

HIGH COURT OF MADHYA PRADESH,

PRINCIPAL SEAT, JABALPUR

SINGLE BENCH

PRESENT: HON'BLE JUSTICE SHRI N. K. GUPTA

MISCELLANEOUS CRIMINAL CASE NO.9311/2012

Smt. Sukhvati Bai

AFR

Vs.

Manphool Narvariya

JUDGE

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For the applicant : Shri N.K. Jain, Advocate.
For the respondent: Shri Rajendra Raghuvanshi,
Advocate.
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ORDER

(Delivered on the 1st day of May, 2015)

That, vide order dated 14.2.2012 the JMFC, Hoshangabad in M.J.C No.226 of 2010 granted a maintenance of Rs.6000/- per month to the applicant from the date of order. In Criminal Revision No.28 of 2012 the Sessions Judge, Hoshangabad vide order dated 22.5.2012 reversed the order passed by the JMFC and dismissed the application under Section 125 of the Cr.P.C filed by the applicant. Being aggrieved with the order passed by the Sessions Judge the applicant has preferred the present petition under Section 482 of the Cr.P.C.

2. Facts of the case in short are that the applicant had preferred an application under Section 125 of the Cr.P.C before

the trial Court that marriage of the applicant and respondent took place on 17.11.1995. The respondent after consuming liquor was habitually doing cruelty upon the applicant. Ultimately on 3.11.2010, he ousted the applicant from his house and she was forced to leave her clothes and ornaments at the house of the respondent and thereafter she resided with her younger sister. She pleaded about the source of income of the respondent and claimed a sum of Rs.10,000/- per month as maintenance.

3. The respondent in his reply accepted the marriage but, denied that it was done according to the rituals of Hindu law. Only an affidavit was executed and therefore, marriage was not solemnized validly. The applicant was already married with one Gopal and it was informed to the respondent that a divorce of the applicant took place with her husband and after some time husband of the applicant had already expired but, after two years of marriage with the respondent, the respondent was informed that the previous husband of the applicant was alive. Since the applicant was not blessed with a child and therefore, she was quarreling with the respondent and ultimately she left the house of the respondent. He denied about his income and therefore, it was prayed that the application under section 125 of the Cr.P.C be dismissed.

4. The JMFC after considering the evidence adduced by the parties found that the applicant was not married with Gopal and allegation made by the respondent to that effect was not correct. The respondent has accepted that being her husband, he

was responsible to maintain the applicant. The trial Court found that he was competent to give a sum of Rs.6000/- per month and therefore, such maintenance was granted from the date of order.

5. In revision the revisionary Court found that the respondent was already married with one Hiriyabai and therefore, marriage of the applicant and the respondent was invalid. Similarly, the applicant did not obtain divorce from her previous husband Gopal and therefore, the applicant was residing with the respondent without any valid marriage and therefore, she was not entitled to get the maintenance. Consequently, the revisions was allowed and maintenance application of the applicant was dismissed.

6. I have heard the learned counsel for the parties at length.

7. In the present matter, there are so many points relating to marriage of the parties and validity of that marriage. The respondent has accepted in his reply that marriage of the applicant took place with him but, rituals were not followed and it was accepted on the basis of affidavits and therefore, it was not a valid marriage in the eye of law. However, it would be apparent that the respondent admitted the fact that marriage of the applicant took place with the respondent and they lived as husband and wife. In this connection, the learned counsel for the applicant has invited the attention of this Court to the judgments passed by the Apex Court in the case of **“Badshah Vs. Sou. Urmila Badshah Godse and another” (2014(2) M.P.H.T.**

499(SC)) and “Tulsa and others Vs. Durghatiya and others”

(I.L.R (2008) M.P. 981). In the case of Tulsa (**supra**) the Apex

Court has held as under :-

“11. “In Mohabhat Ali V. Md. Ibrahim Khan (AIR 1929 PC 135) their Lordships of the Privy Council once again laid down that :

“The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years”

12. It was held that such a presumption could be drawn under Section 114 of the Evidence Act.

13. Where the partners lived together for long spell as husband and wife there could be presumption in favour of wedlock. The presumption was rebuttal, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. Law leans in favour of legitimacy and frowns upon Bastardy (See: Badri Prasad Vs. Dy. Director of Consolidation and others) (AIR 1978 SC 1557).

14. This Court in Gokal Chand V. Parvin Kumari (AIR 1952 SC 231) observed that continuous cohabitation of woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is rebuttal and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.”

