

(2018) 04 BOM CK 0024

In the Bombay High Court

Case No : WRIT PETITION NO.2872 of 2017

AGNES LILLY IRUDAYA

APPELLANT

Vs

IRUDAYA KANI ARASAN AND ANR

RESPONDENT

Date of Decision : 06-04-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 125, 125(1)(a), 125(1)(b), 125(1)(c), 125(1)(d), 125(1)(e), 126
Muslim Women (Protection Of Rights On Divorce) Act, 1986 — Section 3(1)(b)
Hindu Adoption and Maintenance Act, 1956 — Section 20

Citation : (2018) 04 BOM CK 0024

Hon'ble Judges : BHARATI H.DANGRE, J

Bench : Single Bench

Advocate : Sumangala Biradar, Shabnam Kazi

Judgement

1 The present petition is filed by the petitioner—mother claiming maintenance for her major daughter under section 125 of the Code of Criminal

Procedure and the legal issue involved is whether a major daughter is entitled for maintenance under section 125 of the Code of Criminal Procedure

(—the Cr.P.C.— for short) and another issue which arises out of the present proceedings, whether a mother is competent to file proceedings

claiming maintenance on behalf of her major daughter.

2 A brief in sight into the facts would reveal that the petitioner, a Roman Catholics, was married to respondent no.1 in the year 1988 and three children

were born from the wedlock.— At present, two sons are aged 25 and 24 years respectively and daughter Alcina Judy is presently 19 years.— It is

the claim of the petitioner that all the major children are residing with her.— It is the specific case of the petitioner that the respondent had deserted

her in the year 1997 and she was living with her minor children and on the

contrary the respondent is living an adulterous life. The petitioner had filed proceedings under section 125 of Cr.P.C. bearing petition No. EÂ 24/2003 in the Family Court, Mumbai seeking maintenance for her three children who were then minors. The said petition resulted into consent terms being signed by the parties on 25 April 2003 where the respondent no.1 agreed to pay maintenance @ Rs.1000/Â per month towards each minor child. Subsequently on account of change in circumstances the petitioner moved an application for enhancement of maintenance for her three children and by judgment dated 30/12/2009, the respondent was directed to pay an amount of Rs.5000/Â per month towards maintenance of the second son till he attained majority and an amount of Rs.3000 per month was awarded for maintenance of minor daughter Alcina Judy, attained age of majority on 21st August 2015. It is the case of the petitioner that though the daughter has attained the age of majority and she is financially depending on the petitioner, since she is pursuing her higher education and considerable amount is required to meet her day to day expenses which the petitioner is not able to arrange for. According to the petitioner, she is not getting any financial assistance from her elder son who had already obtained an educational loan for graduation and he is repaying said loan. As far as second son is concerned, according to the petitioner, he has graduated but is without any job opportunity.

3 The petitioner moved an application under section 125 of the Cr.P.C. before the Family Court at Bandra and in the said application she claimed maintenance to the tune of Rs.25000 per month for herself. In the said application, the petitioner stated that though her major sons are residing with her, but they are not contributing towards her maintenance. She has stated that the daughter is prosecuting her studies and in the academic year 2015-16 she had to pay amount of Rs.1,02,834 as college admission fee of the Xavier's Institute of Engineering, Mahim and she has also paid an amount of Rs.60,000/Â as contribution towards development of educational infrastructure of the institute. The petitioner stated in the application that in the next two academic years there is likely to be increase in the educational fees of the daughter Alcina Judy and she also has to bear the expenses for books and stationery, travelling expenses, her mobile bill, Internet expenses, clothing, medical expenses and she is also required to

keep some amount for her marriage expenses. The petitioner specifically claim that she had borne the major financial burden of maintenance of three children and she is left with no savings, resultantly she is forced to approach the court seeking maintenance for herself so that she can pay for the daughter's higher education and repay the loans. She therefore claimed an amount of Rs.15000 per month from the date of application as an interim maintenance.

