

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

CRIMINAL WRIT PETITION NO.1199 OF 2019

Ratna w/o Sanjay Wakchoure
Age: 37 Yrs., occu. Nil,
R/o C/o – Nana Sahakari Agawan
R/o Karanji Budruk, Tq.Kopargaon,
District Ahmednagar. = **PETITIONER**

VERSUS

Sanjay s/o Karbhani Wakchoury
Age: 40 Yrs., occu. Service
and Agril. r/o Sanwatsar,
Tq. Kopargaon, Dist.Ahmednagar. = **RESPONDENT**

Mr. PP Mandlik, Advocate for Petitioner;
Ms. Afreen R.Shaikh, Advocate for Respondent.

CORAM : SMT.VIBHA KANKANWADI, J.

RESERVED ON : 13th JANUARY, 2020.

PRONOUNCED ON : 7th FEBRUARY, 2020.

JUDGMENT

1. Rule. Rule is made returnable forthwith
by consent of learned Advocate for the parties.

2. Present writ petition has been filed by
the wife, challenging the Judgment and order dt.
04-04-2019 passed by learned Additional Sessions
Judge, Kopargaon, District Ahmednagar in Criminal
Revision Application No.2 of 2018; thereby
confirming the Judgment and order dt.18-12-2017,

passed by learned Judicial Magistrate First Class, Kopargaoon, District Ahmednagar in Criminal Miscellaneous Application No.122 of 2016. The Application filed by the present Petitioner under Section 125 of Code of Criminal Procedure for getting maintenance came to be rejected by learned Magistrate and it has been confirmed by learned Additional Sessions Judge.

3. The factual matrix, leading to the application for maintenance were that, original applicant No.1 got married to respondent-husband about 16 years prior to 2016. She went to cohabit with husband after the marriage. She was treated properly for about 2 years after the marriage. Thereafter, husband started harassing her on one or the other pretext. He used to assault her. Applicant Nos.2 and 3 were born from the husband. Husband used to ask the wife that she should demand her share from the property of her father and then to give it in his name. He used to give threat to kill her. She was sustaining the harassment on the count of children. He had tried to give poison to her forcibly once, but she was saved by her son.

Husband was not providing daily articles and therefore she used to raise the amount by selling vegetables from field. Husband had never maintained her and her children. He had not made any provision for giving good education to children. Whenever she used to ask him for the education of children, husband used to assault her. She was driven out of the house at the time of Diwali festival of 2014 with her children. He refused to take her back, but falsely sent a notice to her. When she went to cohabit with husband after the notice, she was driven out by saying that the notice has been sent for evidence purpose. Applicants have contended that they are unable to maintain themselves. Husband has means to maintain them, but refused and neglected. Therefore, they have prayed for maintenance.

4. Husband has filed say and resisted the application. He has denied that there was marriage between him and wife about 16 years ago. All other allegations have been denied specifically. It has been contended that marriage between him and wife had taken place in 2000 by exchanging garlands in a

temple at Ukkadgaon. Children are born out of the wedlock. Applicant wife was married to one person from Golhewadi prior to their marriage. She had not taken legal divorce from said person. He was also married earlier prior to their marriage. It has been contended that wife cohabited only for about 10-12 days in the matrimonial home. She was insisted him to stay at her parental house for some days and then at Padhegaon and Karanji. Her brother had asked respondent to extend loan of Rs.1,50,000/- for purchase of a tractor. Accordingly that amount was given by him to her brother. When respondent started demanding the said amount back from her brother, the wife started raising quarrels on one or the other pretext. She was not providing food to him. He had constructed a house at Sanwatsar and started residing with the applicants. However, applicant No.1 left the house with children in October 2014 on the ground that she does not like to stay there, but to stay with her parents. His efforts to bring her back were in vain. He had issued notices to applicant No.1 on 12-10-2015, 28-10-2015, 9-11-2015, 01-12-2015 and 17-03-2016. Wife did not resume cohabitation in

spite of receipt of the notices. He had therefore, filed an application for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. He has not deserted applicants, therefore, they are not entitled to get maintenance. He has no work, no agricultural land. His mother is ill and dependent on him. Wife is doing business of selling vegetable and thereby earning Rs.10,000/- to 15,000/- p.m. He therefore, prayed for rejection of the application.

