
(1983) 09 BOM CK 0033

In the Bombay High Court

Case No : Criminal Application No. 123A of 1982

Balaji Bhaurao Kalbanade

APPELLANT

Vs

Parubai Bhaguji Warhade and Another

RESPONDENT

Date of Decision : 19-09-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(1), 125(4), 386, 399(1)

Citation : (1984) 1 BomCR 61

Hon'ble Judges : G.M. Khandekar, J

Bench : Single Bench

Advocate : S.C. Bora, for the Appellant; B.B. Jadhav, Assistant Public Prosecutor for respondent No. 2-State, for the Respondent

Final Decision : Dismissed

Judgement

G.M. Khandekar, J.—In this Criminal Application, I am called upon to interpret a benign provision in regard to the economic condition of neglected wives and discarded divorcees enacted in the Code of Criminal Procedure, 1973, namely, section 125. The Code of Criminal Procedure, 1973, will hereafter be referred to as "the 1973 Code".

2. It is common ground that the present petitioner, namely Balaji Kalbanade, and present respondent No. 1, namely, Parubai, entered into a legal marriage sometime in the year 1960 and they put an end to this marriage in the year 1970 by executing a deed of divorce. The deed of divorce came to be executed on 17-10-1970 and since then, respondent No.1 stands in the position of a divorcee. There is no dispute that respondent No. 1 has not remarried since the divorce.

3. The original petitioner who is respondent No.1 in this petition, alleged in the lower Court that she used to maintain herself by doing labour work, but since about six months prior to the date of filing her maintenance petition in the lower Court, she was sick and was unable to maintain herself. She alleged that her

husband, that is the petitioner in this petition, was earning Rs. 3,000/- per annum by way of salary and was also getting an income of Rs. 1,000/- from his agricultural property and thus, he possessed sufficient means. Since she was unable to maintain herself, she filed this petition for maintenance u/s 125(1) of the 1973 Code claiming maintenance allowance at the rate of Rs. 200/- per month.

4. The petition was resisted by the husband-original opponent by his say at Exh. No. 8 in the lower Court, in which he admitted that the applicant was his divorcee and that the relationship of husband and wife between them came to end since the time of divorce deed dated 17-10-1970. He however, contended that the applicant was maintaining herself on the earnings as a labourer and by keeping illicit relations with others and, therefore, being of a bad character, she was not entitled to maintenance. He also denied that the applicant was sick and that she was unable to maintain herself. It was his specific plea that when the divorce took place in 1970, both the parties had agreed that none of them would proceed against each other and he had also paid a sum of Rs. 1,500/- to the applicant by way of maintenance and hence she had no right to claim any maintenance from him. He denied that he was getting the salary of Rs. 3,000/- per annum and that he had any income from his agricultural land. He further contended that he was getting only Rs. 100/- per month as salary and as such he could not maintain the applicant within such a small salary even though she was held entitled to maintenance.

5. The original petitioner, that is, Parubai, examined herself in support of her application for maintenance, while the opponent examined himself and one more person by name Maruti Gokul Pirane on the point of illicit connections between applicant Parubai and one Devidas a driver. On considering the evidence on record, the learned Judicial Magistrate First Class, Amdabad, held that the applicant was able to maintain herself and as such she was not entitled to claim any maintenance from her husband. He also negatived the plea of the opponent-husband that Parubai was living in adultery,. With these findings, he dismissed the petition leaving the parties to bear their own costs by his order dated 30th May, 1981 recorded in Miscellaneous Application No. 31 of 1980.

6. The applicant feeling dissatisfied with this order of the learned Magistrate carried a revision to the Sessions Court at Jalna, which was registered as Criminal Revision Application No. 79 of 1981. After hearing both sides, the learned Sessions Judge, Jalna, held that the applicant was unable to maintain herself and that she was entitled to claim maintenance from the husband, that is, Balaji. He negatived the contention of the opponent that the petitioner was living in adultery. With these findings, he allowed the revision petition and ordered the original opponent to pay Rs. 35/- per month by way of maintenance to the original applicant till she remained unmarried, by his order dated 22nd March, 1982.

7. Feeling dissatisfied with this order of maintenance recorded by the learned

Sessions Judge, the original opponent, that is, the husband, has filed this criminal, application.

8. Before I proceed further, I would refer to the provisions of section 125(1) together with its Explanation, as also section 125(4) of the 1973 Code.

