

Bansidhar Vs. Seema

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Court : Allahabad

Decided On : Jan-03-1992

Reported in : 1992CriLJ1562; I(1992)DMC353

Judge : B.L. Yadav and ;G.P. Mathur, JJ.

Acts : [Family Courts Act, 1984](#) - Sections 13 and 19; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125

Appeal No. : F.C.A. No. 455 of 1991

Appellant : Bansidhar

Respondent : Seema

Advocate for Def. : None

Advocate for Pet/Ap. : Tej Pal and ;Surendra Pal Singh, Adv.

Disposition : Appeal dismissed

Judgement :

1. This appeal has been filed under Section 19 of the Family Courts Act against the Judgment and order dated 17.8.1991 of the Judge, Family Court, Bareilly, whereby the petition moved by respondent Smt. Seema under Section 125 Cr.P.C. was allowed and the appellant Bansidhar was directed to pay Rs. 400/- per month as maintenance to the respondent from 25.4.1990.

2. The respondent Smt. Seema filed a petition under Section 125 Cr.P.C. on 25.4.1991 against the appellant Bansidhar claiming Rs. 500/- per month as maintenance. The petition was filed before the Lower Criminal Court 1st, Bareilly. The case of the respondent, in brief, was that she was married to the appellant on 20.5.1989 and thereafter she went to the house of her husband and resided with him at Agra and also performed marital obligations. The parents and other relations of the appellant started ill-treating her immediately after marriage and put pressure upon her to bring more dowry from her parents. On 26.9.1989 the appellant's mother and brother tried to pour kerosene on her and set her on fire but she was anyhow saved and a first information report of the incident was lodged at P.S. Lohamandi, Agra by her uncle Kaushal Kumar on the basis of which a case was registered as Case Crime No. 339 of 1984 under Section 498A I.P.C. The respondent was turned out of the house on 26.9.1989 after giving her beating and the articles given to her as presentation in the marriage, which was her stridhan, was retained by the appellant's parents and brother. They further told the respondent that in case she wanted to live with her husband, she should bring Rs. 50, 000/- from her parents. The case of the respondent further was that her life was not safe in case she lived with the appellant and she might even be murdered. The appellant was carrying on shoe business at Agra and had an income of Rs. 5000/- per month. The respondent was unable to maintain herself and accordingly she prayed that Rs. 500/- per month may be awarded to her as maintenance.

3. The appellant Bansidhar filed a written statement denying the allegations made in the petition filed by the respondent. His case in brief was that no dowry was ever demanded from respondent nor she was ill-treated or assaulted. A false FIR had been lodged against him by the respondent's uncle as he was inimical to him. The allegation in the FIR that an attempt was made to set the respondent on fire after pouring kerosene on her was absolutely false. His case further was that he was merely working as a packer in a shoe shop and was getting only Rs. 400/- per month. The respondent was an educated lady and she was earning Rs. 800/- per month from tuitions before her marriage. The respondent had refused to live with the appellant and had refused to perform her marital obligations and, therefore she was not entitled to any maintenance. It was also pleaded that after the receipt of the notice from the respondent the appellant had sent her a reply to come and live

with him but she has refused to do so and, therefore, she was not legally entitled to get any maintenance from the appellant.

4. Before the Family Court the respondent examined herself and Kaushal Kumar in support of her case. The appellant Bansidhar examined himself and his father Om Prakash Goel in support of his case. The copy of the FIR lodged by Kaushal Kumar was also filed which is Ex. Ka 1 on the record and the appellant filed two documents, namely, copy of the letter dated 24.8.1989 written by his father and a certificate from Prakash Boot House. After considering the evidence on record the learned Judge, Family Court Bareilly, awarded Rs. 400/- per month as maintenance to the respondent from the date of presentation of the petition under Section 125 Cr.P.C.

