

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.3439 OF 2016

Ramchandra Laxman Kamble

...Petitioner

vs.

Shobha Ramchandra Kamble And Anr.

...Respondents

.....

Mr. Sandeep S. Koregave, for the Petitioner.

Mr. Nagesh Chavan, a/w. Mr. Nikhil Pawar, for Respondent No.1.

.....

CORAM : M. S. SONAK, J.

DATE : DECEMBER 21, 2018

ORAL JUDGMENT:

. Heard Mr. Sandeep Koregave for the Petitioner-husband and Mr. Nagesh Chavan for Respondent No.1.

2. The challenge in this petition is to the orders dated 13 October 2011 and 31 January 2013 passed by the Judicial Magistrate, First Class and Additional Sessions Judge rejecting the Petitioner's contention that the Respondent's application seeking maintenance under Section 125 of Cr.P.C. be dismissed or be not proceeded with, since, the Respondent had specifically waived her right to claim for any maintenance.

3. Mr. Koregave, learned Counsel for the Petitioner, submits that in lokadalat proceedings, the Petitioner and Respondent No.1 filed a consent pursis, in which they not only agreed to dissolve from marriage, but also agreed not to claim any maintenance from each other. Based upon such pursis, Civil Judge, Senior Division of Sangli made a decree for

divorce by incorporating agreement arrived at between the parties in the pursis submitted before the lokadalat.

4. Mr. Koregave points out that the Respondent-wife made false allegations that her consent was obtained by fraud, and on such basis, appealed to the District Court to set aside the consent decree made by Civil Judge, Senior Division at Sangli. Such appeal was dismissed as not maintainable in view of the provisions in Section 96(3) of the Civil Procedure Code. Against such dismissal, the Respondent instituted Writ Petition No.1931 of 2012, which was also dismissed by this Court vide order dated 15 October 2012. However, this Court, granted liberty to the Respondent to take out proceedings before the Civil Judge, Senior Division at Sangli to seek recall of the consent decree.

5. Mr. Koregave submits that he is not sure whether any such proceedings have been taken out by the Respondent. However, he submits that as yet the consent decree stands and has not been set aside. He, therefore, submits that in terms of the agreement recorded in the consent decree, the Respondent, having waived her right to receive maintenance, cannot now maintain an application under Section 125 of Cr.P.C. He submits that Respondent's application under Section 125 of Cr.P.C. was, therefore, required to be dismissed, or, in any case, stayed until Civil Judge, Senior Division at Sangli decides the issues as to whether the consent decree is liable to be recalled or set aside.

6. Mr. Chavan, learned Counsel for Respondent No.1-wife, submits that a consent decree in the present case, was a result of fraud, and, therefore, the Respondent has already taken out Miscellaneous

Application No.229 of 2012 before the Civil Judge, Senior Division at Sangli for recall of the same or at least recall of the term relating to alleged waiver of the right to receive maintenance. Such application has been taken out in pursuance of liberty granted by this Court in its order dated 15 October 2012 passed in Writ Petition No.1931 of 2012.

7. Mr. Chavan submits that irrespective of pending Miscellaneous Application No.229 of 2012, and the so called consent decree, any agreement for waiver to receive maintenance is void, since, it is opposed to public policy. He submits that there can be no agreement in derogation of the provisions of Section 125 of Cr.P.C., since, such provisions have been designed as a matter of public policy to protect against destitution and vagrancy.

8. Mr. Chavan relies upon several decisions to point out that even assuming that right to claim maintenance was voluntarily given up by the wife, that by itself does not bar the wife from seeking maintenance, provided the circumstances prescribed in Section 125 of Cr.P.C. stands fulfilled. For these reasons, Mr. Chavan submits that there is absolutely no error in the impugned orders and this petition may, therefore, be dismissed.

9. Rival contentions now fall for determination.

10. In the present case, it does appear that a joint pursis was filed by the Petitioner and Respondent No.1 before the lokadalat to dissolve their marriage. In the pursis, there is a line, which states that both parties give up their rights to claim maintenance against one another. Based upon

such pursis, Civil Judge, Senior Division at Sangli in Hindu Marriage Petition No.48 of 2009 made a consent decree, in which, even the term about the parties giving up their rights to claim maintenance against each other appears to be recorded.

