

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2622 OF 2019
(CONVERTED FROM CRIMINAL REVISION APPLICATION NO.362 OF 2017)

WITH
CRIMINAL APPLICATION NO.127 OF 2018
WITH
CRIMINAL APPLICATION NO.153 OF 2018

Baburao Hari Patil ... Petitioner/Applicant
Vs.
Chingabai Baburao Patil and another ... Respondents

ALONG WITH
CRIMINAL APPLICATION NO.350 OF 2018

Chingabai Baburao Patil ... Applicant

In the matter between:

Baburao Hari Patil ... Applicant
Vs.
Chingabai Baburao Patil and another ... Respondents

Mr. Vivek K. Gupta for Applicant in REVN No.362 of 2017 (Cr.W.P.No.2622 of 2019) and APPR 127 of 2018 and 153 of 2018 and for Respondent No.1 in APPR 350 of 2018.

Mr. Shridhar A. Patil Respondent in REVN No.362 of 2017 (Cr.W.P.No.2622 of 2019) and APPR 127 of 2018 and 153 of 2018 and for Applicant in APPR 350 of 2018.

CORAM : R. G. KETKAR, J.
DATE : APRIL 30, 2019

P.C. :

Heard Mr. Gupta, learned Counsel for the applicant and Mr. Patil, learned Counsel for the respondent at length.

2. By this application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), the applicant has challenged the judgment and order dated 05.05.2017 passed by the learned Additional Sessions Judge, Islampur in Criminal Revision Application No.24 of 2015. By that order, the learned Sessions Judge allowed the Revision Application filed by the first respondent and set

aside the order dated 21.05.2015 passed by the learned Judicial Magistrate First Class, Shirala in Criminal Miscellaneous Application No.56 of 2003. The learned Sessions Judge directed the petitioner to pay maintenance of Rs.5,000/- per month to the respondent No.1 from the date of the application i.e. from 19.06.2013. The learned Sessions Judge further directed the petitioner to pay costs of Rs.2,000/- to the first respondent.

3. Respondent No.1 filed application under Section 125 of Cr.P.C. inter alia contending that the marriage between her and the petitioner was solemnized on 13.03.1962. She alleged that petitioner had driven her out of matrimonial home. In the year 1991, the petitioner instituted proceedings in the Family Court at Mumbai seeking dissolution of marriage. On 17.09.1992, ex-parte decree of divorce was passed against her. Respondent No.1 did not challenge the said decree. On 19.06.2013, she filed application under Section 125 of Cr.P.C. claiming maintenance. By order dated 21.05.2015, the learned Magistrate rejected the application principally on the ground that in view of Section 125(4) of Cr.P.C., respondent No.1 is not entitled to claim maintenance. Aggrieved by this decision, respondent No.1 preferred Revision Application under Section 397 of Cr.P.C. By the impugned order, the learned trial Judge has allowed the Revision Application. As the order impugned in the present C.R.A. is passed in Revision under Section 397 of Cr.P.C., Mr.Gupta seeks leave to convert this Revision Application into Writ Petition under Article 227 of the Constitution of India. Leave as prayed for is granted. Amendment shall be carried out within one week from today.

4. In support of this Petition, Mr. Gupta strenuously contended that the learned Sessions Judge committed several errors of law apparent on the face of the record while passing the impugned order. He submitted

that in proceedings under the Protection of Women from Domestic Violence Act, 2005, the learned Magistrate declined to pass order of maintenance. He submitted that in the application under Section 125 of Cr.P.C., no particulars are set out by the first respondent. She did not disclose where and when child was born as also where the child was delivered. This is to be appreciated on the backdrop of fact that petitioner had instituted divorce petition invoking the grounds of desertion and adultery. Respondent No.1 deserted the petitioner in the year 1964 and has filed application under Section 125 of Cr.P.C. in the year 2013. Respondent No.1 has not explained the delay. Her application suffers from gross delay and laches. The learned Sessions Judge failed to appreciate this aspect.

