

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 165 OF 2007

1. RAFIKA BEGUM ABDUL RAUF
age 27 yrs, Occ. Household,
R/o Madina Nagar, Degloor Naka,
Nanded.
2. Sanna Harmin d/o Abdul Rauf,
age 8 yrs, Occ. Minor.
3. Saba Anjum d/o Abdul Rauf,
age 5 yrs, minor.
4. Abdul Raheman d/o Abdul Rauf,
age 2.5 yrs, minor.

Applicant nos. 2 to 4 under
guardianship of petitioner no.1
r/o as above.

Petitioners

VERSUS

ABDUL RAUF ABDUL HAMID
age 37 yrs, Occ. Driver,
R/o Gadipura, Nanded,
Tq. & Dist. Nanded.

Respondent.

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CORAM : V.K. JADHAV, J.

Dated: November 15, 2016

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ORAL JUDGMENT :-

1. None present for the parties.
2. Being aggrieved by the common judgment and
order dated 13.10.2006 passed by the Sessions Judge,

Nanded in Criminal Revision No.92/2006 and 95/2006, the petitioner/original applicants in maintenance proceeding preferred this writ petition.

3. Brief facts, giving rise to the present writ petition are as follows :-

According to the petitioners, petitioner no.1 is legally wedded wife of respondent whereas petitioners no. 2 to 4 are their children. Petitioner no.1 wife was treated well for few years after marriage, however, thereafter subjected to ill-treatment by the respondent husband. Petitioner no.1 also came to know about illicit relations of respondent with one Saida Begum and she was driven out from the house alongwith minor children when she had questioned about the same to the respondent-husband. Since, respondent husband refused and neglected to maintain petitioners, petitioners constrained to file Cri. MA No.285/2004 before the Judicial Magistrate First Class, Court No.2 Nanded under section 125 of the Criminal Procedure Code for grant of maintenance. Petitioner no.1 has claimed Rs.1,500/- p.m. for herself and Rs.1250/- each

for minor children.

4. Respondent-husband has strongly resisted the application by filing his say. According to him marital relations are not subsisting and he had given divorce to petitioner no.1. Except petitioner no.2 herein respondent husband denied paternity of other two children.

5. Petitioner adduced oral evidence by filing an affidavit exh.24. Respondent-husband failed to cross examine the petitioner no.1 despite several opportunities. Thus, right of the respondent to adduce evidence in the matter came to be forfeited by passing order below exh.1. Learned Magistrate by judgment and order dated 21.4.2006 partly allowed the application of the petitioners and directed the respondent husband to pay Rs.400/- p.m. to petitioner no.1 and Rs.300/- p.m. each to petitioners no. 2 to 4.

6. Being aggrieved by the same, petitioners preferred criminal revision no.92/2006 to the extent of quantum of maintenance and respondent-husband preferred

criminal revision no.95/2006 before the Sessions Court, Nanded. The learned Sessions Judge by its impugned judgment and order dated 13.10.2006 allowed criminal revision no.95/2006 and thereby quashed and set aside the order of maintenance granted by the Magistrate and further remanded the matter to the learned Magistrate with a direction to Magistrate to proceed with the case as per law and decide the maintenance application as expeditiously as possible. The learned Sessions Judge has dismissed the criminal revision no.92/2006 preferred by the petitioners herein. Hence, this writ petition.

7. It appears from the impugned judgment and order passed by the learned Sessions Judge that, the learned Sessions Judge has allowed criminal revision preferred by the respondent-husband on the ground that in terms of provisions of section 126 (2) of Cr.P.C. the evidence of the proceedings shall be taken in presence of the person against whom order of payment of maintenance is proposed to be made and secondly the evidence should be recorded in the manner prescribed for the summons

case. The learned Sessions Judge has also placed his reliance in a case Shankar Gohane (Gavale) Vs. Kalpana Gohale (Gavale) and others reported in 1998 Cri.L.J. 4455 wherein it is held that Magistrate cannot decide the application u/s 125 of the Code merely on the basis of the affidavit of the applicant and recording of the evidence is mandatory.

