

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

Second Appeal No. 459 of 2012

* Sabubai w/o Rupji Valvi,
Age 79 years,
Occupation : Nil,
R/o. Singpur, Taluka Akkalkuwa,
District Nandurbar. **.. Appellant.**

Versus

- 1) Rupji s/o Bawa Valvi,
Since deceased, through his
legal representatives:
- 1A) Amarsing s/o Rupji Valvi,
Age Major,
Occupation: Agri. & Labour.
R/o. Singpur, Taluka Akkalkuwa,
District Nandurbar.
- 1B) Mainabai w/o Rupsing Valvi,
Age Major,
Occupation: Household.
R/o. Singpur, Taluka Akkalkuwa,
District Nandurbar.
- 2) Ramesh s/o Rupji Valvi,
Age 60 years,
Occupation: Agriculturist,
R/o Somawal, Taluka Taloda,
District Nandurbar.
- 3) Ambalal s/o Rupji Valvi,
Age 58 years,
Occupation: Agriculturist,
R/o Somawal, Taluka Taloda,
District Nandurbar.

- 4) Suresh s/o Rupji Valvi,
Age 55 years,
Occupation: Agriculturist,
R/o Somawal, Taluka Taloda,
District Nandurbar.

.. Respondents.

Shri. V.P. Latange, Advocate, for appellant.

Shri. R.S. Shinde, Advocate, for respondent Nos.1A & 1B.

Shri. Mukul Kulkarni, Advocate, holding for Shri. J.R. Shah, Advocate, for respondent No.2.

Shri. P.R. Katneshwarkar, Advocate, for respondent Nos.3 and 4.

CORAM: T.V. NALAWADE, J.

DATE : 11th AUGUST 2016

JUDGMENT:

1) The appeal is admitted. Notice after admission made returnable forthwith. Heard learned counsels for both the sides for final hearing.

2) In short, the facts leading to the institution of this appeal can be stated as follows :-

3) Regular Civil Suit No.32/2000 was filed in the Court of the Civil Judge, Junior Division, Taloda, District Nandurbar by present appellant for relief of maintenance

under provisions of the Hindu Adoptions and Maintenance Act. Maintenance at the rate of Rs.1000/- per month was claimed and arrears of preceding three years were also claimed.

4) Defendant No.1, Rupji was the husband of present appellant, plaintiff. (Rupji died during pendency of the present proceeding and his legal representatives original defendant No.2 is already on the record). Defendant No.2 is son of plaintiff born from Rupji. Defendant Nos.3 and 4 are sons born to the second wife of defendant No.1. One Amarsing is also son of plaintiff born from defendant No.1 but he is not made party to the suit.

5) It is the case of the plaintiff that the defendants have deserted her and they have not made any provision for her maintenance. It is her case that she has no source of income and due to old age she is not able to make earning and maintain herself. It is her case that in the past she had filed proceeding under section 125 of the Code of Criminal Procedure and in Lok Adalat compromise took place and as per the compromise, the

maintenance to her is fixed at the rate of Rs.225/- per month by order dated 19-1-1997. It is her case that defendant No.1 is not regularly paying that maintenance also and that maintenance is not sufficient for her livelihood.

6) It is the case of the plaintiff that defendants own and possess more than 13 hectares of agricultural land and they own two house properties and this property is of joint Hindu family. It is contended that the income per year from the agriculture land is more than five lakh rupees. It is contended that the defendants are in a position to pay separate maintenance at the rate of Rs. 1000/- per month for her in view of the income they are getting and the plaintiff is entitled to get such maintenance as per the status of the parties.

7) Defendant No.1 filed written statement and contested the suit. He admitted the relationship. He denied that he has deserted the plaintiff. He has denied that he owns agricultural land and the income from the land is sufficient for giving separate maintenance to the

plaintiff. He has taken defence that the plaintiff has two sons and these two sons are maintaining her. He also contended that the plaintiff is doing work in the field and so she does not need maintenance from defendant No.1. It was also contended that the plaintiff is entitled to get property which is left behind by her parents. He contended that as per the order made in a proceeding filed under section 125 Cr.P.C. he has been paying Rs.225/- per month to the plaintiff as maintenance and that amount is sufficient for her livelihood.

8) Defendant Nos.3 and 4 adopted the aforesaid written statement of defendant No.1. Defendant No.1 has contended that his marriage with mother of defendant Nos.3 and 4 was legal. Defendant No.2, son of plaintiff also contested the matter by contending that Amarsing, son of the plaintiff is necessary party to the suit.

9) Issues were framed on the basis of aforesaid pleadings. Plaintiff examined herself. She examined her son, Amarsing. Defendant No.1 and 2 gave evidence in rebuttal. The trial Court refused to grant the maintenance

by giving following reasons :-

- (i) Plaintiff has not made Amarsing, her son, party to the proceeding;
- (ii) Plaintiff has compromised the maintenance proceeding filed under section 125 of the Cr.P.C. before Lok Adalat, she has accepted maintenance at the rate of Rs.225/- per month and so she is not entitled to get more amount;
- (iii) One partition suit is pending between the parties and in that suit the plaintiff could have claimed maintenance from the civil Court and as such relief was not claimed in partition suit, the separate suit in Civil Court is barred due to provision of Order 2 Rule 2 of the Civil Procedure Code;
- (iv) The plaintiff failed to prove that defendant No.1 has deserted her.

10) The District Court confirmed the aforesaid findings given by the trial Court and it further held that the plaintiff could have demanded share in the property

left behind by her parents and from the income of that property she could have maintained herself.

