(1983) 7 ACR 149

Allahabad High Court

Case No: Criminal Revision No. 1320 of 1981

Smt. Bina Agarwal alias Shahjahan Begum		APPELLANT
	Vs	
Mahesh Chandra Agarwal and Another		RESPONDENT

Date of Decision: Dec. 16, 1982

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 125

Citation: (1983) 7 ACR 149

Hon'ble Judges: V.N. Misra, J

Bench: Single Bench

Advocate: V.M. Zaidi, for the Appellant; Vijai Bahadur, A.G.A., for the Respondent

Final Decision: Allowed

Judgement

V. N. Misra, J.
This is an application in revision by Smt. Bina Agarwal alias Shahjahan Begum against the judgment and order dated 21-7-1981 passed by Sri B.D. Agarwal, Sessions Judge, Kanpur, in Criminal Revision No. 138 of 1981, which was allowed by him and the application made by the applicant u/s 125 of the Code of Criminal Procedure was dismissed.

2. Briefly stated the case of the applicant in her petition u/s 125 of the Code of Criminal Procedure was that she was initially a Mohammdan and her name was Shahjahan Begum. In 1962, the opposite-party No. 1 developed illicit intimacy with her. He became a convert to Islam and they were married according to Muslim rites. In due course the applicant became pregnant. Then on the insistence of the opposite-party No. 1, she was converted to Hinduism and the parties were again married according to Hindu rites. Four children were born out of this wedlock. The opposite-party No. 1, however, treated her with cruelty, hence she brought this petition and claimed rupees five hundred as her

monthly maintenance.

3. The opposite-party No. 1 denied that he ever became a Muslim or that any marriage was celebrated between him and the applicant. The learned Magistrate allowed the applicant rupees two hundred per month as maintenance because he said that the parties were living as husband and wife since about 1964 and had four children, therefore, it had to be accepted that the applicant was married to the opposite party No. 1. In revision the learned Sessions Judge found that it was not proved that the opposite-party No. 1 became a Muslim or was married to the applicant, therefore, the revision was allowed by the learned Sessions Judge and the petition u/s 125 of the Code of Criminal Procedure moved by the applicant was dismissed.

4. PW 1 Bina Agarwal in her statement said that she was formerly a Muslim; when the opposite-party No. 1 wanted to marry her, on her suggestion he became a Muslim; his Khatna ceremony was performed and they started living together as husband and wife in 1962. In due course, she became pregnant and then on the insistence of the opposite-party No. I she became a Hindu and her marriage with the opposite-party No. 1 was again performed at Bithoor. The applicant asserted that because the opposite-party No. 1 was converted to a Muslim, therefore, his Khatna ceremony took place. This was denied by the opposite-party; but he refused to undergo a medical examination for a check-up whether Khatna had been performed on him or not. In his cross-examination he also admitted that operation was performed and not Khatna. If a person at an elderly age agrees to undergo Khatna operation, it would naturally be indicated that he has become a convert to Muslim. Besides, whether the opposite-party was converted to Muslim or not was a question of fact and if the learned Sessions Judge was not satisfied that the finding given by the learned Magistrate was proper, he could have set aside the finding and remanded the case back to the learned Magistrate. But this was not done and the learned Sessions Judge himself proceeded to give a finding after completely reversing the finding that the opposite-party No. 1 was not proved to have converted to Muslim. The applicant contended that after the opposite-party No. 1 became a Muslim, she was married to him according to Muslim rites. She was not corss-examined on the point nor was she asked what ceremonies were performed and this part of her statement remained unchallenged.

5. Then the applicant''s case was that after their marriage according to Muslim rites, they started living together, she became pregnant and on the insistence of the opposite-party she became a Hindu and she was again married to the opposite-party No. 1 according to Hindu rites at Bithoor. Even if it was not proved that the opposite-party No. 1 was converted to Muslim, it would mean that he continued to be a Hindu, when, therefore, the applicant was converted to Hinduism, she could certainly marry him and their second marriage, in any case, would be valid.

6. The opposite-party No. 1 contended that he was never married to the applicant and according to him for 14 or 15 years the applicant periodically came, stayed with him and then went away. He said that he did not know where she went: but whenever she came

back, they started again living together and that is how four children were born to her from opposite-party No. 1. It is very difficult to believe that for about 15-20 years or so the applicant lived merely as mistress of the opposite-party No. 1 and they were never married. It is also unbelievable that she came for a month or two months to the opposite-party No. 1; stayed with him and then went away and the opposite-party No. I did not even know where she had gone. When they were living together the opposite-party No. 2 was bound to have known where she had gone and because it is not disclosed where she went after every one or two months it would seem that this assertion by the opposite-party No. 1 is false. The learned Magistrate found that the parties were living as husband and wife since about 1964 and had four children, therefore, it had to be accepted that the applicant was the wife of the opposite-party No. 1 and this to my mind was a proper finding. It was held in Badri Prasad Vs. Dy. Director of Consolidation and Others, that where the partners lived together for a long spell as husband and wife there would be a presumption in favour of wedlock. The presumption was rebuttable 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. In view of this law laid down by the Supreme Court since both the parties lived as husband and wife for a fairly long time of 15 to 20 years and four children born to them, there would be a presumption that their marriage was performed in a regular manner and it was for the opposite-party No. 1 who denied this marriage to prove that no such marriage took place. But this was not done.

7. Maintenance was, therefore, rightly allowed by the learned Magistrate and the Sessions Judge could not set aside his order with a finding that conversion of the opposite party No. 1 to Islam was not proved.

8. This revision is, therefore, allowed and the impugned order of the learned Sessions Judge, Kanpur, is hereby set aside.