5. We have heard learned Counsel for the appellant and have also perused the record.

6. There is no dispute that the marriage of respondent with the appellant took place on 20.5.1989. The statement of the respondent shows that she went to her husband's house after her marriage and soon thereafter a demand of Rs. 40,000/- was made from her by her husband and his relations. When she expressed inability to satisfy the demand of her husband, he assaulted her and further threatened her that in case the demand of money was not met she would be murdered. She has also narrated the incident which took place on 29.9.1989, when her husband's younger brother and mother attempted to pour kerosene on her and set her on fire. She was saved only on account of the timely arrival of her uncle Kaushal Kumar who informed the police. Thereafter the police came and rescued her. She has further stated that her husband was carrying on shoe business and was earning Rs. 5000/- per month. In cross-examination a suggestion was made to her that her husband was working in a foot wear shop but she denied the said suggestion. She also denied the suggestion that she was carrying on some tuition work. No other question was put to her. The respondent's other witness Kaushal Kumar is her uncle. He stated that he had gone to the 'Sasural' of the respondent on 10.9.1989 and had tried to persuade her husband and in-laws not to ill-treat her. These persons demand Rs. 40,000/- but he told them that it was not within

his means to pay the aforesaid amount, however, the family members of Bansidhar said that it was necessary to pay the aforesaid amount. He returned after leaving the respondent Smt. Seema in her Sasural. On 17.9.1989 he sent respondent's younger brother Rajiv Kumar to know about her well-being. After returning from there Rajiv Kumar informed that the respondent was not safe in her 'Sasural'. He has also deposed about the incident which took place on 26.9.1989 regarding the attempt made to set the respondent on fire. He has proved the FIR lodged by him, copy of which was filed as Ex. Ka 1. In crossexamination a suggestion was made to him that he had lodged a false FIR and that he was giving false statement. He, however, denied both the suggestions made to him.

7. The statement of Smt. Seema and Kaushal Kumar appear to be very natural and is also corroborated by the FIR which was lodged on 26.9.1989. The petition under Section 125 Cr.P.C. has been filed on 25.4.1990. As such, it is difficult to believe that a false FIR was lodged seven months before, In order to create evidence for the case. The evidence on record also shows that almost immediately after marriage the appellant and his family members were ill-treating the respondent and were putting pressure upon her to bring dowry from her parents. They further made an attempt to murder her. In these circumstances we are inclined to accept the statement of Smt. Seema that her life was not safe in the house of her husband and she had no option but to leave her husband's house and live separately otherwise she might have been murdered. Therefore, the respondent Smt. Seema has justifiable grounds to live separately from her husband.

8. We have also examined the evidence adduced by the appellant. No doubt both the appellant and Om Prakash Goel have stated that the marriage was performed without taking any dowry and that they never demanded any dowry from Smt. Seema or her family members. They have further denied to have ill-treated or made any attempt to set Smt. Seema on fire. However, their statement does not inspire confidence. The statement of Smt. Seema and Kaushal Kumar is most natural and appears to be reliable. No Indian lady would like to break her matrimonial home and make absolutely false accusations against her husband without any reason. The version of the respondent finds corroboration by the FIR

lodged by Kaushal Kumar on 26.9.1989 and also from the fact that the police rescued her from the house of her in-laws and handed her over to the safe custody of her uncle. Therefore, we are not inclined to accept the version of the appellant that no untoward incident took place or there was no demand of dowry or that the respondent was living separately without just cause.

9. Regarding the quantum of maintenance the learned Judge, Family Court, has given good reasons for awarding Rs. 400/- per month to the respondent. It is admitted fact that the respondent is a post-graduate. Her case is that the appellant is carrying on shoe business and his income is Rs. 5000/- per month. On the contrary the statement of the appellant Bansidhar is that he is working as a packer in a foot wear shop and is getting a salary of Rs. 400/- per month. We are not prepared to accept the version of the appellant. No-one would marry his post-graduate daughter to a person who is merely working as a packer on a monthly salary of Rs, 400/- in a foot wear shop. The certificate of income filed by the appellant is not at all reliable. Such a certificate can be procured easily by anyone. The appellant is a young and healthy person. Looking to overall facts and circumstances of the case we are inclined to accept the version of the respondent that the appellant is carrying on foot wear business and has substantial income of his own. In these circumstances the amount of Rs. 400/- per month awarded to the respondent as maintenance appears to be just and proper. Thus we do not find any infirmity in the order passed by the Court below awarding Rs. 400/- per month as maintenance to the respondent from the date of presentation of the petition.

