

(2018) 08 BOM CK 0122

In the Bombay High Court

Case No : Criminal Writ Petition No. 1258 Of 2017

Dnyaneshwar S/O. Eknath Kachre

APPELLANT

Vs

Sunita W/O. Dnyaneshwar Kachre

RESPONDENT

Date of Decision : 27-08-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 125, 125(1)
Constitution of India, 1950 — Article 227
Indian Penal Code, 1860 — Section 498A
Hindu Marriage Act, 1955 — Section 9, 13

Citation : (2018) 08 BOM CK 0122

Hon'ble Judges : MANGESH S. PATIL, J

Bench : Single Bench

Advocate : C.R. Thorat, Shubhangi D. More

Final Decision : Allowed

Judgement

[1] Rule. The rule is made returnable forthwith. With the consent of parties, the matter has been heard finally.

[2] This is a Writ Petition under Article 227 of the Constitution of India preferred by the husband, being aggrieved and dissatisfied by the Judgment

and order dated 12.06.2017 passed by the learned Additional Sessions Judge, Aurangabad in Criminal Revision Petition No. 222 of 2014, quashing and

setting aside the Judgment and order passed by the learned Judicial Magistrate First Class, Aurangabad in Misc. Criminal Application No. 67 of 2009

preferred by the respondent wife under Section 125 of the Code of Criminal Procedure, whereby the learned Magistrate was pleased to reject the

application. Learned Additional Sessions Judge awarded maintenance to the respondent's wife @ Rs.

3,000/â per month from the date of the application as well as Rs. 3,000/â by

way of costs. In order to avoid confusion, the parties are herein after referred to as husband and wife.

[3] The facts as are necessary for decision of the Writ petition are to the effect that the couple was married in the year 2003. They cohabited well for a period of two years and thereafter the husband allegedly started demanding money for purchasing some land. On failure of wife to pay the money, in the month of August 2008, husband assaulted her and drove her out of the house. He then issued her notice to resume cohabitation. She replied the notice and resumed the marital life. Even thereafter, he ill-treated her and driven her out of the house. The wife filed complaint under Section 498A of the Indian Penal Code. It was also alleged that thereafter husband performed second marriage. The wife was unable to maintain herself, whereas husband was having sufficient means. She filed proceeding under Section 125 of the Code of Criminal Procedure.

[4] The husband resisted the application inter alia on the ground that he had never refused or neglected to maintain the wife. But it was she who on her own accord deserted him. In spite of preferring a proceeding for restitution of conjugal rights which was decided in his favour, she did not resume cohabitation. He filed a proceeding for divorce and succeeded in obtaining a decree for divorce on the ground of desertion by the wife and therefore, wife was not entitled to claim maintenance. Husband also denied to have solemnized second marriage.

[5] After hearing, the learned Magistrate by the impugned Judgment and order dated 06.09.2013, rejected the application by holding that the wife failed to prove that the husband had refused or neglected to maintain her and also held that she herself had deserted him and the decision in the divorce petition was sufficient to hold that she had deserted him and therefore, she was not entitled to claim maintenance. In the process, the learned Magistrate relied upon couple of decisions of the Supreme Court in the case of Rohatash Singh Vs. Smt. Ramendri And Others 2000 Cri. L.J. 1498(1).

[6] Being aggrieved and dissatisfied by the rejection of her application, the wife preferred Criminal Revision Petition No. 222 of 2014 before the learned Additional Sessions Judge, Aurangabad. The learned Additional Sessions Judge by the impugned Judgment and order dated 12.06.2017

quashed and set aside the Judgment and order passed by the learned Judicial Magistrate First Class and allowed the petition and awarded

maintenance as mentioned herein above.