4 The said application came to be opposed by the respondent and it is attempted to demonstrate that the major daughter is not entitled to any maintenance and in fact under the guise of maintenance for herself, she is actually claiming daughter's maintenance. It is specifically stated in the reply that the respondent's husband is not bound by law to maintain major children and he categorically stated that he was working as a driver and is about to retire and he is suffering from several health hazards and in such a position it is not possible for him to provide maintenance to the applicant as he has to incur his own expenses including the medical expenses.

5 On consideration of the said application, the Family Court at Bandra proceeded to decide the same by order dated 13th February 2017. The Court made a full attempt to refer the parties to mediation but the matter could not be settled. The Court observed that the petitioner is not entitled for maintenance for herself as she is working as a school teacher and earning Rs.48000 per month. The maintenance amount is claimed for herself for maintaining her daughter who is unable to maintain herself. The impugned order makes a reference to Section 125 (1) (b) of the Cr.P.C. where the maintenance can be granted to the minor children only and the major daughter cannot claim maintenance through her mother. The Judge Family Court Mumbai therefore held that the petitioner is not entitled to claim maintenance for the major daughter under Section 125 of the Cr.P.C. and rejected the application.

6 In support of the petition, I have heard Ms Sumangala Biradar and Ms. Suvarna Joshi appearing for respondent No.1. The learned Counsel for the petitioner would place reliance on the judgment of the Hon'ble Apex Court in the case of Noor Saba Kahtoon vs. Mohd. Quasim 1997 (5) SCALE 248 and the Division Bench of this Court in Vijaykumar Jagdishrai Chawla vs. Reeta Vijaykumar Chawla, reported in III (2011) DMC 687 (DB) to

support her submission that though the daughter has attained majority, as per the Family Law an unmarried daughter is entitled to claim maintenance

from her parents till she attains majority. The learned counsel would submit that the statutory obligation to maintain the daughter who is unmarried,

though she has attained majority, would entitle the mother to claim maintenance for her daughter.Â

7 Per contra, the learned counsel for the respondent would submit that the wife had initially sought maintenance for her minor children which was

granted by the competent court and which was subsequently modified taking into consideration need of the children. According to the learned counsel,

the application claiming maintenance was filed by the mother and the daughter was not impleaded as an applicant in the said application and the

mother was claiming amount towards maintenance of the daughter which is not permissible since it is for the daughterÂ has attained majority andÂ

is conferred with several rights being major and is the competent person to invoke jurisdiction of the Court and to lead evidence to demonstrate that

she is unable to maintain herself and her father has neglected to maintain her. The learned counsel for the respondent would concede to the position of

law that the major daughter, till she is married is entitled for maintenance but her objection is to the application preferred by the mother on behalf of

daughter which did not fit into the parameters of Section 125 of Cr.P.C. She therefore submits that the order passed by the Family Court is just and

proper and needs to be upheld and the present petition deserves to be dismissed.

8 In order to effectively adjudicate the controversy, reference needs to be made to Section 125 of the Cr.P.C. which is included in Chapter IX of the

Cr.P.C. which provides for maintenance of wife, children and parents.Â Section 125 of Cr.P.C. reads thus :Â?

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

(1) If any person having sufficient means neglects or refuses to maintainÂ?

(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 not exceeding five hundred

rupees in the whole, 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;

9 Perusal of Section 125 of Cr.P.C. would reveal that the said provision enables a wife, a legitimate or illegitimate minor child and the legitimate or

illegitimate child, who has attained majority, but unable to maintain itself on account of physical or mental abnormality or injury and a father or mother

can claim maintenance, if there is neglect or refusal to maintain and if they are unable to maintain themselves. What is pertinent to note in Section

125 of the Cr.P.C. is the neglect or refusal on the part of a person having sufficient means to maintain his wife, his legitimate or illegitimate minor

children who are unable to maintain themselves. The order of maintenance can be made under Section 125 of Cr.P.C. by a Magistrate of First

