

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL REVISION APPLICATION NO.189 OF 2019

Sau. Meena w/o Kailasrao Pavitrakar ...**Versus...** Kailasrao s/o Tulshiram Pavitrakar

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. V. G. Bhamburkar, Advocate for applicant.

Mr. S. S. Dhengale, Advocate for non-applicant.

CORAM : AVINASH G. GHAROTE, J.

DATE : 24/03/2022

1] Heard Mr. Bhamburkar, learned counsel for the applicant and Mr. Dhengale, learned counsel for the non-applicant.

2] Mr. Bhamburkar, learned counsel for the applicant submits, that the only question which needs to be determined is, whether an application under Section 127(2) of the Code of Criminal Procedure (in short "the Cr.P.C.") was maintainable in light of the earlier order passed by the learned Judicial Magistrate, First Class, under Section 125 of the Cr.P.C., whereby the application for grant of maintenance as passed by the learned Judicial Magistrate, First Class, came to be rejected. It is the contention that an order of rejection of an application under Section 125 of the Cr.P.C. would be an order which would be included in the language of Section 127(2) of the Cr.P.C. and therefore, the learned Judicial Magistrate, First Class, or for that matter the learned Family Court would be entitled to consider exercise of powers under Section 127(2) of the Cr.P.C. by granting maintenance.

Mr. Bhamburkar, learned counsel for the applicant further submits, even presuming otherwise, considering the fact that the non-applicant claims the applicant to be a divorcee, still the applicant would be entitled for maintenance in light of the language of Explanation (b) to Section 125(1) of the Cr.P.C. It is further submitted that in case it is held that the point on which the matter was remanded by this Court's judgment dated 16.03.2016 was not considered and decided by the Court below, the matter be remanded back.

3] Mr. Dhengale, learned counsel for the non-applicant/husband claims otherwise. He submits, that for the purpose of invoking Section 127(2) of the Cr.P.C., the existence of an order under Section 125 of the Cr.P.C. granting maintenance is a must, in absence of which, there cannot be any exercise of powers under Section 127(2) of the Cr.P.C. He therefore submits, that the application under Section 127(2) as filed by the present applicant before the learned Family Court was not maintainable in itself and the learned Family Court could not have even entertained the same. He further submits, that even presuming otherwise, the learned Family Court, had specifically framed point Nos.3 and 4 (page 56), which have been answered by the learned Family Court in the negative, and therefore, the impugned order is correct.

4] The present litigation has a chequered history which is as under:

- a) On 23.05.1983, the applicant and the non-applicant were married.
- b) January 1984, the applicant claims to have been driven out of the house by the non-applicant.
- c) On 17.01.2006, an application under Section 125 of the Cr.PC. claiming maintenance was filed (after 22 years).
- d) On 29.01.2008, the application under Section 125 of Cr.PC. came to be dismissed by the learned Judicial Magistrate, First Class, holding that the applicant was incapable of looking after herself and the non-applicant had sufficient means, who had neglected to maintain the applicant, however, on the basis of the finding rendered that the applicant was not the legally married wife of the non-applicant, grant of maintenance was declined and the application was rejected.
- e) On 18.07.2008, the Criminal Revision Application No.28 of 2008 filed by the applicant – wife, came to be dismissed by the learned Sessions Court holding that there was no evidence to hold that the applicant and the non-applicant were married.
- (f) On 04.05.2009, Special Civil Suit No.8/2006, filed by the applicant – wife claiming recovery of arrears of maintenance and for grant of future maintenance came to be dismissed. It was however, held that the applicant had proved

marriage with the non-applicant. It was also held that a divorce had taken place between the applicant and the non-applicant in 1985 and therefore, since 1985 onwards the applicant was a divorcee of the defendant (page 31).

- (g) An appeal was filed by the non-applicant which came to be dismissed (as per the admission given by the non-applicant – husband in his cross-examination in petition No.E-114/2010 (para 19).
- (h) On 09.11.2010, a petition No. E –114/2010 came to be filed by the applicant – wife under Section 127 of the Cr.PC. before the learned Family Court claiming maintenance. The learned Family Court, by the judgment dated 08.12.2011 held that the non-applicant, had sufficient means in as much as he was owner of Gat No. 412, admeasuring 7.37 Hectares which was being cultivated and therefore, had means to maintain the applicant, considering which, a maintenance of Rs.5,000/- per month was awarded from the date of presentation of the petition i.e. from 09.11.2010.
- (i) This judgment came to be challenged by way of Criminal Revision Application No.168 of 2013, which came to be decided on 16.03.2016 whereby the judgment of the learned Family Court dated 08.12.2011 was set aside and the matter was remitted back to the learned Family Court on the ground that, when there was no

order by any Court earlier determining the liability of the non-applicant to pay the maintenance allowance to the wife therefor, whether the application under Section 127 of the Cr. P.C. would be maintainable.

