

Sumitra Devi

Vs

Bhikan Choudhary

Criminal Appeal No. 471 of 1984

(P. N. Bhagwati, Ranganath Misra JJ)

28.01.1985

JUDGMENT

RANGANATH MISRA, J. -

1. Appellant filed an application for maintenance under Section 125 of the Code of Criminal Procedure for herself as also a minor daughter alleging that she had been married to the respondent sometime in 1971 and out of the wedlock the child had been born. She further alleged that the fact that the respondent was already married and his spouse was living was not known. After the discovery of the previous marriage of the respondent the relationship between the parties gradually became strained and ultimately the respondent started totally neglecting the appellant and refused to maintain her. She had, therefore, no option left but to ask for maintenance for herself as also for the child.

2. The respondent did not dispute the marriage as a fact though he pleaded that such marriage was void. According to him the appellant's father was the local Gram Rakhi and taking advantage of his position and presence in the village he had prevailed upon the respondent to enter into marriage with the appellant. The respondent later came to discover that the appellant was already carrying being pregnant for about three months and on discovery of this fraudulent conduct of the appellant's father and the suppression of this fact, he did not want to live with the appellant. He pleaded that the child was not his and he did not know if any female child was actually born to the appellant later. In support of the application 8 witnesses including the appellant were examined while the respondent did not examine himself but examined a solitary witness to support his plea of defence. The Sub-Divisional judicial Magistrate who tried the case accepted the fact that the parties were spouses and out of the wedlock the child as claimed by the appellant had been born. He accordingly fixed maintenance separately both for the appellant as also for the child. The respondent appealed to the Sessions Court and the First Additional Sessions Judge of Vaishali reversed the order of the Sub-Divisional Judicial Magistrate and vacated the award of maintenance by holding that the appellant failed to establish the factum of marriage. A revision application by the appellant before the High Court did not succeed. That is how the appellant had approached this Court for special leave.

3. We are impressed by the fact that the respondent had not seriously disputed the fact of marriage and had taken the stand that such marriage was void being vitiated by fraud and suppression of material facts as also for non-performance of religious rites. The Additional Sessions Judge and the High Court have adopted a technical approach while considering the question of marriage. There is no doubt that in order that there may be a valid marriage according to Hindu law, certain religious rites have to be performed. Invoking the fire and performing Saptapadi around the sacred fire have been considered by this Court to be two of the basic requirements for a traditional marriage. It is

equally true that there can be a marriage acceptable in law according to customs which do not insist on performance of such rites as referred to above and marriages of this type give rise to legal relationship which law accepts. The Additional Sessions Judge as also the learned Single Judge of the High Court did not refer to the fact that for about a decade the parties had lived together. Public records including voters' lists described them as husband and wife and competent witnesses of the village of the wife as also the husband had supported the factum of marriage. Witnesses have also spoken about the reputation of the appellant being known in the locality as the wife of the respondent. These facts should not have been totally overlooked while considering the case of marriage. It is possible that on account of the lawyer's mistake the appellant's witnesses have not referred to the religious rites which might have been performed at the time of marriage. It is equally possible that the learned Magistrate while recording the evidence has not specifically recorded the details and has only indicated that witnesses have spoken to the fact of marriage. Since the form of marriage has not been found and traditional marriage according to Hindu law requires performance of certain religious rites, we consider it proper in the peculiar facts of the case to remit the matter to the learned Magistrate for a fresh inquiry at which apart from the evidence already on record both sides should be entitled to lead further evidence particularly in support of their respective stands relating to the factum of marriage.

4. Now that the matter is going back to the original Court we think it appropriate to bring it to the notice of the learned Magistrate that under Section 125 of the Code of Criminal Procedure even an illegitimate minor child is entitled to maintenance. Even if the fact of marriage is discarded, the minor child being found to be an illegitimate daughter of the respondent would be entitled to maintenance. Our saying so may not be construed as a conclusion against the factum of marriage or as a suggestion that the child is not legitimate. We have no intention to say either way.

5. The matter has required a remand to the original Court under peculiar circumstances and if parties, their lawyers and the original Court had devoted proper attention a remand would not have been necessary. The role of the court is not that of silent spectator or of a passive agency. When a dispute is brought before the court, particularly one of the type with which we are concerned, where maintenance of a neglected wife or a minor child is in issue, the court must take genuine interest to find out the truth of the matter. If the learned Magistrate had asked proper questions to the witnesses when they were before him and deposing about the marriage, the relevant evidence would have come one way or the other. We must point out that it was the duty of the lawyer appearing for the appellant also to have played his role properly at the right time. A lot of time has been lost and if the appellant is entitled to maintenance she has been deprived of it for all these years. We accordingly direct the learned Magistrate to dispose of the proceedings within three months from the date the record is received by him. if necessary, he will post the case from day-to-day in order to comply with our direction. The High Court shall ensure that the record is placed before the appropriate Magistrate within one month from today. The appeal is thus allowed and the matter is remanded.

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