(1980) 08 BOM CK 0018

Bombay High Court

Case No: Criminal Application No. 267 of 1980

Shaikh Musa Shaikh Gulab Jamal		APPELLANT
	Vs	
Shahajahan Begum and Others		RESPONDENT

Date of Decision: Aug. 18, 1980

Acts Referred:

- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 125

Hon'ble Judges: P.S. Shah, J

Bench: Single Bench

Advocate: B.D. Kamble, P.P, for the Appellant; G.K. Masand, for the Respondent

Judgement

P.S. Shah, J.

The petitioner is the husband of respondent No. 1. respondent No. 2 is their son and there is another child who is their daughter. They had three children, out of whom the first expired and the second is a daughter who is living with the petitioner ; while the respondent No. 2 is the son who is living with the respondents No. 1. The respondent No. 1 for herself and her son, respondent No. 2, filed an application u/s 125 of the Criminal Procedure Code against the petitioner for maintenance in the Court of the Judicial Magistrate, First Class, Jalgaon. By his order dated April 20, 1979, the learned Magistrate passed an order directing the petitioner to pay to respondent No. 1 Rs. 200/- per month by way of maintenance from the date of application i.e. from June 14, 1976. Similarly, he directed the petitioner to pay respondent No. 2 Rs. 100/- per month by way of maintenance from the date of application. The petitioner challenged this order in a revision Application filed by him in the Sessions Court at Jalgaon. This revision application came to be dismissed. The petitioner has, therefore, filed this petition under Article 227 of the Constitution challenging the said two orders.

2. Mr. Hussein, the learned Counsel, appearing for the petitioner raised these contentions :

1. The respondents have failed to show that the petitioner had neglected to maintain them, but on the contrary it was the respondent No. 1 who voluntarily left the petitioner''s house in the year 1971 and since then has been residing with her father.

2. The respondent No. 1 has failed to discharge the burden which lay on her to prove that she has been unable to maintain herself.

3. The quantum of maintenance awarded by both the courts below is excessive and unreasonable.

4. The petitioner has during the pendency of the application for maintenance before the learned Magistrate, filed a suit for restitution of conjugal rights and in that suit an ex parte decree has been passed against the respondent No. 1. In view of this decree the respondent No. 1 is not entitled to claim maintenance u/s 125 of the Criminal Procedure Code.

3. It appears that the respondent No. 1 father taken out a search warrant u/s 100 of the Criminal Procedure Code on April 3, 1972, before the Magistrate for the production of respondent No. 1 was produced before the Magistrate by the petitioner and the Magistrate recorded her statement and in accordance with the desire expressed by her in her statement , he allowed her to go with her father. This circumstance by itself would not show that the petitioner was not ill-treating respondent No. 1 till the date on which she was produced before the Magistrate. Both the courts below have accepted the evidence of the respondent No. 1 and her witness viz. the father and the brother to the effect that the respondent No. 1 was being ill-treated till the time she was produced before the Magistrate. This is the pure question of facts based on appreciation of evidence. I see no reason to interfere with this concurrent finding of the fact that the respondent No. 1 was being ill-treated by the petitioner. The argument of the learned Counsel that the respondent No. 1 has failed to prove neglect on the petitioner, therefore , cannot be accepted. It is significant that the respondent No. 1 father had to approach the court u/s 100 of the Criminal Procedure Code for a search warrant and it was only then she could express her desire to go to her father.

4. Both the courts below have rejected the case of the petitioner that respondent No. 1 has an independent source of income. In this connection the counsel relied on the observations of the learned Magistrate in para 20 of the judgment that the standard of living of the respondent family is very high as can be inferred from the admission of her father in his evidence that he has been sending Rs. 500/- per month to respondent No. 1 for her maintenance. Whatever be the standard of living of the family, the crucial question to be decided is whether the respondent No. 1 has proved to have any independent source of income. The mere fact that the father has

been sending Rs. 500/- per month to respondent No. 1 for her maintenance is neither here nor there. In the absence of any independent source of income for respondent No. 1, it cannot be held that she is able to maintain herself . There is therefore , no merit in the contention that respondent No. 1 has failed to establish that she is unable to maintain herself. This being the concurrent finding of the facts there is no reason to interfere with the same.

5. As regards the quantum of maintenance, both the courts below have awarded Rs. 200/- for respondent No. 1 and Rs. 100/- for respondent No. 2 i.e. in all Rs. 300/- per month. This figure has been arrived at on the appreciation of the evidence by the courts below. The case of the petitioner that he was working as a labourer from 1971 has been disbelieved. While he maintained that he was working as a labourer his witness has tried to contend that he was working as a Supervisor over his lands. This case has been proved to be false by production of documentary evidence which has been referred to by the courts below. This evidence show that the petitioner described himself as a forest contractor in the year 1971. It was in this state of affairs that the evidence of the petitioner and his witness was disbelieved and the case of the respondent No. 1 that the petitioner has been earning Rs. 1000/- as forest contractor has been accepted. It is difficult to find fault with the reasoning and the appreciation of the evidence on this question. I do not think that any case of interference on the question of quantum of maintenance has been made out by the petitioner.

6. It appears that an ex parte decree was passed in favour of the petitioner in his suit for restriction conjugal rights, after the learned Magistrate passed the impugned order. Mr. Masand, The Learned counsel appearing for respondent Nos. 1 and 2 did not dispute that such an ex parte decree has been passed, but he stated that the said ex parte decree has been set aside and the suit has been restored to file. Mr. Hussein was unable to contradict this statement made by Mr. Masand. Assuming that such a decree has been passed and is still not set aside, it is open to the petitioner to take appropriate proceedings for setting aside the order on the ground of changed circumstances. The petition , therefore, fails Rule discharged with costs.