

Bombay High Court

Kalidas S/O. Durgaji Shinde vs Parwatibai W/O. Kalidas Shinde on 28 January, 1985

Equivalent citations: 1985 (1) BomCR 515

Author: M Deshpande

Bench: M Deshpande

JUDGMENT M.S. Deshpande, J.

1. This revision application by the husband is directed against the order passed by the Sessions Judge, Parbhani, reversing the dismissal of the respondent's application for maintenance and awarding Rs. 50/- per month as maintenance to her.

2. The respondent's case was that she was married to the petitioner about six years ago and resided with him for about 15 months, but he treated her with cruelty and drove her out of the house thus requiring her to reside with her brother. Several attempts to bring about reconciliation failed. The petitioner thereafter filed a petition for restitution of conjugal rights and obtained a decree against, though he never desired to take her to his house. He thus refused and neglected to maintain her. Contending that she was unable to maintain herself, while the petitioner had sufficient means to maintain her, she sought a direction against the petitioner for paying Rs. 250/- per month as maintenance. The petitioner resisted the application by urging that because of his desertion by the respondent, he had to bring a proceeding for restitution of conjugal rights and obtained a decree for restitution in 1977. Since that decree was not obeyed, he brought a petition for divorce and obtained a divorce against her. He denied his liability to pay maintenance.

3. The learned Magistrate found that the respondent had not proved that the petitioner had refused and neglected to maintain her and that though she was unable to maintain herself she was not entitled to maintenance. The learned Sessions Judge took note of the fact that a divorce had been obtained and that on that Court the respondent became entitled to ask for maintenance. He, therefore, awarded Rs. 50/- per month as maintenance to the respondent.

4. In this revision application by the husband petitioner the main point urged was that the status of being a divorce by itself could not invest the respondent with a right to seek maintenance in view of the provisions of section 125 of the Criminal Procedure Code, 1973. Under section 125(1) an order of maintenance can be made if any person having sufficient means neglects or refuses to maintain his wife and upon proof of such neglect or refusal, a Magistrate of the first class may order such person to make a monthly allowance for the maintenance of his wife. Under Explanation (b) to sub-section (1) of section 125, "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. The eligibility of a wife to seek maintenance can arise only upon proof of neglect or refusal to maintain her. Sub-section (4) of section 125 provides that no wife shall be entitled to receive an allowance from her husband, if she is living in adultery, or if, without any sufficient reason she refuses to live with her husband, or if they are living separately by mutual consent.

5. On behalf of the respondent the provisions of sub-section (4) were relied upon and reliance was also placed on the observations of this Court in Vinod Wamanrao Nehulkar v. Smt. Mangala Vinod

Nehulkar, 1981 Bombay Cases Report 962 : 1 M.C. 148. But that case is clearly distinguishable on facts because the husband there filed a petition for divorce alleging that the wife was suffering from venereal disease in which the wife remained absent and the marriage was dissolved. Upon the wife's filing a petition for maintenance under section 125 of the Criminal Procedure Code, it was held that the wife was entitled to maintenance. The question of proving refusal or neglect before such an action could be brought, did not come up for consideration in that case. Reliance was also placed on a learned Single Judge's observation of this Court in *Balaji v. Parubai*, . where it was held that under section 125 of the Criminal Procedure Code, 1973, a divorced wife is entitled to claim maintenance and this is the right which did not exist at the time of executing the said divorce deed in 1970 and, therefore, there was no question of any waiver of any right, which vested in the wife at that time and the question of waiver can arise only when a person consciously abandons or waives a right, to which he or she was in law entitled. In view of the facts of that case it was observed that a wife who lives separately from her husband by mutual consent did so contrary to the legal obligations arising out of her status as a spouse, and the divorced wife has no such legal obligations because she lives separately because of her status as a divorcee unlike the case of the wife who resides separately in spite of her status as a wife. The point which arises here did not arise for consideration in that case.

6. Reliance was also placed on the observations of the Supreme Court in the case of *Bai Tahira v. Ali Hussain Fissali Chothia*, . The observation in para 8 of the report would show that section 125 requires, as a sine qua non for its application, neglect by husband or father and in that case it was established that there was such neglect or refusal. The supreme Court observed that on a simple reading of the Explanation (b) to section 125 of the Criminal Procedure Code, it is clear that every divorced wife, otherwise eligible, is entitled to the benefit of maintenance allowance and the dissolution of the marriage makes no difference to this right under the current Code. The observations of the Supreme Court quoted above would thus unmistakably show that by the mere inclusion of divorcee in the definition of wife, the requirement to establish refusal or neglect is not done away with. Reliance was also placed on behalf of the respondent on the decision in *Zohara Khatoon v. Mohd. Ibrahim*, 1981 Cri.L.J. 754, 1 M.C. 32 (S.C.) but there also the question as it arises here did not come up for consideration.

7. There is a direct authority of this Court in *Saradchandra Satbhai v. Indubai Satbhai*, 1978 Mh.L.J. 123 : 1 M.C. 341 (Bom.) where a Division Bench held that where on a petition by the husband for judicial separation under section 10 of the Hindu Marriage Act on the ground that the wife had deserted the petitioner a decree for judicial separation is passed, the wife is not entitled to claim maintenance under section 125 of the Criminal Procedure Code. When the Civil Court has determined the issue of desertion and held that the wife has left her husband without reasonable cause and against his wish and without his consent, it is plain and simple that she has refused to live with her husband without any sufficient reason, and therefore, the wife is not entitled to receive maintenance under section 125. The fact that a decree for judicial separation has been passed in favour of the husband on the ground of desertion means that the wife is guilty of refusing to live with her husband.

8. In the present case the decree for restitution of conjugal rights was obtained by the petitioner husband on March 30, 1977. The application by the respondent-wife for maintenance under section 125 of the Criminal Procedure Code was filed in 1980 i.e. after the decree for restitution of conjugal rights. The decree of divorce was obtained by the husband on 31-7-1981 during the pendency of these proceedings. On the date on which the application under section 125 of the Criminal Procedure Code was made, the position that there was no refusal and neglect to maintain the wife on account of wife's deserting the husband has been concluded by the decree for restitution of conjugal rights. Once one of the essential ingredients to be established under section 125(1) was not shown to exist, the respondent could not have continued these proceedings.

9. The burden of the argument of the learned Advocates for the respondent has been that it is the character of the respondent as a divorcee which invests her with the right to seek maintenance. This contention evidently is against the plain and careful reading of the conditions which have to be made out under section 125(1) of the Criminal Procedure Code, 1973. Clause (b) of section 125(1) only gives an extended meaning to the term "wife" used in sub-section (1) and does not enlarge the rights of the wife if in course of time she becomes a divorcee. The learned Sessions Judge was, therefore, evidently in error in holding that the respondent by virtue of her being a divorcee become entitled to claim maintenance. The learned Magistrate was right in his view that the case under section 125(1) had not been made out by the respondent and in rejecting her application for maintenance.

10. Another ground which was sought to be raised on behalf of the respondent was that there was a second marriage by the husband, but the evidence on this point was not accepted by the learned Magistrate because neither the respondent nor her brother Gangadhar had personal knowledge about the second marriage. The third witness Dagdu was disbelieved because he was a close relation of the respondent. This was a finding of fact and it was not questioned before the Sessions Judge and it is not, therefore, permissible to go into this question of fact for the first time in this Court and the respondent will not be entitled to succeed even on the ground of the second marriage.

11. In the result, the revision application is allowed. The order passed by the Sessions Judge, is set aside and that passed by the Magistrate is restored. There will be no order as to costs throughout.