of a Civil Court of competent jurisdiction, strict proof of marriage, like performance of rituals according to personal law of the parties by which they are governed, is not required. He has further submitted that the learned Principal Judge has given undue importance to certain omissions and contradictions in the statements of the witnesses examined on behalf of the petitioner for arriving at the conclusion that the petitioner was not the legally wedded wife of the opposite party. He has discarded the evidence of independent witnesses of the neighbourhood of the opposite party on the most fanciful ground that they had not attended the marriage when it was allegedly performed. Therefore, according to him, there being sufficient material to concluded that the petitioner was married to the opposite party, the impugned order is fit to be set aside, otherwise, gross miscarriage of justice shall be the consequence. He has further submitted that the learned Principal Judge totally ignored the provision of Section 17, Cr.P.C. according to which the relevant time when the question whether person seeking maintenance is capable of maintaining herself is the time when order under Section 125, Cr.P.C. is made and not the time when the application was made. Consequently, when the petitioner and her witnesses stated on oath specifically that the petitioner was out of employment three months prior to her evidence in Court and there was no challenge to this statement on oath, the learned Principal Judge, Family Court was not justified in coming to the conclusion that the petitioner was able to maintain herself. Therefore, Mr. Prakash has submitted that the impugned order is fit to be

set aside and opposite party liable to be directed to pay maintenance to the petitioner.

7. Mr. V.P. Singh, learned Counsel for the opposite party, however, submitted that the revisional jurisdiction of this Court being of supervisory nature only, this Court has very limited scope for interfering with the findings of fact arrived at by the Principal Judge, Family Court, based on the evidence adduced before him. Therefore, he has submitted that this application is liable to be dismissed. In support of his contention, he has placed reliance on two decisions, reported in AIR 1975 SC 1960; and (1998) 1 SCC 537, In the case of Duli Chand v. Delhi Administration, AIR 1975 SC 1960, the Apex Court has held that the jurisdiction of the High Court in criminal revision application is severely restricted and it cannot embark upon a re-, /appreciation of the evidence. In the case referred to above, the accused was convicted by the Trial Court under Section 304A of Indian Penal Code on the finding by the Trial Court that he was guilty of negligence in driving the vehicle and thereby causing death of the deceased. His appeal against conviction was dismissed. When he approached the High Court invoking the revisional jurisdiction, concurrent finding of both the Courts below was confirmed by the High Court. When the matter went to the Apex Court by special leave to appeal, the Apex Court declined to interfere with the finding arrived at against the accused appellant.

7(a). In the case of Bakula Bai v. Gangaram, 1988 (1) SCC 537=I (1988) DMC 210, the appellant had presented an application under Section 125, Cr.P.C. before Judicial Magistrate seeking maintenance on the ground that she was the lawfully married wife of respondent No. 1 Gangaram. On evidence the Judicial Magistrate accepted her plea that she was the married wife of the respondent and granted , maintenance in her favour. Aggrieved by that order, respondent No. 1 filed a criminal revision before the Sessions Judge. The appellant Bakula Bai had also filed a revision application before the Sessions Court, because she was (not) satisfied with the quantum of the maintenance granted. In that case, the respondent had taken a plea that she was not his legally married wife in view of the fact that he had already been married twice. The Sessions Judge accepted the defence plea and reversed the finding of the Judicial Magistrate and dismissed the

revision filed by the respondent Gangaram. When Bakula Bai challenged the order of the Sessions Judge before the Bombay High Court by filing a revision application, the Bombay High Court dismissed her revision on the ground that it was barred under Sub-section (3) of Section 397 of the Code of Criminal Procedure. It was in this background that when the matter went to the Apex Court it was observed that the findings of the Magistrate on the disputed question of fact were recorded after full consideration of the evidence and should have been left undisputed (by the Sessions Judge) in revision. As no error of law appeared to have been discovered in his judgment, the Revisional Courts were not justified in making a re-assessment of the evidence and substitute their own views for those of the Magistrate.

