

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 291 OF 2016

Ayubkhan Ibrahim Mazgaonkar ... Petitioner

versus

State of Maharashtra
Samina Ayubkhan Mazgaonkar & Anr ... Respondents

Mr. Hemant V. Kenjalkar, a/w Ms. Minal Kamble, for the
Petitioner.

Mr. Rajan Salvi, APP for Respondent No.1/State.

Mr. Nikhil Patil, i/by Mr. P. M. Jadhav, for Respondent No.2.

CORAM : SMT. BHARATI H. DANGRE, J

DATE : 15th MARCH, 2018.

P.C. :-

1. The present revision application is filed by the Petitioner – husband being aggrieved by the judgment dated 24th February, 2016, passed by the Family Court, Nashik, on an application filed by the wife seeking maintenance under Section 125 of the Criminal Procedure Code ('CrPC', for short). The said application came to be filed in the year 2014, with a grievance that the husband has neglected to maintain the

wife as well as her son and she is unable to maintain herself. The Family Court, Nashik. on consideration of the material on record allowed the application and has directed the Petitioner to pay an amount of Rs.4,000/- per month towards maintenance of his wife from the date of the application and also directed to pay an amount of Rs.6,000/- per month towards the maintenance of Petitioner no.2, in the application i.e. the son and to cater his educational expenses from the date of application till he attains the age of majority.

This Hon'ble Court by a detailed order passed on 29th August, 2016, was pleased to admit said revision application and issued a direction to the Petitioner to deposit an amount of Rs.15,000/- in lumpsum with the Registrar of this Court within a period of eight weeks from the order. Interim stay was granted in terms of prayer clause (c) and till pendency of the case.

2. In pursuant to the said order, the amount as directed, has been deposited and the order has been complied with. The matter was listed before this Court on earlier two occasions and parties agreed to argue the matter finally and it

was taken up for final hearing and placed before the Court today for passing orders upon hearing the Counsel for the both sides.

The learned Counsel for the Petitioner would urge that the order passed by the learned Family Court, granting maintenance under Section 125 of CrPC is unsustainable in law on three counts. He would submit that the wife had preferred an application under Section 125 of CrPC, which resulted into a compromise being effected between the parties and disposal of the said application by the Judicial Magistrate, First Class, Nashik, on 15th January, 2003. In the light of the compromise effected between the parties, which was tendered before the Court, it was agreed that the husband would construct a house for the Petitioner within a span of one year from the date of filing of the compromise pursis and till then he would pay an amount of Rs.800/- per month to the Petitioners jointly. The learned Counsel would submit that he has abided by the undertaking in the compromise pursis and continued to make the payment of maintenance of Rs.800/- per month till the construction of the house. The learned Counsel would submit that

subsequent to the disposal of the application, second application was filed by the wife on 6th May, 2014, which resulted into passing of the impugned order, which is not sustainable. He also invites the attention of this Court to the fact that, after the house has been constructed by him in terms of the compromise pursis, the Petitioner has rented out the house and is in receipt of the rent from the said house and in such circumstances, he would pray for quashing and set aside the said order. Another ground raised by the learned Counsel for the Petitioner in assailing the impugned order is that the maintenance awarded to the son cannot be sustained, since the son had attained majority.

Per contra, the learned Counsel for the Respondent would submit that the filing of subsequent application under Section 125 of CrPC, when the first application has resulted in its disposal on account of compromise, would not bar second application being preferred and considered. According to the learned Counsel, the Petitioner has not abided by the terms and conditions in the said compromise pursis. The learned Counsel would submit that there is no bar under Section 125 of CrPC and, in fact, an application is permissible

and the competent Court can modify, reverse, or alter the order of maintenance meaning thereby that the legislature intended to take into consideration the change in circumstances and, therefore, even in the first application filed under Section 125 of CrPC is disposed of, it would not bar second application. The learned Counsel would not dispute that the date of birth of the son is 11th January, 1996 and that he has attained majority, which would dis-entitle him to claim maintenance under Section 125 of CrPC. The learned Counsel would also invited my attention to the conduct of the Petitioner and would argue that the Petitioner has failed to abide by the undertaking submitted before the Court, which resulted into disposal of an application filed under Section 125 of CrPC and according to him, the house was not constructed and handed over to the wife within a period of one year as undertaken and, in fact, he also refused to make a payment of Rs.800/- per month, which was undertaken, which resulted the wife being leading a life of destitution and vagrancy compelling her to take action under Section 125 of CrPC claiming maintenance for herself and her son.

