
(1980) 09 BOM CK 0020

In the Bombay High Court

Case No : Criminal Application No. 521 of 1979

Baburao Akaram Kalaskar

APPELLANT

Vs

Kusum Baburao Kalaskar

RESPONDENT

Date of Decision : 26-09-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(4), 126(2), 127, 482

Hindu Marriage Act, 1955 — Section 10

Citation : (1980) MhLj 871

Hon'ble Judges : S.W. Puranik, J

Bench : Single Bench

Advocate : J.N. Chandurkar, for the Appellant; S.G. Singhai and M.A. Garud for State, for the Respondent

Final Decision : Allowed

Judgement

S.W. Puranik, J.—This petition u/s 482 of the Criminal Procedure Code, while invoking the inherent powers of this Court, raises an interesting question of law dealing with the proceedings for grant of maintenance u/s 125 of the Criminal Procedure Code. The petition is directed against the concurrent findings of the learned Judicial Magistrate, First Class, and the Sessions Judge, upholding the claim of the respondent Kusum against her husband-petitioner Baburao regarding the maintenance u/s 125 of the Criminal Procedure Code.

2. The respondent Kusum had filed proceedings before the Judicial Magistrate, First Class, Amravati vide Misc. Criminal Application No. 58 of 1977, against the petitioner-husband Baburao on the ground that the petitioner had refused and neglected to maintain her and that she was entitled to claim maintenance at the rate of Rs. 250 per month. In the said proceedings, the present petitioner had filed his written statement on 7-10-1977, denying these allegations. He also referred to a Hindu Marriage Petition bearing No. 26 of 1974. on the file of the Civil Judge, Senior Division, Amravati, preferred by his wife Kusum against him,

praying for judicial separation on the ground of cruelty by the husband, on the ground of desertion by the husband and on the ground that the husband has married again and has issues from his second wife. On these grounds, the said matrimonial proceedings were commenced and after due contest on 28-9-1977, the said petition came to be decided, whereby the learned Civil Judge dismissed the petition. The petitioner therefore contended that no maintenance is liable to be granted to the wife Kusum. At the time of the decision of the maintenance proceedings, the learned Magistrate held that the Hindu Marriage Petition is entirely a different matter, while the maintenance proceedings are independent in nature and he would not be bound by the said decision.

3. In the Criminal Revision bearing No. 50 of 1979, preferred by the husband before the Additional Sessions Judge, Amravati, the order of the maintenance was confirmed and the revision petition was dismissed. There also the husband-petitioner had urged regarding the earlier decision in the Hindu Marriage Petition and had claimed that the maintenance proceedings are not liable to be granted in favour of the wife. The learned Additional Sessions Judge, however, also held the view that proceeding u/s 125 of the Criminal Procedure Code are independent in nature and the decision of the civil Court in its matrimonial jurisdiction is not binding on these proceedings.

4. It is against these concurrent findings, that the petitioner has come up, invoking the inherent powers of the High Court. Shri J. N. Chandurkar, the learned counsel for the petitioner pointed out the brief facts of the case, as well as of the marriage petition and contended that the proceedings u/s 125 of the Criminal Procedure Code are essentially civil in nature and if there be a decision between the same parties, on the same set of facts before the civil Court, the same should be binding on the Criminal Court and the maintenance proceedings are liable to be dropped. He also referred to the general principles of res judicata and its applicability to the criminal proceedings.

5. Shri Singhal, the learned Advocate for the non-applicant urged that when under Criminal Procedure Code concurrent findings have been granted by both the Courts below and any further revision or appeal is barred under the Code, the High Court would not exercise its inherent powers to upset the said findings. He further urged that the proceedings u/s 125 of the Criminal Procedure Code are independent in nature and the decision in the matrimonial jurisdiction of the civil Court would not be binding on the Criminal Courts. He also urged that the respondent wife had established her case to the satisfaction of the trial Court, as well as the Revisional Court and hence there is no reason to interfere with the said findings.

