

(1984) 01 BOM CK 0009

In the Bombay High Court

Case No : Civil Revision Application No. 744 of 1982 with Second Appeal No. 56 of 1983

Dattu Bhau Undage and other

APPELLANT

Vs

Tarabai Dattu Undage and another

RESPONDENT

Date of Decision : 27-01-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 127
Hindu Adoptions and Maintenance Act, 1956 — Section 18, 25

Citation : (1984) MhLj 224

Hon'ble Judges : B.C. Gadgil, J

Bench : Single Bench

Advocate : H.D. Hombalkar in Civil Revn. appln. No. 744 of 1982 and M.A. Rane in Second Appeal No. 56 of 1983, for the Appellant; Bhimrao N. Naik in Civil Revn. Appln. No. 744 of 1982 and Ajit P. Shah in Second Appeal No. 56 of 1983, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Gadgil, J.—These two matters, though unconnected with each other, can be conveniently decided by a common judgment, as a similar controversy arises in both of them.

2. Before considering the dispute between the parties, I would like to state briefly the relevant facts in both the litigations. Civil Revision Application No. 744 of 1982 arises from an order passed in Special Darkhast No. 121 of 1979 that the amount of maintenance claimed in that Darkhast should be recovered from the judgment-debtor. This Darkhast was filed by the decree-holder-wife on the basis of a decree dated 31-7-1967 passed in Special Suit No. 44 of 1966. Maintenance of Rs. 100 per month has been granted to the wife. In Darkhast No. 121 of 1979 the husband resisted the execution on the ground that after the passing of the decree the husband and the wife (viz. the judgment-debtor and the decree-holder) had resumed cohabitation and that on this count the decree for maintenance had become unenforceable. This contention was rejected by the

executing Court and hence the husband-judgment-debtor filed a revision.

3. Second Appeal No. 56 of 1983 is filed by the husband against an order for recovery of maintenance amount in pursuance of a decree for maintenance that was passed against him in Suit No. 243 of 1974. It was a compromise decree under which the husband agreed to pay Rs. 300 per month if he would provide a separate residence and otherwise Rs. 400 per month. The wife filed Regular Darkhast No. 88 of 1977 for executing the decree. The Darkhast was opposed by the husband on the ground that the parties had resumed cohabitation after the passing of the decree and that, therefore, the decree had become inexecutable. The said objection was overruled. The judgment-debtor-husband filed Appeal No. 322 of 1980 in the District Court, Sangli. That appeal was dismissed and hence, he has filed the second appeal.

4. Thus, the main controversy in both the matters is as to whether the judgment-debtor-husband can resist the execution of a maintenance decree on the ground that after the passing of the decree the parties have resumed cohabitation and whether by such cohabitation the decree becomes inexecutable. Shri Hombalkar who appears for the revision petitioner and Shri Rane who argued for the appellant in the second appeal contended that the husband can, in an execution petition, allege that the decree has become inexecutable on account of resumption of cohabitation. As against this, Shri Shah and Shri Naik argued that such a plea is not permissible. The learned Advocates on behalf of both the sides relied upon a number of decisions of the various High Courts and it would be necessary to consider them.

5. The Madras High Court has taken the view that such a resumption of cohabitation would make the decree ineffective. For example, the head-note in the case of Vasantam Venkayya Vs. Vasantam Raghavamma, , reads as follows : -

...A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation, and, therefore, when the wife subsequent to the decree resumes co-habitation with her husband, the English principle can be applied viz., that the decree becomes ineffective and cannot be enforced. If she is compelled to leave him after resuming co-habitation she should apply for a fresh decree.

This was a case about the execution of a maintenance decree. The same High Court had an occasion to consider the execution of an order passed u/s 488 of the Code of Criminal Procedure. In the case of Kuppuswami Padayachi v. Jagadambal (1947) 48 Cri. LJ 302, the Madras High Court held as follows:-

When once after the passing of an order of maintenance u/s 488 the husband and wife have resumed cohabitation, the order becomes automatically ineffective and unenforceable. No formal cancellation of that order is necessary. If there is neglect or refusal on the part of the husband subsequently, that would furnish a ground for the wife to make a fresh application, but she would not be entitled to

claim the payment of maintenance on the strength of the order passed before the resumption of co-habitation.

Similar view has been taken in a later decision in the case of *S. Natesa Pillai Vs. Jayammal*, . The Andhra Pradesh High Court in the case of *Bussa Ansuya Vs. Bussa Rajaiah*, , by implication, held that an objection about the excitability of a decree for maintenance on the basis of resumption of co-habitation is permissible.

6. It is, however, material to note that this Court had an occasion to consider such an objection when raised in a proceeding u/s 488 of the Code of Criminal Procedure, 1898. The decision is reported in the case of *Laxman Gajju Vs. Sitabai Laxman and Another*, . The head-note reads as follows: -

Co-habitation does not put an end to the order u/s 488.