8. In the case of State of Kerala v. Puttumana illathjathavedan Namboodiri, 1999 SCC (Cr.) 275=I (1999) CCR 92 (SC)=II (1999) SLT 83, Apex Court has held that in its revisional jurisdiction, the High Court can call for and examine records of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of the supervisory nature exercised by the High Court for correcting the miscarriage of justice, but the said revisional power cannot be equated with the power of an Appellate Court, nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. It shall be appropriate to mention here that in the above referred case before the Apex Court, the accused had been convicted by the Trial Court for commission of offences under Sections 408, 468 and 477A of Indian Penal Code on the basis of the allegations as well as evidence adduced in support thereof. On appeal to the Sessions Court, after perusal of the entire evidence the Sessions Court affirmed the conclusion of the Magistrate and upheld the conviction and sentence passed by him. However, in exercise of revisional power the High Court of Kerala interfered with the concurrent finding of both the Courts below and set aside the conviction and sentence because on reappraisal of the evidence, it found that the

prosecution had failed to establish the case beyond any reasonable doubt.

9. Be that as it may, even though the Court of revision has very limited and restricted scope of re-appraisal of evidence on which the order impugned is based, its power to do so for correcting the miscarriage of justice is universally recognised. Therefore, within this limited scope it has to be considered whether the findings of the Principal Judge, Family Court, Dhanbad can be sustained or not. The petitioner had approached the Family Court for direction to the opposite party to pay to her a sum of Rs. 1,000/- by way of maintenance. She had alleged that she had been married to the opposite party in August, 1978. However, after three years of marriage, torture started because she could not bear any child. The matter went to the 'desertion cell' established by the Deputy Commissioner of Dhanbad for settling the matrimonial disputes between the spouses, etc. and Misc. Case No. 72/1982 was registered. Annexure-2, a copy of which was also filed before the Principal Judge at the time of argument shows that when conciliation between the parties was not eventually possible, the proceeding was dropped and the first party to the proceeding, who was the father of the present petitioner, had been given liberty to approach the Civil Court of competent jurisdiction. It appears that earlier some sort of settlement had been arrived at and the opposite party had agreed to take the petitioner with him, but as there was insistence on the part of the first party to the proceeding for his executing a bond not to torture the petitioner in future in any manner, he declined the settlement which had been arrived at, could not fructify. On his part, the opposite party denied that the petitioner was his wife. However, he admitted in his show cause petition that such proceeding had been initiated against him, but the same was, ultimately, dismissed. Annexure-2 shows that the proceeding was, in fact, not dismsised, but it was dropped with liberty to the father of the petitioner to seek remedy in Civil Court of competent jurisdiction, presumably because the 'desertion cell' had no legal sanctity and was without any teeth. In the Family Court the petitioner examined herself as a witness (A.W. 1). She also examined her younger brother (A.W.I), cousin {A.W. 2) and two neighbours of opposite party namely A3 Naresh Mohan Mishra and A.W. 4 Madan Mohan Mandal. All of them stated on oath that the petitioner was married to the opposite party and they had lived together as husband and wife for some time. On the other hand, the opposite party examined

himself and three others only to say that he was never married with the petitioner and that he was married with another woman in 1985.

10. The learned Principal Judge has disbelieved the version of the petitioner and her witnesses for arriving at the conclusion that she was not married to the opposite party. On going through para 7 of the impugned judgment, I find that the learned Principal Judge of the Family Court started with altogether an incorrect approach in the matter. He has given several grounds for not accepting the plea of the petitioner that she was married to the opposite party in 1978 and at a later stage her neglect started. The learned Principal Judge has stated that in view of the specific denial by the opposite party that the petitioner is not his wife and the marriage was never solemnized at any point of time, it was incumbent on the part of the petitioner to prove that her marriage with the opposite party was solemnized in accordance with Hindu rites and religion and that ritual, like 'Saptapadi' was performed. Simply because she did not say either in her application or in course of evidence that the ritual of Saptapadi was undergone and at the same time, failed to state the place where the marriage was performed, the Principal Judge started doubting her plea of marriage with the opposite party. It may be mentioned that in course of their evidence, A.Ws. 1, 2 and 5 stated on oath that the marriage of the petitioner was performed with opposite party. No question was put to any of those witnesses by, and on behalf of, opposite party whether in course of such marriage, rituals like Saptapadi and invocation of sacred fire were performed. If no such question was asked and the opposite party did not challenge the marriage on the ground that necessary rituals were not performed, in my opinion, the learned Principal Judge was not justified in drawing a conclusion in the manner he has done. Mention of the place of marriage in the pleading and evidence is necessary only for the purpose of the jurisdiction of the Court in which a proceeding can be initiated. For initiating a proceeding which Section 125, Cr.P.C. the place of marriage is quite, irrelevant, because according to Sub-section ('!.) of Section 126, Cr.P.C. a proceeding under Section 125 may be taken against any person in any district where he is or where he, or his wife resides, or where he last resided with his wife, as the case may be, with the another of the illegitimate child. The case of the petitioner is that she was residing in the district of Dhanbad with her father and when the application was presented she was residing there with his brother.