10. Learned Counsel for the appellant next contended that though order 3 Rule 1 C.P.C. and Section 303 Cr.P.C. give a right to a party to appear through a Counsel in a proceeding before the civil Court or before a criminal Court, as the case may be, but the Family Court did not permit the appellant to be represented by a Counsel in view of Section 13 of the Family Courts Act and thus the appellant could not properly defend himself. According to learned Counsel the provisions of Section 13 of the Family Courts Act are repugnant to Section 30 of the Advocate Act which lays down that every Advocate whose name is entered in the State roll shall be entitled, as of right, to practise in all Courts including the Supreme Court. Learned Counsel further contended that the maintenance amount awarded by the

Family Court in proceedings under Chapter IX Cr. P.C. is recoverable as fine under sub- Section (3) of Section 125 of the code and the person ordered to pay maintenance can also be sentenced to imprisonment and as he is not allowed to be defended by a Counsel his fundamental right as enshrined in Article 22(1) of the Constitution is violated.

11. In order to appreciate the arguments advanced by the learned Counsel it will be useful to quote Section 13 of the Act which reads as follows :-

'13. Right to legal representation.-

Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner :

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*.'

12. The dictionary meaning of the word 'right' in the context in which it is used in Section 13, is as under :

Chambers: just or legal claim; what one has a just claim to.

Webster's : Third New international Dictionary : Something to which one has just claim; a power or privilege vested in a person by the law to demand action or forbearance at the hands of another; a legally enforceable claim against another that the other will do or will not do a given act; a capacity or privilege the enjoyment of which is secured to a person by law. Wharton's Law Lexicon : It is a liberty of doing or possessing something consistently with law. The Law Lexicon by P. Ramanatha Aiyar : A lawful title or claim to anything, property, prerogative, privilege.

13. The expression 'as of right' also finds place in Section 15 of Easements Act and Section 25 of Limitation Act. It is well known principle of interpretation of statutes that use of same words in similar connection in a later statute gives rise to a presumption that they are intended to convey the same meaning as in the earlier

statute. When once certain words in an Act of Parliament have received a judicial construction and the Legislature has repeated them, the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them (See in re Lily Isabel Thomas A.I.R. 1964 S.C. 855 and Vajaravelu v. Special Deputy Collector A.I.R. 1965 S.C. 1017), while interpreting Section 15 of Easement Act it has been held that 'enjoyment as of right' must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance or by permission asked from time to time, on each occasion or even on many occasions of using it; but an enjoyment had openly, notoriously without particular leave at the time by a person claiming to use it as a matter of right.

14. The correct meaning of first part of Section 13, therefore, is that no party to a suit or proceeding before a Family Court can make a legal claim to be represented by a legal practioner. But the Family Court can grant leave or permission to a party to be represented by a legal practitioner. The representation by a legal practitioner will, therefore, depend upon the discretion of the Family Court. The Section does not impose a complete bar on representation by a legal practitioner. The proviso to Section 13 also lends credence to the above view that the Family Court may, in the interest of justice, permit a party to be represented by a Counsel.

15. It may be noticed that the language used in the Section is different from Section 36(3) Industrial Disputes Act, 1947, or Section 8(e) of Conservation of Foreign Exchange and prevention of smuggling Activities Act, or Section 11(4) of National Security Act which impose a complete bar on representation by a legal practitioner. Clause (1) of Article 22 of the Constitution provides that any person arrested and detained in custody shall not be denied the right to consult and be defended by a legal practitioner of his choice. Clause (3) (b) makes an exception and says that the provisions of clause (1) shall not apply to any person who is arrested or detained under any law providing for preventive detention. It is under this clause that the provision in the detention laws, which debar representation through legal practitioner, is constitutionally protected. However, when the vires of the aforesaid provisions was challenged a Constitution Bench of Hon'ble Supreme Court in A.K. Roy v. Union of India (AIR 1982 S.C. 710) observed as follows in para 94 of the report :-

'We must, therefore, hold regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22(3)(b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Art.

