Smt. Yamunabai Anantrao Adhav A vs Ranantrao Shivram Adhav And Another on 27 January, 1988

Equivalent citations: 1988 AIR 644, 1988 SCR (2) 809, AIR 1988 SUPREME COURT 644, 1988 (1) SCC 530, 1988 (15) IJR (SC) 482, 1988 ALL WC 350, 1988 BLT (REP) 143, 1988 APLJ(CRI) 47, 1988 CALCRILR 66, 1988 SCC(CRI) 182, (1988) 1 KER LT 416, (1988) 1 HINDULR 375, (1988) 1 KER LJ 204, (1988) MPLJ 223, (1988) 1 SCJ 316, (1988) 1 SCWR 121, (1988) ALLCRIR 178, (1988) 1 ALLCRILR 439, (1988) 1 CRIMES 594, (1988) 1 JT 193 (SC)

Author: L.M. Sharma

Bench: L.M. Sharma, Misra Rangnath

PETITIONER:
SMT. YAMUNABAI ANANTRAo ADHAV A

Vs.

RESPONDENT:
RANANTRAo SHIVRAM ADHAV AND ANOTHER

DATE OF JUDGMENT27/01/1988

BENCH:
SHARMA, L.M. (J)
BENCH:
SHARMA, L.M. (J)
MISRA RANGNATH

CITATION:
1988 AIR 644 1988 SCR (2) 809
1988 SCC (1) 530 JT 1988 (1) 193
1988 SCALE (1)184

ACT:
Criminal Procedure Code , 1973: Section 125-Hindu woman marrying a Hindu man having a lawfully wedded wife -Whether entitled to maintenance-Personal law of the party-Whether can be excluded-Expression 'wife'-Meaning of.
Hindu Marriage Act, 1955: Sections 4, 5(i), 11, 12, 14, 1 Hindu woman marrying a Hindu man having a lawfully wedded wife Whether such marriage valid-Effect of such marriage-Whether such woman entitled to maintenance under s. 125 Cr. P. C. . 1973.
Words and Phrases: Expression 'wife'-Meaning of.

HEADNOTE:
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The appellant was married to the first respondent by observance of rites under Hindu Law in June, 1974, while the first respondent's earlier marriage was subsisting and the wife was alive. After living with the first respondent for a week, she left the house alleging ill-treatment. She filed an application for maintenance in 1976, which was dismissed by the trial Court. Her appeal to the High Court was dismissed by a Full Bench.

In the appeal to this Court it was urged on behalf of the appellant that a marriage should not be treated as void because such a marriage was earlier recognised in law and custom and in any event, the marriage would be voidable under s. 12 of the Hindu Marriage Act, 1955, that the term "wife" in s. 125 of the Cr. P.C., 1973 should be given a wider and extended meaning so as to include therein not only a lawfully wedded wife but also a woman married, in fact, by performance of necessary rites or following the procedure laid down under the law, that the personal law of the parties to a proceeding under s. 125 of the Cr. P.C. should be excluded from consideration, and since a divorcee has been held to be entitled to the benefits of the section, a woman in the same position as the appellant should also be brought within the sweep of the section, and since the appellant was not informed about the respondent's earlier marriage, when she married him, who treated her as his wife, her prayer for maintenance should be allowed.
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It was contended on behalf of the respondent that the term "wife" used in Section 125 of the Cr. P.C. meant only a legally wedded wife, and as the marriage of the appellant must be held to be null and void by reason of the provisions of the Hindu Marriage, Act, 1955 the appellant was not entitled to any relief under the section.