3. With the assistance of the learned Counsel, I have perused the paper-book, which includes the earlier orders passed by the Court and also the evidence which has been brought on record before the Court in order to ascertain the stand of the parties. It can be seen that the application which came to be filed claiming maintenance under Section 125 of CrPC resulted into a compromise being effected between the parties and the terms of compromise contemplated that the husband will construct a house for the Petitioner within a span of one year and till that period he would pay an amount of Rs.800/- per month jointly to the Petitioners. On query from both the parties as to what is the actual date on which the house was constructed and as to the date since when the Respondent – wife is put into possession of the said house nothing has been brought on record either before the Court below or before this Court. The Petitioner has placed on record certain documents in relation to the payment of property tax for the year 2014-2015. Perusal of the application filed by the wife under Section 125 of CrPC contains a categorical statement made by the wife that from 1997 he is not residing in the matrimonial home and in view of the

conduct and behaviour of the Petitioner, she was compelled to leave her matrimonial house and there was utter failure on the part of the Petitioner - husband to cohabit with the Respondent and he was not even prepared to arrange for day to day expenses. In the said application, which is filed on 6th May, 2014, first time an allegation has made that there is no compliance of the compromise pursis filed between the parties to the effect that the Petitioner has failed to honour the commitment of payment of Rs.800/- per month as undertaken. The Respondent – wife has attempted to put up a new case before the Court and alleges that it was agreed by the Petitioner that after construction of the house he would start residing there with the wife, but he is not abiding by the said terms and conditions and even has not bothered to pay the amount of maintenance. The application is, however, conspicuously silent as from what date she was put into possession of house. It is alleged in the application that the Petitioner is a Civil Engineer and is earning an amount of Rs.32,000/- to Rs.35,000/- per month and apart from this he is also working as an estate agent, which makes him to entitle for an income about Rs.1 lakh to Rs.1.5 lakh per month.

Based on this, the maintenance has been claimed to the tune of Rs.20,000/-per month for herself and Rs.25,000/- per month for her son.

The Respondent – wife has tendered her evidence on Affidavit before the Court, where she was subjected to cross-examination. Both the learned Counsel would place heavy reliance on the cross-examination. In the cross-examination, the Respondent – wife gives a categorical admission that she has not filed any petition for restitution of conjugal rights, however, she denies that it is not true that she is not willing for cohabitation. She admits and also denies the suggestion that house was constructed and handed over to her. The cross-examination of the husband is also carefully perused and he also makes a categorical statement that the Respondent – wife is residing separately since 1997 and inspite of strenuous efforts by him, she was not ready to cohabit. Then a statement is made that he has constructed a house for her and has put her in possession and, thereafter, he had re-married and his son and second wife are dependent on him. He would also specifically give the details about his manner of earning and denied the allegation that he is

earning amount of Rs.1 lakh to Rs.1.5 lakh per month as alleged by the Respondent – wife.

Attention of the Court is also invited to the proceedings initiated under Section 12 of the Domestic Violence Act, 2005, by the Respondent – wife in the Court of Judicial Magistrate, First Class, Nashik, vide Criminal Proceeding No.549 of 2008, which has resulted into its disposal by order dated 20th June, 2015. Perusal of the said order reveals that the dismissal is on the ground that before coming into force the Act, the wife had left the matrimonial home and is not residing with the husband. A finding has been recorded by the Court that since the year 1997, she is residing separately by the husband. The fact of separate residence by the wife is admitted by the Petitioner, who is Respondent in the said application. I do not wish to go into the correctness of the said order, in the light of the submission of the decision of the Apex Court, as to whether the domestic violence existing before coming into force the enactment and merely because of wife is residing separately would bar for the wife to invoke the proceedings under Domestic Violence Act. I would refer this proceedings only to the limited purpose, since it is admitted by both the

parties that since the year 1997, the Respondent – wife is residing separately from the husband.