5. Mr. Gupta further submitted that as on date, petitioner is 85 years old. He has no means to maintain respondent No.1. He submitted that it has come on record that son of the respondent No.1 is major. In view of Section 125(1)(d), respondent No.1 can claim maintenance from her major son if she is unable to maintain herself. As the petitioner has no sufficient means and as respondent No.1 has deserted the petitioner in the year 1964, she is dis-entitled to claim any maintenance from the petitioner. Mr. Gupta has taken me through the order passed by the learned Magistrate dismissing application filed by the respondent No.1 under Section 125 of Cr.P.C. as also the impugned order. Mr. Gupta submitted that in fact respondent No.1 has practised fraud upon the Court in obtaining the order of maintenance. As she has obtained favourable order by practising fraud, she is not entitled to any relief. In support of his submissions, he relied upon the following decisions:

a. ***Raju Vs. Rekha, 2016 ALL M.R. (Cri.) 301*** to contend that as in the present case, without any sufficient cause, respondent No.1 deserted the petitioner as also because of gross delay and laches on her part in filing application under Section 125, she is not entitled to any

maintenance.

b. ***Bhaskarrao Uttamrao Patil Vs. Sumanbai @ Kokilaben Bhaskarrao Patil, 2018 (3) Mh.L.J. (Cri.) 295*** to contend that almost after 50 years, respondent No.1 has filed under Section 125 of Cr.P.C. In that case, there was delay of nearly about 25 years in approaching the Court for maintenance. This Court declined maintenance on that ground.

c. ***S. P. Chengalvaraya Naidu Vs. Jagannath by LRs, AIR 1994 SC 853*** to contend that as respondent No.1 has suppressed material facts and has obtained favourable order by practising fraud upon the Court, she is not entitled to claim maintenance.

6. Mr. Gupta, therefore, submitted that Petition deserves to be allowed thereby setting aside the impugned order by dismissing the application filed by the respondent No.1 under Section 125 of Cr.P.C.

7. On the other hand, Mr. Patil supported the impugned order. He submitted that the marriage between the parties was solemnized in Sangli. The parties never resided lastly at Mumbai. The petitioner filed Petition for divorce at Mumbai. The Family Court, Mumbai had no jurisdiction to entertain and try the proceedings.

8. He submitted that after the decree of divorce was passed in 1992, petitioner remarried. Thus, respondent No.1 has sufficient cause to refuse to cohabit with the petitioner, at least post re-marriage. He submitted that petitioner admitted marriage between the parties and also that he did not pay any maintenance amount to the first respondent. He submitted that though the decree of divorce was passed, no permanent alimony was awarded to the first respondent. Equally, no monthly maintenance was awarded while passing the decree of divorce. He submitted that respondent No.1 is an illiterate lady and was working as a

a labourer. Because of lack of legal knowledge, she did not move the Court on earlier occasion. In fact, she did not challenge the ex-parte decree of divorce. He relied upon the decision in ***Rohtash Singh Vs. Ramendri***, JT 2000 (2) SC 553. He has invited my attention to paragraphs 15 to 17 of the impugned order. The learned Sessions Judge held that Section 125(4) of Cr.P.C. is not applicable. After considering the financial position of the petitioner, he had directed payment of maintenance of Rs.5,000/- that too from the date of the application. He, therefore, submitted that no case is made out for interfering with the impugned order.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph 17, the learned Sessions Judge observed that petitioner admitted that he performed second marriage. He does not remember in which year, he got remarried. He admitted that he has one son from the second wife. He also could not tell age of the son. The learned Sessions Judge observed that petitioner is denying facts only to deny the maintenance. The learned Sessions Judge further noted that respondent No.1 came with the case that petitioner was ill-treating her. Because of the physical and mental harassment at the hands of the petitioner and his family members, she was driven out along with her son from the house. Since then, she is residing in her parents house. The petitioner had not made any provision for her maintenance. He refused to maintain her and her son. He further admitted that her son is doing labour work and she is maintaining herself by doing labour work from the last 50 years.

10. Mr. Gupta submitted that there was oral agreement between the parties that respondent No.1 will not claim any maintenance. In any

case, respondent No.1 is estopped from claiming maintenance as for last 50 years, she did not claim any maintenance. The said contention was raised before the learned Sessions Judge. The learned Sessions Judge has considered this submission in paragraph 16 and observed that she is illiterate lady and was not having knowledge of law that she can get maintenance from her husband. In fact, she did not even challenge the ex-parte decree of divorce passed against her. I do not find that the learned Sessions Judge committed any error in recording these findings. The learned Sessions Judge also noted that petitioner is denying paternity of the child as also denying right of the respondent No.1 to get maintenance. The provisions of Section 125 are meant to prevent destitution and vagrancy. Because of her advanced age, she may not be in a position to carry on labour work. In paragraph 17, the learned Sessions Judge noted that respondent No.1 produced Khata extract Form No.8A and 7/12 extract, which shows that total 5 Hectares 54 Ares land in Village Arala is standing in the name of petitioner, his three brothers and two sisters. He is also residing in flat in Mumbai. The learned Sessions Judge accordingly allowed the Revision Application and held that the learned Magistrate committed error in dismissing the proceedings on the ground that Section 125(4) of Cr.P.C. is applicable.