Dismissing the appeal,
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HELD: l. The marriage of a woman in accordance with the Hindu rites with a man having legal spouse, after coming into force of the Hindu Marriage Act, 1955 is a complete nullity in the eye of law and she is not entitled to the benefit of Sec. 125 of the Criminal Procedure Code, 1973. [813D]

2.1 Clause (1)(i) of s. 5 of the Hindu Marriage Act, lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage, and therefore a marriage in contravention of this condition is null and void, under section 11 of the Act. [813G]

2.2 By reason of the overriding effect of the Act, as mentioned in s. 4, no aid can be taken of the earlier Hindu

law or any custom or usage as a part of that law, inconsistent with any provisions of the Act. Section 12 is confined to other categories of marriages, and is not applicable to one solemnized in violation of s. 5(1)(i) of the Act. Cases covered under section 12are not void ab initio. [813H; 814A-B]

2.3 The marriage covered by s. 11 are void-ipso-jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. [814B-C]

The marriage of the appellant must, therefore, be treated as null and void from its verv inception. [815C]

3.1 Section 125 has been enacted in the interest of a wife, and one who intends to take benefit under sub-section (l)(a) has to establish the necessary condition, namely, that she is the wife of the person concerned. This issue can be decided only by a reference to the law applicable to the parties. [815E]

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3.2 It is only where an applicant establishes her status or relationship with reference to the Personal Law that an application for maintenance can be maintained. Once the right under the section is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the Personal Law. [816D-E]

3.3 For the purpose of extending the benefit of the section to a divorced woman, and an illegitimate child, the Parliament considered it necessary to include in the section specific provisions to that effect but has not done so with respect to women not lawfully married. [816F]

3.4 The word "wife" is not defined in the Cr. P.C. except indicating in the Explanation to s. 125 its inclusive character so as to cover a divorcee. A woman cannot be a divorcee, unless there was a marriage in the eye of law preceding that status. The expression must, therefore, be given the meaning in which it is understood in law applicable to the parties, subject to the Explanation (b). A divorcee is included in the section on account of cl. (b) of the Explanation. [815D-E]

3.5 Principle of estoppel cannot be relied upon to defeat the provisions of the Act. So far as the first respondent treating her as wife is concerned, it is of no avail, as the issue has to be settled under the law. It is the intention of the legislature, which is relevant, and not the attitude of the parties. The prayer of the appellant for maintenance cannot, therefore, be allowed even if the appellant was not informed, at the time of her marriage to the respondent, about his earlier marriage. [816G-H]

Mohd. Ahmed Khan v. Skah Bano Beghum, [1985] 3 SCR 844,

distinguished.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 475 of 1983.

From the Judgment and order dated 21/22-4-1982 of the Bombay High Court in Crl. Appln. No. 478 of 1980.

A.K. Sanghi for the Appellant.

A.M. Khanwilkar for the Respondents.

The Judgment of the Court was delivered by SHARMA, J. The point involved in this appeal is whether a Hindu woman who is married after coming into force of the Hindu Marriage Act, 1955 to a Hindu male having a living lawfully wedded wife can maintain an application for maintenance under section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code). The appellant Smt. Yamunabai was factually married to respondent no. 1 Anantrao Shivram Adhav by observance of rites under Hindu Law in June, 1974. Anantrao had earlier married one Smt. Lilabai who was alive and the marriage was subsisting in 1974. The appellant lived with the respondent no. 1 for a week and there after left the house alleging ill-treatment. She made an application for maintenance in 1976 which was dismissed. The matter was taken to the Bombay High Court, where the case was heard by a Full Bench, and was decided against the appellant by the impugned judgment.

2. Section 125 of the Code by sub-section (1) which reads as follows clothes the "wife" with the right to receive maintenance is a n summary proceeding under the Code:

> 125(1). If any person having sufficient means neglects or refuses to maintain-
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> (a) his wife, unable to maintain herself, or
>
> (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
>
> (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such

> Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:
>
> Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child if married is not possessed of sufficient means.
>
> Explanation. For the purposes of this chapter:
>
> (a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;
>
> (b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. "

According to the respondent the term 'wife' used in the section means only a legally wedded wife, and as the marriage of the appellant must be held to be null and void by reason of the provisions of the Hindu Marriage Act, 1955, she is not entitled to any relief under the section.