In the present case, the applicant resided with the respondent for 15 years as a wife and therefore, in the light of the aforesaid judgment of the Apex Court, it shall be presumed that the applicant was the wife of the respondent. Hence it was for the respondent to rebutt the presumption.

8. Similarly, according to the provisions of Section 103 of the Evidence Act if any of the party pleads a particular fact then it is its duty to prove it. Provisions of Section 103 of the Evidence Act is reproduced as under :-

“S.103. Burden of proof as to particular fact. - The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

In this case the respondent has pleaded that marriage of the applicant and the respondent took place by execution of affidavits and therefore, it was for the respondent to prove that marriage was performed in such a manner which was not an appropriate procedure to make a valid marriage. To prove such a fact it was for the respondent to file those affidavits by which the marriage was alleged to be performed but, except for giving his oral evidence the respondent did not furnish any documentary evidence to that effect and a fact which was specifically pleaded by the respondent could not be proved by him. Hence, on his admission that his marriage took place with the applicant and in the light of the judgment passed by the Apex Court in the case of **Tulsa (supra)** where it is an admitted fact that the applicant resided with the respondent for 15 years as a wife, it shall be presumed that pleadings and statements of the applicant are acceptable and the marriage of the applicant took place with the respondent by following the various rituals and procedure as prescribed in the Hindu Marriage Act.

9. The respondent took a plea that the applicant was already married with one Gopal and without taking any divorce from that Gopal the applicant started residing with the respondent. In this context Sukhvati Bai (PW1) has denied that her marriage ever took place with Gopal. In the cross examination of Sukhwati Bai such a suggestion was not given by the learned counsel for the respondent to show that the applicant was married with one Gopal and no divorce took place. According to Section 103 of the Evidence Act a specific pleading was done by the respondent but, it is surprising that after receiving the notice Ex.P/4 the respondent did not send any reply to the notice with such objection. According to the provision of Section 103 of the Evidence Act, it was the duty of the respondent to prove that the first marriage of the applicant took place with one Gopal and best evidence could be placed by the respondent before the Court that Gopal could be brought before the Court with the claim that the applicant was his wife. Manphool (DW1) has stated that he has filed the electoral roll of Polling Centre, Nagar Paradhe as Ex.D/3 in which it was mentioned that at serial no.327 one entry was made that Gopal s/o Manphool r/o House No.69 was listed in that electoral roll and at serial no.328 in the same house one Shukvati was listed. However, the respondent could not connect with document Ex.D/3 that it was relating to the applicant. It was for the respondent to establish that the applicant resided on a particular address given in electoral roll specifically in House No.69. Name of the applicant is not exactly re-produced in the

document Ex.D/3. A person who is shown in the electoral roll Ex.D/3 has a name Shukvati. It is slightly different from the name of the applicant and therefore, it was necessary for the respondent to prove that the document Ex.D/3 was the document related to the applicant. Secondly, if name of a woman is given as a wife of someone in the electoral roll then it is not necessary that a woman was a wedded wife of the person for whom the electoral roll indicates that she is wife of that person. Electoral roll is prepared only by information given by the person residing in the house and therefore, by collecting such information if a electoral roll is prepared then on the basis of electoral roll it cannot be concluded that alleged Shukvati was wedded wife of Gopal s/o Manphool.

10. According to the document Ex.D/3 alleged Shukvati was aged 21 years in the year 1998 and therefore, in the year 2011 she should be 43 years old whereas, Sukhvati (PW1) has stated her age to be 30 years in her statement. If it may be presumed that Sukhvati Bai could not tell her actual age and she was 35 years old at the time of her statement then still age of alleged Shukvati as mentioned in the document Ex.D/3 does not match with the age of the applicant.

11. Under these circumstances, when the respondent did not give any reply to the notice given by the applicant no suggestion was given in the cross examination of the applicant Sukhvati (PW1), alleged Gopal could not be produced before the Court and also, no other witness was produced before the Court that marriage of the applicant took place with Gopal or she

resided with Gopal at a particular place in a particular house shown in the document Ex.D/3. The testimony of the respondent Manphool cannot be accepted. The respondent could not prove his pleading relating to the fact that the applicant was already married with Gopal and without getting a divorce from that Gopal the applicant entered into a marriage with the respondent. The revisionary Court has committed an error of law in finding that the applicant was already married with Gopal and no divorce took place between them.