Therefore, the place of marriage was quite irrelevant and only because she did not state the place where she was married with the opposite party, her story of marriage could not be disbelieved, especially when in course of evidence, the witnesses examined by her had stated that her marriage with the opposite party was performed at the place of her father at village Bhera in the district of Bhagalpur and therefrom she was taken to Mohalla Ishaq-chak of Bhagalpur town where the family of the opposite party, admittedly, was, and is still, residing. The Principal Judge has also disbelieved the evidence of the petitioner, simply because she failed to name the priest and the barber who had participated in the marriage. This can hardly be a ground for disbelieving the factum of marriage, because every bride or bridegroom is not expected to recollect the name of the priest or barber even after lapse of twenty years of the marriage as in the present case.

11. According to the evidence of A. Ws. 1 and 2 and the averments made in the application filed by the petitioner, the marriage was performed in the month of August, 1978, to be precise, on 9.8.1978. However, in course of her evidence A.W. 5 (petitioner) stated that her marriage was performed on 9.7.1978. It may be a mistake due to lapse of memory or even a slip of tongue. No attempt was made by, or on behalf of the opposite party to draw their attention, when in the witness box, to her statement in the application that the marriage had been performed, in fact, on 9.8.1978. In the context of the evidence of two competent witnesses, like A.Ws. 1 and 2, the date of the marriage as given by the petitioner in course of her evidence appears to be either a slip of tongue or due to lapse of memory. That factor alone cannot be a ground to disbelieve the story of the marriage. Curiously enough, the Principal Judge of the Family Court discarded the testimony of A.Ws. 3 and 4 who are, admittedly, the neighbours of the opposite party, because they were not members of the marriage party (Baarat) of the opposite party which had gone for solemnisation of the marriage. Both the witnesses stated that they had seen the 'Baarat' of the opposite party going for marriage. According to them, the 'Baarat' had gone to village Bhera and after marriage the newly wed wife of opposite party, namely, the present petitioner had been brought to the matrimonial home, where both of them resided for a few years as husband and wife. Being neighbours, they were the most competent witnesses to depose on this point. Only

because they did not attend the marriage, their evidence could (not) be discarded. The learned Principal Judge has also disbelieved the testimony of the brother of the petitioner, because at the relevant time, he could have been a boy of 10 years. An age of 10 years is certainly not such an age when a boy cannot be said to have come to the age of discretion.

12. The testimony of the petitioner was also disbelieved because she omitted to mention of the proceeding initiated in the desertion cell of the Dy. Commissioner, Dhanbad, even though her brother had said so. The learned Principal Judge lost sight of the fact that in his show cause, the opposite party himself admitted initiation of such proceeding against him. He has also admitted in the show cause petition that the relatives of the petitioner had made certain complaints against him to his department. However, the learned Principal Judge disbelieved the evidence. In course of their evidence the witnesses examined on behalf of the petitioner had stated that when her father had made the complaint against the petitioner, the matter was subsequently compromised, and compromise petition was, accordingly, filed. Photo copy of application sent to the Supdt. of Police, Bhagalpur had been produced, which bears signatures of A.Ws. 3 and 4. According to ASI, even the opposite party had put his. signature thereon. According to this letter, earlier, the father of the petitioner had made complaint against 'the opposite party with whom the petitioner was married in 1978'. At a later stage, the matter was amicably settled. Consequently, the Superintendent of Police, Bhagalpur was requested by letter dated 22.8.1984 not to proceed in the matter against the opposite party. The Principal Judge has observed that since the original of the document was not produced and the person on whose behalf the letter was sent, was not examined, it was not admissible. He lost sight of the fact that the letter purported to have been sent by Dashrath Singh (father of the petitioner) and by the time the proceedings in question had been started by the petitioner he was dead. Be that as it may, merely because the contents of the letter were not proved, it could not have been taken as a circumstance for disproving the factum of marriage of the petitioner with the opposite party.