3. For appreciating the status of a Hindu woman marrying a Hindu male with a living spouse some of the provisions of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) have to be examined. Section 11 of the Act declares such a marriage as null and void in the following terms:

> " 11. Void marriages-Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5. "

Clause (1)(i) of s. 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that a marriage should not be treated as void because such a marriage was earlier recognised in law and custom. A reference was made to s. 12 of the Act and it was said that in any event the marriage would be voidable. There is no merit in this contention. By reason of the overriding effect of the Act as mentioned in s. 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. So far as s. 12 is concerned, it is confined to other categories of marriage and is not applicable to one solemnised in violation of s. S(1)(i) of the Act. Sub-section (2) of s. 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by s. 11 are void-ipso- jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such

a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of s. 16, which is quoted below, also throw light on this aspect:

> " 16. Legitimacy of children of void and voidable marriages.-(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.
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> (2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties of the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child not withstanding the decree of nullity.
>
> (3) Nothing contained in sub-section (1) or sub section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

(Emphasis added).

Sub-section (1), by using the words underlined above clearly, implies that a void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by s. 12, sub- section (2) refers to a decree of nullity as an essential condition and sub-section (3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by ss. 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception.

4. The question, then arises as to whether the expression 'wife used in s. 125 of the Code should be interpreted to mean only a legally wedded wife not covered by s. 11 of the Act. The word is not defined in the Code except indicating in the Explanation its inclusive character so as to cover a divorcee. A woman cannot be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must, therefore, be given the meaning in which it is understood in law applicable to the parties, subject to the Explanation (b), which is not relevant in the present context.

5. It has been contended on behalf of the appellant that the term 'wife' in s. 125 of the Code should be given a wider and extended meaning so as to include therein not only a lawfully wedded wife but

also a woman married in fact by performance of necessary rites or following the procedure laid down under the law. Relying upon the decision of this Court in Mohd. Ahmed Khan v. Shah Bano Beghum, [1985] 3 SCR 844, it was argued that the personal law of the parties to a proceeding under s. 125 of the Code should be completely excluded from consideration. The relationship of husband and wife comes to an end on divorce, but a divorcee has been held to be entitled to the benefits of the section, it was urged, and therefore applying this approach a woman in the same position as the present appellant should be brought within the sweep of the section. We are afraid, the argument is not well founded. A divorcee is included within the section on account of clause (b) of the Explanation. The position under the corresponding s. 488 of the Code of 1898 was different. A divorcee could not avail of the summary remedy. The wife's right to maintenance depended upon the continuance of her married status. It was pointed out in Shah Bano's case that since that right could be defeated by the husband by divorcing her unilaterally under the Muslim Personal Law or by obtaining a decree of divorce under any other system of law, it was considered desirable to remove the hardship by extending the benefit of the provisions of the section to a divorced woman so long as she did not remarry, and that was achieved by including clause (b) of the Explanation. Unfortunately for the appellant no corresponding provision was brought in so as to apply to her. The legislature decided to bestow the benefit of the section even on an illegitimate child by express words but none are found to apply to a de facto wife where the marriage is void ab initio.

6. The attempt to exclude altogether the personal law applicable to the parties from consideration also has to be repelled. The section has been enacted in the interest of a wife, and one who intends to take benefit under sub-section (1)(a) has to establish the necessary condition, namely, that she is the wife of the person concerned. This issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes her status on relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the section is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the section is attracted or not cannot be answered except by the reference to the appropriate law governing the parties. In our view the judgment in Shah Bano's case does not help the appellant. It may be observed that for the purpose of extending the benefit of the section to a divorced woman and an illegitimate child the Parliament considered it necessary to include in the section specific provisions to that effect, but has not done so with respect to women not lawfully married.

7. Lastly it was urged that the appellant was not informed about the respondent's marriage with Lilabai when she married the respondent who treated her as his wife, and, therefore, her prayer for maintenance should be allowed. There is no merit in this point either. The appellant cannot rely on the principle of estoppel so as to defeat the provisions of the Act. So far as the respondent treating her as his wife is concerned, it is again of no avail as the issue has to be settled under the law. It is the intention of the legislature which is relevant and not the attitude of the party.

8. We therefore, hold that the marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is not entitled to the benefit of s. 125 of the Code. The appeal is accordingly dismissed. There will be no order as to costs. During the pendency of the appeal in this Court some money was paid to the appellant in pursuance of an

interim order. The respondent shall not be permitted to claim for its refund.

N.P.V. Appeal dismissed.