[7] The learned Advocate for the husband vehemently submitted that the husband had initially obtained a decree for restitution of conjugal rights under

Section 9 of the Hindu Marriage Act and still the wife refused to resume cohabitation. He had to file a petition for divorce on the ground of desertion

in which he had succeeded in obtaining divorce, and the decision has become final. No fault could have been found in the observations and the

conclusions of the learned Magistrate in concluding that the wife having deserted the husband without reasonable cause hence she was not entitled to

claim maintenance. The learned Advocate would submit that the wife who has not been divorced nor has obtained divorce was not covered by the

definition of wife given in Clause b of the Explanation to Sub Section (1) of Section 125 of the Code of Criminal Procedure. In view of the decision of

Division Bench of this Court in the case of Bhagwan Raoji Dale Vs. Sushma alias Nanda Bhagwan Dale 1998 All M.R. (Cri) 1266, the wife is not

entitled to claim maintenance under that provision. He would submit that merely because now during pendency of the proceeding for maintenance

under Section 125 of the Code of Criminal Procedure, the husband has obtained a decree for divorce, that would not make her entitled to claim

maintenance on the sheer ground that she is a divorced wife. Therefore, there was no error committed by the learned Magistrate in concluding that

the wife was not entitled to maintenance since she herself had deserted the husband.

[8] The learned Advocate for the husband would therefore, submit that the decision of the Magistrate was rendered after correct appreciation of the

facts and law. There was no perversity or arbitrariness and the Revisional Court ought not to have interfered. On the contrary, the learned Additional

Sessions Judge missed the point and has clearly overlooked the fact that there was a decree for restitution of conjugal rights operating against the

wife, as also the husband had obtained the divorce on the ground of desertion which decisions had become final and as a matter of fact the decision

clearly established that the wife had voluntarily left the company of the husband. There was no sufficient cause for her to reside separately from

husband.

[9] The learned Advocate for the respondent supported the impugned Judgment and order. He submitted that the learned Magistrate had clearly erred in ignoring the fact that the wife was a divorcee who was entitled to claim maintenance, but refused to award it. Even the divorcee wife is entitled to claim maintenance under Section 125 of the Code of Criminal Procedure. The learned Additional Sessions Judge, correctly appreciated this aspect of the matter and has rightly awarded maintenance to the wife which may not be interfered with.

[10] It is necessary to note that in her affidavit in reply filed in this proceeding, the wife has specifically admitted about the decree of divorce having become final and also admitted that it was preceded by the decree for restitution of conjugal rights, which according to her was obtained by the husband by practicing fraud upon the Court. It is further stated that the husband had solemnized second marriage and the second wife had also given birth to a child on 11 June 2011. Even by producing a birth certificate (Exh.RA1) attempt has been made to forge the name of the husband as Dnyandev Eknath Kachre, though he is a Dnyaneshwar Eknath Kachre.

[11] I have carefully gone through the papers including the affidavit in reply. As can be noticed, there is no dispute about the fact that couple was married in the year 2003 and after few years of marriage there was discord between the two and they became separate. It is also admitted that the husband initially filed proceeding for restitution of conjugal rights which was decreed and the decision has become final. Though an attempt was made by the wife to get ex parte decree set aside, but even her such attempt had failed. The husband thereafter instituted a proceeding for divorce on the ground of desertion. The wife though filed her say, did not turn up to contest the matter subsequently and it resulted in passing of decree for divorce on 14.05.2009. She applied for setting aside the decree and for restoration of the proceeding by filing Misc. Criminal Application No. 173 of 2013. However, it seems that even that attempt failed and the decree for divorce has become final. Even in her affidavit in reply the wife has specifically admitted that the decree for divorce has become final. It is in the backdrop of such admitted fact that one needs to appreciate and ascertain whether such a wife would be entitled to claim maintenance under Section 125 of the

Code of Criminal Procedure.

[12] In the case of Bhagawan Raoji D ale (supra) the Division Bench of this Court on a reference had an occasion to decipher status of such a wife

and her right in question. It was concluded in paragraph 31 as under :Â?