4. Perusal of the order passed by the Family Court under Section 125, which is the impugned, proceeds on a footing which is quite strange. The contention of the Respondent – wife has been accepted and the learned Judge after referring to the evidence of the wife picks up one statement from the evidence about the second marriage of the Petitioner – husband and makes an observation that the personal law may permit the non-applicant to perform second marriage and the performance of the second marriage itself is a sufficient ground for the Respondent – wife to reside separately and claim maintenance. The learned Judge fails to take into consideration the specific averments of the parties even a statement made by the Respondent – wife that she is residing separately from the year 1997, on account of the alleged harassment faced by her. The learned Judge, Family Court, did not even bother to enquire as when second marriage was performed. On enquiry, the learned Counsel for the Petitioner on instructions from the Petitioner, who was present in the Court, has made categorical statement that

second marriage was performed in the year 1999. In any contingency, it was revertible case that the Respondent – wife, who started residing separately from the year 1997 that it was on account of the second marriage of the husband. The learned Judge has recorded a finding which is based on no evidence and hence the finding recorded in paragraph 12 of the order is perverse and cannot be sustained.

As far as maintainability of the second application is concerned, it is an accepted position of law that the provision of *res judicata* would be applicable to the criminal proceedings. However, what is to be seen is whether the second application in the peculiar facts and circumstances is maintainable or not. The Respondent – wife had filed an initial application which resulted into its disposal by an order dated 15th January, 2003, in view of a compromise pursis filed between both the parties. The learned Judge would have adjudicated upon the merits of the matter, however, since both the parties agreed that inspite of a monthly maintenance, the Petitioner – husband would construct a house for her. The terms of compromise pursis which are placed on record makes it ample clear that what was agreed

was payment of maintenance at the rate of Rs.800/- per month. Material on record reflects that the payment has been made from February, 2003 to September, 2003 and that has been accepted by the Respondent – wife, However, it is a specific contention of the wife that subsequently the amount was not paid. Moreover, Respondent did not make any grievance at any point of time as regard the non-payment of the amount. She kept mum and probably for the reasons that she was put in possession of the house. This inference is required to be drawn since none of the parties have placed on record any document to show the date when construction of the house was completed and since what date she was residing in the said house. In any event, the Respondent – wife did not make any grievance about non-payment of the amount of Rs.800/- per month and it was only when she filed an application on 6th May, 2014, she makes an allegation that an amount has not been paid. It was open for the Respondent – wife to take appropriate proceedings from the year 2004 to 2014 in regard to the recovery of the said amount. However, the contention of the learned Counsel for the Petitioner that the second application under Section 125 of CrPC is not

maintainable in these peculiar circumstances is not accepted. On perusal of the provisions contained in Section 125 CrPC would reveal that it is a beneficial provision made for the welfare of the wife and the dependent including the other family members like the children. However, it is amply clear that the Court awarding the maintenance do not become *functus officio* after grant of maintenance therefore Chapter IX contains provisions which stipulated modification and alteration of the maintenance if there is any change of circumstances and they are brought to the notice of the Court on which the order can be either modified, cancelled or even an enhanced maintenance can be granted. The Respondent has chosen not to take any steps for modification of the order. However, as far as maintainability of the second application is concerned, it can be seen that the first application came to be compromised and disposed of. The intention of the legislature is to permit an application for modification of maintenance, which is already been granted by subsequently if the applicant invites the attention of the Court to the changed circumstances. The learned Counsel for the Petitioner had argued that it is only possible when an amount of

maintenance has been paid on this ground by the court, the principle would apply. However, there may be several circumstances when a wife's claim of maintenance initially rejected on the ground that the wife has certain earning capacity and she is making good earning. Therefore, application under Section 125 of CrPC is rejected. However, subsequently proceeding on account of laps of time or certain changed circumstances, the wife meets with an accident and is unable to earn a living and is totally incapacitated from earning a living. In such circumstances, it cannot be said that second application is completely barred. The beneficial provisions cannot be so strictly construed since the law expects the Court to take note of the subsequent developments, which are taken place as far as relation between the parties husband and wife are concerned, specifically in the backdrop of Section 125 of CrPC, they may undergo a change and in such circumstances to observe and to conclude that second application is completely barred, cannot be said to true interpretation of Section 125 of CrPC. The learned Counsel for the Respondent has rightly placed reliance on the judgment of this Court in the case of *Sunanda*

Chandrakant Karanjkar vs. Chandrakant Bhaskar Karanjkar & Anr, reported in 1988 Mah LJ 610, in support of his contention that second application under Section 125 of CrPC is maintainable which fortifies the view of this Court, there is no bar in filing the subsequent application under Section 125 of CrPC.

