

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

CRIMINAL WRIT PETITION NO. 1466 OF 2022

Tushar Suresh Thigale

.. Petitioner

Versus

Archana Tushar Thigale and another

.. Respondents

Mr. K. N. Shermale, Advocate for the Petitioner.

Mr. Satyajeet S. Dixit, Advocate for Respondent Nos. 1 and 2.

CORAM : KISHORE C. SANT, J.

Date on which reserved for order : 27th March, 2023.

Date on which order pronounced : 26th April, 2023.

ORDER :-

. This writ petition is filed by the husband-original respondent in the proceeding filed under Section 125 of the Code of Criminal Procedure (hereinafter referred to as “Cr.P.C.”) filed by respondent-wife challenging the order passed on an application below Exh. 16 in Criminal Miscellaneous Application No. 812/2019 that was filed before the learned J.M.F.C., Court No. 3, Sangamner. The petitioner filed revision application against the order rejecting the application under Order VII, Rule XI of the Code of Civil Procedure (hereinafter referred to as “C.P.C.”) which was confirmed by the learned Additional Sessions Judge, Sangamner in Criminal Revision Application No. 11/2021 dated

29.03.2022. The proceeding is arising out of the proceeding filed under Section 125 of the Cr.P.C.

2. The facts in short are that, the respondent No. 1 - wife filed criminal misc. application under Section 125 of the Cr.P.C. praying for maintenance to herself and respondent No. 2 – son of petitioner and respondent No. 1 bearing Criminal Misc. Application No. 812/2019. It is the case of respondent - wife that, the petitioner has neglected and refused to maintain the wife and son. The husband is getting income of Rs. 50,000-60,000/- per month by running a business of travel company. In the said application, the petitioner appeared and filed his say. On 06.05.2020 by another application below Exh. 16 he prayed for rejection of the proceeding as the same is not tenable.

3. It is the case of the husband that the wife had filed earlier proceedings for maintenance. In the said proceeding, there was a compromise and in view of compromise the parties filed divorce petition under Section 13(B) of the Hindu Marriage Act by mutual consent. By way of settlement, it was decided that the wife would give up her right to maintenance in lieu of one time settlement for an amount of Rs. 7,00,000/- (Rs. Seven Lakh only).

4. It is the case of the husband that, once there was a compromise

between the parties, the wife is now estopped from praying for maintenance. In view of the settlement even the decree of divorce was passed in HMP No. 984/2010 dated 29.04.2011. On this, the separate application was filed under Order VII, Rule XI of the C.P.C. The respondents filed say that the respondent No. 2 – son is deaf and dumb. Though there was a settlement between the parties, however, no amount was in fact paid to the wife. The right of the wife to claim maintenance under Section 125 of the Cr.P.C. is intact. The learned J.M.F.C. considered the arguments and held that, the adjudication on the issue is necessary by taking evidence on record and rejected the application. The petitioner therefore filed criminal revision application in the Court of learned Additional Sessions Judge, Sangamner. The learned Additional Sessions Judge also considered the submissions of both the sides and held that, the order passed by the learned J.M.F.C. does not call for any interference. The application seeking maintenance needs to be considered on its own merits.

5. Learned advocate for the petitioner submits that, the application under Order VII, Rule XI of the C.P.C. was perfectly maintainable as right to seek maintenance is a civil right. Section 125 of the Cr.P.C. only gives wife the right to file petition for maintenance by way of civil remedy only and does not affect the civil rights of the parties. Further,

it is the case of the petitioner that once there was a decree of divorce by consent of the parties and when the wife had given up her right of future maintenance there is no question of filing an application under Section 125 of the Cr.P.C. and therefore, on this count also the application under Section 125 of the Cr.P.C. ought to have been rejected. He further submits that, even the proceeding under the Protection of Women from Domestic Violence Act (hereinafter referred to as "Domestic Violence Act") filed by the wife was withdrawn on 18.01.2014 in view of the compromise. He further submits that, the parties have even acted upon the compromise and on the compromise wife has withdrawn the proceeding filed under the Domestic Violence Act clearly shows that both the parties have accepted the compromise. He further submits that, thus both the Courts below have committed illegality in not allowing the application below Exh. 16.

