

(2011) 07 BOM CK 0107

In the Bombay High Court

Case No : Criminal Application No. 1588 of 2010

Dr. Shahid Rizwan Khan

APPELLANT

Vs

Dr. Smt. Masoor Khan, Master Sufyaan and Baby Rumaisha

RESPONDENT

Date of Decision : 07-07-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 127, 127(3), 482
Family Courts Act, 1984 — Section 7(2)

Citation : (2012) BomCR(Cri) 268 : (2011) 3 Crimes 689

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : R.B. Gaikwad, for the Appellant; Mohd. Moin, for the Respondent

Judgement

A.P. Bhangale, J.—Rule. Rule, returnable forthwith. With the consent of the respective parties, the matter is taken up for final disposal.

2. By this application u/s 482 of the Criminal Procedure Code, 1973 (henceforth "the Code"), the applicant prayed that order dated 26/08/2010 (passed below Ex. 5) in Petition No E371/2009 by the family Court No 3, Nagpur, granting interim maintenance to the Respondents No. 1,2 and 3 in the sum of Rs. 10,000/-; Rs. 3,000/-and Rs. 2,000/-per month, respectively, be set aside.

3. The facts are:

Applicant was husband of the Respondent No. 1 (who is divorced wife) and father of Respondent no 2 and 3. Applicant and Respondent no 1 had married on 21/05/2006 at Nagpur according to Muslim religious rites and rituals. The matrimonial discord led to their dispute, separation and ultimately to divorce. The Respondents by the application no E.371 /2009 dated 27/10/2009 u/s 125 Code in the family Court, Nagpur and claimed maintenance. Interim maintenance was claimed by application Ex5, which was granted by the impugned order.

4. Learned Advocate for the applicant contended that the impugned order is arbitrary and bad in law as the interim maintenance is palpably excessive. It is

argued that the Respondent No. 1 is educated lady having taken education up to D. Pharm and that she can maintain herself. On the other hand, the applicant is B.A.M.S. and has dependents in his family and as, such, unable to provide amount of excessive maintenance.

5. Learned Advocate for the Respondents supported the impugned order on the ground that the final hearing is awaited and it is open for the parties to lead evidence and to pray for just, reasonable and proper sum of maintenance. The Family Court concerned can consider the plea as to alteration or modification of the allowance of interim maintenance granted.

6. There is an alternative efficacious remedy in the trial court itself u/s 127 of the Code, which reads thus:

127. Alteration in allowance.[(1) (1) On proof of a change in the circumstances of any person, receiving, u/s 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.

(2) Where it appeared to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made u/s 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made u/s 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order.

(i) in the case where such sum was paid before such order, from the date on which such order was made, (ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance or interim maintenance, as the case may be, after her divorce, cancel the order from the date thereof.

From the reading of Section 127, it is clear that on proof of a change in circumstances of a person receiving a monthly allowance for maintenance u/s 125 may seek such alteration before the Magistrate as he thinks fit in respect of

the interim maintenance awarded. However, as per Sub-section (3) of Section 127 of the Code, a Magistrate has got power to cancel the maintenance awarded in favour of a woman provided divorced woman has remarried and that such divorced woman has received whole of the sum which has been ordered under any customary or personal law applicable to the parties at the time of obtaining divorce and similarly if the wife has voluntarily surrendered her rights to maintenance after her divorce same can be cancelled at the instance of the husband from the date of such divorce. From the reading of Clause (c) of Sub-section (3) of Section 127 of the Code, it is clear that if a woman had been granted maintenance u/s 125 of the Code on an earlier occasion and if such woman had voluntarily surrendered to claim maintenance at the time of divorce, based on such voluntarily surrendering of her right, husband may approach the Magistrate for cancellation of the maintenance awarded u/s 125 of the Code, prior to the date of such divorce. But that does not mean that a divorced wife who had voluntarily surrendered rights to maintenance cannot maintain a petition u/s 127 of the Code. u/s 127 of the Code, even though a divorced women had voluntarily surrendered to claim maintenance from her divorced husband on proof of change in the circumstances, she can maintain a petition u/s 127 of the Code, and as long as the divorced wife has not been remarried and or not living in adultery, husband cannot shirk from his responsibility to maintain a divorced wife. Section 127 can be pressed into service only for cancellation of maintenance ordered in favour of a wife u/s 125 if she had voluntarily surrendered her right to claim maintenance from the divorced husband while obtaining a divorce. But the same cannot be made applicable to a divorced woman who is claiming maintenance considering the changed circumstances in her life. Therefore, this Court does not see any reasons to differ with the view taken by the Trial Court.

