

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 474 OF 2016

1] Sau. Karuna W/o. Narendra Dhole,
Age – 39 years, Occupation – household,

2] Rahul S/o. Narendra Dhole,
Age – 18 years, Occupation – Education

Minor represented through his mother
Sau. Karuna W/o. Narendra Dhole,

3] Kapil S/o. Narendra Dhole,
Age – 17 years, Occupation – Education,

Minor represented through his mother
Sau. Karuna W/o. Narendra Dhole,

All R/o. Javakheda,
Tal. - Shirpur, District – Dhule

.. Appellants
(Orig. Plaintiffs)

VS.

Narendra S/o. Dharmaraj Dhole,
Age – 47 years, Occupation – Service,
R/o. Pimpalner, Taluka – Sakri,
District – Dhule

.. Respondent
(Orig. Defendant)

Mr. B.K. Patil, Advocate for the appellants
Mr. K.C. Sant, Advocate for the respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 02-05-2017

ORAL JUDGMENT :

1. Appellants – wife and children of respondent are before
this court in second appeal, questioning decision dated 28-01-2014

in regular civil appeal no. 3 of 2012 of *Ad-hoc* District Judge – 1, Dhule, setting aside judgment and decree dated 28-11-2011 passed by civil judge junior division, Shirpur granting maintenance.

2. There is consensus between learned counsel appearing for the parties, that the appellate judge has not rendered decision on merits of the case, and, has decided only tenability of the proceedings.

3. Appellants were before civil court in regular civil suit no. 8 of 2006, seeking grant of maintenance under sections 18 and 20 of Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as the "**Act**"). There had been assertion of rights by the plaintiffs against the defendant in the pleadings, whereas there had been denial of the same by the respondent, giving rise to issues, as under,

“ 1. Whether plaintiffs prove that defendant is guilty of desertion and wilfully neglecting plaintiff no.1 ?

2. Whether plaintiff no.1 proves she being unable to maintain herself and children ?

3. Whether the plaintiffs are entitled to maintenance at the rate of Rs.2000/- per month from defendant ?

4. Whether plaintiff no.1 proves that she is entitled to be separated from her husband without forfeiting claim to maintenance on the ground of desertion and cruelty etc. ? ”

4. The trial court answered issues no. 1 and 2 in affirmative and answered issue no.3, holding plaintiff no. 1, to be entitled to maintenance at the rate of Rs.1400/- per month and plaintiffs no. 2 and 3, to be entitled to maintenance at the rate of Rs.900/- per month, each.

5. Aggrieved by the decree, the respondent had been before appellate court in regular civil appeal bearing no. 3 of 2012 referred to hereinabove. Appellate court has framed as many as seven points for determination, however, the appellate court has decided only point no.5, which is *germane* to be considered in the present matter, reading, thus,

“ 5. *Whether present suit for maintenance u/sec. 18 and 20 of the Hindu Adoption and Maintenance Act 1956 is hit by the principles of res-judicata in view of the order of maintenance passed u/sec. 125 of the Cr.P.C. ”*

6. Point no.5 had been answered in the affirmative by the appellate court.

7. Mr. Patil, learned counsel appearing for appellants – plaintiffs submits that appellate court has been in gross error in holding the proceedings instituted by plaintiffs, to be not maintainable, for maintenance has been awarded to the plaintiffs under section 125 of the Code of Criminal Procedure. He submits

that appellate court erroneously got swayed by the decision and observations, as appearing in the decision of this court in the case of *Baburao Akaram Kalaskar Vs. Kusum Baburao Kalaskar* reported in 1980 *Mh.L.J. 871 : AIR 1971 SC 1244*. He submits that the appellate court failed to appreciate the context in which the decision had been rendered and the observations made in the same. It was a case wherein civil proceedings had already been pending, and, the proceedings under section 125 of Cr.P.C. had been moved during its pendency. He further points out that the decision had been rendered in the civil proceedings before proceedings under section 125 Cr.P.C. came to be decided. It is in that context that observations as are appearing in the judgment, suggest that it is the decision in civil proceedings which would hold sway and not *vice versa*. The decision does not at all refer to that decision under section 125 of the Code of Criminal Procedure would operate as a decision in previous civil litigation, and, would tantamount to *res-judicata*.

