

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

CRIMINAL REVISION APPLICATION NO.164 OF 2017

Bhooshan Suryakant Kale

...Applicant

Vs.

Sou Anita Bhooshan Kale & Ors.

... Respondents

.....

Mr. Ashok B. Tajane for the Applicant.

Mr. Nilesh J. Mohite I/b Mr. J. D. Mane for the Respondent No.1.

.....

CORAM : G.S. KULKARNI, J.

DATE : JANUARY 17, 2018.

Oral Judgment:

1. Heard learned counsel for the applicant and learned counsel for the respondent.
2. The challenge in this application is to the order dated 23rd September 2015, passed by the learned Family Court at Solapur, whereby, the petition of the respondent-wife under section 125 of the Cr. P.C. has been allowed in the following terms:

- “1. The petition is partly allowed.
2. The respondent is hereby directed to pay Rs.5000/- to the petitioner no.1 and Rs.3000/- to petitioner no.2 towards maintenance from 1.7.2014 till further order.
3. The amount of maintenance if paid shall be deducted from recovery.
4. The respondent is directed to clear the arrears in 12 equal installments.
5. The first installment shall fall one month after the date of order.
6. The respondent shall bear his own cost and shall pay

Rs.1000/- separately towards cost of the proceeding within one month from today.

7. The respondent is directed to deposit the amount as above in the designated account of the petitioner no.1 on or before 10th day of each month as per English Calendar.

8. copy of Judgment be given free of costs to the petitioners as per Sec.128 of Cr. P.C.”

3. Mr. Tajane, learned counsel for the applicant in assailing the impugned order has made following submissions before the court. Firstly, he contends that the application of respondent no.1 under section 125 of Cr.P.C. was opposed by the applicant-husband on the specific ground that prior to the marriage of respondent no.1 with the petitioner, respondent no. 1 was married and that there was no valid dissolution of the said marriage and thus the marriage of respondent no.1 with the petitioner itself was illegal. It is thus submitted that the application of respondent no.1 under section 125 of Cr. P.C. itself was not maintainable. The second ground on which the impugned order has been challenged is that on the day on which the impugned order was passed, his advocate was not present and that though the application of respondent no.1 was pending since long time i.e. from the year 2010 and that the reply to the said application on merits was filed by the applicant, the court ought not to have proceeded in the absence of the advocate. It is next submitted that in the reply filed before the Family Court, it was pointed out that the applicant is not in

a position to meet the claims of maintenance as made by respondent no.1, in as much as the applicant was also required to bear the responsibility of his sons from the previous marriage and also an old mother who is suffering from Cancer.

4. On the other hand, learned counsel for respondent no.1 has supported the order passed by the trial Court and submits that the respondent had no source of income. She was also not much educated so as to secure an employment and earn her livelihood and that of the minor son whom she was looking after. In regard to the first plea, as urged on behalf of the applicant it is submitted that the Family Court has appropriately dealt with in the impugned order and the court has found substance in defence as raised on behalf of respondent no.1. It is submitted that as regards the contention of the applicant that respondent no.1 was not legally wedded wife and/or that the marriage itself was illegal was wholly misconceived and false, in as much as the applicant had earlier instituted proceedings for declaration that the marriage is illegal. However later on, the said proceeding was withdrawn and there was neither valid declaration of any court to support the said contention nor any other material on record. My attention has been drawn to the reply of respondent no.1 filed before the Family Court to show that the application itself is vague and

misconceived and there is no supporting material to substantiate such contentions of the applicant.

5. Having heard the learned counsel for the parties and having perused the documents placed on record as also the impugned order, I am not persuaded to accept the submissions as made on behalf of the applicant. As regards the contention of the petitioner that the marriage with the respondent itself is illegal as the respondent's earlier marriage was not annulled and therefore application under Section 125 of the Cr.P.C. of respondent no.1 was not maintainable, in my opinion this contention has been rightly rejected by the learned judge of the Family Court. There was no dispute that the applicant was married to the respondent and from the wedlock respondent no.2 child was born. Learned trial judge in paragraph 5 and 11 of the impugned order has clearly observed that the applicant had filed a petition for declaration of nullity of marriage with respondent no.1, however the said petition was withdrawn. Thus there cannot be any infirmity in the finding recorded by the learned Trial Judge in rejecting such assertion as made on behalf of the applicant that respondent no.1 is not legally wedded wife of the applicant. When such contentions are raised the law in the context of the provisions of section 125 of the Cr.P.C. is well settled.