22. Permitting the detaining authority or the Govt. to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the Govt. takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner '

The Court further held that whosoever assists or advises on behalf of the Government the Advisory Boards on facts or law must be deemed to be in a position of legal advisor. The scheme of the Family Courts Act shows that while hearing a case it can hear persons other than parties to the dispute. Section 13 permits the Family Courts to take assistance of amicus curiae. Section 5 permits the association of institutions or organisations engaged in social welfare and persons working in the field of social welfare, or professionally engaged in promoting the welfare of the family. In our opinion if the Family Court hears anyone other than a party, as amicus curiae or as legal expert, it must permit a party to be represented by a legal practitioner if the said party makes a request to that effect. The scheme of the Act does not show that there is any complete prohibition on representation by a legal practitioner before the Family Courts.

16. So far as the submission made with regard to Section 30 of the Advocates Act is concerned it may be pointed out that Sub-section (3) of Section 1 of the Act provides that it shall come into force on the date as the Central Government may

in the official gazette appoint and different dates may be appointed for different provisions of the Act. Section 30 finds place in chapter IV of the Act while as Sections 29, 31, 33 and 34 of Chapter IV have been enforced with effect from 1.6.1969, but Section 30 has not yet been enforced by the Central Government. Since Section 30 has not yet been enforced the question of repugnancy, as contended by the learned Counsel, need not be examined.

17. Now we have to examine whether the appellant moved any application or made any request before the Family Court for permission to be represented by a legal practitioner. From the record of the case we do not find that any such request was made by the appellant before the Family Court, In the affidavit filed in support of the stay application, which has been sworn on 1.9.1991, the only allegation made in para. 25 and para. 26 is that the appellant was never informed by the Family judge that he can take assistance of a lawyer and that he was very much handicapped in effectively putting his case on account of lack of legal assistance. The affidavit shows that the appellant never made any attempt to seek permission of the Court for allowing him to engage a lawyer. In fact it appears that he never complained to the Court that he was feeling handicapped in effectively putting forward his case on account of lack of legal assistance. The appellant filed a supplementary affidavit, which has been sworn on 18.9.1991 and in this affidavit also there is no whisper to the effect that the appellant was denied the assistance of a lawyer though he had made a request to that effect. In these circumstances we are satisfied that the appellant never made a request before the Family Court for permission to engage a lawyer.

18. The next question which falls for consideration is whether the impugned order should be set aside on the legal contention advanced by the learned Counsel for the appellant. Since the appellant made no request before the Family Court for permission to appear through Counsel and such a request was not refused, it is not open to him to contend that the provisions of the Act are ultra vires. We are supported in our view by the decision of a Constitution Bench of the Hon'ble Supreme Court in *State of M.P. v. Shobha Ram* (AIR 1966 S.C. 1910). In this case accused Shobha Ram was convicted by the Nyay Panchayat but the conviction was set aside by the High Court of M.P. on the ground that Section 63 of the M.B.

Panchayat Act, which provided that no legal practitioner shall appear on behalf of any party in any dispute or case before the Nyay Panchayat, was violative of Article 22(1) of the Constitution Hon'ble Sarkar, C.J. and Hon'ble Mudholkar, J. held that Section 63 was not ultra vires. Hon'ble Bachawat, J. and Hon'ble Shelat, J., though held that Section 63 was void as it denied a person a right to be defended by a legal practitioner of his choice but reversed the judgment of the High Court on the ground that during the trial the accused never claimed that he should be defended by a Counsel and the existence of Section 63 on the statute book did not cause him any prejudice.

In the result the appeal fails and is dismissed in limine.

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