

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

33 CRIMINAL WRIT PETITION NO.1238 OF 2018

Shivaji Tukaram Davargave,
Age : - 46 years, Occ. Agri.,
R/o. Tambarwadi, Tq. Nilanga,
Dist. Latur.

... PETITIONER

VERSUS

1. CHAYA W/o Shivaji Davargave,
Age – 33 yrs. Occu. House hold,
2. Kunal s/o Shivaji Davargave,
Age – 16 yrs. Occu. Nil,
3. Omkar Shivaji Davargave
Age – 14 yrs., Occu. Nil,
(Applicant No. 2 & 3 are minors u/g of
Real Mother Chaya Respondent No. 1)
All R/o Walandi, Tq. Deoni, Dist. Latur.

... RESPONDENTS

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Advocate for Petitioner : Mr. Hanumant P. Jadhav
Advocate for Respondent No. 1: Mr. Vinod M. Vibhute
Respondent Nos. 2 and 3 are minors.

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CORAM : MANGESH S. PATIL, J.

DATE : 18.02.2019

JUDGMENT :

1. Heard.

2. Rule.

3. The Rule is made returnable forthwith.

4. The learned Advocate for the Respondents Mr. Vibhute waives service. At the request of both the sides, the matter is heard finally at the stage of admission.

5. A very interesting point which arises for consideration in this Writ Petition is, as to whether the husband can make an offer to maintain his wife as contemplated in the Second Proviso to Sub-Section 3 of Section 125 of the Code of Criminal Procedure even after the proceeding for maintenance under Sub-Section 1 of Section 125 is concluded, in a proceeding initiated by the wife for enforcement of the order of maintenance as contemplated under Section 125 (3).

6. According to the learned Advocate for the petitioner, pursuant to such a provision, by submitting application (Exhibit 15 and Exhibit 24) the petitioner husband had clearly extended an offer to maintain the respondent wife and the children. They had opposed the application without any reason and therefore, no warrant for recovery of maintenance could have been issued in the proceeding initiated by the respondent under Section 125 (3) of the Code of Criminal Procedure. In support of his submission, he placed reliance on the decision of Gujarat High Court in *Mohanlal Maganlal Vs. Savitaben and another (AIR 1965 Gujarat 281)*.

7. Per contra, the learned Advocate for the respondents

vehemently submitted that such an offer as contemplated under the Second Proviso to Sub-Section 3 of Section 125 should have been made only before the application for maintenance under Sub-Section 1 of Section 125 was being decided. The order passed in their favour awarding them maintenance had reached finality. It is thereafter that the order was sought to be executed by invoking the provision of Section 125 (3) of the Code of Criminal Procedure and the only matter which could have been considered was regarding issuance of warrant for enforcement of the order passed under Sub-Section 1 of Section 125. The learned Advocate therefore would submit that no illegality was committed by the learned Magistrate in rejecting the application (Exh. 15 and Exh. 24) filed by the petitioner and the impugned order passed by the learned Additional Sessions Judge in Criminal Revision Application No.4/2018 confirming the order passed by the Magistrate.

8. Admittedly, the respondent had applied for maintenance under Sub-Section 1 of Section 125 of the Code of Criminal Procedure by filing Criminal Miscellaneous Application No.293/2015. Admittedly, the order had reached finality. By preferring Criminal Miscellaneous Application No.172/2016, the respondents made an attempt to enforce the order of maintenance. During pendency of this proceeding for execution, the petitioner husband filed the application (Exh.15) stating that he was ever ready and willing to maintain

respondents but still they were refusing and therefore they were staying separately without there being any sufficient cause and therefore they were not entitled to claim maintenance and the warrant directed to be issued against him may be cancelled.

9. It is necessary to understand the entire scheme of Chapter IX of the Code of Criminal Procedure. Under Sub-Section 1 of Section 125 a right to maintenance has been recognized and the powers of the Magistrate to decide the claim for maintenance have been prescribed. Sub-Section 2 even permits a Magistrate to award maintenance but requires him to specify as to from which date the maintenance is to be paid namely whether from the date of the application or from the date of the order. Sub-Section 3 of Section 125 then empowers a Magistrate to issue a warrant for levying the amount of maintenance and also empowers him to sentence the person who fails to pay the maintenance. The First Proviso, thereafter, circumscribes the powers of the Magistrate to issue warrant under Sub-Section 3 of Section 125 by saying that the warrant for recovery of amount shall not be issued unless the application is made within a period of one year from the date when it becomes due. The Second Proviso of Sub-Section 3 of Section 125 then lays down as under :-

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses

to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

10. The explanation to Sub-Section 3 then provides that if a husband has contracted marriage with another women or keeps a mistress, that shall be considered to be a just ground for the wife's refusal to live with him. Sub-Section 4 of Section 125 then lays down that wife shall not be entitled to claim maintenance if she is living in adultery or she refuses to live with her husband without sufficient reason, or if they are living separately by mutual consent. Sub-Section 5 of Section 125 then lays down that a Magistrate shall cancel the order of maintenance on a proof of wife living in adultery, or refuses to live with her husband without sufficient reason, or that they are living separately by mutual consent.