Class, upon proof of such neglect or refusal and a direction can be issued to make monthly allowance for maintenance of those who are entitled under

clause (a), (b), (c), (d) and (e) of Section 125 (1) of the Cr.P.C. 10 Under Section 125 of the Cr.P.C. it is only the minor child who is entitled to claim

maintenance if such child is not able to maintain itself. A child who has attained majority is held entitled for claiming maintenance, on account of

physical or mental abnormality or injury he is unable to maintain himself. There is no any specific provision contained in Section 125 for grant of

maintenance to a daughter who is major. However, perusal of the judgment of the Hon'ble Apex Court in the case of Noor Saba Khatoon vs.

Mohd. Quasim (supra) where the Hon'ble Apex Court had an opportunity to deal with the issue as to whether children of Muslim parents are entitled

to grant maintenance under Section 125 of the Cr.P.C. after they attain majority, the Hon'ble Apex Court by making a reference to Section 3 (1) (b)

of the Muslim Women (Protection of Rights on Divorce) Act, 1986 observed thus :Â?

10. Thus, both under the personal law and the statutory law (Sec. 125. Cr.P.C.) the obligation of a Muslim father, having sufficient means, to maintain

his minor children, unable to maintain themselves, till they attain majority and in case of females till they get married, is absolute, notwithstanding the

fact that the minor children are living with the divorced wife.

11. Thus, our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance

under Section 125, Cr.P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier, and in case of females, till

they get married, and this right is not restricted, affected or controlled by divorcee wife's right to claim maintenance for maintaining the infant

child/children in her custody for a period of two years from the date of birth of the child concerned under Section 3(1)(b) of the 1986 Act. In other

words Section 3(1)(b) of the 1986 Act does not in any way affect the rights of the minor children of divorced Muslim parents to claim maintenance

from their father under Section 125, Cr.P.C. till they attain majority or are able to maintain themselves, or in the case of females, till they are married.

11 Further, the Division Bench of this Court in case of Vijaykumar Jagdishrai Chawla vs. Reeta Vijaykumar Chawala reported in III (2011) DMC 687

while dealing with similar issue as to whether unmarried daughter is entitled to receive amount of of maintenance from her father or mother so long

she is unable to maintain herself out of her own earnings. By referring to the provisions of Section 20 of the Hindu Adoption and Maintenance Act,

1956 the Division Bench of this Court was pleased to hold that the father cannot be extricated from his liability to maintain his unmarried daughter who

is staying with his wife and he would be bound not only to maintain his unmarried daughter but also responsible to maintain until her marriage while

dealing with the objection of the respondent as to whether a wife can seek relief of maintenance on behalf of her major daughter, the Division Bench

held that the unmarried daughter is entitled to receive maintenance from her father and the mother is competent to pursue relief of maintenance for

the daughters even if they have become major if the daughters are staying with her and if she was taking responsibility of their maintenance and

education. At this stage, it is also relevant to refer to the judgment of the Apex Court in the case of Jagdish Jugtawat Vs. Manju Lata and ors reported

in (2002) 5 SCC 422, where the Apex Court held as follows :Â?

â??Applying the principle to the facts and circumstances of the case in hand, it is manifest that the right of a minor girl for maintenance from parents

after attaining majority till her marriage is recognized in Section 20 (3) of the Hindu Adoptions and Maintenance Act. Therefore, no exception can be

taken to the judgment/order passed by the learned Single Judge for maintaining the order passed by the Family Court which is based on a combined

reading of Section 125, Code of Criminal Procedure and Section 20(3) of the Hindu Adoptions and Maintenance Act. For the reasons aforestated, we

are of the view that on facts and in the circumstances of the case no interference with the impugned judgment order of the High Court is called for.â??

From the aforestated position, it is clear that the unmarried daughter though attained majority is entitled to claim maintenance from the father.

