

(1976) 02 BOM CK 0044

Bombay High Court

Case No: Criminal Application No. 1541 of 1975

Smt. Mehbubabi Nasir Shaikh

APPELLANT

Vs

Nasir Farid Shaikh

RESPONDENT

Date of Decision: Feb. 13, 1976

Acts Referred:

- Constitution of India, 1950 - Article 227

Citation: (1976) 78 BOMLR 258 : (1976) MhLj 631

Hon'ble Judges: Vaidya, J; Rege, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Vaidya, J.

The above petition, under Article 227 of the Constitution of India, is filed by Smt. Mehbubabi, wife of respondent No. 1, who had filed an application, being Miscellaneous Application No. 44 of 1974, in the Court of the Judicial Magistrate, First Class, Sangli, u/s 125 of the Code of Criminal Procedure, 1978, in which she had claimed maintenance from her husband, respondent No. 1, Nasir Farid Shaikh, a business man of Sangli at the rate of Rs. 450 per month as maintenance for herself and her two title children born out of respondent No. 1.

2. The application was made by her on December 81, 1974, u/s 125 of the new Criminal Procedure Code, which defines "wife" as including a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried and does not exclude Muslim wives notwithstanding that under Muslim law, a divorced wife would be entitled to maintenance only upto the period of Iddat.

3. The application was resisted by the husband, contending that the wife ran away from the matrimonial home on April 24, 1974, taking with her ornaments from the house; and as such, he has been put to loss; that there was an agreement between them that she should stay separately; that she was quarrelsome and had made his

life miserable; that she had further an affair with one Sudani with whom she used to go to pictures and, therefore, she was not interested in staying with him and for these reasons when she ran away to Kolhapur, he had sent a notice giving talaq on August 19, 1974. The husband however, admitted that he had remarried one month after she left the place and out of the three children, one son was living with him and the two daughters were left with the wife.

4. The only evidence led by the parties consisted of the testimony on oath of the wife herself and of the husband and of one witness on behalf of the husband, Nazir Papa Mulani, who claimed to have seen the petitioner going along with one Sudam to a picture house known as Sadashiv Theatre. The wife said that she was treated by the husband in such a way that she was compelled to run away with her two small daughters. But both the Courts ignored the revolutionary provisions in Section 125, which entitle even a divorced wife till she has remarried to claim maintenance from her quondam husband unless the husband is able to establish that the wife is living in adultery or is living separate from her husband without any sufficient reason or they are living separately by mutual consent, as laid down in Section 125(4) of the Criminal Procedure Code.

5. There was no evidence whatsoever in this case to show that the wife was living in adultery or there was separation by mutual agreement. The husband admitted in the cross-examination that he was for the first time making allegation against the wife in Court about the friendship between Sudam and his wife. It is difficult to believe that the husband, who is only twenty-six years old would not kick up a row if he had seen his wife friendly with Sudam or sleeping with him, as falsely deposed to by him in Court while giving evidence in Court.

6. His witness, Mulani, merely stated that ha had seen the wife with Sudam going for a picture. He has not even stated that she was seated with Sudam in the picture house. In the circumstances, there was noting before the Court from which it could be said that the wife was "living in adultery". It is shocking to see that both the Courts have drawn improper inferences denigrating the character of the wife merely because the husband stated in Court with a view to avoid paying maintenance, that she was a woman of suspicious and quarrelsome character.

7. It may be that the wife like some women after having three children had become a little suspicious about her husband or had become a little quarrelsome as she was, by then twenty-five years old mother of three children; and her husband was twenty-six years old; but that does not mean a charter for the Courts to draw all sorts of inferences against the character of the woman. The Courts are not justified in suspecting the chastity of a woman merely because the husband casts aspersions on her chastity when opposing an application for maintenance.

8. The two Courts, in our opinion, acted without jurisdiction and contrary to the ordinary canons of justice in holding that, from what they regarded as the behaviour

of the wife, there appeared to be some truth in the allegation made by the husband, without any evidence on record to support any such inference. Courts are Courts of law and justice and not Courts of suspicions and particularly suspicions against the character of women who happen to be the wives in applications for maintenance, as in the present case. Courts must not allow themselves to be converted into places for character assassination in this fashion.

9. The two Courts, in our opinion, acted without jurisdiction and contrary to all principles of administration of justice in speculating on the basis of what they regarded as the behaviour of the wife, when the only behaviour of the wife was in making an application before them u/s 125 of the Criminal Procedure Code, which provoked the husband to make baseless allegations against the mother of his three children.

10. We do not wish to express any opinion as to whether the notice to talaq relied upon by the husband in the present case, is a talaq in accordance with Muslim law. But when it is admitted that the husband has another wife, the wife has every right to stay away from her husband.

11. Section 125 of the Criminal Procedure Code applies to all parents, wives, and children irrespective of their religion and caste. See the judgment in [Khurshid Khan Amin Khan Vs. Husnabanu Mahimood Shaikh](#), . As none of the grounds mentioned in Sub-section (4) of Section 125 was established by the husband, the Courts were bound to award maintenance to the wife and the two children, for whom she had claimed maintenance. The two Courts, in our opinion, therefore, failed to exercise the jurisdiction vested in them by law u/s 125 of the Criminal Procedure Code in refusing maintenance to the petitioner.