"125. Order of maintenance of the wives, children and parents.---(1) if any person having sufficient means neglects or refuses to maintain---

(a) his wife, unable to maintain herself, or

.....

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...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:

.....

Explanation.---For the purpose of this chapter---

.....

(b) "wife" includes a woman, who has been divorced by, or obtained a divorce from her husband and has not remarried.

.....

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

....."

9. Shri S.C. Bora, learned Counsel for the petitioner, posed an interesting point of law before me for consideration of this criminal application. He canvassed before me that while enacting section 125(1) and (4) of the 1973 Code, and more particularly, while incorporating the definition of "wife" in the said section under the 1973 Code, the Legislature, in its wisdom, has considered the prevailing status of divorced wife in the society and included the divorced wife in the category of "wife". He further submitted that the Legislature has not included or intended every divorced wife as "wife" for the purpose of Clause (b) of Explanation to sub-section (1) of section 125 of the 1973 Code. The Legislature purposely defined the word "wife" for the purpose of this section and included in its ambit a wife, who has been divorced by her husband, or who has obtained divorce from her husband. Thus, what is pressed before me by Shri Bora is that every divorced wife is not included in the inclusive definition of "wife" and the wife who has obtained divorce in her husband's favour and who made stipulation in such divorce deed that she would have no further claim from her erstwhile

husband stands excluded from the definition of "wife" as laid down in Clause (b) of Explanation to section 125(1) of the 1973 Code and, as such, a divorced wife is not entitled to claim any maintenance allowance from her husband inasmuch as such a divorced wife as respondent No. 1 cannot claim the status of "wife" under the 1973 Code. Shri Bora further submitted that if this Court comes to a conclusion that a divorced wife as respondent No.1 is also a "wife" within the meaning of Clause (b) of Explanation to section 125(1) of the 1973 Code, then aid of section 125(4) is to be invoked and if there is divorce by mutual consent and wife is living separately in view of such agreement, then she would not be entitled to claim any maintenance from her husband in the light of provisions contained in sub-section (4) of section 125 of the 1973 Code. Shri Bora fairly conceded before me that the decisions of Kerala High Court in Padmanabhan Prasad Vs. Bhargavi Sarojini, and in K. Shanmukhan Vs. G. Sarojini, are not supporting his submissions made above, but according to him, there is no decision of this High Court on this point and as such, both these reported judgments require consideration by this Court.

10. The learned Sessions Judge preferred to follow the decision of Kerala High Court, cited *supra*, in the instant case, and repelled the arguments advanced by the respondent before him. It may be pointed out that similar arguments were advanced before me on behalf of the petitioner, who was respondent before the learned Sessions Judge.

11. Shri B.B. Jadhav, learned Additional Public Prosecutor appearing on behalf of respondent No. 2, contended that whether wife was unilaterally divorced by the husband or whether she obtained divorce either by mutual agreement or through a Civil Court, yet Clause (b) of Explanation to section 125(1) of the 1973 Code applies to the divorced wife by whatever mode the dissolution of marriage is brought about and in support of this argument, he relied on the pronouncement of the Supreme Court in *Mst. Zohara Khatoon Vs. Mohd. Ibrahim*, . As regards the other argument advanced on behalf of the petitioner, Shri Jadhav submitted that it could not be said that in view of divorce, the husband and wife were residing separately by mutual consent as envisaged by sub-section (4) of section 125 of the 1973 Code. It was also argued by Shri Jadhav that even if the wife had agreed to surrender all the claims against her husband under the deed of divorce, yet such an agreement was hit by section 23 of the Indian Contract Act, and as such, it was void and illegal. He thus lends support to the view taken by the learned Sessions Judge.

12. Shri Bora referred me to some rulings and he fairly conceded before me that those rulings were not supporting his arguments advanced before me, which are quoted above. He, however, requested this Court to consider all these rulings and then give its opinion.

13. In *Ravindran Nair Vs. Sakunthala Amma*, the divorce had taken place between the parties prior to the coming into force of the 1973 Code and the compromise petition and the divorce deed incorporated a statement by wife that

she had no further subsisting rights. It was held by the Kerala High Court that the same would not bar her application for maintenance u/s 125(4) of the 1973 Code. It was also observed that u/s 125 of the 1973 Code, a divorced wife is entitled to claim maintenance and this was the right which did not exist at the time of executing the compromise deed or the divorce deed and, therefore, there was no question of any waiver of any right which was vested in the wife at that time. The Court further observed that the question of waiver can arise only when the person consciously abandoned or waived a right, to which he or she was in law entitled. It was also observed that a divorced wife cannot be characterised as living separately by mutual consent. She is a person who lives separately from her former husband by virtue of a change in status consequent upon the dissolution of the marriage. She cannot be denied maintenance on the ground that she lives separately by mutual consent as envisaged by section 125(4) of the 1973 Code.