5] After remand by the judgment dated 18.02.2019, the learned Family Court though held that the applicant was legally wedded wife of the non-applicant and was entitled for asking variation, and the non-applicant had sufficient means to maintain her, declined to award any maintenance to the applicant on the ground that she had not been able to prove that the applicant willfully neglected and refused to maintain the applicant and also failed to prove that the applicant was unable to maintain herself. In order to come to such a finding, the learned Family Court took into consideration that certain agricultural land No.102, which was in the name of the applicant was sold by her vide Exh.74 (page 69) to one Pravin Mukundrao Gawande for consideration of Rs. 4,29,000/-, which was the value mentioned in the sale deed 18.10.2011, however, judicial note was taken of the allegation that in order to avoid stamp duty, though the consideration was Rs.16,00,000/- a lesser amount of Rs.4,29,000/- was shown and therefore, it was held that the applicant had sufficient means to maintain herself. It was also held that the non-applicant had sufficient means. Further finding was rendered that the applicant had married with one Dnyaneshwar Pande and was having a daughter out of the said wedlock

namely Ku. Sakshi, born on 30.07.2000, as the birth certificate of said Ku. Sakshi was admitted by the applicant in her cross-examination. Reliance is also placed upon an order dated 02.01.2009 passed by the Education Officer directing change of name of Ku. Sakshi Dnyaneshwar Pande to Ku. Sakshi Meena Gawande, who is claimed by the applicant, to be her daughter, on account of an unknown person having committed rape upon her in 1999.

6] Thought it has been contended that the matter needs to be remanded back to the learned Family Court, for deciding the issue regarding maintainability of the application under Section 127(1) of the Cr. P.C, however considering the chequered history between the parties, I deem it inappropriate to do so.

7] The factum of marriage between the applicant and the non-applicant is no more a disputed question in light of the judgment dated 04.05.2009 (page 26) rendered by the Civil Judge, Senior Division, Daryapur in Special Civil Suit No.8 of 2006, in which, the non-applicant was a contesting party and a categorical finding has been rendered in answer to issue No.7(A) – Whether plaintiff proves that she is legally wedded wife of defendant?, to the effect that yes, but now she is divorced. The cross-examination of the non-applicant, in petition No.E-114/2010 indicates an admission that the judgment of the Civil Suit was challenged by way of an appeal, however, the same was dismissed. It would mean

that the finding rendered by the learned Civil Court of a legal and valid marriage having been performed between the applicant and the non-applicant cannot be in dispute any more, which is equally true in respect of the further finding that divorce had taken place between them in the year 1985, by virtue of the divorce deed at Exh.67 therein, which was proved by PW-2 and PW-3 in the Civil Suit as held therein. Thus, the factum of marriage and divorce between the applicant and the non-applicant is no longer open to challenge.

8] That takes me to the contention that petition No.E-114/2010 was an application under Section 127(2) of the Cr.P.C. and therefore, in absence of any order under Section 125 (1) of the Cr.P.C., the same was not maintainable. The learned Family Court in para 11 while answering point No.1, holds that Sections 125 and 127(2) does not say whether the application under Section 125 of the Cr.P.C. is allowed or rejected and therefore, even if the application under Section 125 of the Cr.P.C. was rejected, the provisions of Section 127(2) of Cr.P.C. would be applicable and application thereunder would be tenable and maintainable. The contention has to be looked into in the light of the language of Section 125 and 127 (2) of the Cr.P.C. which is as under:

Section 125

“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:

.....

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.

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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 proceeding, as the case may be,] 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.

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(5) On proof that any wife in whose favour an order has been made under this section in 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.”

Section 127 : Alteration in allowance

“(1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother; as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.”

