

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.709 OF 2019

1. Haji Ahemad Salim S/o Haji Abdul Rashid
Age : 53 years, Occ : Business,
2. Mohammad Kalim S/o Haji Abdul Rashid
Age : 48 years, Occ : Business,

Both R/o Bhaji Mandi, Kadrabad,
Jalna, Tq. & Dist. Jalna.
3. Mohammad Aji S/o Haji Abdul Rashid
Age : 43 years, Occ : Business,
4. Mohammad Mukhtar S/o Haji Abdul Rashid
Age : 40 years, Occ : Business,
5. Mohammad Ashpak S/o Haji Abdul Rashid
Age : 36 years, Occ : Business,
Nos.3 to 5 R/o Jafarkhan Chal,
Bhoipura, Kacheri Road, Jalna,
Tq. & Dist. Jalna.

..PETITIONERS

-VERSUS-

Haji Abdul Rashid Haji Lalmiya
Age : 83 years, Occ : Nil.,
R/o Jafarkhan Chal, Bhoipura,
Kacheri Road, Jalna, Tq. & Dist. Jalna.

..RESPONDENT

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Mr.S.J. Salunke, Advocate for petitioners.

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CORAM: V.L. ACHLIYA, J.

DATE : 17.07.2019

ORAL JUDGMENT:

By this Petition filed under Article 227 of the Constitution of India, the petitioner has challenged the order dated 23.03.2018 passed in Misc. Criminal Application No.851/2016 by the Judicial Magistrate, First Class Court No.3, Jalna and confirmed in Revision with modification by the judgment and order dated 12.02.2019 passed by learned Additional Sessions Judge-2, Jalna in Criminal Revision No.46/2018.

2. Heard learned counsel for the petitioners. Perused the order passed by the Courts below.

3. Mr.Salunke, learned counsel for the petitioners assailed the order passed by the trial Court with contention that the trial Court has erred in passing the order in absence of necessary parties to the application. It is submitted that in an application filed U/Sec. 125 of the Cr.P.C. at the instance of respondent, the respondent/applicant ought to have made all sons and daughters as party to the

application. It is submitted that for non-joinder of necessary parties, the impugned order vitiates in law and liable to be set aside. It is further submitted that the Revisional Court has exceeded its jurisdiction and allowed the revision petition filed by the respondent to make the petitioners liable to pay the maintenance from the date of application. It is submitted that in order to grant maintenance from the date of application, the Court is required to record the reasons for awarding the maintenance from the date of application. It is submitted that only in absence of exceptional circumstances, the maintenance cannot be awarded from the date of application. In support of submissions advanced, learned counsel referred and relied upon the decision of this Court in the case of **Vasant Govindrao Naik V/s Govindrao Upasrao Naik and another** reported in **2016(2) Bom.C.R. (Cri.) 569.**

4. I have carefully considered the submissions advanced in the light of overall facts of the case and the orders passed by Courts below.

5. The respondent herein is the father of the petitioner. He filed application seeking maintenance U/Sec. 125 of Cr.P.C. By order dated 23.03.2018 passed in the matter, learned Judicial Magistrate, First Class Court No.3, Jalgaon allowed the application and directed the petitioners to pay maintenance @ Rs.15,000/- per month from the date of order. Being aggrieved, the respondent preferred the Petition challenging the order granting maintenance from the date of passing of order instead of date of application, as claimed in the application. The petitioners also filed Revision Petition challenging the order passed by the trial Court awarding maintenance @ Rs.15,000/- per month to respondent. By the judgment and order dated 12.02.2019, the Revisional Court decided both revision petitions and modified the order passed by trial Court. The monthly maintenance awarded by the trial Court reduced from Rs.15,000/- to Rs.12,500/- per month. However, the order to pay maintenance made applicable from the date of application. Being aggrieved, the petitioners have preferred this Petition.