6. In *Dwarika Prasad Satpathy v. Bidyut Prava Dixit*¹, the Supreme Court held that the validity of the marriage for the purpose of summary proceeding under Section 125, Cr.P.C. is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceeding is not as strict as is required in a trial of offence under Section 494 of the I.P.C. If the claimant in proceedings under Section 125 of the Code succeeds in showing that she and the respondent have lived together as husband and wife, the Court can presume that they are legally wedded spouses, and in such a situation, the party who denies the marital status can rebut the presumption. It was held that once it is admitted that marriage procedure was followed then it is not necessary to further probe into whether the said procedure was complete as per the Hindu rites in the proceedings under Section 125, Cr.P.C. The Supreme Court in paragraph 9 and 10 has observed thus:

“9. It is to be remembered that the order passed in an application under Section 125, Cr.P.C. does not finally determine the rights and obligations of the parties and the said section is enacted with a view to provide summary remedy for providing maintenance to a wife, children and parents. For the purpose of getting his rights determined, the appellant has also filed a Civil Suit, which is pending before the trial Court. In such a situation, this Court in S. Sethurathinam Pillai v. Barbara alias Dolly

1 AIR 1999 SUPREME COURT 3348

Sethurthinam, (1971) 3 SCC 923, observed that maintenance under Section 488, Cr.P.C., 1898 (similar to Section 125, Cr.P.C.) cannot be denied where there was some evidence on which conclusion for grant of maintenance could be reached. It was held that order passed under Section 488 is a summary order which does not finally determine the rights and obligations of the parties; the decision of the criminal Court that there was a valid marriage between the parties will not operate as decisive in any civil proceeding between the parties.

10. *After not disputing the paternity of the child and after accepting the fact that marriage ceremony was performed, though not legally perfect as contended, it would hardly lie in the mouth of the appellant to contend in proceeding under Section 125, Cr.P.C. that there was no valid marriage as essential rites were not performed at the time of said marriage. The provision under Section 125 is not to be utilized for defeating the rights conferred by the Legislature to the destitute women, children or parents who are victims of social environment. In Ramesh Chander Kaushal v. Mrs. Veena Kaushal, AIR 1978 SCC 1807 : 1979 Cri LJ3) Krishna Iyer, J. dealing with interpretation of Section 125, Cr.P.C. observed (at para 9) thus:-*

“This provision is a measure of social justice and specifically enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible

to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts.””

7. In ***Badshah v. Sou. Urmila Badsha Godse & Anr.***², the Supreme Court has held it to be well settled that Section 125 of the Cr.P.C deals with an application of the destitute wife and unfortunate children. The court deals with such marginalized sections of the society. The provision thus deals with the cause of social justice and its advancement and to achieve equality and dignity of the individuals.

The Supreme Court in paragraph 17 and 25 to 27 has observed thus:

17. Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125, Cr.P.C. While dealing with the application of the destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve “social justice” which is the Constitutional vision enshrined in Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap

between the law and society.

25. *Thus while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon's, (1854) 3 Co.Rep.7a, 7b, case which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction ut res magis valeat quam pereat, in such cases i.e. where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125, Cr.P.C., such a woman is to be treated as the legally wedded wife.*

26. *The principles of Hindu Personal Law have developed in an evolutionary way out of concern for all those subject to it so as to make fair provision against destitution. The manifest purpose is to achieve the social objectives for*

making bare minimum provision to sustain the members of relatively smaller social groups. Its foundation spring is humanistic. In its operation field although, it lays down the permissible categories under its benefaction, which are so entitled either because of the tenets supported by clear public policy or because of the need to subserve the social and individual morality measured for maintenance.

