

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6101 OF 2018

Mohd. Hussain Nizampasha Patil ... Petitioner

Versus

Nilofar @ Farheen (Gori)

Mohammadhusain Patil and Ors. ... Respondents

Mr.Subhash Jha a/w. Ms.Sanjana Pardeshi, Ms. Ankita Pawar, Mr.Hare Krishna Mishra i/b. Law Global for the Petitioner.

CORAM : AKIL KURESHI &

S.J. KATHAWALLA, JJ.

DATE : 8TH AUGUST, 2019

P.C.:

1. The petitioner has made following substantive prayers :

“(a) that this court may be pleased to hold and declare section 125 of Cr.P.C. as ultra-vires of the Constitution of India as the same discriminates between men and women and thus is against the constitutional mandate contain under Article 14 of the Constitution of India and also on the touch stone of the same being unfair and unreasonable.

(b) that this court may be pleased to direct the Union of India / State of Maharashtra to formulate guidelines for being followed by the courts in the matter of grant of maintenance under different statutes such as section 125 of Cr.P.C., section 24 of the Hindu Marriage Act, section 12 of the Domestic Violence Act, etc. to the extent that the educational qualification and / or

ability of the wife to maintain herself be the prime consideration before embarking upon to pass an order of maintenance.

(c) that in the alternative, but without prejudice to prayer clause (b) above, in exercise of the extra-ordinary jurisdiction vested with this court under Article 226 of the Constitution of India may graciously lay down guidelines for being followed by different courts dealing with different statutes provided for maintenance of women and children before embarking upon to pass an order of maintenance till such time the legislature realising the need for there being vacuum in the field comes out with solution either in the form of an Act or amendment under different statutes.”

2. Brief facts are as under :

The petitioner and respondent no. 1 got married on 25th December, 2011 as per Islamic rites. The marital dispute surfaced within a short time. Respondent wife filed an application for maintenance under section 125 of the Criminal Procedure Code, 1973 (**‘Cr.PC’** for short) on 22nd July, 2014 before the Family Court, Solapur claiming maintenance of Rs.25,000/- from her husband for herself and Rs.25,000/- for her son. The wife also instituted two separate proceedings against the husband under the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as **‘DV Act’**) before the Court of Judicial Magistrate, First Class, Solapur. The wife has also filed an FIR against the Petitioner before Vijapur Naika Police Station at Solapur on 1st May, 2013 alleging commission of offence punishable under section 498A of the Indian Penal Code, 1860.

3. The Family Court, Solapur in the application for maintenance filed by the wife directed the husband to pay Rs.30,000/- to the wife and Rs.10,000/- to the son by an order dated 24th February, 2017. Against the said order dated 24th February, 2017, the petitioner filed a revision petition before the High Court. Revision petition was dismissed by an order dated 26th July, 2017. The learned Single Judge of the High Court confirmed the order of the Family Court. In such order, it was noticed that the petitioner's gross salary for the month of February, 2016 was Rs.1,37,894/- and for the month of March, 2016 was Rs.1,73,085/-. He had received gross salary for the month of April, 2016 was Rs.2,17,756/- and for the month of May, 2016 was Rs.2,13,699/-. The learned Single Judge noted that the Family Court had awarded 1/3rd of the petitioner's income by way of maintenance to the wife and son. It was recorded that the wife was not employed.

4. Thereafter, the petitioner filed the present petition, in which he has made the above noted prayers. The prayers made by the petitioner can be divided in three parts. In prayer clause (a), the petitioner has challenged the constitutional vires of section 125 of Cr.PC. In prayer clause (b), the petitioner seeks a direction to the Union of India or the State of Maharashtra to formulate guidelines, which would be followed by the Courts while granting maintenance under different statutory provisions such as section 125 of Cr.PC, section 24 of Hindu Marriage Act, 1955 and section 12 of the DV Act. Prayer clause (c) is in the nature of alternate to prayer (b) urging this Court to

lay down guidelines for the purpose of awarding such maintenance.