11. Section 126 lays down the procedure to be followed in a proceeding initiated under Section 125 and the place where a proceeding can be instituted.

12. Section 127 empowers a Magistrate to alter the allowance for maintenance or interm maintenance in an appropriate proceeding. It is pertinent to note that by virtue of Sub-Section 3 of Section 127, a Magistrate is empowered to cancel the order of maintenance in case of

certain contingencies like the women after the divorce has remarried or has waived her right to claim maintenance while obtaining the divorce.

13. Section 128 then provides for enforcement of the order of maintenance and the place where a proceeding for enforcement can be made.

14. A careful reading of the entire scheme makes it abundantly clear that after laying down the list of persons who can claim maintenance, the contingencies have been laid down, wherein, a person would not be entitled to claim maintenance under this provisions. As far as the claim of wife is concerned, such contingencies could be that she is living in adultery or without sufficient reason she refuses to live with her husband or that the couple is residing separately by mutual consent. What Second Proviso of Sub-Section 3 lays down is only a contingency, where a husband makes an offer to maintain the wife on a condition of her living with him but she refuses to live with him. It is a fact which a Magistrate may consider while making an order under that Section i.e. Section 125.

15. Use of the word 'section' in this proviso and not 'sub-section' is conspicuous and makes it abundantly clear that such an offer by the husband and the refusal by the wife is to be considered while

considering the later's request/claim for maintenance. In my considered view, it cannot be interpreted to mean that even after the Magistrate has awarded maintenance and the proceeding under Sub-Section 1 of Section 125 is concluded in favour of the wife, her husband could raise an offer to maintain her while she is seeking to execute the order. Obviously, it would be the pure question of fact whether the offer is bona fide and whether there is any sufficient cause for the wife to discard the offer, which essentially could be decided based on some evidence. If that be so, all these facts can be considered and ascertained only during the course of the proceeding under Sub-Section 1 of Section 125. When once a final order is passed under that order and the wife seeks to recover the allowance for maintenance by preferring an application under Sub-Section 3 seeking a warrant to be issued, there would be no occasion for recording of any evidence touching these facts. The only rider would be that the application is filed within one year from the date on which the allowances becomes due. The proviso cannot be interpreted to mean that the parties are to be relegated to the initial stage allowing them to lead evidence to prove and disprove the offer being made by the husband. Otherwise, there would be no finality and it would be always open for the husband to make an offer at every attempt by the wife to recover the allowance and protract the matter incessantly.

16. One cannot forget that in Chapter IX, a summary proceeding and a speedy remedy is contemplated to enable a wife and minor children and parents who have been neglected or refused, to claim maintenance. Any interpretation sought to be placed on Second Proviso of Sub-Section 3 which runs counter to the object of providing for a speedy remedy to recover maintenance needs to be scuttled down.

17. In the case of Mohanlal Maganlal, without examining all these aspects, only a stray observation has been made that even after passing of the order a husband can make an offer under Sub-Section 3 of Section 488 of the predecessor of the present Criminal Procedure Code which is a provision similar to the existing Sub-Section 3 of Section 125. All these aforementioned aspects were not considered and it does not lay down any ratio as such.

18. As can be seen from the Sub-Section 5 of Section 125, a Magistrate is empowered to cancel the order of maintenance passed under Sub-Section 1 on proof that the wife is living in adultery or without no sufficient reason, she refuses to live with her husband or that they are living separately by mutual consent. Consequently, a husband may prefer an application under Sub-Section 5 of Section 125 seeking cancellation of such order passed under Sub-Section 1 on the

grounds mentioned therein. Obviously, those would be pure questions of facts and both the sides will have to lead evidence to substantiate their cases enabling the Magistrate to pass a suitable order either for cancellation of the maintenance awarded under Sub-Section 1 or even he may reject the application preferred by the husband. That would partake independent judicial proceeding. However, in an execution proceeding preferred by the wife under Sub-Section 3 of Section 125 of the Code of Criminal Procedure, the husband is not entitled to any such indulgence requiring reconsideration of the order awarding maintenance passed under Sub-Section 1 by putting forth a contention that the wife was refusing to live with him without sufficient reason. In other words, the scope and ambit of Sub-Section 3 of Section 125 is restricted to the recovery of the arrears of maintenance awarded under Sub-Section 1. If the husband so desires, he may avail of the remedy under Sub-Section 5 independently.

19. The upshot of the above discussion, any offer to be made by the husband to maintain the wife as contemplated under Second Proviso to Sub-Section 3 of Section 125 has to be made only during the hearing of a proceeding under Sub-Section 1 of Section 125. Once that proceeding is decided, no such offer can be made or entertained in a proceeding under Sub-Section 3 for issuance of warrant for recovery of maintenance allowance. The Magistrate as well as the learned

Additional Sessions Judge have correctly rejected the application (Exh. 15 and Exh. 24). I find no apparent illegality. The Writ Petition is dismissed. The Rule is discharged.

(MANGESH S. PATIL, J.)

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