6. In order to appreciate these contentions, it would be necessary to mention briefly the relevant facts and circumstances of the proceedings before us. The respondent was married to the petitioner on 12-5-1965 and they lived together as husband and wife upto August 1969. It is the contention of the respondent-wife that during this period she was ill treated by the husband probably because

she did not have any issue from the wedlock. It is also the contention of the respondent-wife that she was deserted by her husband and sent to her parent's home in August 1969. It is an admitted position that from August 1969, she has not returned to the husband's house. It is an admitted position that on 20th March, 1973, i.e. about 2 1/2 years after she started living with her parents, the wife-respondent had filed a petition u/s 10 of the Hindu Marriage Act, seeking judicial separation from her husband. The said marriage petition was registered as H. M. P. 26 of 1974 on the file of Civil Judge, Senior Division, Amravati. In the said petition, the wife alleged that there was cruel treatment meted out to her by the husband to such an extent, that it gave reasonable apprehension in her mind that it was dangerous for her life and person to live with the husband. She also contended in the said petition that the petitioner has deserted her on his own volition and that the petitioner has also remarried and has issues from his second wife Shewantibai. The said petition was duly contested by the present petitioner-husband and he denied all these allegations. The issues that were framed in the Hindu Marriage Petition were:

- (i) whether the wife proves that husband had treated her with such a cruelty, which raises an apprehension in her mind that it is harmful and dangerous to live with her husband.
- (ii) Whether the wife proves that the non-applicant husband has re-married and,
- (iii) whether the husband has withdrawn from the Society of the petitioner and,
- (iv) whether on these grounds, she was entitled for a decree of judicial separation.

After evidence was recorded and the case was coming to an end before the civil Court, the wife, present respondent preferred proceedings u/s 125 of the Criminal Procedure Code before the Judicial Magistrate, First Class, Amravati. The said Misc. Criminal Case was registered and the notice thereof was served upon the non-applicant-husband. It is pertinent to note that the notice was served upon the husband sometime in July, 1977 and the written statement was filed on his behalf on 7th October, 1977. In the meantime, the Hindu Marriage Petition was decided on 28th of September, 1977, wherein all the issues which were framed, were found against the wife. It is in this light that the statement which was filed on 7-10-1977 was worded by the non-applicant, inter alia mentioning that the civil proceedings have now been decided against the wife, and that therefore she has no right to claim any maintenance and that her application for maintenance be dismissed. The learned Magistrate, however, decided the proceedings before him holding that they were independent of the Civil Proceedings. This order came to be challenged by the husband in criminal revision preferred by him before the Lamed Additional Sessions Judge, which was also dismissed as already discussed above.

7. The main points for consideration that arise in this petition are :

1. What is the nature of proceedings u/s 125 of the Criminal Procedure Code.
 2. Whether the general principles of res judicata can be made applicable to the proceedings u/s 125 of the Criminal Procedure Code, or
 3. Whether the maintenance proceedings are so independent in nature that the Civil Court's decision in its matrimonial jurisdiction has no relevance before it.
8. It is an admitted position that there is a parallel jurisdiction of the Civil Court and the Criminal Court in the matter of granting or allowing the maintenance allowance. It is only as a matter of expeditious remedy and summary procedure that a Scheme for grant of maintenance allowance is provided under the Criminal Procedure Code. If we peruse the scheme of this proceeding as per Chapter 9 of the Code of Criminal Procedure, we find, that the entire chapter and the scheme is independent of the Code of Criminal Procedure. We find that, unlike the procedure adopted in regular criminal cases, the application for maintenance u/s 125 is not required to be verified by the Magistrate. No sooner the proceedings are filed, the notice is issued to the non-applicant, as in a Civil Suit. Further, we find from section 126 (2) of the Criminal Procedure Code, that the proceedings are conducted in the presence of the party, against whom the order for maintenance is proposed to be made, but the proviso to this subsection states that in case the Magistrate is satisfied that the non-applicant is wilfully avoiding service or is negligent to attend the Court, he may proceed to hear and determine the case ex parte as in civil proceedings. It further provides for setting aside of such ex parte order within 3 months from the date thereof on sufficient cause being shown by the non-applicant for his nonappearance. Subject of course to payment of cost to the applicant. This also in my view is a matter, which is exclusively civil in nature. Sub-clause 3 of this section also provides payment of costs to the party at the time of deciding the case u/s 125 of the Criminal Procedure Code. It is seen from the provisions of section 127, Clause 2 of the Code of Criminal Procedure, that after the passing of the order u/s 125, if there is a change in the circumstances as a consequence to any decision of the competent Civil Court, the order u/s 125 shall be cancelled by the concerned Magistrate.
9. The Scheme of Chapter 9 of the Criminal Procedure Code, therefore, leaves no manner of doubt that the proceedings under it are essentially civil in nature, providing an expeditious and summary remedy for the party claiming maintenance. We may now refer to the decision of the Supreme Court in *Nandlal Misra Vs. K.L. Misra*, . Supreme Court dealing with this point has laid down categorically "the relief given under this Chapter is essentially of civil nature. It prescribes a summary procedure for compelling a man to maintain his wife or children. The findings of a Magistrate under this Chapter are not final and the parties can legitimately agitate their rights in a civil Court".
10. So also in *Jagir Kaur and Another Vs. Jaswant Singh*, . It is held that, "the proceedings under this section (488 of the old Criminal Procedure Code) are in