9] The language of Section 125 of the Cr.PC. would categorically demonstrate, that the Magistrate considering the application thereunder may upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of the persons named therein. The powers as vested in the Magistrate therefore, empower the Magistrate to pass an order for grant of a monthly allowance for maintenance. The heading of Section 127 of the Cr.PC. speaks about alteration in the allowances and Sub-section (1) of Section 127 speaks about alteration in respect of allowance for maintenance granted under Section 125 of the Cr.PC. Section 127(2) of the Cr.PC, therefore, when it uses the expression “any order made under Section 125 should be cancelled or varied”, would necessarily mean

cancellation or variation of an order passed under Section 125 of the Cr.P.C. granting a monthly allowance for maintenance. Of course, such cancellation and variation, would be based upon a decision of a competent Civil Court. Strictly legally speaking therefore, when the learned Civil Court rendered a judgment on 05.04.2009 in Special Civil Suit No.8 of 2006 holding that the applicant was a divorcee, what should have been filed by the applicant, was an application under Section 125 of the Cr.P.C. and not an application under Section 127 of the Cr.P.C. It is however, material to note that the proceedings under Chapter IX of the Cr.P.C. which include Sections 125 and 127 of the Cr. P.C. are proceedings of a beneficial nature for the purpose of maintenance of wives, children and parents. It is equally a settled position of law, that the substance and not the form is material, considering which, even if Petition No.E-114/2010 was styled as a petition under Section 125 of the Cr.P.C, the first judgment rendered therein on 08.12.2011 itself in point No.2 indicates that the Court had treated the same as an application under Section 125 of the Cr.P.C. for the sake of ready reference point No.2 is answered as under:

“2. If yes, whether the petitioner is entitled for maintenance from the respondent under section 125 of Cr.P.C. ? Yes.”

It is thus considering the above beneficial aspect of the provisions of Chapter IX and the fact that the learned Family Court in the judgment dated 08.12.2011 itself had

treated the application under Section 125 of the Cr.P.C. which is apparent from what has been considered in para 6 and para 9 thereof, it will have to be held that mere styling of the application as one under Section 127 (2) of the Cr.P.C., would preclude the exercise of jurisdiction by the learned Family Court under Section 125 of the Cr.P.C. would be too technical, as such an interpretation cannot be given to provisions contained in a beneficial legislation and wider meaning and import has to be the norm. In view of what has been discussed above, in my considered opinion though the application before the learned Family Court has been styled as one under Section 127(2) of the Cr.P.C. that by itself did not prevent the learned Family Court from treating it as one under Section 125 of the Cr.P.C. and exercising the powers under section 125 of the Cr.P.C., which in fact was so done as is indicated in the judgment dated 08.12.2011, which has been set aside by this Court.

10] The impugned order also in para 13, indicates that while deciding petition No.E-114/2010, all the ingredients of Section 125 of the Cr.P.C., have been taken into consideration, which would indicate the exercise of the jurisdiction under Section 125 of the Cr.P.C. itself.

11] The impugned judgment categorically holds that the applicant is the legally wedded wife of the non-applicant which finding has not been challenged by the non-applicant and therefore, the non-applicant is

bound by the same. Insofar as the finding as to whether the non-applicant has willfully neglected and refused to maintain the applicant, the learned Court relies upon the divorce deed dt 8.7.1985, which records that the applicant has even relinquished her right of maintenance, though the same cannot be held against the applicant. It is however material to note that it is an admitted position on record that since 1984, the parties had separated, and were residing separately. Till 2006, the applicant, did not bother to approach any court of law, seeking any maintenance as against the respondent, which is a period of nearly 22 years. It is also material to note that such separation could be said to be by mutual consent, as is the position spelt out from divorce deed dated 8.7.1985, which appears to be by mutual consent as has been found by the learned Civil Court in the judgment dated 4.5.2009 in SCS No. 8/2006, in which the said document, has been proved by the plaintiff/wife through PW-4, the scribe of the document. It would thus be apparent that the matter would squarely fall under Section 125 (4) of Cr.PC and would be covered by what this court has held in **Bhaskarrao Uttamrao Patil (Chopde) vrs. Sumanbai @ Kokilabai Bhaskarrao Patil, (2017) SCC Online 10015**, which holds that a wife becomes disentitled to claim maintenance, as she was residing separately with mutual consent, considering which I do not see any merit in the application and the same is accordingly dismissed.

(13)

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JUDGE

Jalit