11. Admittedly, Respondent No.1 has taken out Miscellaneous Application No.229 of 2012, which is pending before the Civil Judge, Senior Division at Sangli, seeking recall of the consent decree at least to the extent it records that Respondent No.1 is giving up her right to seek maintenance from the Petitioner. It is the case of Respondent No.1 that there was no such agreement between the parties and the line recording the giving up of rights to give maintenance was inserted fraudulently in the joint pursis filed in the lokadalat. However, the fact remains that as yet the consent decree or the term in the consent decree in relation to maintenance stands.

12. The consent decrees made by the courts are in effect of nothing but contracts with the seal of the court super-added to them. Accordingly, if the term of the contract is itself opposed to public policy then, such term, is void and unenforceable. If the term is severable then, only the term can be declared as void. If the term is not severable, then, perhaps, the entire contract may fall.

13. There are several rulings, which take the view that an agreement, in which the wife gives up or relinquishes her right to claim maintenance at any time in the future, is opposed to public policy and, therefore, such an agreement, even if voluntarily entered, is not enforceable. The two courts in the present case have basically relied upon

such rulings and held that even if it is assumed that the parties had voluntarily agreed to give up their time to claim maintenance from each other, such agreement is opposed to public policy and, therefore, the same is not enforceable, or the same does not bar the maintainability of an application under Section 125 of Cr.P.C. There is no jurisdictional error in the view taken by these two courts so as to warrant interference under Article 227 of the Constitution of India.

14. In **Shahnaz Bano d/o Aslam Khan (Smt.) vs. Babbu Khan s/o Nanhekhan Pathan & Another**¹, learned Single Judge of this Court has held, considering the trend of decisions of different courts in India and the Supreme Court, that he was firmly of the view that even in a case covered by Clause (c) of Section 127 (3) of Cr.P.C., where the wife has surrendered her rights voluntarily, in a given case, if after waiving her rights to maintenance, she becomes vagrant and destitute and is unable to maintain herself, then irrespective of her personal law, she would be entitled to avail statutory remedy for maintenance under Section 125 of Cr.P.C.

15. In **Rameshwar s/o Sandu Kachkure vs. State of Maharashtra & Anr.**², another learned Single Judge of this Court has taken a view that an agreement, by which the wife relinquishes her right to receive maintenance any time in future, is contrary to public policy and consequently unenforceable.

16. In **Tejaswini d/o Anandrao Tayade And Anr. vs. Chandrakant Kisanrao Shirsat And Anr.**³, another Single Judge of this

1 1985 Mh.L.J. 853

2 2018(4) Mh.L.J.(Cri.)

3 2005(3) Mh.L.J. 137

Court refused to reject an application under Section 125 Cr.P.C. on the ground that wife in the customary divorce deed and consent deed executed by her relinquished her claim for past and future maintenance. To the same effect are the observations of a learned Single Judge of Allahabad High Court in **Mahesh Chandra Dwivedi vs. State of U.P. & Anr.**⁴

17. In **Rajesh R. Nair vs. Meera Babu**⁵, Division Bench of Kerala High Court has held that an agreement, by which the wife waived her right to claim maintenance, would be a void agreement as against public policy. Such an agreement would amount to ousting of jurisdiction of Magistrate and Family Court to entertain maintenance claim, which cannot be permitted by law. Therefore, the claim for maintenance cannot be rejected on the basis of such agreement of waiver of right to maintenance.

18. In the aforesaid case, the Division Bench of the Kerala High Court relied upon the ruling of the Apex Court in **Bai Tahira vs. Ali Hussain Fidaalli Chothia and Anr.**⁶, in which Apex Court rejected the defence based upon mehar payment to the divorced Muslim wife. The Apex Court held that the contractual limb of the contention must easily fail. The consent decree of 1962 resolved all disputes and settled all claims then available. But here is a new statutory right created as a projection of public policy by the Code of 1973, which could not have been in the contemplation of the parties when in 1962, they entered into a contract to enter their then mutual rights. No settlement of claims, which does not have the special statutory right of the divorce under Section 125, can operate to negate that claim. The Apex Court proceeded to hold that even Section 127 of Cr.P.C. cannot rescue the husband from his obligation.