6. Perusal of the order passed by the Courts below spell out that the petitioners have first time raised the challenge before this Court in respect of non-joinder of necessary parties to the application. Before the trial Court as well as the Revisional Court, no such objection was raised. The maintainability of application for want of non-joinder of necessary parties cannot be entertained while dealing with petition filed under Article 227 of the Constitution of India. Such objection ought to have been raised at the stage of deciding the application by the trial Court. In absence of such challenge being raised before the trial Court, the contention of the petitioners that the order passed is bad in law for non-joinder of necessary parties cannot be accepted. The decision in the case of **Vasant Govindrao Naik V/s Govindrao Upasrao Naik and another** reported in **2016(2) Bom.C.R. (Cri.) 569** have no bearing upon the facts of the present case. In the case cited, the specific objection was raised in the written statement filed in the proceedings before the trial Court as to the non-joinder of major son and

daughters of the applicant. In the case in hand, no such objection was raised in the trial Court so also no ground to that effect was raised before the Revisional Court. In that view, the contention of the learned counsel that the order is bad in law for non-joinder of necessary parties cannot be accepted.

7. So far as the submission advanced by learned Counsel that the Revisional Court has erred in modifying the order passed by the trial Court and to pay maintenance from the date of order is cannot be accepted in the light of the reasons recorded by the Revisional Court. In paras 12 and 13, the Court has observed as under :-

"12. The next question arises whether it was proper on the part of Ld. Magistrate to order the payment of maintenance from the date of order. Sub section (2) of Sec. 125 of Cr.P.C. declares that maintenance shall be payable "from the date of order" or, "if so ordered from the date of

application.". Thus, it is in the discretion of the Ld. Magistrate to direct the payment of maintenance allowance either from the date of order or from the date of the application. In the present case in hand, Ld. Magistrate had stated that as the respondents-sons were paying the applicant Rs.100/- per day, it would be appropriate to grant the maintenance from the date of order. This reasoning in support of his order to make an order granting maintenance not from the date of application, but from the date of order for maintenance is not proper for more than one reasons :-

First is that on the admission of the applicant that he is paid Rs.100/- by the respondents-sons is not a clear cut admission as he has in very next line of his cross examination stated that the said amount is given by them some times. This means the aforesaid payment of

Rs.100/- was not regular and so due that only he must have approached the Court. That being so, it was not correct way of evaluation by the Ld. Magistrate at the evidence that had been brought on record in the course of proceeding. The Ld. Magistrate ought to have considered the probability of the fact that the applicant must have come before the Court as the respondents were not making regular payment of Rs.100/- if had considered this fact, he could have come to a fair conclusion as to what is real state of affairs.

Second reason is that, it cannot be lost sight that after filing of the application u/s 125 the application has to wait for several months and at time years for getting the relief of maintenance from the Court. Even considering that aspect the legislature had to make express provisions in the Code of Criminal

Procedure for interim maintenance allowance to the aggrieved persons.

Third reason is that Sec. 125 mandates disposal of the application within 60 days from the date of service notice, but in present case the disposal period was of almost more than 15 months and so the order of the Ld. Magistrate ought to have been from the date of the application and not from the date of the order.

Fourth reason is that as has been held by their Lordships of Apex Court in catena of judgment the purpose of Sec. 125 is to prevent vagrancy and destitution and essentiality to financial support to neglected wife, whose husband refuses to maintain her and to the aggrieved parents, whose children may have garbed their property and yet are not performing their duty to maintain their parents, who are unable to maintain

themselves. If this fact is considered the Ld. Magistrate would have not hesitated in granting maintenance from the date of application instead of from the date of order.

Fifth reason is that the applicant-father is an octogenarian and is without any source of income. It is the obligation of the respondents-son moral in view of religious principle enshrined in 'Holi Quran' and legal on the basis of Sec. 125 of Cr.P.C. His right to claim maintenance fructifies on the date of filing of the application. Therefore, it would have been proper on the part of the Ld. Magistrate to exercise discretion considering the above multiple circumstances to grant maintenance from the date of application.

13. The above sturdy reason manifestly show that there was justification on the part of Ld.

Magistrate in making order of maintenance from the date of application rather than from the date of order. The above reasons were quite sufficient and justifiable for the Ld. Magistrate to grant maintenance from the date of application. To that extent, therefore, the order of Ld. Trial Judge is vulnerable and is accordingly deserves to be set aside by granting maintenance to the applicant from the date of application."

8. In that view, the present petition filed challenging the concurrent findings rendered by the Courts below calls for no interference in exercise of supervisory jurisdiction of this Court under Article 227 of the Constitution of India. The Petition filed by petitioner is devoid of merit. I am therefore, not inclined to entertain the Petition. Accordingly, the Petition is dismissed.

**[V.L. ACHLIYA]
JUDGE**