8. He therefore submits that impugned decision in the present matter rendered with reference to the decision in *Baburao Akaram Kalaskar Vs. Kusum Baburao Kalaskar* (supra), is erroneous and unsustainable. He refers to decision of Supreme Court of India, in the case of *Nagendrappa Natikar Vs. Neelamma* reported in 2013 *STPL 10436 SC*. He submits that the apex court in the same has clearly

ruled, referring to paragraphs no.10 and 11, which are reproduced hereinbelow for ready reference, as under,

“ 10. Section 125 Cr.P.C. is a piece of social legislation which provides for summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final determination of the status and personal rights of parties, which is in the nature of civil proceeding, though are governed by the provisions of the Cr.P.C. and the order made under Section 125 Cr.P.C. is tentative and is subject to final determination of the rights in a civil court.

11. Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a Court of Law and such an agreement is void, since the object is unlawful. Proceeding under Section 125 Cr.P.C. is summary in nature and intended to provide a speedy remedy to the wife and any order passed under section 125 Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18(2) of the Act. ”

He submits that the decision under section 125 Cr.P.C. in the proceedings is of summary nature, whereas the decision of the civil court is a regular trial leading to a decree by adjudication of rights.

9. He, therefore, urges to set aside the judgment and restore the appeal for adjudication afresh on merits.

10. Mr. Patil, learned counsel for the appellants also relies on decision in the case of *Aher Mensi Ramsi Vs. Aherani Bai Mini Jetha*

reported in *AIR 2001 GUJARAT 148*, putting emphasis on paragraphs no. 5 and 6 therein, reading thus,

*“ 5. So far as the argument that the respondent herein held 10 Bighas of land as she got from her father, I find that the same has not been believed by the trial Court and there is no material or evidence of contemporaneous nature in support of this argument and I find that the view taken by the trial Court in this regard does not warrant any interference. The argument that she was already getting maintenance of Rs. 45/- per month on the basis of the orders passed in the proceedings under the old Code of Criminal Procedure and therefore, she should not have been granted the maintenance of Rs. 200/- per month by the trial Court in the present suit does not at all impress this Court and this argument cannot be said to be an argument of any substance. Merely because an order of maintenance had been passed under Section 488/489 of old Code of Criminal Procedure and the respondent herein was getting a sum of Rs. 45/- per month could not come in her way to seek the maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956. **The grant and receipt of any amount of maintenance under the Code of Criminal Procedure is no bar or impediment to the grant of adequate amount of maintenance under Hindu Adoption and Maintenance Act, 1956.** Provisions in the Code of Criminal Procedure are general in nature, whereas the Hindu Adoption and Maintenance Act is special enactment and any order passed under general law cannot close the remedy under special law. Relevant portions of Section 488 of old Cr. P.C./Section 125 of the new Cr. P.C. and Section 18 of the Hindu Adoption and Maintenance Act, 1956 and reproduced as under :*

The Criminal Procedure Code (Old) :

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that, if such person offers to maintain his wife on condition of her living with him and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

If a husband has contracted marriage with another wife or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him;

Provided further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section 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 proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) to (8)

Code of Criminal Procedure (New) :

Order for maintenance of wives, children and parents.

125. (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself or,

(b) to (d)

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct :

.....

.....

.....

Provided further that if such person offers to him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation : If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance from her husband under this section 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 proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

Hindu Adoption and Maintenance Act, 1956 :

"18. Maintenance of wife. - (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,--

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) if he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

While the proceedings under Section 488/125 of old and new Cr. P.C. are of summary nature, it would also be clear from the reading of the aforesaid provisions that the order for maintenance under Cr. P.C. is for wives, children, and parents in case the husband having sufficient means neglects or refuses to maintain his wife who is unable to maintain herself, upon proof of such neglect or refusal, the Magistrate may order such person to make a monthly allowance up to the ceiling of Rs. 500/- per month for the maintenance of his wife, child, father or mother. It has also been provided under sub-sections (4) and (5) of Section 488 of old Cr. P.C. as to in what cases the wife shall not be entitled and in what cases the order of maintenance