4 2009 All MR (Cri.) Journal 182

5 2013 CRI. L.J. 3153

6 (1979) 2 Supreme Court Cases 316

Payment of mehar money, as a customary discharge, is within the cognizance of that provision. But mehar money in Rs.5000/-, interest from which could not even keep the woman's body and soul together for a day, even in a City where 40% of the population is reported to be living on pavements, unless she was ready to sell her body and give up her soul. The Apex Court adverted to the scheme of the complex of provisions in Chapter IX of Cr.P.C., which has a social purpose. Ill-used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of Section 127. Where the husband, by customary payment at the time of divorce, has adequately provided for the divorcee, a subsequent series of recurrent doles is contra-indicated and the husband liberated. This is the teleological interpretation, the sociological decoding of the text of Section 127. The key-note though is adequacy of payment which will take reasonable care of her maintenance.

19. In **R. Rambilas vs. Ms. Anita and Another**⁷, a learned Single Judge of the Andhra Pradesh High Court has held that a wife's claim for maintenance cannot be defeated by any agreement not to claim any maintenance. Even divorced wife is entitled to maintenance so long as she remains unmarried and unable to maintain herself. Mere divorce does not end right to maintenance. A clause in an agreement that wife shall not be entitled to claim maintenance from husband cannot be used in proceedings under Section 125 of Cr.P.C., since, such clause is opposed to public policy and, therefore, void under Section 23 of the Contract Act.

20. Division Bench of the Punjab and Haryana High Court in the

7 2009 All MR (Cri) Journal 232

case of **Ranjit Kaur vs. Pavittar Singh**⁸, has held that maintenance is a statutory right, which the legislature has framed irrespective of nationality, cast or creed of the parties. The statutory liability under Section 125 is, therefore, distinct from the liability under any other law. Therefore, the statutory right of a wife of a maintenance cannot be bartered, done away with or negated by the husband by setting up an agreement to the contrary. Such an agreement in addition to it being against public policy would also be against the clear intendment of this provision. Therefore, giving effect to an agreement, which overrides this provision of law, that is, Section 125 of Cr.P.C. would tantamount to not only giving recognition to something, which is opposed to public policy, but would also amount to negation of it. The law makes a clear distinction between a void and illegal agreement and void but legal agreement. In the former case, the legislature penalizes it or prohibits it. In the latter case, it merely refuses to give effect to it. This is what exactly Section 23 of the Contract Act provides for. Thus, the agreement, whereby this statutory right of wife to maintenance was relinquished, may not *per se* be illegal, but it cannot be given effect to being a negation of the statutory right as provided for in this section and being opposed to public policy. However, Clauses (b) and (c) of Section 127(3) do not annihilate or defeat the right of the wife's future maintenance.

21. Taking into consideration the aforesaid legal position, there is no reason to interfere with the views taken by the two courts in the present matter.

22. The learned Counsel for the Petitioner also contended that

8 1992 CRI. L.J. 262

Respondent No.1 is not entitled to any maintenance in view of Section 25(4) of the Cr.P.C. He submits that one person has already been convicted under Section 497 of the Indian Penal Code for having committed adultery with Respondent No.1. He, however, submits that this ground was not available to the Petitioner earlier and had only been subsequently raised. He also admits that such a ground has not been considered by the two courts in the impugned orders.

23. Mr. Chavan, learned Counsel for Respondent No.1, submits that to the best of his knowledge, an appeal is pending against the conviction of such other person under Section 497 of the Indian Penal Code, since, the allegation of adultery was false. In any case, Mr. Chavan submits that whereas Section 497 of Indian Penal Code contemplates even a single act of adultery, Section 125(4) of Cr.P.C. contemplates a situation, where the wife "*is living in adultery*". He submits that there is a clear distinction between commission of a single act of adultery and of "*living in adultery*". He submits that in the absence of any evidence whatsoever that Respondent No.1 is living in adultery, her claim for maintenance can never be defeated.

24. Since, the impugned orders, do not decide the issue of adultery or living in adultery, there is no reason for this Court, at this stage, to go into this issue. Now that the application of Respondent No.1 under Section 125 of Cr.P.C. is held as maintainable, it is open to both the parties to raise such issue or to lead evidence on such issue and, based upon the same, there is no doubt that the Magistrate will dispose of the application under Section 125 of Cr.P.C. in accordance with law and on its own merits. It is, therefore, clarified that this issue is left open for determination by the

Judicial Magistrate, First Class.

25. For all the aforesaid reasons, this petition is dismissed. There shall be no order as to costs. The learned Judicial Magistrate is directed to dispose of application of Respondent No.1 for maintenance in accordance with law and on its own merits, as expeditiously as possible, in any case, within a period of one year from today. The Registry to ensure that the R&P is sent back expeditiously.

(M. S. SONAK, J.)