6. Both the parties had adduced evidence. After considering the evidence on record and hearing both sides, the learned Magistrate has rejected the application as against applicant No. 1. Maintenance has been granted to applicant No.2 and 3 @ Rs.2,500/- p.m. from the date of the application till they attain their respective majority. The prayer of the wife for maintenance was rejected on the ground that wife as well as husband had living spouse, when they got married and their respective earlier marriage was subsisting.

7. The wife had challenged the said Judgment

and order to the extent of rejection of maintenance to her in Revision Application. The said revision has been dismissed by the learned Additional Sessions Judge on the same ground, thereby confirming the view and decision by learned Magistrate. Hence, this writ petition.

8. Heard learned Advocate Shri P.P. Mandlik for petitioner/original applicant No. 1 and learned Advocate Ms. Shaikh Afreen for respondent/original respondent.

9. Learned Advocate for petitioner submitted that the husband has not denied that he ever married to applicant No.1. He admits that he has performed marriage with applicant No.1 and then applicant No.2 and 3 are their children. He has not challenged the order of maintenance granted to applicant No.2 and 3. The learned Magistrate and Revisional Court was too technical in rejecting the application/prayer for maintenance of applicant No. 1. It has come on record that wife as well as husband in this case were married to different persons earlier and without taking any legal

divorce, they had performed second marriage. Only wife can not be taxed for the wrong. They both were residing as husband and wife. It was relationship known to people surrounding them. Wife is unable to maintain herself. Husband has means to provide maintenance. Under such circumstance, prayer for maintenance ought to have been granted in favour of wife/petitioner.

10. In order to buttress his submissions, learned Advocate for petitioner has relied on the decision in *Rakmabai Pandurang Sonawane v/s. Pandurang Ramkrishna Sonavane and others* [2016 (5) Mh. L. J. (Cri) 530 : 2016 DGLS(Bom) 442]; wherein reliance was placed on the decision in *Badshah v/s. Urmila Badshah Godse & Anr* [2013 (4) Bom.C.R. (Cri)616 (S.C.)] it has been held that, " As held in case of *Badshah (supra)*, the respondent cannot be permitted to take advantage of his own wrong and to say that the petitioner is not entitled to maintenance under Section 125 of Cr.P.C., even though, there is no material on record to establish that the petitioner married the respondent with full knowledge about the

subsistence of his first marriage with Anusayabai. In Badshah (supra), under similar circumstances, the Supreme Court has held that at least for purposes of Section 125 of Cr.P.C., such wife is required to be treated as a legally wedded wife of the respondent. In support of such reasoning, the Hon'ble Supreme Court has adopted a purposive interpretation by reference to 'social justice adjudication' or 'social context adjudication' rather than the usual 'adversarial approach'. The learned Additional Sessions Judge in making the impugned judgment and order, having failed to apply 'social context adjudication' or 'social justice adjudication' approach, the impugned judgment and order warrants interference". It was also submitted that strict proof of marriage is not required in proceedings under Section 125 of Code of Criminal Procedure. Reliance has been placed on the decisions in Kamala and others v/s. M. R. Mohan Kumar [2018 DGLS(SC) 1080 : AIR 2018 SC 5128 and Dwarika Prasad Satpathy v/s. Bidyut Prava Dixit [AIR 1999 SC 3348] in support of said proposition.

11. Per contra, the learned Advocate appearing for husband supported the reasons given by both the Courts below and submitted that when the fact was admitted by the wife that she as well as husband were married to different persons prior to their marriage and their respective marriages were subsisting as they had not obtained legal divorce from the spouses, their marriage was void. Maintenance can be granted under Section 125 of Code of Criminal Procedure only to the legally wedded wife. Various decisions were relied by the Respondent-husband in support of the arguments and they have been properly considered. The prayer for grant of maintenance to applicant No.1 has been rightly rejected.

