

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 161 OF 2018

Dhanaji S/o. Keshav Kamble,
Age: 35 years, Occu: Computer Classes,
R/o Prakash Nagar, Latur,
Taluka & District - Latur. ... **Petitioner**

Vs.

1. Sarika Prabhakar Waghmare @
Sarika W/o Dhanaji Kamble
Age: 34 years, Occu: Household,
R/o: Paru Nagar, In front of Khile
Factory, Latur, Tq. & Dist. Latur
2. Ku. Sanjana D/o Dhanaji Kamble
Age: 05 years, Occu: Nil,
Notice, serve through, Petitioner No.1
R/o: Paru Nagar, In front of Khile
Factory, Latur, Tq. & Dist. Latur ... **Respondents**

Mr. R.P Bhumkar, Advocate for the Petitioner.
Mr. Mukund D. Gitte, Advocate for the Respondent nos.1 & 2.

CORAM : MANGESH S. PATIL, J.

DATE OF RESERVING THE JUDGMENT : 04.02.2019
DATE OF PRONOUNCING THE JUDGMENT : 07.03.2019

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JUDGMENT :

Heard. Rule. Rule is made returnable forthwith. Learned advocate Mr. M.D. Gitte waives service for the respondents. At the request of both the sides the matter is heard finally at the stage of

admission.

2. The petitioner husband is impugning the order passed by the Family Court in ER -137 of 2017 on the application (Exh.12) filed by him whereby he was directed to deposit the arrears of maintenance awarded against him and in favour of the respondents in Criminal Misc. Application No.24 of 2013 by the learned Judicial Magistrate First Class, Latur under Section 125 of the Code of Criminal Procedure within 15 days else directing a warrant to be issued for sending him to jail.

3. The learned advocate for the petitioner vehemently submits that in fact the order granting maintenance itself deserves to be quashed and set aside. A compromise entered into between the couple on 05.12.2009, whereby the respondent no.1 had received an amount of Rupees One Lakh in full and final settlement of her claim for maintenance. Besides a customary divorce has taken place in the form of deed of divorce on 22.02.2017 in presence of a Corporator, whereby the respondent no.1 again accepted a sum of Rupees Three Lakhs in lieu of her right to claim maintenance. Accordingly, a Hindu Marriage Petition No.F-37 of 2017 was preferred under Section 13B of the Hindu Marriage Act seeking divorce by mutual consent. She had also filed an affidavit in support thereof. However, she back tracked and proceeded with the execution of the order awarding maintenance to her. Therefore, the impugned order passed by the Family Court ignoring all

these facts is illegal and is liable to be set aside.

4. The learned advocate for the respondents submits that the order awarding maintenance in Criminal Misc. Application No. 24 of 2013 has reached finality. No proceeding has been initiated by the petitioner husband seeking to recall it by resorting to Sub-section 5 of Section 125 of the Code of Criminal Procedure or under Section 127 of the Cr.P.C. In the absence of any such supervening event, no fault can be found in the impugned order of the Family Court seeking to put the order to execution to enable the respondents to recover the arrears of the maintenance. The petitioner has also filed a proceeding before the Family Court under Section 127 (3) of the Code of Criminal Procedure which may take its own course. For the time being the fact remains that there is an order of maintenance passed in favour of the respondents which enables them to execute it so long as it is not quashed and set aside.

5. At the out set, it is necessary to observe that the petitioner has come with following two main prayers in the petition:

“C. Issue writ of ceertiorari or any other appropriate writ, order, direction or writ of certiorari like nature and to quash and set-aside the order dated 16/01/2018 passed below Exh.-12D in application No. ER-137/2017 passed by learned Family Court, Latur.

D. Issue writ of certiorari or any other appropriate writ, order, direction or writ of certiorari like nature and to quash and set-aside the order dated 22/02/2016 passed by learned J.M.F.C., Latur in Criminal Misc. Application NO. 24/2013.”

6. As far as the prayer 'D' is concerned, one cannot comprehend as to how such a prayer could be made in this writ petition when the remedy for challenging the order of maintenance passed by the learned Magistrate under Section 125 of the Code of Criminal Procedure has not been availed of. A remedy to prefer a revision under Section 397 was very well available to the petitioner, but apparently that has never been availed of and the order awarding maintenance has reached finality. If that be so, one need only to discard and reject the prayer 'D' in *limine*.

7. Even according to the petitioner's own saying an application has been preferred by him under Section 127 (3) of the Code of Criminal Procedure (Exhibit-H) which clearly shows that he has availed of a remedy to quash and set aside the order of maintenance awarded against him under Section 125 of the Code of Criminal Procedure code. Needless to state that the proceeding would lead to a logical and legal end. The fact remains that as of now the order awarding maintenance to the respondents under Section 125 of the Code of Criminal Procedure having reached finality, no fault can be found with the respondents in

putting it to execution.

8. Whether there was a customary divorce as is alleged by the petitioner is a pure question of fact and what is its effect on the right of the respondents to claim maintenance is a question of law and both these questions cannot be answered in this writ petition and may have to be gone into one and decided in a proceeding initiated by the petitioner under Section 127 of the Code of Criminal Procedure.

9. Coming to the order passed by the learned Family Court on the application (Exhibit-12) preferred by the petitioner in ER-137 of 2017, in fact the petitioner had filed that application (Exhibit-12) seeking permission to deposit an amount of Rupees Twenty Thousand towards the arrears of maintenance. The learned Judge allowed the amount to be deposited. However, in the say on behalf of the respondents it was brought to the notice that he was still in arrears of Rs. 64,500/- and had only deposited Rs.34,000/-. It is on the basis of such stand taken by the respondents that the learned Family Court Judge directed the petitioner to deposit the arrears within 15 days and warned him of issuing a warrant for sending him to jail for one month or till he paid the entire arrears by the next date and directed a warrant to be issued on his failure to deposit the arrears.

10. Again, I find no apparent illegality in the impugned order passed by the Family Court in directing the petitioner to deposit all the

arrears before the next date and directing a warrant to be issued on his failure to do so. If the petitioner was in arrears of maintenance, one cannot find any reason as to how the impugned order would be illegal when he was warned to deposit the arrears by the next date else a warrant would be directed against him.

11. The learned advocate for the petitioner pointed the first proviso to Sub-section 3 of Section 125 and submitted that no warrant could be issued for recovery of any amount due unless an application was made to levy such amount within a period of one year from the date on which it had become due. Admittedly, the learned Magistrate had passed the order awarding maintenance to the respondents on 22.02.2016 and there is no material to show that they had preferred execution ER-137 of 2017 beyond the period of one year from the date of the order. Whatever was the period regarding past maintenance, the past maintenance had become final on the date of passing of the order by the learned Magistrate on 22.02.2016 and the entire arrears could be said to have become due only on such order being passed by the learned Magistrate. Therefore, even the first proviso to Sub-section 3 of Section 125 of the Code of Criminal Procedure would not come to the help of the petitioner.

12. Therefore, without expressing any opinion touching factual aspects relevant for deciding the application preferred by the petitioner

under Section 127 of the Cr.PC, the writ petition is dismissed.

13. The Rule is discharged.

(MANGESH S. PATIL, J.)

KAKADE