14. Another case to which I was referred by Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another, . In that case there was marriage between the parties some time in 1956 and the husband divorced his wife-Bai Thira-around July 1962. Some time later on, the divorced wife filed an application before the Magistrate u/s 125 of the 1973 Code for a monthly allowance for the maintenance of herself and her child alleging that she was entitled to maintenance being a divorced wife and she had not remarried. It was held by the Supreme Court that on a simple reading of the Explanation (b) to section 125(1) of the Code it was clear that every divorced wife, otherwise eligible, was entitled to the benefit of maintenance allowance and the dissolution of the marriage made no difference to this right under the current Code. It was also argued in that case that both the parties were living separately by mutual consent and as such the divorced wife was not entitled to claim maintenance in view of the provisions contained in section 125(4) of the 1973 Code. While dealing with this submission about the parties living separately by mutual consent, the Supreme Court observed :---

".....We see hardly any force in this plea: The compulsive conclusion from a divorce by a husband and his provision of separate residence as evidenced by the consent decree fills the bill. Do divorcees have to prove mutual consent to live apart? Divorce painfully implies that the husband orders her out of the conjugal home. If law has nexus with life this argument is still-born.

"....The contractual limbs of the contention must easily fail. The consent decree of 1962 resolved all disputes and settled all claims then available. But here is a new statutory right created as a projection of public policy by the Code of 1973, which would not have been in the contemplation of the parties when in 1962 they entered into a contract to adjust their then mutual rights. No settlement of claims which does not have the special statutory right of the divorcee u/s 125 can operate to negate that claim."

15. Shri Bora next referred to a Division Bench ruling of this Court in Isak

Chandra Palkar v. Nayamatbi w/o Isak Palkar and others 1980 Mh. L.J. 287. In that case, the parties were governed by the Mohamedan Law and there was a divorce between the husband and wife. An argument was advanced on behalf of the husband in the High Court that in view of the personal law governing the parties, viz. Shariat Act, 1937, the wife was not entitled to claim any maintenance after the period of Iddat and the provisions of section 125 of the 1937 Code were directly in conflict with the provisions of Shariat Act and, therefore, the Shariat Act, being a special law, its provisions were saved and they would override the general provisions incorporated in the 1937 Code, and particularly, of sections 125 to 127 of the said Code. This argument was negated by this Court by placing reliance on the decision of the Supreme Court in Bal Thira's case, cited supra, and it was held that such a Muslim divorced wife cannot be precluded from applying for maintenance u/s 125 of the 1937 Code. From paragraph 4 of the said judgment, it appears that there was conflict in the Division Bench decision of this Court as reported *Khurshid Khan Amin Khan v. Hasnabanu Mohamed Shaikh* 1976 M. L.J. 628; *Mahabubabi Pravin v. Shaikh Mohammed Hussain* 1978 M. L.J. 631 and *Ruksana Parvin v. Shaikh Mohammed Hussain* 1977 M. L.J. 231. The matter was therefore, referred to the Full Bench of this Court and the Full Bench, placing reliance on the Supreme Court decision in *Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another*, observed as under:

"Having considered the provisions of sections 125 and 127 of the new Code the Supreme Court has laid down the correct legal approach of these provisions in paragraphs 11 and 12 of the judgment. Since the very question, which has been referred to us, has been covered by the Supreme Court decision, it is not now necessary for this Bench to re-examine the provision."

16. Another ruling of this Court, to which reference was made by Shri Bora, was *Abedabi d/o Doud Shaikh and another v. Sikandar Akbar Mujawar and another* 1980 Bom. C.R. 240. In that case, husband gave talaq, to his wife on 6-1-1973, in consequence of talaq she filed a suit for maintenance and for recovery of certain amount, which includes some amount towards Mehar and some amount as maintenance for the period of Iddat. The suit was decreed in the trial Court and an appeal was pending in the District Court. In the meantime, Abedabi filed a petition for maintenance u/s 125 of the 1937 Code. It was held by this Court that every divorced wife, otherwise eligible, was entitled to the benefit of maintenance allowance and dissolution of marriage made no difference to this right.

