

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

22 CRIMINAL REVISION APPLICATION NO.152 OF 2018

Shravan Tukaram Nimbolkar
Age : 72 years, Occu:- Retired,
R/o c/o Shri. Vilas Jadhav, Advocate,
Flat No.8, Shriram Shagun Housing Society,
Dhanori, Pune – 411 015. **... APPLICANT**

VERSUS

Kasturabai Shravan Nimbolkar,
Age 69 years, Occu. Nil,
R/o c/o Shri Samadhan Pandurang Wane,
AB Tower 3rd Floor, in front of
Apna Guest House, VIP Road,
Bhadkal Gate, Aurangabad. **... RESPONDENT**

...

Advocate for Applicant : Mr. Pranjape Prakash S. and Menezes Joslyn A
Advocate for Respondent : Dr. Tawashikar Swapnil D. and Mr. S.F. Patel

...

CORAM : MANGESH S. PATIL, J.

DATE : 23.09.2019

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith.
Learned Advocate Mr. Tawashikar waives service for the respondent.
On the request of the parties, the matter is heard finally at the stage of

admission.

2. The only issue that arises in the matter in hand, is as to whether in the facts and circumstances, the respondent who is wife of the petitioner can be said to have relinquished/waived her right to claim maintenance under Section 125 of the Code of Criminal Procedure by executing the Deed of Divorce (Exh.34).

3. The respondent preferred a proceeding in the Family Court under Section 125 of the Code of Criminal Procedure claiming maintenance from the petitioner husband. She alleged that they were married on 17.05.1967. However a Deed of Divorce was executed on 12.05.1975 and since thereafter he has not provided anything to her or to their son who was brought up by her. She was now 69 years of age and was unable to earn her livelihood. Though the son has become independent, he has been residing separate. As against this the petitioner has remarried and has couple of sons and a daughter from second wife. They are all married. He was serving in Zilla Parishad and though he has retired he is getting pension of Rs.14000/- per month. Besides, he earns agricultural income to the tune of Rs.2,00,000/- per annum and gets rental income. His sons from the second wife are well off. She may be granted maintenance.

4. The petitioner contested the proceeding by his say. He

admitted that she is his wife. He also admitted that the Deed of Divorce was entered into on 12.07.1975 and it was a customary divorce. It is after such divorce that he has remarried in the year 1977 and has three issues from the second marriage. He contended that she has been residing with her son who is maintaining her. She was willingly residing separately and was not entitled to receive any maintenance.

5. After necessary hearing, by the impugned judgment and order, the learned Judge of the Family Court directed him to pay maintenance to her @ Rs.2000/- per month from the date of the order. Hence this Writ Petition.

6. The learned advocate for the petitioner submits that irrespective of the consequences of the Deed of Divorce dated 12.05.1975 it would at least demonstrate that the couple was residing separate by mutual consent. By virtue of Sub-section 4 of Section 125 of the Code of Criminal Procedure she would not be entitled to claim maintenance. The application was filed belatedly, after lapse of 41 years from the date the couple had separated. All these aspects were not duly appreciated and considered by the learned Judge and the impugned judgment and order be quashed and set aside.

7. The learned advocate for the applicant sought to place

reliance on the decision in the case of **Shravan Sakharam Ubhale Vs. Durga Shravan Ubhale and others ; 1990 (1) Mh. LJ 418**, wherein it has been laid down that when there is a divorce by the mutual consent and the wife agrees not to claim maintenance, she cannot claim maintenance under Section 125 of the Code of Criminal Procedure. It has also been held that a divorcee wife can contract away her right to claim maintenance under Section 125 of the Code of Criminal Procedure.

8. Per contra, the learned advocate for the respondent submits that since the applicant in his say has specifically admitted that there was a customary divorce and once it is found that the respondent is a divorcee wife, irrespective of the contents of the Deed of Divorce (Exh.34), she would be entitled to claim maintenance in the capacity of a divorced wife as has been laid down in the case of **Rohtash Singh Vs. Ramendri ; AIR 2000 952 (SC)**.

9. The learned advocate also placed reliance on the decision of this Court in **Ramchandra Laxman Kamble Vs. Shobha Ramchandra Kamble ; 2019 ALL MR (Crl) 426** and **Sarafraj Jailab Nadaf Vs. Faimida S. Nadaf and Ors.; in Criminal Writ Petition No.2690/2014 decided on 23.02.2016**.

10. The learned advocate would then submit that once it is

found that the respondent is entitled to claim maintenance under Section 125 of the Code of Criminal Procedure, she cannot be denied the right only on the ground that she has claimed it many years after separation.