11) Both the sides were allowed to argue on the following substantial questions of law :-

(I) *Whether the Courts below have committed error in taking into consideration the circumstance that in the proceeding filed under section 125 of the Cr.P.C. one order is made in favour of the plaintiff ?*

(II) *Whether the Court below have committed error to hold that Amarsing was necessary party to the suit ?*

(III) *Whether the Courts below have committed error in holding that maintenance ought to have been claimed by the plaintiff in the partition suit and as such relief was not claimed in the partition suit, the present suit is barred due to provision of Order 2 Rule 2 of the Civil Procedure Code ?*

12) It is settled law that the purpose behind the provisions of Section 125 of the Code of Criminal Procedure is different and that remedy is urgent remedy

and the inquiry provided is summary inquiry. Provisions of Sections 125 to 128 of the Code show that when Magistrate is making order of maintenance he is expected to take into consideration the order, if any, made by the civil Court of maintenance and in accordance with that order, and after adjustment that amount, Magistrate can make order under section 125 of the Cr.P.C. These provisions are separate and independent and they cannot come in the way of civil Court in granting maintenance. It can be said that Civil Court is also expected to consider the income of the plaintiff while fixing maintenance and that income includes maintenance, if any, the wife is receiving. This aspect was not at all considered by the Courts below. Only because before Lok Adalat compromise took place in the proceeding filed under section 125 of the Cr.P.C. the plaintiff agreed to accept maintenance at the rate of Rs.225/- per month, the plaintiff cannot be prevented from getting maintenance from the Civil Court. Thus both the Courts below have committed error by giving findings against the plaintiff due to this circumstance.

13) If a person like plaintiff is entitled to get maintenance from any persons like husband and issues, the Court cannot compel the plaintiff to make other persons who are liable to maintain her party to the proceeding. Court can consider capacity of the defendants and the status of the parties and can grant the relief. It can be said that in present matter the defendant No1 married second wife and he has issues from the second wife and due to that circumstance the plaintiff is living separate from him and she claimed maintenance from defendant No.1. In view of these circumstances, the Courts below ought to have considered the claim of the plaintiff as against defendant No.1 husband but that is not done. In view of these circumstances, it could not have been held that Amarsing was necessary party to the suit and as he was not made party the suit cannot be decreed. Thus on this point also the Courts below have committed error.

14) Right to get maintenance is separate right, it is separate from the right to get share when partition of joint family property takes place. There may be cases in

which a party like wife, may get very small share and which may not be sufficient for her for maintenance. There may be circumstances that the property which has come to her share may not yield any income and in that case also she can exercise her right to get maintenance. In the present matter, only a suit for partition was pending. Today this Court is deciding the other appeal like Second Appeal No.384/2012 filed by the original defendant No.2 against the decree given in favour of the present appellant and Amarsing in a partition suit. Thus no share is in the hands of the plaintiff but the Courts below have held that the plaintiff ought to have filed application for maintenance in the partition suit. It is true that such application could have been made but that does not mean that she is precluded from filing separate suit for maintenance. In the said suit she could have claimed relief of creating charge in respect of decree of maintenance on the shares of the defendant. This aspect of the matter is not considered by the Courts below and there they have committed error. For the same reasons it cannot be said that separate suit filed in Civil Court, present suit is barred due to provision of Order 2 Rule 2 of

the Civil Procedure Code.

15) It can be said that both the Courts below ought to have granted relief of maintenance to the plaintiff and the order already made in her favour under section 125 of the Cr.P.C. could have been taken into consideration at the time of fixing rate of maintenance. The plaintiff was aged 64 years at the relevant time and the age of the husband was around 67 years. Admittedly, the land admeasuring more than 13 hectares is with the defendants and they have their two houses also. Defendant No.1 married second time and he had issues from the second wife. These circumstances were certainly against defendant No.1. Thus the defendant No.1 was definitely in a position to give maintenance at the rate of Rs.1000/- per month. Suit was filed in the year 2000. Even a labour could earn Rs.100/- per day in those days. These circumstance needs to be considered for fixing the rate of maintenance when the agriculturist owns such huge land. Agriculturist has allied sources like milk business. In view of these circumstances, this Court holds that the plaintiff is entitled to get maintenance at the rate of Rs.1000/- per

month. The maintenance if she recovers under section 125 of the Cr.P.C. can be deducted from this amount and the remaining amount can be recovered from the property left behind by the defendant No.1. To that extent, the maintenance decree will bind even defendant No.2 and also Amarsing as they are getting share in the joint family property. Thus all the above points are answered against the respondents. In the result, following order :-

16) The appeal is partly allowed. The judgments and decrees of the Courts below by which maintenance is refused to the present appellant, Sabubai are hereby set aside. The suit of the appellant is decreed in following terms :-

(i) Maintenance at the rate of Rs.1000/- (Rs. One Thousand only) per month is granted in favour of appellant, Sabubai and the maintenance will be payable from the date of the suit.

(ii) The maintenance will be recoverable from the property left behind by defendant No.1, husband and if

that property is not sufficient then from the property which will come in the hands of defendant No.2 and Amarsing.

(iii) The amount of maintenance granted by Criminal Court under section 125 of the Code of Criminal Procedure can be deducted if that is recovered by Sabubai from the amount of Rs.1000/- granted in the present proceeding. Decree is to be prepared accordingly.

Sd/-
(T.V. NALAWADE, J.)

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