5. We have noticed that the petitioner has not challenged any specific order, adverse to him. All these three prayers are therefore in the nature of abstract prayers without any consequential reliefs, which may flow to the Petitioner. The petitioner has thus challenged the virus of a central legislation and prayed for issuing guidelines without challenging any order adverse to him. These prayers therefore cannot be entertained. Only on that count, the petition could have been dismissed without any further scrutiny. We understand the predicament of the petitioner. Since he had already challenged the order passed by the Family Court on the petition filed by the wife for maintenance and failed, he could not have again challenged the same order in the present proceedings. Be that as it may, the learned counsel for the petitioner has vehemently and passionately argued the challenge to the constitutionality of the section 125 of Cr.PC. We would therefore prefer to comment on the same.

6. His contention was that section 125 of Cr.PC is discriminatory and violative of the Articles – 14, 15, 20 and 21 of the Constitution of India. He submitted that the section 24 of the Hindu Marriage Act, 1955 gives right either to the wife or the husband to seek maintenance *pendente lite* without any discrimination on the gender of the claimant. Section 125 of the Cr.PC removes this equality and brings the angle of providing maintenance only to a wife. He therefore contended that section 125 of Cr.PC is violative of equality clause enshrined in Article-14 of the Constitution of

India. It also offends gender equality referred to an Article-15 of Constitution of India. Counsel also drew our attention to the provisions of the DV Act, which make special provisions for protection of women. Though no formal challenge is brought before us to any of the provisions of the DV Act, the counsel for the petitioner submitted that such provisions are also in the nature of departure from the principle enshrined in section 24 of the Hindu Marriage Act, 1955.

7. In the context of the petitioner's challenge to the vires of section 125 of Cr.PC, we may reproduce the said provision :

*“125. Order for maintenance of wives, children and parents. -
(1) If any person having sufficient means neglects or refuses to maintain -
(a) his wife, unable to maintain herself, or
(b) his legitimate, or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
(d) his father or mother, unable to maintain himself or herself,
a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct :
Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.*

(Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct : Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceedings under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.)

Explanation. - For the purposes of this Chapter, -

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875, (9 of 1875), is deemed not to have attained his majority ;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.)

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,) remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the

date on which it became due :

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.

Explanation . - If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an (allowance for the maintenance or the interim maintenance and expenses of proceedings, as the case may be,) from her husband under this section if she is living in adultery, or if, without any sufficient reasons, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

8. Under sub section (1) of section 125 of Cr.PC, any person having sufficient means neglects or refuses to maintain his wife, who is unable to maintain herself or his legitimate or illegitimate minor child unable to maintain itself, his legitimate or illegitimate child not being a married daughter, who has attained majority, where such child is, by reasons of any physical or mental abnormality or injury unable to maintain itself, or his father or mother, unable to maintain himself or herself, would be entitled to file an application before the competent Magistrate and upon proof of such neglect

or refusal, the Magistrate would award monthly maintenance as he thinks fit and direct the same will be paid to such person from time to time.

9. Sub section (1) of section 125 of Cr.PC, thus makes a special provision for the purpose of securing maintenance in favour of four classes of persons namely (a) wife, (b) legitimate or illegitimate minor child (c) legitimate or illegitimate child, who may have attained majority but by reason of any physical or mental abnormality or injury is unable to maintain itself and (d) father or mother. In all sub clauses, the legislature has used the words “unable to maintain” himself or herself as the case may be. The direction for payment of maintenance by the Magistrate, can therefore be granted must in case of any of the persons belonging to the said four categories and is also unable to maintain himself or herself. It thus clearly emerges from this provision, firstly that the provision is made for maintenance of a special class of persons and secondly the maintenance would be awarded if such person is unable to maintain himself or herself. The legislature has thus clubbed wife, minor children, major children who on account of physical or mental abnormality or injury are unable to maintain themselves and the father and mother of a person for awarding maintenance.