11. I have carefully gone through the impugned judgment and the record and the proceeding including the Deed of Divorce (Exh.34). There is no dispute that the couple was married and had apparently entered into this arrangement witnessed by this writing (Exh.34). Though some argument was advanced by the learned advocate for the petitioner to the effect that the law would not recognize such a writing to be a legal divorce. However it is a question of fact as well and in the say filed by him in the proceeding before the Family Court, even he specifically mentioned in the say (Exh.12) that in fact there was a customary divorce in the form of the Deed of Divorce (Exh.34) dated 12.05.1975. He further contended that after such a customary divorce he got remarried in the year 1977 and got two sons and one daughter out of such marriage. It is in view of such peculiar state of affairs that one can easily proceed on the premise that the parties are unanimous that the respondent is a divorcee wife of the petitioner.

12. Having reached such a conclusion, it would be suffice to refer to the decision in the case of Rohtash Singh (supra) and the

following observations in paragraph No.5, 6 and 7 would be relevant:

“5. Sub-section (4) of Section 125 Cr. P.C. provides as under :-

"(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

6. Under this provision, a wife is not entitled to any Maintenance Allowance from her husband if she is living in adultery or if she has refused to live with her husband without any sufficient reason or if they are living separately by mutual consent. Thus, all the circumstances contemplated by Sub-section (4) of Section 125 of Cr. P.C. presuppose the existence of matrimonial relations. The provision would be applicable where the marriage between the parties subsists and not where it has come to an end. Taking the three circumstances individually, it will be noticed that the first circumstance on account of which a wife is not entitled to claim Maintenance Allowance from her husband is that she is living in adultery. Now, adultery is the sexual intercourse of two persons, either of whom is married to a third person. This clearly supposes the subsistence of marriage between the husband and wife and if during the subsistence of marriage, the wife lives in adultery, she cannot claim Maintenance Allowance under Section 125 of the Code of Criminal Procedure.

7. The second ground on which she would not be entitled to Maintenance Allowance is the ground of her refusal to live with her husband without any sufficient reason. This also presupposes the subsistence of marital relations between the parties. If the marriage subsists, the wife is under a legal and moral obligation to live with her husband and to fulfill the marital obligations. She cannot, without any sufficient reason, refuse to live with her husband. "Sufficient reasons" have been interpreted

differently by the High Courts having regard to the facts of individual cases. We are not required to go into that question in the present case as admittedly the marriage between the parties came to an end on account of a decree for divorce having been passed by the Family Court. Existence of sufficient cause on the basis of which the respondent could legitimately refuse to live with the petitioner is not relevant for the present case. In this situation, the only question which survives for consideration is whether a wife against whom a decree for divorce has been passed on account of her deserting the husband can claim Maintenance Allowance under Section 125 Cr. P.C. and how far can the plea of desertion be treated to be an effective plea in support of the husband's refusal to pay her the Maintenance Allowance."

13. From the observations it is quite clear that Sub-section 4 of Section 125 of the Code of Criminal Procedure presupposes existence of matrimonial relations. It is only when the marriage subsists and the parties agree to reside separately that the wife would not be entitled to claim maintenance by virtue of this provision. But if the marriage is dissolved, a divorcee wife would be entitled to claim maintenance. Therefore, even if the Deed of Divorce (Exh.34) purports to waive right to claim maintenance, the respondent's claim for maintenance cannot be defeated by pointing out that by virtue of such writing she had agreed to reside separately and such agreement was mutual one.

14. The submission of the learned advocate for the petitioner to the effect that firstly, she is not a divorcee is contrary to the stand of

the petitioner before the Lower Court as can be understood from the contents of his say (Exh.12). Secondly, even if it is mentioned in this Deed of Divorce (Exh.34) that she would not claim any money, being a divorcee wife she cannot be deprived of the right to claim maintenance under Section 125. The writing cannot be taken as her consent to reside separate as contemplated under Sub-section 4 of Section 125 of the Code of Criminal Procedure.

15. As far as the argument as to whether the wife can relinquished her right to claim maintenance by the recital in a deed of divorce, the learned Judge in Ramchandra Laxman Kamble (supra) had referred to various decisions holding that such relinquishment would be opposed to public policy and therefore would not be enforceable. I find no justifiable reason but to concur with the observations and the conclusions. Therefore assuming that in the Deed of Divorce (Exh.34) the respondent had waived her right to claim maintenance, still such contracting out being against the public policy, it would not inure to the benefit of the petitioner.

16. The impugned judgment and order does not suffer from perversity, arbitrariness or capriciousness so as to enable this Court to intervene under the revisional jurisdiction. As far as quantum is concerned, he is getting pension of Rs.14000/- and the impugned

direction is to pay to the respondent Rs.2000/- per month from the date of the order which by no stretch of imagination could be said to be disproportionate.

17. The revision is dismissed. The Rule is discharged.

(MANGESH S. PATIL, J.)

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