

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1736 OF 2017

Nandabai (Divorced)
W/o Dhondiram Karhale
Age: 51 years, Occ. Household,
R/o Deogaon, Tq. Purna,
Dist. Parbhani. ... **Petitioner**

Vs.

Dhondiram S/o Kishan Karhale,
Age: 56 years, Occ: Agri,
R/o Deogaon, Tq. Purna,
Dist. Parbhani. ... **Respondent**

Mr. Shaikh Wajeed Ahmed, Advocate for the Petitioner.
Mr. S.B. Ghatol Patil & U.M. Maske Patil, Advocates for the Respondent.

CORAM : MANGESH S. PATIL, J.

DATE OF RESERVING THE JUDGMENT : 06.08.2018
DATE OF PRONOUNCING THE JUDGMENT : 06.09.2018

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith.

2. The learned advocate for the respondent waives service.
With the consent of both the sides the matter is heard finally at the stage of admission.

3. This is a writ petition under Article 226 and 227 of the Constitution of India preferred by a divorced wife against her husband

being aggrieved and dissatisfied by the judgments and orders of the two Courts below in refusing her maintenance under Section 125 of the Code of Criminal Procedure.

4. The learned advocate for the petitioner submitted that the two Courts below have committed gross error in appreciating the pleadings and the evidence in the proper perspective. He would point out that contrary to the actual replies given by the petitioner during her cross-examination, the Courts below have taken the replies as admission by her about having accepted some money and property in lieu of her claim to maintenance. He would point out that no such admission was given by her and the statements will have to be considered in the context of the entire cross-examination. He would further submit that even the Courts below have committed a gross error in readily relying upon the testimony of the witness of the respondent to conclude that the petitioner has re-married after getting customary divorce from the respondent. He was clearly a got up witness and was unable to give all the particulars of the marriage he allegedly attended. Except his vague statements there was absolutely no material to conclude that the petitioner had re-married. Still the Courts below have accepted such vague testimony to reach such a conclusion. Though there are consistence findings of the facts of the two Courts, since both the orders are perverse, arbitrary and capricious, this Court should re-appreciate the evidence and should arrive at an independent conclusion. The

impugned orders be quashed and set aside and the petitioner may be awarded just maintenance.

5. The learned advocate for the respondent supported the observations and the conclusions of the Courts below. He would submit that the petitioner had relinquished her right of claiming maintenance by accepting some money and property. She has specifically admitted this fact during her cross-examination. Her conduct in selling the property subsequently corroborates such an inference. Besides, the evidence of the witness for the respondent duly established the fact of she having re-married. There was no fault on the part of the Courts in appreciating the evidence and in concluding that the petitioner had relinquished her right to have maintenance and had since re-married and was not entitled to claim any maintenance under Section 125 of the Code of Criminal Procedure. The learned advocate would further rely upon the decision of the single Judge of this Court in the case of **Sou. Rajashree @ Kalpana Ramchandra Desai (Deshmukh) V/s. Shri Ramchandra Shivaji Desai (Deshmukh) & Ors.; 2016 All MR (Cri) 816.**

6. I have carefully gone through the pleadings of the parties as also their testimonies. Normally when there are consistent findings of facts of the two Courts below this Court is not excepted to intervene by resorting to the scanning of evidence and to arrive at an independent

conclusion touching the facts. However, such a normal course admits of an exception where there is a gross error committed by the two Courts below in appreciating the evidence and the observations and the conclusion are perverse, arbitrary and capricious. In such an exceptional case this Court is excepted to scan the evidence and can arrive at an independent conclusions even on facts. In my considered view, this is the one instance where recourse to such a step has become imperative as would be demonstrated herein-after.

7. It is apparent that the respondent is resorting to two defences. Firstly, according to him, the petitioner while getting customary divorce in the year 1996 has accepted some land and money in lieu of her right to claim maintenance. Secondly, according to him, the petitioner has since re-married and becomes dis-entitled to get maintenance. Taking up the first defence, a careful perusal of his say (Exhibit-15) filed in the original proceeding would reveal that in paragraph no.9 he contended that in the year 1996 there was a divorce. At that time, a portion ad-measuring 80 Are from land Gut no.178 was transferred in the name of their daughter Bhagyashree and further an amount of Rupees Thirty Thousand was also paid. In paragraph no.11 he contended that the petitioner had on her own obtained the divorce and in lieu there of accepted an amount of Rupees Thirty Thousand and the land ad-measuring 80 Are was mutated in the name of daughter Bhagyashree and the petitioner was shown as her guardian. One fails to

understand as to how such a pleading can be considered as a plea regarding relinquishment of petitioner's right to claim maintenance. Nowhere it has been specifically and precisely alleged that the land and the money was given in lieu of her right to claim maintenance. It is only mentioned that it was in lieu of her claim to seek divorce that the money was paid and the land was mutated in the name of daughter Bhagyashree. Therefore, by no stretch of imagination such a pleading could have been considered as a specific and precise plea regarding relinquishment of right to claim maintenance. The learned Judges of the Courts below have clearly failed to treat such a pleading of the respondent as his say as a plea of relinquishment.