the nature of the civil proceedings, the remedy is a summary one and the person seeking that remedy, as we have pointed out, is ordinarily a helpless person".

11. From the discussion as above, it can be safely laid down that the proceedings u/s 125 of the Criminal Procedure Code are essentially civil in nature.

12. Having come to this conclusion, it is to be seen whether the general principles of res judicata can be extended to these proceedings.

13. In *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, the Supreme Court had laid down "the principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter--whether on a question of fact or a question of law--has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principles of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

14. We also find another decision reported in *Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another*, , where the Supreme Court has laid down as follows:

It is well known that the doctrine of res judicata is codified in section 11, CPC but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine, of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of section 11 and in many other situations also principles not only of direct res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.

15. We also find some decisions from other High Courts in India, as well as the Supreme Court that the civil forum is admittedly a superior forum to other judicial tribunals. In *Karam Chand Ganga Prasad and Another Vs. Union of India (UOI) and Others*, , their Lordships of the Supreme Court had decided and held that a civil Court's decision is binding on the Criminal Court but the converse is not true. The decision of our own High Court reported in *Fakruddin Shamsuddiu Saiyed v. Bai Jenab A I R (31) 1944 Bom. 11*, in substance held that a civil order is binding on the Criminal Court, but Criminal Court must apply its mind to the facts of each case without running the risk of relying on a paper decree of the Civil Court. In the judgment of the Allahabad High Court, reported in *Ravendra Kaur Vs. Achant Swarup*, it was held that the wife was not entitled to receive maintenance allowance from the husband. It was further held that the Magistrate was bound to take notice of the decision of the Civil Court as provided u/s 489, sub-clause (2) of the Criminal Procedure Code, even though there was no specific application under that section before him.

16. Now, therefore, it is abundantly clear that the general principles of res judicata can be made applicable to the proceedings u/s 125 of the Criminal Procedure Code. With advantage we may refer to a very recent decision of our own High Court. The said judgment reported in *Laxman Vithal Rewankar v. Rajaram N. Pohurkar A I R 1960 S C 1153* stated that the general principles of res judicata are applicable to a finding of an Authority or Tribunal exercising judicial functions. In the said case, *Ginwala J.*, was dealing with a matter decided between the same parties, before the Rent Controller and subsequent suit between the same parties before the civil Court. He has referred to several decisions including the one reported in *Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat)*, and came to the conclusion that when a finding has been arrived at before a Court of competent jurisdiction between the parties after due contest, then the said decision before any other judicial tribunal in another lis between the same parties is binding.