12. The respondent took a plea that he was married with one Hiriyabai and thereafter, the applicant resided with him as a wife for 15 years but, after her ouster he again started to reside with Hiriyabai. In support of these objections document Exs.D/1 and D/2 are filed and Hiriyabai (DW2) was also examined. In this context the learned counsel for the applicant has placed his reliance upon the judgment of Badshah (**supra**) in which it is held that a Hindu having his first wife living but, suppressing that fact duping respondent/woman by getting her to marry him then he cannot be permitted to deny the benefit of maintenance to the respondent taking advantage of his own wrong. In this judgment the Apex Court has dealt with the development of "Social Context Adjudication" and "Social Justice". Hence in the light of the judgment passed by the Apex Court in the case of Badshah (**supra**) if the respondent had hidden a fact of his previous marriage with Hiriyabai then no effect would be caused if maintenance application of the applicant is granted. However,

the position of evidence is to be examined before deciding that point.

13. It is an admitted fact that the applicant resided with the respondent for 15 years from November 1995. The respondent has filed the copy of electoral rolls of the year 1988 as Exs.D/1 and D/2 in which one Hiriya Bai was shown to be residing with the respondent as wife. In this context if the statement of present Hiriya Bai (DW2) is examined then Hiriya Bai claims that her marriage with the respondent took place 40 years ago and thereafter, she was continuously residing with the respondent. However, she did not claim that she resided with the respondent in presence of the applicant Sukhvati Bai. When she was asked such a question then she replied that after her marriage her mental condition was disturbed and therefore, she was taken by her parents etc. to her parents house. Again she claimed that she remained for two years in her parents house and thereafter, she came back but, admittedly, the applicant resided with the respondent for 15 years and it is strange that Hiriya Bai does not know Sukhvati Bai and Sukhvati Bai does not know Hiriya Bai. If Hiriya Bai was wife of the respondent and she was residing with the respondent in the year 1988 or 1991 then as to why she did not reside with the respondent in those 15 years when Sukhvati Bai resided with the respondent. This question was not answered by Manphool (DW1).

14. The Sessions Judge has relied upon the judgment passed by the Apex Court in the case of **“Savita Ben Somabai**

Bhatia Vs. State of Gujarat and others” (2005 (2) M.P.H.T. 382) and **“Vimala Vs. Veeraswamy” (1991 (2) SCC 375)** in which it was held that a woman whose marriage did not take place validly then she is not entitled to get any maintenance from such alleged husband. However, the revisionary Court has committed a mistake in taking guidance from the aforesaid judgment. In this connection a portion of para 3 of the judgment passed by the Apex Court in the case of Vimala (**supra**) may be referred as under :-

“When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept-mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage.”

Hence it was for the respondent to plead and prove about his first marriage. I have gone through the reply submitted by the respondent before the trial Court and it is surprising that the respondent did not take the plea that he was already married with Hiriya Bai. It is also shocking that when Manphool (DW1) and Hiriya Bai (DW2) were examined the learned counsel for the respondent did not amend the reply filed by the respondent and did not add such a plea in the reply and therefore, the revisionary Court has committed an error that without looking to the pleadings it took a decision on the basis of arguments advanced by the learned counsel for the respondent. It is settled view of the Apex Court that the procedure which is to be adopted for considering a maintenance application under Section 125 of the Cr.P.C is not a

purely criminal procedure. Such a procedure that is a quasi civil procedure and therefore, as held by the Hon'ble the Apex Court in the case of Vimala (**supra**) it was for the respondent to "plead" and prove his objection. It is the settled principle of Civil Procedure Code that a fact which is not pleaded cannot be proved and if any proof is given then such proof shall be discarded. At this stage, I do not want to quote various orders of this Court in which it was held regularly that if there is a variance between pleading and proof then such portion of proof which is laid without any pleading shall not be read into the evidence.