On an application u/s 488 by the wife the Magistrate made an order allowing the wife maintenance at the rate of Rs. 20 per month and each child at Rs. 15 per month. The wife then made an application for arrears of past maintenance, when there was a compromise between the parties, because the parties agreed that they would resume co-habitation, and the application for arrears was disposed of. Subsequently the wife and husband co-habited for some time, but then they again separated, and the wife made an application again for arrears of past maintenance from the date of the original application. The husband then raised a contention that he and the wife had resumed co-habitation, and consequently the order had come to an end.

Held, that the original order on wife's petition had not come to an end. (1887) 18 Q. B. D. 778, distinguished.

The matter has also gone to the Supreme Court in the recent case of *Bhupinder Singh Vs. Daljit Kaur*, . The Supreme Court came to the conclusion that a subsequent resumption of co-habitation would not put an end to the maintenance order passed u/s 125 of the Code of Criminal Procedure. It was held that an order for maintenance u/s 125 will operate until vacated or altered in terms of the provisions of the Code itself. Such an alteration is permissible by following the procedure contemplated by section 125 (4,) or (5) or section 127. As to what would happen if appropriate proceedings are not taken is considered by the Supreme Court in the following words :-

But until the original order for maintenance is modified or cancelled by a higher Court or is varied or vacated in terms of section 125 (4) or (5) or section 127, its validity survives. It is enforceable and no plea that there has been cohabitation in the interregnum or that there has been a compromise between the parties can hold good as a valid defence.

In view of the above-mentioned decision of the Supreme Court, it will not be possible for a husband to resist the maintenance order under the Code of Criminal Procedure on the ground of resumption of cohabitation.

7. It was, however, urged by Shri Hombalkar and Shri Rane that the principle laid down by the Supreme Court in the above-mentioned case would have no application when one has to decide about the excitability of a maintenance decree passed by a Civil Court. It was contended that the executing Court can decide the question as to whether the decree has become inoperative or unenforceable on account of certain subsequent events. My attention is drawn to the observations of the Supreme Court in paragraphs 7 and 8 wherein it is held that any defence against an order u/s 125 must be founded on a provision in the Code and that such a statutory order can be demolished only in terms of the statute and not otherwise.

8. Both the Advocates viz., Shri Hombalkar and Shri Rane, contended that an order u/s 488 of the old Code of Criminal Procedure (i.e. section 125 of the Code of Criminal Procedure, 1973) would be quite different from a decree for maintenance passed by a Civil Court. It was submitted that an order passed by a Criminal Court would be a sort of a summary remedy so as to avoid any vagrancy of a wife by providing her urgent maintenance. I am not, however, able to accept the contention that a summary remedy of maintenance under the Code of Criminal Procedure would stand on a different footing from a decree of a Civil Court, particularly when one has to decide the excitability or otherwise of the maintenance order on account of the alleged resumption of cohabitation. In my opinion, a decree for maintenance has to be executed as per the terms thereof and there cannot be any modification in the decree. The question as to whether such modification is permissible is considered by this Court in the case of *Maharana Shri Ranmalsangji v. Bai Shri Kundankuwar* ILR 26 Bom 707. There was an unconditional decree for maintenance in favour of a wife. She applied for execution of that decree. The judgment-debtor husband raised an objection that by reason of the conduct of the wife she had forfeited her right of maintenance. The Division Bench of this Court has held that no modification of a decree can be allowed in execution thereof on grounds not recognised in the decree itself and that it would be necessary to file a separate suit.

9. It is true that sub-sections (4) and (5) of section 125 as also section 127 provide a remedy for alteration of the maintenance order passed by a Criminal Court. However, that would not be a distinguishing factor for the purpose of holding that execution of a Civil Court's decree can be resisted by raising a contention that the parties have resumed cohabitation. Section 18 of the Hindu Adoptions and Maintenance Act has made provision for the separate maintenance of a wife. Section 25 of the said Act provides for the alteration of the amount of maintenance on proof of change of circumstances. It is needless to say that such an alteration would also include total quashing of the maintenance order if the circumstances are alleged and proved that such a quashing is necessary. The provisions of sections 18 and 25 of the Hindu Adoptions and Maintenance Act are practically similar to the provisions of sections 125 and 127 of the Code of Criminal Procedure. Thus, on principle there cannot be any difference between an order by a Criminal Court u/s 125 and a decree by a Civil Court. In view of this

position, it will be very difficult for me to accept the contention of the judgment-debtors in both these matters that they can successfully resist the execution of the decree on the ground that the husband and wife have resumed cohabitation after the passing of the decree.

10. The net result of the above discussion is that both the matters fail. Rule in Civil Revision Application No. 744 of 1982 is discharged. Interim stay granted by this Court stands vacated. Second Appeal No. 56 of 1983 is dismissed.