5. In such circumstances, it is held that second application preferred by the wife is maintainable and has been rightly entertained. However, it will have to be seen whether the wife was entitled for the grant of maintenance by the impugned order. The most important word contained in Section 125 of CrPC under which a maintenance has been granted is the wording “if any person having sufficient means neglects or refuses to maintain (a) his wife who is unable to maintain herself.” An order of maintenance under Section 125 (1) of CrPC can be passed if two conditions are satisfied (a) having sufficient means neglects or refuses to maintain and (b) the wife is unable to maintain herself.

6. Perusal of the evidence on record clearly reveals that the wife has categorically admitted that she had left the company

of the husband since 1997 and since then she is residing separately. Perusal of her complaint filed before the Court as well as the evidence on record would reveal that she alleged physical and mental harassment at the instance of the husband and she was compelled to reside separately since year 1997. This fact is not in dispute that the parties are residing separately since 1997. The parties belong to Muslim religion and after the wife started residing separately, the Petitioner – husband has solemnized second marriage in the year 1994 and is residing with his wife. Though it is not clear from the record as to when the Respondent – wife was put in possession of the house, it is no doubt admitted fact that when the application came to be decided, the Respondent – wife was in possession of the house and in the evidence rendered by the parties it has come on record that she has rented the premises and is receiving the rent. In any contingency whatever is agreed between the parties, it is not the case of the Respondent that no house was constructed and she was not put in possession. What is actual date on which she was put in possession is not on record and Respondent has not bothered to bring on

record said date and no Affidavit makes a reference to it. However, one thing is clear that the husband has constructed the house and put the wife in possession, since the statement is made in the application that she was put in possession of the house but which was not in locality in which she desired it to be. Thus the Petitioner – husband has handed over the house to the wife and the address reflecting in the cause-title of the petition before this Court would reveal her address to be Flat no.4, Saidarshan Apartment, Pakhal Road, District Nashik. It is a disputed question of fact which cannot be decided by this Court at this stage as to whether the Respondent herself is residing in the house or she has rented the said premises, though attempt has been made by the learned Counsel for the Petitioner to demonstrate that she has rented the premises and receiving rent from the said amount. During the course of the proceedings before the Lower Court, two independent witnesses have categorically stated that they have been residing in the said premises on rent. However, what actual rent was received is not brought on record but surely certain amount is received, since no person would permit to occupy

the house, free of costs.

7. The most important ingredient of Section 125 of CrPC being whether the husband has neglected to maintain the wife is to be established. Perusal of the proceedings before the Court below would reveal that husband has honoured the commitment before the Court below but since the Respondent would submit that Rs.800/- per month was not paid by the Petitioner, it was open for the Respondent to take out appropriate proceedings at proper stage. However, she did not make any grievance. The husband has put his entire amount of money from his earnings and purchased a plot and constructed house for the wife as per his commitment. In these circumstances, the wife cannot be said to be neglected neither it is the case of the Respondent that he has not taken her case and except barring few statements where she discloses that he did not cater to her daily needs. However, it appears that if she was placed in possession of house by the husband constructed for her, specifically since 1997 she was not residing with her husband. In such circumstances, it cannot be said that the Petitioner has neglected to maintain his wife. As far as source of earning of the husband is

concerned, the learned Court has completely erred in making the observations without any evidence. There is no evidence adduced by the Respondent on record to reveal the earning of the Petitioner and specifically to demonstrate the contention that he is a Civil Engineer. On the other hand, the Petitioner was cross – examined about details of his earning and it has come on record that he has to maintain his second wife and his son and his old mother. In such circumstances, impugned order passed by the Family Court, which directs payment of maintenance of Rs.4,000/- per month to the wife cannot be sustained and is liable to be set aside. Further that portion of the order by which the Court had directed the non-applicant to pay the maintenance of Rs.6,000/- per month towards son also cannot be maintained, since the son has attained majority, as such he is not entitled for being maintained.

8. In the aforesaid circumstances, Revision Application is allowed. The impugned order is quashed and set aside. Rule is made absolute.

9. At this stage, the learned Counsel for the parties invited my attention to the order dated 29th August, 2016 passed by

this Court while admitting the revision application. By the said order the Petitioner was directed to deposit an amount of Rs.15,000/- in lumpsum with the Registrar of this Court within a period of eight weeks from the order. In pursuant to the said direction, the amount has been deposited and is lying with the Registry of this Court. In view of the Criminal Revision Application No.291 of 2011 being allowed and the impugned order being set aside, there is no question of this amount being disbursed in favour of the Respondent. Since the amount is lying with the Registrar of this Court, the Petitioner is permitted to withdraw the said amount.

[SMT. BHARATI H. DANGRE, J]