27. *In taking the aforesaid view, we are also encouraged by the following observations of this Court in Capt. Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70 : (AIR 1978 SC 1807).*

“The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts.””

Adverting to the above principles of law there cannot be two opinions that the application of the respondents under section 125 of the Cr. P.C. was maintainable.

8. Mr. Tajane, learned counsel for the applicant however in supporting the contention that there was an existing marriage of the respondent at the time of the applicant's marriage with the respondent no.1 and therefore the marriage of the applicant with respondent no.1 would be nullity, relied on the decision of the Supreme Court in the case of **Savitaben Somabhai Bhatiya V/s. State of Gujarat and**

Others³. The facts in the said decision pertained to the respondent-husband marrying the appellant-wife during the subsistence of an earlier marriage solemnized with one Veenaben about twenty five years prior to the marriage in question. This position stood proved on evidence. It is in this context the court has made the following observation as relied by the learned counsel for the petitioner in paragraph 8 of the decision.

“There may be substance in the plea of learned counsel for the appellant that law operates harshly against the woman who unwittingly gets into relationship with a married man and Section 125 of the Code does not give protection to such woman. This may be an inadequacy in law, which only the legislature can undo. But as the position in law stands presently there is no escape from the conclusion that the expression “wife as per Section 125 of the Code refers to only legally married wife.”

There cannot be any dispute on the proposition as referred in paragraph 8 of the said decision that expression as per section 125 Cr. P.C. refers to only legally married wife. However, the facts of the present case as discussed above do not justify the application of this decision.

9. It is not in dispute that the marriage of applicant had taken place on 28.10.2005 with respondent no.1 and from the said marriage, one son is born. Respondent no.1's application under section 125 of Cr. P.C. was filed on 12.3.2010. It is clear that the adjudication of the

3 (2005) 3 Supreme Court Cases 636

same was delayed for almost five years and same came to be decided by the impugned order on 23.9.2015. As regards the submission that the applicant is required to maintain his two sons and old mother who is suffering from Cancer and thus it is not possible for the applicant to pay maintenance to the respondent also cannot be accepted. In paragraph 12 of the impugned order, the learned judge of the Family Court has appropriately observed that the gross salary of the petitioner was Rs.42,825/- and the salary in hand was about Rs.38000/-. To substantiate the plea that it is totally unreasonable for the applicant to make payment of the maintenance of Rs.5000/- to respondent no.1 and Rs.3000/- to the respondent no.2/son as granted by the impugned order, the applicant had not placed any material before the court, which would weigh with the court to award a lesser amount of maintenance.

10. As regards the contention as urged by the applicant that the Family court ought not to have proceeded in the absence of the advocate for the applicant, in my opinion, this plea cannot be accepted, firstly for the reason that the proceedings before the trial Court were summary proceedings under section 125 of Cr. P.C.. The applicant had filed an exhaustive reply on every contention as urged on behalf of the respondent-wife. Thus merely contending that the advocate was not

present would not be an acceptable argument. The applicant was interested in further delaying the proceedings. The learned judge in paragraph 15 has clearly observed that the proceedings under section 125 although summary in nature had remained pending for an unreasonable period of five years and thus considering the over all facts and circumstances, the pleading of the parties being complete, there was no impediment for the trial Court to proceed and decide the application more particularly when there was already an unreasonable delay in deciding the claim of the maintenance of the respondent. It cannot be overlooked that for want of maintenance the respondents were kept suffering for almost five years. The applicant was never interested in early disposal of the respondent's application seeking maintenance. This approach of the applicant has been rightly perceived and was dealt by the learned trial judge. It cannot be disputed that for any unwarranted cause the proceedings could not have been delayed as also the delays are required to be sternly dealt to achieve the object of the legislative provision in question which directly concerns the livelihood of a destitute person.

11. In view of the above discussion, revision application is dismissed with costs.

(G.S. KULKARNI, J.)