17. Shri Bora then referred me to the two decisions of the Kerala High Court; *Padmanabhan Prasad v. Bhargavi Sarojini*, and *K. Shanmukhan v. G. Sarojini* 1981 Cri. L.J. 831, on which reliance was placed by the learned Sessions Judge. According to Shri Bora, there was no decision of this Court on the point decided in these two decisions. In the case of *Padmanabhan* (supra), it was observed as under :

"A wife who became a divorcee by mutual consent by executing a document

would fall within the scope of the inclusive definition of "wife" given in explanation (b) to section 125(1) and would be entitled to claim maintenance. "Mutual consent does not mean that the divorce is arranged because wife has upper hand over the husband or because she is at fault. Where a husband asks for divorce from his wife, she may not be in a position to resist the same either for lack of economic strength or on account of social factor or other causes. If she agrees to the demand made by the husband and joins a deed of divorce, she is a divorcee by mutual consent. It cannot be said that the legislature intended to exclude some women from the preview of section 125. When martial tie is served by a document executed by both the spouses it may be that it is brought about at the initiative of the husband, in such a case it can be legitimately said that the wife is "divorced by her husband". On the other hand if document is obtained on the initiative of the wife, it can be said that she "obtained divorce from her husband" notwithstanding that both of them signed the document. The position does not alter merely because the spouses show the good sense of avoiding embarrassing marital litigation and settle their dispute amicably.

"Further, it could not be contended that the divorcee-woman should not be in a better position than that of a wife living separately by mutual consent who is denied the right to maintenance u/s 125(4), because wife who lives separately from her husband by mutual consent does not contrary to her legal obligations arising out of her status as spouse. A divorced wife has no such legal obligations. She resides separately because of her status as a divorcee unlike in the case of a wife who resides separately in spite of her status as a wife."

18. In the other case, namely, K. Shanmukhan v. C. Sarojini, cited supra, it was held that the wife who has attained the status of a divorcee by mutual consent and who is not residing with her husband is also entitled to maintenance as she falls within the inclusive definition in Explanation (b) to section 125(1). In such case, the bar of section 125(4) would not be applicable.

19. Shri Bora then referred to the decision of the Supreme Court in Mst. Zohara Khatoon Vs. Mohd. Ibrahim, In that case also, there was a dissolution of marriage between the husband and the wife under the Dissolution of Muslim Marriage Act, 1939. When the matter went to the High Court it was of the view that Clauses (b) of Explanation to section 125(1) of 1973 Code would apply only if the divorce proceeded from the husband, that is to say, the said clause would not apply unless the divorce was given unilaterally by the husband or was obtained by the wife from the husband. In other words, the High Court thought that as in the instance case, the dissolution of marriage was brought about by the wife under the Dissolution of Muslim Marriage Act, 1939 the decree under the said Act did not amount to a divorce by the husband because the marriage was dissolved by operation of law only. The High Court further held that Clause (b) of Explanation to section 125(1) of the Code had no application and as such the wife was not entitled to any maintenance u/s 125. When the matter went to Supreme Court, it was held that the view taken by the High Court was erroneous

and was based on a wrong interpretation of Clause (b) of Explanation to section 125(1) of the Code. It was further observed that Clause (b) of Explanation to section 125(1) has made a distinct departure from the earlier Code in that it has widened the definition of wife. Under Clause (b), the wife continues to be a wife within the meaning of the provisions of the Code even though she has been divorced by her husband or has otherwise obtained a divorce and has not remarried.

I would now come to the arguments advanced by Shri Bora, which have already been referred to by me above.

20. It is an admitted position that present respondent No. 1 Parubai had filed a criminal case against present petitioner Balaji and others for offence u/s 494 of the Indian Penal Code and ultimately the matter was compromised. The parties thereafter executed a divorce deed and registered the same before the Sub-Registrar, Ambad, on 17-10-1970 and under the said deed of divorce, the wife had surrendered all her claims against the husband. Shri Bora placed some reliance on this recital in the deed of divorce whereby she had surrendered all her claims in favour of her former husband. u/s 125 of the 1973 Code, a divorced wife is entitled to claim maintenance and this is the right which did not exist at the time of executing the said divorce deed in 1970 and, therefore, there was no question of any waiver of any right, which vested in the wife at that time. The question of waiver can arise only when a person consciously abandons or waives a right, to which he or she was in law entitled. To repeat, at the time of divorce in October 1970, present respondent No. 1 was in law not entitled to claim any maintenance from her husband and as such the question of waiver could not arise. Apparently, the new statutory right created as the projection of public policy by the 1973 Code could not have been in contemplation of the parties, when they entered into a contract to adjust their mutual rights at the time of divorce in October 1970. No settlement of claims which does not have the special statutory right of the divorce; u/s 125 of the 1973 Code can operate to negate her claim. Consequently, the argument of Shri Bora that respondent No. 1 had surrendered all her claims at the time of divorce in 1970 and as such in view of the recital in the divorce deed, she is not entitled to claim any maintenance cannot be accepted.