12. The next question is about the quantum of maintenance. In the petition before this Court, the wife has prayed for maintenance for herself and her children as prayed for in the application before the Magistrate. As already stated above, the wife had prayed for Rs. 450 for all the three of them per month. The learned Magistrate, without discussing the evidence and without giving a single reason, has fixed Rs. 40 per month for the two children; and he has not awarded any maintenance to the wife on the basis of what he described as the doubtful character of the wife without any support of any reliable evidence on the record. The learned Sessions Judge has not applied his mind to the quantum of maintenance.

13. In the original application, particulars of the income of the husband are not given. It is merely stated that having regard to the high prevailing prices, the wife and the two children would be able to maintain themselves somehow if Rs. 450 per month is given to them. In her evidence, the wife stated that the husband was staying along with the second wife and his brother in his house; and the second marriage was effected only one month after driving her out of the house. She has further stated in her examination-in-chief that the husband owns two shops in the

bazaar; and earns about Rs. 25 per day. She has also stated that the brother of the husband independently earns money by preparing keys in the bazaar.

14. The evidence given by her is not even challenged in the cross-examination. The husband in his turn has stated in the examination-in-chief that he runs a handcart and earns only Rs. 2 to 4 per day; and he has not got two shop³. He has denied receiving an income of Rs. 500 to 525, But his witness, Nazir Papa Mulani, has admitted in the cross-examination that he has a shop by the side of the said shop of the husband. It means that the husband is telling a lie when he speaks of running a hand-cart, though he has got a shop as deposed to by his own witness.

15. It is also difficult to believe that he could have hurried to marry a second wife one month after the departure of the first wife, who had already given him there children, if he could not afford to maintain his second wife. In the lower Courts, the husband had agreed to maintain the two children. It is clear that false allegations were being made against the wife by the husband, for the first time in Court, in these proceedings, saying that she had a friendship with Sudam. It would be wrong to consider such mere friendship as amounting to adultery within the meaning of Sub-section (4) of Section 125 of the Criminal Procedure Code.

16. Having regard to all these aspects of the matter, to the conditions of the husband and the wife, and to the general conditions of inflation in the country, we think that the amount ordered to be paid as maintenance to the two children at the rate of Rs. 20 per month is too meagre. Even making some allowance for the exaggeration by the wife, we order the husband to pay Rs. 75 per month to the wife and Rs. 50 per month for each of the children from the date of the application onwards.

17. Mr. Bhonsale, the learned Counsel for the respondent-husband vigorously urged that the two Courts, who were Courts of facts had found that the wife was not justified in running away from the house of the husband, and hence this was not a fit case for interference under Article 227 of the Constitution of India. In support of his argument, he drew our attention to the decision of the Supreme Court in AIR 1975 1297 (SC) . He also pointed out that without the authority of the husband, the wife had pledged the ornaments, which were with her; and that shows that the wife was of the character which was described by the two Courts below as doubtful or suspicious.

18. It is true that in Babhutmal's case, the Supreme Court has laid down that ordinarily this Court should not convert itself into a Court of appeal where appeal is not provided by the statute. But the Supreme Court has also laid down that it is the function of this Court when exercising the powers under Article 227 of the Constitution to see that the subordinate Court functions within the limits of its authority. The jurisdiction under Article 227 is conferred in this Court for enforcing the rule of law. In the present case, as already stated above, the lower Courts have

failed to exercise the jurisdiction vested in them by law and have relied on speculations without any foundation on facts and the record; and denied what appears to us to be a salutary, though revolutionary justice for even a divorced woman and her children u/s 125 of the Criminal Procedure Code. The circumstances show that the wife had mortgaged the ornaments by and with the consent of the husband and at his instance and she was driven away by the husband.

19. After the coming into force of s, 125, even a Muslim husband cannot divorce his first wife and marry a second wife with impunity and without paying anything to the first wife and children from her. He has an obligation to maintain his former wife till she remarries, u/s 125. Section 127(3) cannot be invoked where nothing has been paid by the husband as in this case. The two Courts appear to have ignored these aspects. The two Courts have wrongly attributed a suspicious character to the wife merely borrowing the suspicion of the husband without any real or reliable basis on the record or evidence in the case. In such a case, we think, it is the duty of the Court to interfere u/s 482, Criminal Procedure Code or under Article 227.

20. Again the trial Court acted arbitrarily and with indifference to the prevailing conditions of life in awarding a meagre sum of Rs. 20 each to the two children, when the husband's witness himself admitted that the husband had a shop, which the husband was hiding from the Courts when he gave evidence. Having regard to all these facts and circumstances, the contention of Mr. Bhonsale that the High Court should not interfere in this matter under Article 227 must be rejected.

21. In the result, the petition is allowed- The order passed by the Sessions Judge, on August 1, 1975, is set aside. The order passed by the Judicial Magistrate, First Class, Sangli, rejecting the application of the wife for maintenance is also set aside; and instead, it is ordered that the husband shall pay from December 31, 1974, the date of the application, Rs. 75 per month to the wife as maintenance.

22. The order passed by the Judicial Magistrate fixing the maintenance for the children, who were described as applicants Nos. 2 and 3, at the rate of Rs. 20 per month each is modified by directing respondent No. 1 to pay, from the date of the application, to the said children, at the rate of Rs. 50 per month for each of the children.

23. Rule made absolute with costs.