13. The proceeding of the nature being summary one not intended to determine fully and finally the status and personal rights of the parties and the remedy being

summary one and the order being expressly made subject to the decision of the competent Civil Court, the Principal Judge exercising jurisdiction under Section 125 of the Code of Criminal Procedure was not required to decide the question of marriage like a Matrimonial Court. The object of such proceeding is only to prevent vagrancy and make a provision for destitute woman or child. The evidence adduced to prove the marriage should not have been viewed with such precision as the learned Principal Judge has done. If there was any evidence on record to bring out sufficient facts and circumstances to support the case of the petitioner respecting her marriage with the opposite party, there was no justification for the learned Principal Judge of the Family Court to take a contrary view by adopting an altogether technical approach to the matter. Whereas the evidence adduced on behalf of the petitioner appears to be quite probable, the plea taken by the opposite party in show cause that he is being pursued by the petitioner or her relatives with a view to wreck vengeance upon him simply because he declined to marry her in 1978 appears to be quite unconvincing. Therefore, on evidence adduced, there could have been no difficulty for any Court required to decide a proceeding under Section 125, Cr.P.C. to hold that the petitioner has succeeded in proving that she had been married to the opposite party.

14. Admittedly, the petitioner is not being maintained by the opposite party, who, according to his own admission, earns a net salary of Rs. 5,500/- per month. He has to maintain himself, besides his second wife and two children born to him by the said marriage. On the other hand, the evidence adduced on behalf of the petitioner was that she was employed as a teacher in a private school and earning Rs. 300/- per month. The witness stated that three months back even that much of income was not available to her as she had been removed from service. Taking the cue from such statement made by P. Ws. 1 and 5, the learned Principal Judge has held that since she was, admittedly, having an income of Rs. 300/ - per month, she could not be said to be incapable of maintaining herself when the application was filed. I find substance in the contention of the learned Counsel for the petitioner that relevant point as to the ability or otherwise of the wife to maintain herself is the date when an order on the application under Section 125 of the Code of Criminal Procedure is made, and not when the application is filed, because in terms of Section 125, Cr.P.C. any order regarding payment of maintenance is

liable to be changed in consequence of changed circumstance occurring subsequent thereto. If the date of filing of the application could be the only relevant point for deciding the question of inability or otherwise of the applicant, there was no need to enact Section 127 of the Code that on proof of change in the circumstance of any person receiving under Section 125 a monthly allowance or ordered under the same to pay monthly allowance to his wife, children, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he deems fit. Therefore, from the evidence adduced on behalf of the petitioner, it is fully established that the petitioner is not able to maintain herself, whereas the opposite party has sufficient means and is still neglecting to maintain her. Even if it is found that the petitioner is earning Rs. 300/- per month as a teacher in a private school, that amount cannot be considered to be sufficient to maintain her keeping in view the soaring prices of the essential commodities, these days. She has claimed a sum of Rs. 1,000/- (rupees one thousand) per month by way of maintenance. Under Section 125, Cr.P.C. the amount of maintenance cannot exceed Rs. 500/- (rupees five hundred). The opposite party, admittedly, gets a net salary of Rs. 5,500/-. Therefore, he can reasonably be asked to pay a sum of Rs. 500/- (five hundred) only out of that salary by way of maintenance to the petitioner.

15. In the result, the application is allowed and the judgment and order dated 19.11.1998 of the Principal Judge, Family Court, Dhanbad in M.P. Case No. 91/97 is hereby set aside. The opposite party is directed to pay to the petitioner a sum of Rs. 500/- (rupees five hundred) every month by way of maintenance from this month of September, 1999.