12 The next question is whether the mother can claim maintenance on behalf of the daughter by initiating proceedings. The learned counsel for the

respondent has vehemently argued that though the entitlement of the unmarried daughter with the aid of personal law, imposes an obligation on the

parents, mother and father, equal responsibility is not onÂ both of them to maintain the children. The question whether a mother can file proceeding

on behalf of the daughter isÂ moot question.Â

13 Perusal of Section 125 of Cr.P.C. would reveal that the wife, legitimate or illegitimate child or major child covered under clause (c) and the father

or mother who are unable to maintain themselves, upon a proof of neglect or refusal to maintain by any person, can be fastened with the liability of

monthly allowance for maintenance of such wife, child, father or mother as may be directed by the Magistrate.

Â As per section 126 of the Cr.P.C., the evidence is required to be tendered and is to be recorded in the manner prescribed for summons cases and it

then contemplates followance of the procedure prescribed in Chapter XX of the

Cr.P.C. The party who claim maintenance is duty bound to tender proof about neglect or refusal to maintain and also the factum that the person claiming maintenance is unable to maintain herself.Â Undisputedly, it is the person claiming maintenance would be required to discharge the burden of proving such neglect or refusal. The learned counsel for the respondent had vehemently argued that on attaining majority the daughter can herself file proceeding and would step into the witness box to discharge the said burden and the mother is not competent to do so on behalf of the daughter.Â The said argument appears to be misconceived as in the present case the mother who moved an interim application claiming maintenance has prayed that an amount of Rs.15000/Â per month be granted to her as an interim maintenance so as to enable her to meet the expenses of the daughter's education.Â She has made it clear in the application that her income is insufficient to meet her personal medical and other expenses as well as the daughter's expenses and she has approached the Court seeking maintenance for herself so that she can arrange for daughter's higher education and repaying loans. Once the learned counsel for the respondent has conceded to the position of law that major unmarried daughter is entitled to claim maintenance from the father, then, hyper technical objection that it is she, who should enter the witness box and discharge the burden of proving neglect or refusal to maintain and to prove her dependency is to be discharged by her cannot be sustained. Even if the daughter would have filed the proceedings, the parameters for deciding her entitlement would have been the neglect and refusal of the father to pay for the educational expenses and other expenses of the daughter.Â The daughter can be a competent person to file her own application claiming maintenance. However, in order to avoid multiplicity of the proceeding, no fault can be found in the application preferred by the mother claiming maintenance with a view to meet the expenses of the daughter, since wife has not claimed maintenance for herself and she has not denied the factum of her employment.Â In such circumstances, it appears that the stand taken by the respondent is a hyper technical plea and the respondent cannot be absolved of his liability to meet the necessary expenses of his major unmarried daughter who is persuading her education and she needs cannot be met by the petitioner wife who has her limited source of earning. Once this

principle is clear, then, the technical objection cannot come in the way of granting substantive relief in favour of the petitioner to claim an amount of maintenance for meeting the expenses of her daughter's education.

The Family Court, however, has cursorily dealt with the application filed by the petitioner wife and has rejected it with a one line reasoning, namely,

“Under section 125 of Cr.P.C., the major daughter cannot claim maintenance from her father through her mother. The petitioner is therefore not

entitled to claim maintenance for her major daughter under section 125 of Cr.P.C.”

The order passed by the Principal Judge, Family Court, Mumbai cannot be sustained in the light of the aforesaid observation and in the light of the

settled position of law that a major unmarried daughter is entitled for maintenance from her father and since this Court do not find any fault in the

application being preferred by the mother claiming only that amount which she requires for meeting the educational expenses and other expenses of

the daughter as maintenance amount, the impugned order passed by the Family Court is liable to be set aside. The Principal Judge, Family Court,

Mumbai is directed to entertain the claim of the petitioner by properly examining the wilful neglect or refusal to maintain the daughter to maintain

herself and also the inability of the petitioner to arrange for daughter's maintenance. The impugned order passed by the Family Court is quashed and

set aside. Application preferred by the petitioner's wife is remanded back to the Family Court for proper adjudication by applying the parameters for

grant of maintenance.