10. The Statement of Objects and Reasons for introducing the said provision, provides *inter alia* that :

“It has been observed that an applicant, after filing application in a Court under section 125 of the Code of Criminal Procedure, 1973, has to wait for several years for getting relief from the

Court. It is, therefore, felt that express provisions should be made in the said Code for interim maintenance allowance to the aggrieved person under said section 125 of the Code. Accordingly, it is proposed that during the pendency of the proceedings, the Magistrate may order payment of interim maintenance allowance and such expenses of the proceedings as the Magistrate considers reasonable, to the aggrieved person. It is also proposed that this order be made ordinarily within sixty days from the date of the service of the notice.”

11. Section 125 of Cr.PC thus makes a welfare provision for protection of the needy and weaker section of the society. The Supreme Court in case of ***Chaturbhuj v. Sita Bai***¹ observed that the object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those, who can provide support to those, who are unable to support themselves and who have a moral claim to support. It was further observed that where the wife was surviving by begging, it would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Following observations may be noted :

“6. The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase “unable to maintain herself” in the instant case would mean that means available to the deserted wife while she was living

1 (2008) 2 Supreme Court Cases 316

*with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in **Captain Ramesh Chander Kaushal v. Veena Kaushal**² falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speed remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in **Savitaben Somabhai Bhatiya v. State of Gujarat**³.*

7. Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient. In the instant case, there is no dispute that the appellant has the requisite means. But there is an inseparable condition which has also to be satisfied that the wife was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. It has to be established that the wife was unable to maintain herself. The appellant has placed material to show that the respondent wife was earning some income. That is not sufficient to rule out application of Section 125 CrPC. It has to be

² (1978) 4 SCC 70 : 1978 SCC (Cri) 508 : AIR 1978 SC 1807

³ (2005) 3 SCC 636 : 2005 SCC (Cri) 787 : (2005) 2 Supreme 503

established that with the amount she she earned the respondent wife was able to maintain herself.

*8. In an illustrative case, where the wife was surviving by begging, it would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 CrPC. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In **Bhagwan Dutt v. Kamla Devi**⁴, it was observed that the wife should be in a position to maintain a standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression “unable to maintain herself” does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 CrPC”.*

12. In the case of **Shabana Bano v. Imran Khan**⁵, the Supreme Court held that the provisions of section 125 of Cr.PC would also apply to a divorced Muslim woman as long as she does not remarry, the same being the beneficial legislation.

13. In the case of **Danial Latif v. Union of India**⁶, the Supreme Court made

⁴ (1975) 2 SCC 386 : 1975 SCC (Cri) 563 : AIR 1975 SC 83

⁵ (2010) 1 Supreme Court Cases 666

⁶ (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266

following observations :

“30. A comparison of these provisions with Section 125 Cr.PC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 Cr.PC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

31. Even under the Act, the parties agreed that the provisions of Section 125 Cr.PC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provisions for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 Cr.PC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.”

14. The constitutionality of section 125 of Cr.PC thus has been tested and

upheld. In other words, we find absolutely no merit in the contention raised by the learned counsel for the petitioner in this regard. Article-14 of the Constitution of India as is well-known, prohibits classes legislation but not reasonable classification. In the context of the ability to earn, the legislature has drawn distinction between the man and his wife who is unable to maintain herself, his minor children, his children who may be major but are unable to maintain themselves on account of physical or mental abnormality or injury and his parents, who are unable to maintain themselves. The challenge to the vires of section 125 of Cr.PC must fail.

15. Prayer clause (b) needs to be summarily rejected. Neither the Union of India nor the State of Maharashtra has power to issue guidelines to govern the judicial discretion of the competent Courts while considering the cases of maintenance under the different statutory provisions. The Court would be guided by indication and guidelines contained in the respective provisions and binding judgments of Courts. No executive instructions can be issued to govern the discretion of any Court.

16. The occasion for us to lay down any guidelines as prayed for in prayer clause (c) has not arisen. This petition is not filed in the nature of public interest petition. Without there being any relevance or reference point, we would not undertake the exercise in futility. Petition is therefore dismissed.

(S.J.KATHAWALLA, J.)

(AKIL KURESHI, J.)