21. The next question for consideration would be whether a wife, who has obtained a divorce by mutual consent by executing a deed of divorce in her husband's favour and who made a stipulation in the divorce deed that she would have no further claim from her erstwhile husband, stands excluded from the definition of "wife" as laid down in Clause (b) of Explanation to section 125(1) of the 1973 Code. It will be seen that a divorced wife is a person, who lives separately from her husband by virtue of a change in status, consequent upon the dissolution of marriage, and as such she cannot be characterised as living separately by mutual consent and consequently she cannot be denied the right of maintenance on the ground that she lives separately by mutual consent. This

view of mine stands supported by the decisions cited supra including the decision of the Supreme Court. In my opinion therefore, respondent No.1 would become a divorcee by mutual consent by executing a document and would become "wife" within the scope of inclusive definition given in Clause (b) of Explanation to section 125(1) of the 1973 Code and as such she would be entitled to claim maintenance. The view taken by the Kerala High Court in its two decisions *Padmanabhan Prasad Vs. Bhargavi Sarojini*, appears to be quite reasonable and I am inclined to accept the same. Shri Jadhav canvassed before me that even if the wife had agreed to surrender all the claims against her husband under the deed of divorce. Yet such an agreement was hit by section 23 of the Indian Contract Act and as such it was void and illegal. In fact, the divorce deed has been acted upon by both the parties and none of them has raised a dispute about the legality or otherwise of that document in the courts below. Consequently, in such circumstances, I do not think it proper to dilate much on that argument advanced by Shri Jadhav.

22. The next question that requires consideration is whether the claim of respondent No. 2 stands defeated by virtue of the provisions contained in section 125(4) of the 1973 Code. Shri Bora canvassed before me that even if it is held that respondent No. 1 is also a wife within the meaning of Clause (b) of Explanation to section 125(1) of the 1973 Code and held to be entitled to claim maintenance, then aid of sub-section (4) of that section is to be invoked and if there is divorce by mutual consent and wife is living separately in view of such agreement, then she will not be entitled to claim any maintenance in the light of provisions contained in sub-section (4) of section 125. It is to be noted that a wife, who lives separately from her husband by mutual consent does so contrary to her legal obligations arising out of her status as spouse. The divorced wife has no such legal obligations, because she resides separately because of her status as a divorcee unlike in the case of the wife, who resides separately in spite of her status as a wife. Consequently, it is not open for the petitioner to argue that the divorcee women should not be in a better position than that of a wife living separately by mutual consent in order to deny her the right of maintenance u/s 125(4) of the 1973 Code. In my opinion, respondent No. 1 is a person who is residing separately from her husband by virtue of a change in status consequent upon the dissolution of marriage and as such she cannot be characterised as living separately by mutual consent. In this view of the matter, therefore, I feel that respondent No. 1 cannot be denied maintenance on the ground that she is living separately by mutual consent. The argument thus advanced on behalf of the petitioners that the claim of respondent No. 1 would stand defeated by virtue of the provisions contained in section 125(4) of the 1973 Code cannot be accepted.

23. It may be pointed out that so far as the contention of the petitioner that respondent No.1 was living in adultery is concerned, both the courts below have held against the husband on this point and consequently that point was rightly not pressed by Shri Bora before me.