8. In this case, despite several opportunities respondent-husband has failed to cross examine the petitioner as well as failed to adduce any evidence. Furthermore, the learned Magistrate has partly allowed the application for maintenance on the basis of the affidavit submitted by the petitioner no.1-wife.

In a case Shankar Gohane (supra) this Court in paragraph nos.3 and 4 of the Judgment has made following observations :-

3. The only point that is canvassed before me in this writ petition is whether the learned Magistrate could proceed to decide the substantive application under [section 125](#) of the Criminal Procedure Code on the basis of an affidavit that also by calling upon the applicant to file an affidavit instead of recording her evidence. The procedure prescribed for an application under [section 125](#) is contained in [section 126](#) and sub-section (2) of [section](#)

[126](#) clearly states that the procedure applicable to the trial of summons cases shall be applicable to the proceedings under [section 125](#) of Criminal Procedure Code. Therefore, the law is clearly laid down in [section 126](#) itself and that being the position, the substantive application under [section 125](#) cannot be decided merely on the basis of an affidavit. This view has been taken by this Court in a case reported in 1982(1) Bom.C.R. 329 : 1982 Mh. L.J. 352, [Ramesh Laxman Contractor v. Mrs. Jayshreeben Ramesh Contractor](#). It reads as under:---

"The proviso to [section 126\(2\)](#) provides that if the Magistrate is satisfied that the person against whom an order for maintenance is proposed to be made is wilfully avoiding service or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex-parte. However, this does not mean that the Magistrate shall pass an order without recording evidence as required in the main part of sub-section(2) of [section 126](#). The proviso only dispenses with the necessity of recording evidence in the presence of the other side if that other side is wilfully avoiding service or wilfully neglecting to attend the Court. [Section 126\(2\)](#) itself provides that all the evidence shall be recorded in the manner prescribed for summons cases, under Chapter 20. [Section 254](#) in the said Chapter lays down that if the Magistrate does not convict the accused, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence. The recording of evidence, therefore seems to be mandatory even when the opponent in proceedings under [section 125](#) is avoiding service or is wilfully neglecting to attend the Court. [Section 296](#) of the Code, which

permits the Court to receive the affidavit of any person whose evidence is of a formal character, cannot obviously apply when under [section 125](#) of the Code, questions relating to the neglect or cruelty on the part of the husband and the quantum of maintenance to be given to the wife are to be decided."

4. On behalf of the respondent, reliance was placed on a Judgment of the Apex Court, [Smt. Savitri v. Govind Singh Rawat](#). However, the point involved in that case was different and the Apex Court has held that although there is no specific provision for grant of interim maintenance pending the final disposal of an application under [section 125](#), the Court has powers to do it and while laying down this proposition, the Apex Court has also observed that in the absence of any express prohibition, it is appropriate to construe the provisions of Chapter 9 as conferring an implied power on the Magistrate to direct a person against whom an application is made under [section 125](#) of the Code, to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. This legal position cannot be disputed. The Apex Court has however not laid down that the Magistrate can ignore any express provision of law prescribing a particular procedure to be followed. In my view the Magistrate cannot follow such course in flagrant disregard to the express provisions of [the Code](#) of Criminal Procedure. Therefore, in my view, the learned Magistrate was in error in passing the order of maintenance and disposing of the application under [section 125](#) of Criminal Procedure Code, merely on the basis of an affidavit of the applicant before him.

9. So, in view of the ratio laid down by this Court as aforesaid, the learned Sessions Judge has rightly remanded the matter to the Magistrate with a direction to dispose off the said maintenance application in accordance with law. I do not find any error in the impugned judgment and order passed by the learned Sessions Judge. There is no merit in the writ petition. Criminal writ petition is hereby dismissed. Rule discharged.

sd/-

(V.K. JADHAV, J.)

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aaa/-