already passed shall be liable to be cancelled. Sec. 488 in Old Cr. P.C. was already there and was in force when Hindu Adoption and Maintenance Act, 1956 was enacted and brought in to force. Similarly, it is also to be noted that even in the year 1973 when old Cr. P.C. was amended, the provisions under Section 488 were retained in the Cr. P.C. by way of Section 125, and at that time, the Hindu Adoption and Maintenance Act, 1956 was already there. Thus, it is clear that the remedies under both these laws are available to the wife and these remedies are coexistent, mutually complementary, supplementary and in aid and addition of each other. Hence the remedy resorted to under either of the two cannot foreclose the remedy under the other Act. The very fact that despite the provisions for maintenance of wife being there under the Cr. P.C., while enacting the Hindu Adoption and Maintenance Act in the year 1956 through Section 18 thereunder, the specific provision was made for maintenance of wife, goes to show that Section 18 is a specific provision with regard to the maintenance of wife in this special enactment as compared to the provisions in the Cr. P.C, with regard to the wives, children and parents and that the provisions under the Cr. P.C. have to be read only in aid and addition to the specific right conferred with regard to the maintenance of wife under Section 18 of the Hindu Adoption and Maintenance Act, 1956 and not in derogation or denial thereof. The concept of maintenance to the wife is based on the matrimonial tie and obligates the husband to maintain his wife during his life time. This moral and social obligation has been incorporated as a legal liability in the Act because according to our social values, a non-earning wife without any means is considered to be dependent on the husband and the question of her maintenance consequential to the dependence cannot be left at the sweet will of the husband. Apart from the ground of inability of the wife to maintain herself, in case a husband with sufficient means neglects or refuses to maintain her

as contemplated under Section 488/125 of old/new Cr. P.C., under Section 18 of the Hindu Adoption and Maintenance Act, 1956, a Hindu wife is entitled to live separately from her husband without foregoing her claim for maintenance on grounds enumerated under Section 18(2). Such grounds include desertion or abandonment by the husband without reasonable cause, cruelty, suffering of the husband from a virulent form of leprosy, in case the husband has any other wife living or keeps a concubine or ceased to be a Hindu by conversion or any other cause justifying her living separately. Thus, the provisions of Section 18 are far wider as compared to the provisions of Section 488/125 of the Cr. P.C. old and new. It is, therefore, clear that any order of maintenance under Section 488/125 of Cr. P.C. old and new cannot foreclose the wife's remedy under Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 and vice versa. These provisions do reflect the compassion of Law for Women and for their protection in conformity with the concept of reasonable classification against discrimination as provided in Art. 15(3) of the Constitution of India which makes it permissible for the State to make special provisions for women.

6. In the facts of the present case, the appellant had gone to the extent of alleging adultery against the respondent, and had filed a petition under the Hindu Marriage Act for divorce in which he failed and in a case of defamation filed by the respondent against him for this allegation, he was subjected to a fine of Rs. 500/-. It is also admitted case of the appellant that he had one other wife living. On such grounds, the respondent was certainly entitled to claim maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956. Even otherwise, the order of maintenance of Rs. 15/- per month which was later on revised to Rs. 45/- per month under the provisions of the Cr. P.C. had been passed long back. The sum of Rs. 45/- per month can hardly

be sufficient to meet the requirement of maintenance and if the trial Court has passed the order that she was entitled to maintenance at the rate of Rs. 200/- per month notwithstanding the order passed under Sections 488, 489 of old Cr. P.C., the same cannot be said to be illegal or unreasonable. The respondent had in fact claimed Rs. 250/ per month and therefore, while passing the order of maintenance of Rs. 200/- per month only, it appears that the Court has kept in view the fact that she was already getting Rs. 45/- per month on the strength of the orders passed for maintenance under the provisions of Cr. P.C. ”

11. Learned counsel for the respondent Mr. Sant submits that proceedings under section 125 of Cr.P.C. are intrinsically civil in nature as observed by this high court in the case of *Baburao Akaram Kalaskar Vs. Kusum Baburao Kalaskar* (supra), and contends that as such, observations in *Baburao Akaram Kalaskar's case* (supra), that decision operates as *res-judicata* can very well be applied in the present matter. Fault can hardly be found with the decision rendered by the appellate court. He submits that even otherwise the appellants have no case on merits, and, the second appeal is liable to be turned down.

12. In addition to the observations as are appearing which have been quoted hereinabove from the Gujarat High Court judgment, it would be worthwhile to refer to observations of this High Court in paragraphs no. 15, 16 and 17 in *Baburao Akaram Kalaskar's case* (supra), reading thus,

“ 15. We also find some decisions from other High Courts in India as well as the Supreme Court that the civil forum is admittedly a superior forum to other judicial tribunals. In M/s. Karamchand Ganga Pershad and another v. Union of India and others their Lordships of the Supreme Court had decided and held that a civil Court's decision is binding on the Criminal Court but the converse is not true. The decision of our own High Court reported in Fakruddin Shamsuddin Saiyed v. Bai Jenab in substance held that a civil order is binding on the Criminal Court, but Criminal Court must apply its mind to the facts of each case without running the risk of relying on a paper decree of the Civil Court. In the judgment of the Allahabad High Court, reported in Ravendra Kaur v. Achant Swarup it was held that the wife was not entitled to receive maintenance allowance from the husband. It was further held that the Magistrate was bound to take notice of the decision of the Civil Court as provided under section 489, sub-clause (2) of the Criminal Procedure Code, even though there was no specific application under that section before him.