24. The next question that was canvassed before me by Shri Bora was that the learned Magistrate had held on merits that the respondent No. 1 was able to maintain herself and as such she was not entitled to claim any maintenance on that ground. This finding of the learned Magistrate was interfered with by the learned Sessions Judge by discussing the evidence on record and he held that respondent No. 1 was not able to maintain herself. The legality of this finding was challenged by Shri Bora before me. He canvassed that the learned Sessions Judge had no jurisdiction sitting in revision to set aside the finding of the learned Magistrate and the only question, which was open to the learned Sessions Judge for consideration, was whether there was a glaring defect in the procedure observed by the learned Magistrate or whether there was any manifest error on a point of law, which had consequently resulted in flagrant miscarriage of justice. Since such a position was not obtaining before the learned Sessions Judge, Shri Bora canvassed that the learned Sessions Judge had no jurisdiction to reappreciate the evidence on record and to come to a finding contrary to the one recorded by the learned Magistrate on point No. 1 in support of the argument, Shri Bora placed reliance on two decisions, namely, *State of Orissa Vs. Nakula Sahu and Others*, ; and *Vimal Sukumar Patil v. Sukumar Anna Patil* and another 1981 Mh.L.J. 82. In *Nakula Sahu's* case cited supra, the Supreme Court considered the provisions contained in section 439 read with section 435 of the Code of Criminal Procedure, 1898, and observed that where neither the trial Court nor the Sessions Judge committed any error of fact or law in arriving at their conclusions and the High Court upset their concurrent findings in exercise of the revisional jurisdiction and acquitted the accused, the order of acquittal passed by the High Court was not proper and it was liable to be set aside. In *Vimal Sukumar Patil's* case, cited supra, this ruling of the Supreme Court in *Nakula Sahu's* case was relied upon and it was held by this Court that normally, revisional jurisdiction is to be exercised only in exceptional cases when there is a glaring defect in the procedure or there is a manifest error on the point of law which has consequently resulted in miscarriage of justice. It was also observed that the revisional Court is not expected to act as if it is hearing an appeal.

25. Shri Jadhav referred me to the provisions contained in section 399(1) of the 1973 Code and canvassed before me that under this section, the power of the Sessions Judge in revision were enhanced and the Sessions Judge could exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of section 401 of the 1973 Code. Sub-section (3) of section 399 is to the effect that where any proceeding by way of revision is commenced before the Sessions Judge under sub-section (1), the provisions of sub-section (2), (3), (4) and (5) of section 401 shall so far as may be, apply to such proceeding and references in the said sub-section to the High Court shall be construed as references to the Sessions Judge. It would, therefore, be important to take into account the provisions contained in section 401 of the 1973 Code, which enumerated the High Court's power of revision. Sub-section (1) of section 401 is to the effect that in the case of any proceeding the record of which has been

called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Sessions by section 307, and when the Judges comprising the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392. The powers of the Appellate Court are enumerated in section 386 of the 1973 Code. As we have seen, the view of the provisions contained in section 399(1) of the 1973 Code, the sessions Judge does possess the powers conferred on a Court of Appeal by section 386 in the light of the provisions contained in section 401. I, therefore, feel that if the Sessions Judge found that the finding of the learned Magistrate on point No. 1 was not correct or in other words, it was perverse, he had all the powers to re-appreciate the evidence on record and consider the said point in view of the powers available to him. I, therefore, do not find myself in agreement with the argument advanced by Shri Bora that the learned Sessions Judge had no jurisdiction at all to disturb the finding of the learned Magistrate on point No. 1.

26. It is true that while discussing point No. 1, the learned Magistrate has referred to the evidence of the applicant, that is, Parubai, and in view of some discrepancy appearing in her evidence, he held that the application was able to maintain herself. The learned Sessions Judge has re-appreciated the evidence in paragraph 6 of the judgment and come to the conclusion that only because the applicant was not doing labour work since last six months, it was sufficient to hold that she was unable to maintain herself. In my opinion, even if the wife earns her livelihood by working on wages, that factor can be taken into account only for assessing the amount of maintenance payable to her. However, the fact that the wife is working on wages and earning some income does not absolve the husband from liability to maintain his wife. I agree with the reasoning given by the learned Sessions Judge in paragraph 6 of his judgment and hold that the learned Sessions Judge was correct in holding that present respondent No. 1 was unable to maintain herself. It is not a case that there was no pleading to that effect, but only a question of appreciating the evidence on record on that point arose in this case.

27. The next point that needs to be considered is whether respondent No. 1 is entitled to claim maintenance. In view of my discussion made above, it is clear that respondent No.1 is entitled to claim maintenance from the petitioner. The learned Sessions Judge has awarded a sum of Rs. 35/- per month as maintenance allowance to respondent No. 1 and I do not think that the said finding is perverse or unreasonable. I would, therefore, maintain the quantum of maintenance allowance fixed by the learned Sessions Judge.

28. In the result, the impugned order of maintenance recorded by the learned Sessions Judge, Jalna, in Criminal revision Application No. 79 of 1981 is correct and it is accordingly confirmed. This Criminal Application consequently stands dismissed and the rule is discharged.