11. A perusal of the judgment of the Family Court dated 17.09.1992 shows that the ex-parte decree of divorce was passed against the first respondent on the ground of desertion and not on the ground of adultery. Section 125(4) of Cr.P.C. reads thus,

“125. Order for maintenance of wives, children and parents.

(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.”

12. In the present case, as mentioned earlier, decree of divorce is not passed on the ground of adultery. That leaves me to consider whether respondent No.1, without any sufficient reason, refused to live with her husband or that they are living separately by mutual consent.

13. As mentioned earlier, the petitioner filed divorce proceedings in the year 1991 and the ex-parte decree was passed on 17.09.1992. In the case of **Rohtash Singh** (*supra*), the Apex Court considered Section 125(4) of Cr.P.C. In paragraphs 6 and 7, it was observed thus,

“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 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."

14. A perusal of the above extracted paragraphs shows that after considering Section 125(4), the Apex Court observed that the said provision would be applicable when the marriage between the parties subsists and not when it has come to an end. The Apex Court considered the ground of adultery for denying maintenance to the wife. In paragraph 7, the Apex Court considered the ground of refusal of wife to live with her husband without any sufficient cause and observed that the said ground 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. Admittedly, in the present case, marriage between the parties came to an end on account of decree of divorce having 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. 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.

15. In paragraph 8, the Apex Court observed that since the decree of divorce was passed on 15.07.1995 and since then, she is under no obligation to live with the petitioner. Though the marital relations came to an end by the divorce granted by the Family Court, the respondent No.1 continues to be "wife" within the meaning of Section 125 (4) of

Cr.P.C. on account of Explanation (b) to Sub-section (1), a woman who has been divorced by her husband on account of a decree passed by the Family Court, continues to enjoy the status of a wife for the limited purpose of claiming maintenance allowance from her ex-husband. In view of the decision of the Apex Court, I do not find that the impugned order suffers from any error apparent on the face of the record.

16. Mr. Gupta relied upon the decision in **Raju** (*supra*) to contend that because of delay in approaching the Court claiming maintenance, the learned Sessions Judge was not justified in directing the petitioner to pay maintenance to the respondent No.1. In view of the decision of the Apex Court in **Rohtash Singh** (*supra*), the reliance placed by Mr. Gupta on the decision in Raju does not advance the case of the petitioner. He also relied upon the decision in **Bhaskarrao Uttamrao Patil** (*supra*) where this Court declined to award maintenance on account of delay of 25 years in approaching the Court claiming maintenance. A perusal of paragraph 7 of that decision shows that the learned Single Judge noted that wife was residing separately from her husband without sufficient cause or reason. In view of the decision in **Rohtash Singh** (*supra*), no assistance can be derived from this judgment. Mr. Gupta relied upon **S. P. Chengalvaraya Naidu** (*supra*) to contend that respondent No.1 practised fraud. However, this plea is not substantiated. Even otherwise, I fail to understand as to how this decision is applicable to the present case. In the result, Petition fails and the same is dismissed.

17. Criminal Application No.350 of 2018 is taken out by the first respondent for withdrawal of the amount deposited by the petitioner. As the main Petition is dismissed, Criminal Application No.350 of 2018 is allowed in terms of prayer clause (a).

18. Criminal Application No.127 of 2018 is taken out for expeditious

disposal of the Criminal Revision Application. As the main Petition is dismissed, Criminal Application No.127 of 2018 does not survive and the same is disposed of.

19. Criminal Application No.153 of 2018 is taken out for fixing date of hearing of Criminal Revision Application. As the main Petition is dismissed, Criminal Application No.153 of 2018 does not survive and the same is disposed of.

20. At this stage, Mr. Gupta orally applies for stay of this order for a period of four weeks. Having regard to the fact that the impugned order is order of maintenance, oral application for stay is rejected.

(R. G. KETKAR, J.)

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