12. At the out set, it can be seen that, it was admitted by the wife in her cross-examination that her marriage was performed with one Shantaram earlier and there is no divorce between her and Shantaram. It was indicative that her marriage with respondent was during the subsistence of her earlier marriage. This has been considered by both the Courts as void marriage, dis-entitling

applicant No. 1 from claiming maintenance from the respondent. However, what has been not considered by both the Courts below is that, the respondent is accepting the fact of marriage with wife. Though he is stating that the marriage was performed by exchange of garlands; yet, he was considering applicant No.1 as his wife. As laid down in Kamala and Dwarika Satpathy's case (supra) strict proof of marriage, as required in any matrimonial dispute, is not required in the proceedings under Section 125 of the Code. Another important fact to be noted is that the respondent had issued notices to the wife asking her to resume cohabitation and even went on to file the petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. Unless he was considering her as wife (much less legally wedded wife) he would not have taken such action. Intention of the parties is therefore required to be considered here. He is not denying that he had resided with applicant No.1 as husband and wife for more than 16 years and applicant No.2 and 3 are their children. Now, when it comes to grant of maintenance, he wants to take advantage of the fact that wife has not taken legal

divorce from her earlier husband. He has not come with a case that he was not aware about the first marriage of applicant No.1 when he performed marriage with her. He has also not stated that he had told the fact about his earlier marriage with some lady prior to performing marriage with applicant No.1. Therefore, under such circumstance, he can not be allowed to take disadvantage of his own wrong.

13. The decision in ***Badshah's case*** (cited supra) is squarely applicable here. Hon'ble Supreme Court has observed in that case that, *"Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125 Cr.P.C. while dealing with the application of destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to*

achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society".

14. Taking into consideration the decision in the case of Badshah; the decision in the case of Rakmabai has been given by this Court at Principal seat. In Rakmabai's case also, the husband had already married and his first wife was living on the date of solemnization of marriage with applicant therein. It was held that, when wife and husband were staying as per the said status, known to the society, then husband can not be allowed to avoid maintenance on the ground of void marriage. Here in this case also, the husband himself is accepting that he and applicant No.1 were living as husband and wife and it was known to society. He has rather taken those steps which a husband would take as against a legally wedded wife. Therefore,

he can not be allowed to avoid payment of maintenance. Both the Courts below erred in not taking into consideration the ratio laid down in Badshah's case by Hon'ble Apex Court. Hence, it is held that even applicant No.1 is entitled to get maintenance, as she is unable to maintain herself. The respondent has not brought on record any such cogent evidence to prove that the petitioner-wife is sufficiently earning. He has stated that she is selling vegetables and earning, but there is no documentary or oral proof, except his bare interested words.

15. Respondent has means to provide maintenance and it has been so held by both the Courts below, while granting the prayer in respect of applicant Nos.2 and 3. His salary was around Rs.15,000/- p.m. and he is also having agricultural land. Therefore, it would be proper to award amount of Rs.2,500/- p.m. to applicant No.1 also. There is no need to show any sympathy to the respondent while directing payment of maintenance from the date of original application, as he has unnecessarily tried to get advantage of his own

wrong. Hence, following order is passed.

ORDER

- i. Writ petition stands allowed.
- ii. The Judgment and order passed by learned Additional Session Judge, Kopargaon, District Ahmednagar in Criminal Revision Application No. 2 of 2018 dt. 04-04-2019, and the judgment and order passed by learned Judicial Magistrate First Class, Kopargaon, District Ahmednagar in Criminal Miscellaneous Application No.122 of 2016 dt.18-12-2017 are hereby set aside to the extent of rejecting the prayer of maintenance to applicant No. 1.
- iii. The original application stands allowed in respect of prayer of maintenance to applicant No. 1 also.
- iv. Respondent-husband shall pay maintenance @ Rs.2,500/- p. m. to applicant No.1 also from the date of application i.e. 01-03-2016.

v. The arrears of the maintenance till 01-02-2020 be paid in four equal monthly installments starting from 01-03-2020.

vi. Respondent to pay cost of Rs.5,000/- also to the applicant No.1 in respect of cost of this proceedings.

vii. Rule is made absolute in the aforesaid terms.

(SMT. VIBHA KANKANWADI,J.)

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