16. Now, therefore, it is abundantly clear that the general principles of res judicata can be made applicable to the proceedings under section 125 of the Criminal Procedure Code. With advantage we may refer to a very recent decision of our own High Court. The said judgment reported in Laxam Vithal Rewankar v. Rajaram N. Pohurkar stated that the general principles of res judicata are applicable to a finding of an Authority or Tribunal exercising judicial functions. In the said case, Ginwala, J., was dealing with a matter decided between the same parties, before the Rent Controller and subsequent suit between the same parties before the civil Court. He has referred to several decisions including the one reported in Gulabchand v. State of Gujarat and came to the conclusion that when a finding has been

arrived at before a Court of competent jurisdiction between the parties after due contest, then the said decision before any other judicial tribunal in another lis between the same parties is binding.

17. From the discussion above, I am of the opinion that an earlier decision between the same parties in the civil Court can, on the basis of the general principles of res judicata, be made applicable to even subsequent criminal proceedings and particularly maintenance proceedings of civil nature. This application of the principle of res judicata in such cases would of court be conditional. The matter in the earlier proceedings must have been between the same parties after due contest and on the same issues and on same set of facts. If, however, there is a different cause of action with different set of facts then naturally the earlier decision would not operate as res judicata. ”

13. The substantial questions that arise, as such, are,

“ I) Whether the first appellate Court has committed error in holding that decision of the proceeding under section 125 of Code of Criminal Procedure operates as res judicata to the proceeding under section 18 of the Hindu Adoption and Maintenance Act ?

II) Whether the matter is liable to be remanded for re-adjudication to appellate court ? ”

14. The context in which the decision had been rendered in *Baburao Akaram Kalaskar's* case (supra), appears to have been missed out and not appreciated by the appellate judge. Obviously *Baburao Akaram Kalaskar's* case (supra) has been dealing with a situation which in a sense can be said to be a reverse case, wherein civil court

had already decided the *lis* during the pendency of proceedings under section 125 of Cr.P.C. and it is in that context, the decision had been rendered and observations had been made. It does not appear to be a case, wherein it can be said that it has been ruled that decision rendered in the proceedings pursuant to section 125 Cr.P.C. would be ever considered to put an end to civil proceedings for maintenance under sections 18 and 20 of Hindu Adoption and Maintenance Act, 1956. It further appears that though it has been observed that the proceedings under section 125 of Cr.P.C. essentially are of civil nature, yet, it has been further observed that these proceedings are expeditious and summary remedy for a party claiming maintenance. In the decisions in *Baburao Akaram Kalaskar's* case (supra), and, the supreme court in the case of *Nagendrappa Natikar Vs. Neelamma* (supra), it has been clearly observed that proceedings under section 125 of Cr.P.C. are summary in nature, intended to provide expeditious remedy to wife and others. It does not appear to be a case that it may can be said that the proceedings under section 125 of Cr.P.C. are a suit before a court competent to try the subsequent suit (present proceeding), in order to satisfy the requirements of *res-judicata*.

15. Having regard to the position as emerging, and, from the decisions referred to hereinabove, it appears that the appellate judge has fallen in error in disposing of the appeal, as being not

maintainable by giving finding on point no. 5. It does appear from the perusal of the judgment that no other points, although framed, have been applied mind to, and, effectively decided. Point no. 6, though decision is purportedly rendered on the same, the same loses significance in the facts and circumstances above, and, as such, the second appeal deserves to be allowed, and, the matter deserves to be remanded for reconsideration by the appellate court afresh, on merits. Substantial questions of law stand answered accordingly.

16. In view of the observations, as are appearing, it would be in the fitness of things that the civil appeal filed by the present respondent be taken up afresh for reconsideration on merits without getting baulked by the decision rendered in section 125 Cr.P.C. proceedings.

17. Impugned judgment and decree of appellate court dated 28-01-2014 in regular civil appeal no. 3 of 2012 stands set aside. The matter is remanded to District Court, Dhule. Regular civil appeal no. 3 of 2012 stands restored for decision afresh on merits before appellate court.

18. Second appeal is allowed accordingly.

[SUNIL P. DESHMUKH]
JUDGE

arp/