15. However, though pleading is not done by the respondent if his proof is perused then Manphool and Hiriya Bai did not examine any independent witness to show that a valid marriage took place amongst them prior to the year 1988. By filing of electoral rolls the factum of marriage is not proved. As discussed above electoral roll could be prepared by the information given by the concerned person whose name is incorporated in that roll and therefore, in the year 1988 if Hiriya Bai was residing with Manphool and she had alleged before the officer preparing that electoral roll that she was wife of Manphool then her name could be shown as wife of Manphool in that electoral roll but, that electoral roll is not a sufficient document to prove the marriage of Hiriya Bai with the respondent. If she was wedded wife of the respondent then what was the reason as to why she did not reside with the respondent for 15 years from November 1995 to the year 2010 when the applicant was residing with the respondent. If

her mental condition was not good then according to Hiriya Bai herself she remained for two years at her parents house and thereafter, she resided with the respondent but, it is an admitted fact that when the applicant Sukhvati Bai resided with the respondent for 15 years Hiriya Bai was not there in the life of the respondent. Hence it was for Hiriya Bai to show that as to why she left the respondent for more than 15 years and the reason behind such a conduct. If she was ousted by the respondent then whether she had taken any step for redressal. The conduct of the witness Hiriya Bai that she did not reside with the respondent for 15 years continuously when the applicant Sukhvati Bai resided with the respondent indicates that Hiriya Bai was not the wedded wife of the respondent otherwise, she would have tried to come back to her husband's house or she would have initiated any proceeding under Section 125 of the Cr.P.C or Section 498-A of I.P.C against the respondent in that period of 15 years but, no such proceeding has been initiated by Hiriya Bai according to herself. Hence conduct of Hiriya Bai defeats the entry of electoral roll Exs. D/1 and D/2 that she was the wedded wife of the respondent.

16. When the respondent had tried to adduce an evidence that he was already married with Hiriya Bai and therefore, as marriage took place with the applicant was invalid then it was for him to prove the factum of marriage of himself with Hiriya Bai. Unfortunately, the respondent could not prove that his marriage took place with Hiriya Bai. No witness has been examined who, attended such a marriage. No reason could be shown by the

respondent Manphool himself as to why his first wife Hiriya Bai did not reside with him for 15 years when he resided with the applicant Sukhvati Bai. Hence by filing the copy of two electoral rolls and examining Hiriya Bai, evidence given by Manphool cannot be accepted that he was married with Hiriya Bai prior to his marriage with the applicant. The revisionary Court has drawn a conclusion of such marriage without any basis, especially when the respondent did not plead such an objection in his reply to the maintenance application under Section 125 of the Cr.P.C. Hence, in the light of the judgment passed by the Apex Court in the case of *Vimala (supra)* the respondent neither could plead his objection relating to validity of marriage of the applicant due to first marriage of the respondent with Hiriya Bai nor he could prove such a fact. Possibility cannot be ruled out that in the year 1988 or 1991 Hiriya Bai would have resided with the respondent but by only that fact her marriage cannot be presumed with the respondent to be a valid marriage. Also in the light of the judgment passed by the Apex Court in the case of *Badshah (supra)* if the respondent has done a cheating with the applicant that he did not inform about the first marriage then still he is liable to pay maintenance to the applicant.

17. So far as the right of the applicant is concerned as to whether she is entitled to get maintenance without living with the respondent is concerned, the trial Court has rightly held that the testimony of the applicant Sukhvati (PW1) is acceptable. The respondent did not try to bring her back. On the contrary he kept

another woman Hiriya Bai with him. Now Hiriya Bai was residing with the respondent therefore, this is the second ground for the applicant for her denial to reside with the respondent in the same house in the presence of Hiriya Bai. Looking to the conduct of the respondent the allegation made by the applicant that she was ousted by the respondent from his house appears to be correct and therefore, the applicant Sukhvati Bai is entitled to get a maintenance without residing with the respondent.

18. So far as the quantum is concerned, the respondent has tried to prove that he is an old man and therefore, he cannot do anything. However, it is proved by the applicant that the respondent has various pieces of land duly cultivated by the labours and he has a house in which many tenants are residing on rent and he is getting rent from those tenants and therefore, he has sufficient income so that he can provide the maintenance. However, if total income of the respondent as proved by the applicant and admitted by the respondent is considered and also the requirement of the applicant is assessed then the maintenance granted to the applicant appears to be slightly higher. A sum of Rs.5000/- per month would be the appropriate maintenance which can be granted to the applicant.

19. On the basis of the aforesaid discussion, the present petition filed by the applicant appears to be acceptable and it is partly accepted. The order passed by the revisionary Court is hereby set aside and the order passed by the trial Court is modified that the applicant is entitled to get a maintenance of

Rs.5000/- per month from the respondent from the date of order passed by the trial Court.

20. A copy of the order be sent to the Courts below along with their records for information and future compliance.

(N.K.GUPTA)
JUDGE
01.05.2015

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