6. Learned advocate for respondents submits that, the application is filed under Order VII, Rule XI of the C.P.C. The provisions of C.P.C. are not at all applicable to the proceedings under the Cr.P.C. He submits that, the Courts below have rightly passed the order. He further submits that, the condition of respondent No. 2 – son is not well and that is a matter of record. The wife is residing with her parents without any source of income. His further submission is that, though there was

a compromise recorded in earlier proceeding, however, the husband has not deposited the amount as per the compromise and therefore, a fresh proceeding was required to be filed. Learned advocate along with his reply invited attention to the annexure filed along with his reply showing that the respondent No. 2 – son requires a treatment. He is required to undergo Cochlear Implant which would require cost of Rs. 28,00,000/- (Rs. Twenty Eight Lakh only) in the year 2018 and now the said cost has gone up to Rs. 32,00,000/- (Rs. Thirty Two Lakh only) by showing a certificate issued by the Civil Surgeon General Hospital, Ahmednager dated 22.10.2022.

7. Learned advocate for the petitioner submits that, the medical papers which are now filed on record were not part of the papers before the learned Trial Court and the revisional Court. The respondent No. 2 has also filed application through respondent No. 1 as pauper under Order XXXIII, Rule I of the C.P.C. and that is also pending. There is also evidence on record in the said proceeding. He also submits that there is no any application for medical expenses till now and for the first time the respondents have come with a case of medical expenses.

8. Learned advocate for the respondents relied upon various judgments. In the case of **Vinod s/o Pralhad Balap Vs. Smt. Chhaya**

w/o Vinod Balap reported in 2002 (4) Mh.L.J. 937 wherein, it is held that, on non payment of interim maintenance the defence of the husband cannot be strike out as Civil Procedure Code has no application and proceedings would be governed by the Criminal Procedure Code.

9. In the judgment of the Hon'ble Apex Court in the case of Rakesh Malhotra Vs. Krishna Malhotra in Criminal Appeal Nos. 246-247/2020, the Hon'ble Apex Court has observed that, the remedy under Section 25 (2) of the Hindu Marriage Act is available to the party to seek modification of the maintenance order. It is held that, such application can be filed considering the exigencies of the situation and urgency in the matter. It is further held that, under 125 proceeding the wife is entitled to have a full-fledged adjudication in the form of any challenge raised before the competent authority either under the Act or similar such enactments.

10. In another judgment of the Hon'ble Apex in the case of Shree Surya Developers and Promoters Vs. N. Shailesh Prasad and others reported in (2022) 5 SCC 736, it is held that, once there is a compromise between the parties and the order is passed under Order 23, Rule 3 or Rule 3-A, no challenge is maintainable except and provided by law.

11. In the judgment of this Court in the case of **Sau Mandakini w/o Bhausahab Pagire Vs. Bhausahab Genu Pagire** in Criminal Writ Petition No. 184/2003, there was a divorce under Section 13 (B) by mutual consent where the husband had given Rs. 2,00,000/- (Rs. Two Lakh only) to the wife and daughter for their maintenance, residence and education etc. Later on, the wife initially had filed proceeding under Section 125 of the Cr.P.C. for her daughter. It is held that, in such case the order passed by the learned Magistrate granting maintenance under Section 125 of the Cr.P.C. was held to be nullity in the eyes of law. In the said judgment, however, the question was not about the maintainability of the proceedings wherein, in this case the husband is coming with the case that the application under Section 125 of the Cr.P.C. is not maintainable and therefore, the said judgment has no application to the present case.

12. After going through all these judgments cited, this Court finds that, in any case proceeding requires full-fledged adjudication. The proceeding under Section 125 of the Cr.P.C. itself is in summary nature and therefore, there is no question of stopping the proceeding in between on any application in the nature of Order VII, Rule XI of the C.P.C., as it is such application is not maintainable. The legislature has not provided any such application in maintenance proceeding. This

Court therefore finds that, the application under Order VII, Rule XI of the C.P.C. is not at all maintainable. Both the Courts below have rightly rejected the application of the husband.

13. The criminal writ petition stands dismissed.

(KISHORE C. SANT, J.)

. At this stage, learned advocate for the petitioner prays for continuation of interim relief for a period of eight (08) weeks from today.

2. Considering the nature of the dispute and since it is seriously objected by the learned advocate for respondents, interim relief to continue only for a period of four (04) weeks from today.

(KISHORE C. SANT, J.)

PS.B.