17. From the discussion above, I am of the opinion that an earlier decision between the same parties in the civil Court can, on the basis of the general principles of res judicata, be made applicable to even subsequent criminal proceedings and particularly maintenance proceedings of civil nature. This application of the principle of res judicata in such cases would of course be conditional. The matter in the earlier proceedings must have been between the same parties after due contest and on the same issues and on same set of facts. If, however, there is a different cause of action with different set of facts then naturally the earlier decision would not operate as res judicata.

18. With this conclusion, the question whether the proceedings before the Executive Magistrate or Judicial Magistrate u/s 125 of the Criminal Procedure Code are so independent in nature that the civil Court's decision in its matrimonial jurisdiction has no relevance before it, does not survive. It is apparent that with the given- set of facts and circumstances an earlier decision

before the civil Courts can squarely come under the principles of res judicata, and become binding on the Criminal Courts.

19. In the instant case, we have seen that the parties were already separated from the year of August 1969 and thereafter they have been living separate. Admittedly, there is no change in the situation between the parties from 1960 till the Hindu Marriage Petition was filed in 1974 and decided in September, 1977. It is also to be noticed that the pleadings in the matrimonial case of 1974 and pleadings for claiming maintenance u/s 125 in the proceedings started in 1977 are identical, In that the wife claims that she has been treated cruelly by the husband and because of the cruel treatment she had reasonable apprehension in her mind that it would be dangerous for her person and life to live with the husband. The other pleading is regarding the second marriage of the husband and lastly she also contends that she has been deserted by the husband or that he has voluntarily withdrawn from her society. The same set of facts are alleged in the proceedings u/s 125 of the Criminal Procedure Code also. Since there is no change in the circumstances- between the parties from. 1969, when they separated from each other till the filing of the maintenance proceedings, we find that the decision of the civil Court bearing on these facts would be squarely binding on the proceedings u/s 125 of the Criminal Procedure Code. We have seen that the proceedings u/s 125 are essentially civil in nature.

20. From the pleadings as seen from the certified copy of the judgment of the civil Court in the matrimonial case, it is implicit that some set of facts was to be established before the Criminal Court in the maintenance proceedings. The decision in the matrimonial case would show that when her petition for judicial separation was rejected, the civil Court held that the husband had not ill-treated wife. It further shows that the husband had not remarried again. Lastly, it shows that the husband had not driven the wife out of the house or withdrawn himself from her society. On the other hand, it is implicit in this decision that the wife is living away from the husband without any sufficient reason. In that view of the matter, section 125 (4) of the Code of Criminal Procedure would become applicable wherein it is stated that no wife would be entitled to maintenance if she is living in adultery or if she is living away from the husband without sufficient excuse or if they are living away from each other by mutual consent. This is the net result of the decision of the civil Court and since there has been no change in the circumstances between the parties right from 1969 when they separated, it can only be inferred directly from the decision in the matrimonial case that either they are living separately by mutual consent or that it is the wife who is living away from the husband without sufficient excuse, In that view of the matter, the learned Judicial Magistrate First Class ought to have rejected the application for grant of maintenance on this short point.

21. In the instant case, the matter went up before the Sessions Judge, Amravati in Revision Application Ho. 50 of 1979 who also did not interfere with the order passed by the learned Judicial Magistrate First Class and confirmed the order for

grant of maintenance. Both the Courts below have erred on this crucial point inasmuch as they have opined that the proceeding under the Code of Criminal Procedure for grant of maintenance are independent in nature and hence, the earlier judgment by the civil Court in its matrimonial jurisdiction even if between the same parties and on the criminal Courts. This view is erroneous for the reasons stated above.

22. Ordinarily, when there are concurrent findings of the Courts below, the High Court will not invoke its inherent powers u/s 482 of the Code of Criminal Procedure. It is only when this Court feels that the orders of the Courts below are erroneous and perverse that, to meet the ends of justice, it will exercise powers u/s 482 of the Code of Criminal Procedure. The instant case is one such where it would be just and proper to exercise powers u/s 482 of the Code of Criminal Procedure in the interest of justice. Hence, I pass the following order.

23. Criminal Application No. 521 of 1979 is allowed. The impugned orders of the Courts below are quashed.