" 31 In the light of the above discussion, we may sum up our conclusion as under. It is not every divorced wife who can claim maintenance under

Section 125(1) of the Code. A woman who has been divorced by her husband is included in the first part of Explanation (b) to Section 125(1). She can

claim maintenance under Section 125(1). In this category would normally, fall the case of a Muslim woman who has been unilaterally divorced by her

husband in accordance with Muslim Personal Law. This category may also include a woman who, under the customary law applicable to some

Hindus, has been unilaterally divorced by her husband. The second category falling under Explanation (b) of Section 125(1), who can claim

maintenance under the said section, consist of a woman who has obtained divorce from her husband, meaning thereby that the wife has initiated

proceedings for obtaining divorce from the husband, as indicated in paragraph 24 above. In this view of the matter, we are of the opinion that the

Division Bench decision of this Court in Shardchandra Satbhai Vs. Indubai Satbai, 1978 Mh.L.J. 123, does not require reconsideration and we are in

agreement with the ratio of the said decision. We also approve of the decision rendered by three learned Single Judges of this Court in the three cases

discussed above"

[13] As can be seen, apparently the decision of the Division Bench would cover the situation in the matter in hand. However, it is important to note

that in similar set of facts, in the case of Rohtash Singh Vs. Smt. Ramendri and others (supra) the Supreme Court has considered such a fact situation

and has held that a wife against whom a decree for divorce has been passed on account of her deserting the husband is also entitled to claim

maintenance under Section 125 of the Code of Criminal Procedure, and the plea of desertion by wife is not available to husband.

[14] The Supreme Court has formulated a question in paragraph No.7 which reads as under :

"In this situation, the only question which survives for consideration is whether a wife against whom a decree for divorce has been passed on account

of her deserting the husband can claim Maintenance Allowance under Section 125, Cr.P.C and how far can the plea of desertion be treated to be an effective plea in support of the husband's refusal to pay her the Maintenance Allowance."

The Supreme Court has then made following observation in paragraph no. 8 :

"Admittedly, in the instant case, the respondent is a divorced wife. The marriage ties between the parties do not subsist. The decree for divorce was

passed on 15th of July, 1995 and since then, she is under no obligation to live with the petitioner. But though the marital relations came to an end by the

divorce granted by the Family Court under Section 13 of the Hindu Marriage Act, the respondent continues to be "wife" within the meaning of Section

125, Cr.P.C on account of Explanation(b) to sub-Section(1) which provides as under : " Explanation For the purpose of this Chapter

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

[15] While concluding, it has answered the question in following words in paragraph No. 10 :

" As a wife, she is entitled to maintenance unless she suffers from any of the disabilities indicated in Section 125(4). In another capacity, namely, as a

divorced woman, she is again entitled to claim maintenance from the person of whom she was once the wife. A woman after divorce becomes a

destitute. If she cannot maintain herself or remains unmarried, the man who was, once, her husband continues to be under a statutory duty and

obligation to provide maintenance to her. "

[16] It was accordingly held that such a wife who has been divorced on the ground of desertion can maintain a claim for maintenance, but it would be

available to her only from the date of the decree for dissolution of marriage. In view of such authoritative pronouncement of the Supreme Court

subsequent to the decision of the Division Bench in the case of Bhagwan R aoji Dale , with respect, the decision of the Supreme Court will have to be

followed.

[17] Though the decision in the case of Rohtash Singh (supra) was brought to the notice of the learned Magistrate, he failed to follow the ratio laid

down therein and had wrongly dismissed the application. The learned Additional

Sessions Judge has specifically referred to the decision in the case of Rohtash Singh (supra) and has rightly held that the wife was entitled to claim maintenance even if she was a divorced wife.

[18] The learned Additional Sessions Judge has failed to assign any reason for arriving at a figure determining the quantum of maintenance, but the evidence on record is sufficient to justify the quantum.

[19] However, he has awarded the maintenance from the date of the application when in the light of the decision in Rohtash Singh (supra) the wife would be entitled to claim it only from the date of dissolution of marriage i.e. 29.04.2013.

[20] In the circumstances, in substance the Writ Petition fails to the extent, it impugns the Judgment and order passed by the learned Additional

Sessions Judge holding the wife entitled to claim maintenance. However, it needs to be allowed to the limited extent of modifying the direction of the

learned Additional Sessions Judge, making the right to claim maintenance to be effective from the date of decree for dissolution of marriage passed in

Hindu Marriage Petition No. 398 of 2010 on 29.04.2013.

The rule is accordingly made absolute in above terms.