

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 763 OF 2007

Sou. Indubai Sadashiv Bhilla

.. Petitioner

vs.

Sadashiv Bhilla and anr.

.. Respondents

Mr. Amogh Karandikar a/w. Mr. Rajdeep Gude i/b S.S. Kalke for the
Petitioner.

CORAM : M. S. SONAK, J.

DATE : 26 AUGUST 2016.

P.C. :-

1] The challenge in this petition is to the orders dated 27 August 1992 and 2 December 2005 made by the Judicial Magistrate First Class (JMFC), Tasgaon and the Sessions Judge, Sangli respectively, allowing the respondent-husband's application under Section 125(5) of the Code of Criminal Procedure, 1973 (Cr.PC.) and cancelling the order for payment of maintenance earlier made by the JMFC on 27 August 1992 and confirmed by the Sessions Judge at Sangli on 24 June 1999.

2] Mr. Karandikar, learned counsel for the petitioner, has submitted that in the proceedings under section 125 of the Cr.PC. instituted by the petitioner-wife in the year 1991, the respondent had resisted the claim by alleging that the petitioner was living in adultery with one Vishnu. This defence was however, rejected by the JMFC, Tasgaon by order dated 27 August 1992, which order was upheld by the Sessions Judge, Sangli by order dated 24 June 1999. In such circumstances, Mr. Karandikar submits that there was no

question of resort to the provisions contained in Section 125(5) of the Cr.P.C.. for the purpose of cancellation of the maintenance order, by citing the very same ground.

3] Mr. Karandikar further submitted that the so called complaint and statement allegedly made/given by the petitioner has not been proved in accordance with law. In any case, Mr. Karandikar submits that the complaint/statement has been misinterpreted. On basis of the complaint/statement, no case was made out to establish that the petitioner is living in adultery with Vishnu. Accordingly, it is submitted that there was no case made out to exercise jurisdiction under section 125(5) of the Cr.P.C. and cancel the maintenance order already made.

4] The respondent, though served, is not present. Counsel for the respondent is also not present. Since the matter relates to the year 2007, it is not possible to adjourn the same. Recently, the Hon'ble Apex Court, in *Bhuvan Mohan Singh Vs. Meena and others - (2015) 6 SCC 353* has emphasized that the Family Judge is expected to be sensitive to issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and maintenance. This does not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. Therefore, the dilatory tactic by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive the fact that the lis before

him pertains to emotional fragmentation and delay can feel it it to grow. Further, in the same case, the Hon'ble Apex Court has emphasized that applications under Section 125 of Cr.P.C. for maintenance ought to be disposed of expeditiously. Therefore, taking into consideration such observations, it is not possible to adjourn the matter or to grant the respondent any further time.

5] The JMFC, Tasgaon by order dated 27 August 1992 had directed the respondent to pay to the petitioner maintenance at the rate of Rs.200/- per month under Section 125 of Cr.P.C.. At this stage, the respondent-husband had in fact resisted the claim for maintenance by urging that the petitioner is living in adultery with Vishnu and therefore, should not be awarded any maintenance. This defence was, however, disbelieved and maintenance was directed. The order dated 27 August 1992 was confirmed by the learned Sessions Judge vide order dated 24 June 1999.

6] On 25 August 1999, the respondent instituted Criminal Miscellaneous Application No. 164 of 1999 before the JMFC, Tasgaon seeking cancellation of the maintenance order, on the ground that the petitioner is living in adultery with Vishnu. In effect, the respondent invoked the provisions contained in section 125 (5) of Cr.P.C.

7] By the impugned orders dated 3 March 2005 and 2 December 2005, the JMFC, Tasgaon and learned Sessions Judge, Sangli have accepted the case of the respondent-husband and cancelled the maintenance orders. Both the Courts have relied upon the complaint

dated 30 March 1994 and statement dated 19 April 1994 made/given by the petitioner at Vishram Baug Police Station, Sangli. In the said complaint, the petitioner had made certain allegation of harassment against Vishnu. In the complaint as well as statement, however, the petitioner has made certain statements, which have been used against the petitioner and on the said basis, it is held that the petitioner has been living in adultery with Vishnu and therefore the maintenance orders earlier made deserve cancellation.

8] Since, the proceedings under Section 125 of Cr.P.C. are summary in nature, it is not possible to uphold Mr. Karandikar's contention with regard to mode of proof of aforesaid documents. The JMFC as well as the Sessions Judge, therefore, cannot be faulted with reading the said two documents in evidence. However, if the two documents are perused, on the basis of statements therein, it cannot be said that the petitioner has been "*living in adultery*" with said Vishnu. The two statements, at the highest, suggest that there were some relations between the two, however, the relations strained and in fact, the two documents are complaints/statements made by the petitioner against the said Vishnu. Therefore, on the basis of two documents not corroborated by any further evidence, it was not open to the JMFC or for that matter learned Sessions Judge to record a conclusion that the parameters of Section 125(5) stand fulfilled and that the petitioner is indeed "*living in adultery*" with Vishnu. In absence of fulfillment of such jurisdictional parameter, there is no question of exercise of powers under section 125(5) of the Cr.P.C. and cancellation of maintenance order already made.

9] This is also not a case where the allegation of living in adultery has been made for the first time, since making of the maintenance order. Such allegation had been made earlier, the respondent-husband has failed in proving the same. Therefore, although, it cannot be said that there was any bar to invocation of powers under section 125 (5) of Cr.PC., the circumstance that such allegations had been made earlier and the same had failed, is a relevant circumstance that was required to be taken into consideration by the JMFC and the Sessions Judge. The total non-consideration of such vital circumstance, vitiates the impugned orders.

10] The complaint/statement made in the years 1994, in fact, referred to harassment of the petitioner by said Vishnu. In such circumstances, it cannot be said that the petitioner and the said Vishnu were "*living in adultery*". It is settled position in law that some stray instances of cohabitation are by no means sufficient for making out a case of "*living in adultery*". The material on record hardly warrants the conclusion that the petitioner was living in adultery.

11] For all the aforesaid reasons, the impugned orders are set aside. Rule is made absolute in terms of prayer clause (a). The respondent is therefore, directed to pay maintenance to the petitioner in terms of the order dated 27 August 1992. The arrears to be cleared within a period of three months from today. In case, the arrears are not cleared or the maintenance amount is not paid,

the petitioner shall be at liberty to institute execution proceedings before the appropriate Court.

12] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

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