8. Now coming to the testimonies, a careful reading of the cross-examination of the petitioner would reveal that is to the effect that she admitted that while getting divorce from the respondent she had received Rupees Thirty Thousand and three acres of land and she has sold the land. Conspicuously, no suggestion was put to the effect that the money and the land was received by her in lieu of her right to claim maintenance. Not even a bald suggestion was put to her that she had relinquished her right. The two Courts below have also grossly erred in reading the testimony of the petitioner and particularly her cross-examination and have wrongly concluded that it constituted an admission by her about having relinquished her share when the replies given by her do not convey any such admission.

9. It is also important to note that as is demonstrated herein-above, without there being any specific pleading regarding relinquishment in the say of the respondent and without there being any suggestion having been put to the petitioner during her cross-examination, in the affidavit in lieu of examination-in-chief of the respondent, for the first time he stated that at the time of customary divorce the petitioner had accepted the land and the money as a permanent alimony. Obviously, his such statement has been contradicted on behalf of the petitioner during his cross-examination.

10. It is important to note that going by the state of affairs, it was a matter of oath against oath as far as the plea of relinquishment of right to claim maintenance by the petitioner. If really it was a customary divorce and the land was mutated and the money was paid, may be by way of permanent alimony, there must have been at least few witnesses to such happenings. However no attempt has been made by the respondent to examine any other witness. Therefore, merely because the land was mutated in the name of the daughter and the money was paid to the petitioner at the time of divorce, one could not have jumped to the conclusion that the money was paid in lieu of her right to claim maintenance. The observations and the conclusions of the Courts below in concluding that the petitioner had relinquished her right to claim maintenance by accepting the money is clearly perverse, arbitrary and

capricious. They have failed to appreciate the pleadings and the testimonies in their proper perspective.

11. Now coming to the plea of the respondent about the petitioner having re-married, perusal of the say of the respondent in the trial Court reveals that it is absolutely devoid of any particulars. He simply averred that after customary divorce she got re-married. Conspicuously, he did not name the person or even the place of his residence with whom she has remarried. For that matter, even during the cross-examination of the petitioner only a bald and vague suggestion was put that she re-married to a boy from Khandegao. Even the name of the boy was not suggested to her let alone the date and place of marriage. More importantly, even the respondent during his testimony did not come out with these particulars and was equally vague in stating that she had re-married with a boy from Khandegao.

12. In spite of such a stand till the testimony of the respondent was recorded, a person by name Babaram Tukaram Kusule was examined as a witness for the respondent and for the first time in his examination-in-chief he came out with the statements that after divorce from the respondent the petitioner solemnized marriage with one Baburao Deorao Kusale resident of Khandegaon, Taluka Basmath in the year 1997. It was solemnized at village Devgaon, Taluka Purna, District Parbhani and he had attended the marriage. Neither in the say nor in

his testimony the respondent had come out with these details and had not even disclosed that he had a witness who had attended the marriage. The testimony of this witness ought to have been received with utmost circumspection. During his cross-examination he failed to mention the date and time of the marriage or even could not name the priest or even the other persons who had attended the marriage. It is thus apparent that he was clearly a got up witness. When no such suggestion was put to the petitioner during her cross-examination about she having solemnized marriage with a specific person and when the respondent had also not disclosed the name it was highly suspicious as to how this witness could have come out with these particulars. Ignoring all these circumstances, the two Courts below have readily accepted the testimony of such a witness to conclude that the petitioner had re-married. They have clearly fallen in error in ignoring these facts and have committed gross error in appreciating the evidence in the proper perspective.

13. The quality of evidence led by the parties and particularly by the respondent was far from satisfactory much less to conclude that the petitioner had relinquished her right to claim maintenance by accepting the money and the property and that she had solemnized second marriage. The learned Judges having failed to appreciate the evidence have refused to award any maintenance to the petitioner. In my considered view, this is a fit case where this Court under writ

jurisdiction should intervene and should re-appreciate the evidence. The observations and the conclusions drawn by the Courts below are not sustainable in law and are liable to be quashed and set aside.

14. This takes me to the quantum of maintenance. The respondent is stated to be more than 60 years of age when his testimony was recorded in the year 2012 and must be around 66-67 years of age today. He has stated that he has no occupation while the petitioner is claiming that he has agricultural land and is also a journalist by occupation. However, there is absolutely no material to conclude about his occupation and income. Therefore, some guess work in this regard is inevitable. In my considered view, in the absence of concrete material, only as a vague estimate, the petitioner deserves to be awarded Rupees One Thousand per month from the date of the application and that would meet the ends of justice.

15. The Writ Petition is allowed. The impugned order passed by the learned Sessions Judge, Parbhani in Criminal Revision Petition No. 71 of 2013 dated 27.09.2017 dismissing it and thereby confirming the order passed by the learned Judicial Magistrate First Class, Purna in Misc. Application No. 17 of 2011 dated 03.05.2013 rejecting the application of the petitioner under Section 125 of the Code of Criminal Procedure is quashed and set aside. The Criminal Misc. Application No. 17 of 2011 is allowed. The respondent shall pay Rupees One Thousand

per month to the petitioner from the date of that application i.e. 15.02.2011 under Section 125 of the Code of Criminal Procedure and shall pay Rupees Five Thousand to her as costs.

16. The Rule is made absolute in the above terms.

(MANGESH S. PATIL, J.)

KAKADE