

PATHERMA & ANR.

v.

MUHAMMAD

APRIL 17, 1986

[V. KHALID AND MURARI MOHON DUTT, JJ.]

Revisional jurisdiction of the High Court under section 401 of the Criminal Procedure Code, 1973, scope of - Reappreciation of evidence and substituting its own view by the High Court is impermissible.

In the Criminal application filed by the appellants under section 125 of the Code of Criminal Procedure, the Trial Court on an appreciation of the evidence accepted the defence of the respondent that the first appellant was not his wife but held that the second appellant was his illegitimate child and directed the payment of Rs. 25 per month towards maintenance of the child. Two revision petitions preferred by both the parties before the Kerala High Court were heard together. Allowing the respondents' petition and dismissing the appellants' petition, the Court held that the second appellant was not the child of the respondent. Hence the appeals by special leave.

Allowing Criminal Appeal No. 462A/81 and dismissing Crl. Appeal No. 463/81, the Court,

Held : 1. The High Court in its criminal jurisdiction under section 401 of the Code of Criminal Procedure was not justified in making a re-assessment of the evidence and in substituting its own view for that of the trial Judge on a question of fact. The questions whether the appellant No. 1 was the married wife of the respondent and whether the appellant No. 2 was the legitimate or illegitimate child of the respondent are pre-eminently questions of fact. [733 F-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 462A-463 of 1981.

From the Judgment and Order dated 21.10.1980 of the Kerala High Court in Crl. R.P. Nos. 188 and 204 of 1979.

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E.M.S. Anam for the Appellants.

Nemo for the Respondents.

The Judgment of the Court was delivered by

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DUTT, J. These two appeals by special leave have been preferred by the appellants against the judgment of the High Court of Kerala dismissing the Criminal Revision Petition of the appellants and allowing that of the respondent, both arising out of a proceeding under section 125 of the Code of Criminal Procedure instituted by the appellants.

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The appellants filed an application before the Judicial Magistrate, First Class, Pattambi, under section 125 of the Code of Criminal Procedure. The said application was numbered as M.C. No. 5 of 1978. In the application, it was alleged that the respondent married the appellant No. 1, Pathumma, 6 years ago as per Muslim rites and the respondent resided with her as husband and wife. When she was carrying two months, she was taken to her father's house by the respondent. Thereafter, the respondent left her there and did not enquire about her. Subsequently, the respondent divorced her without, however, making any payment to her of any Mahar or other compensation.

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It was further alleged that the appellant No. 2 Sulekha, a minor daughter, was born out of the wedlock. The appellants had no means of livelihood and accordingly, they claimed maintenance respectively at the rate of Rs. 100 and Rs. 50 per month from the respondent. The application was opposed by the respondent. The case of the respondent was that he never married the appellant No. 1, and that the appellant No. 2 was not his child, legitimate or illegitimate.

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The learned Magistrate by his order dated March 24, 1979 came to the finding that the marriage of the respondent with the appellant No. 1, as alleged, was not proved and, as such, the appellant No. 1 was not the wife of the respondent. The learned Magistrate, however, held that the appellant No. 2 was the illegitimate child of the respondent. In that view of the matter, the learned Magistrate directed the respondent to pay maintenance to the appellant No. 2 at the rate of Rs. 25 per month from the date of the application under section 125 Cr.

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P.C.

Against the order of the learned Magistrate, the appellants filed a revision petition being Criminal R.P. No. 204 of 1979 before the High Court of Kerala in so far as it refused the claim of the appellant No. 1 for maintenance. The respondent also filed another petition being Criminal R.P. No. 188 of 1979 against the order of the learned Magistrate directing payment of maintenance at the rate of Rs. 25 per month to the appellant No. 2. Both the said revision petitions were heard together by a learned Single Judge of the High Court.

The learned Judge by his judgment dated November 21, 1980 upheld the finding of the learned Magistrate that the marriage of the respondent with the appellant No.1 was not proved and that, accordingly, the appellant No.1 was not the wife of the respondent. So far as the order of the learned Magistrate directing payment of maintenance to the appellant No.2, the minor child of the appellant No.1 was concerned, the learned Judge made a re-assessment of the evidence and came to the finding that the appellant No.2, Sulekha, was not the illegitimate child of the respondent. Accordingly, the learned Judge dismissed the revision petition of the appellants being Criminal R.P. No. 204 of 1979 and allowed that of the respondent being Criminal R.P. No. 188 of 1979. The net result was that the order of the learned Magistrate allowing maintenance to the appellant No.2, was set aside and the entire application of the appellants under section 125 Cr. P.C. stood dismissed.

The questions whether the appellant No.1 was the married wife of the respondent and whether the appellant No.2 was the legitimate or illegitimate child of the respondent, are pre-eminently questions of fact. The learned Magistrate after considering the evidence, as adduced by the parties, held that the appellant No.1 was not the wife of the respondent. He further held on the basis of the evidence on record that the appellant No.2 was the illegitimate child of the respondent. We are afraid, the learned Judge of the High Court committed an error in making a re-assessment of the evidence and coming to a finding that the appellant No.2 was not the illegitimate child of the respondent. We have ourselves considered the evidence on record and we agree with the learned Magistrate, who had taken much pains in analysing the evidence, that the

A appellant No.2 was the illegitimate child of the respondent. The High Court in its revisional jurisdiction was not justified in substituting its own view for that of the learned Magistrate on a question of fact.

B For the reasons aforesaid, we set aside the order of the High Court in so far as it disallows the claim of the appellant No.2, Sulekha, for maintenance as granted by the learned Magistrate and dismiss the Criminal Revision Petition No.188 of 1979. Criminal Appeal No. 462A of 1981 is accordingly allowed.

C The order of the High Court dismissing Criminal Revision Petition No.204 of 1979 is affirmed and the Criminal Appeal No. 463 of 1981 is dismissed.

There will be no order for costs in either of the appeals.

D The appellants are granted liberty to approach the learned Magistrate for the enhancement of the amount of maintenance of the appellant No.2.

S.R.

Cr.A. No. 462A/81 allowed.
Cr.A. No. 463/81 dismissed.