7. The jurisdiction exercised by the Family Court u/s 7(2)(a) of the Family Court Act is the one exercisable by a Judicial Magistrate 1st Class under the Code, wherever a Family Court is established for any area, the jurisdiction of judicial Magistrate 1st Class having territorial jurisdiction over that area ceases and the Family Court is entitled to exercise the said jurisdiction. No doubt u/s 7(2)(a) of the Family Court Act, what is exercised by the Family Court is the jurisdiction exercisable by the Magistrate under Chapter IX of the Code. Nevertheless it is not a Criminal Court. It is a Civil Court. There is an inherent jurisdiction in a Civil Court to pass ex parte orders and ex parte interim orders in aid of the main relief in order to protect the interest of the party who approaches the Court and/or to protect the subject matter of the suit, in order to ensure that the relief which the party will be granted in the suit or a proceeding is not rendered infructuous. Thus, in aid of the final relief, an interim ex parte order can be granted. That it is so cannot at all be doubted. In the absence of such power the very jurisdiction to pass final order in many cases would be rendered ineffective. When the Court has jurisdiction to pass final order, the power to pass interim order stems from the very power to pass final order. Such a power is necessarily concomitant of

the power to order maintenance. In the absence of such a power, the jurisdiction will not be meaningful and effective. A person approaches the Court for maintenance because he or she as the case may be, is not in a position to maintain himself or herself. If such a person is required or made to wait for a considerable time and he has to be told only after a lapse of considerable period that he or she is entitled to certain amount of maintenance, how such a person could carry on and live to know the decision of the Court which may take place in some cases several years. Such a situation would either result in miscarriage of justice or failure of justice. An interim order can also be modified, dissolved or vacated after hearing the Respondent/s. Even the final order can be altered in the circumstances stated in Section 127 of the Code. It is not possible to hold that the Court has no power to revise the interim order. That being the position, the fact that Section 125 of the Code does not specifically provide for revision of the interim order, cannot be of any relevance. Further when it is the Court, whether Criminal or Civil, that exercises the jurisdiction, every details of the procedure need not be provided. The procedure consistent with justice and actuated by exigencies of the situation can be adopted even if there is no specific provision is provided in the statute governing or conferring the jurisdiction to award maintenance. In addition to this, it is not the Criminal Court that exercises the jurisdiction. It is a Civil Court that exercises the jurisdiction exercisable by the Court of the Judicial Magistrate 1st Class. As a matter of fact, Chapter IX of the Code does not relate to any criminal matter and it is certainly not punitive. It deals with civil liabilities only. In order to ensure expeditious decision so that a person in need of maintenance is able to get it expeditiously within a short period, the subject of maintenance of wives, children and parents is included in the Code. The Judicial Magistrate 1st Class and the Family Court exercising jurisdiction u/s 125 of the Code in the light of the provisions contained in Section 7(2)(a) of the Family Court Act have jurisdiction to pass an order directing payment of maintenance, pending final disposal of the petition filed u/s 125 of the Code.

8. In addition to this, the matter is considered by the Supreme Court in *Savitri Rawat Vs. Govind Singh Rawat*, . The question that is specifically raised and considered in that decision is as to whether Magistrate before whom an application is made u/s 125 of the Code can make an interim order directing the person against whom the application is made under that Section to pay reasonable maintenance pending disposal of the application. After referring to provisions contained in Section 125 of the Code and other relevant provisions contained in the Code, it is held as follows (at pp. 4344 of Cri LJ):

In view of the foregoing it is the duty of the Court to interpret the provisions in Chap. IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made u/s 125 of the Code to pay some reasonable sum by way

of maintenance to the applicant pending final disposal of the application. It is quite common that applications made u/s 125 of the Code also take several months for being disposed of finally. In order to enjoy the fruits of the proceedings u/s 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the Court. Every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim "*ubi aliquid conceditur, conceditur et sine quo res ipsa esse non potest* (where anything is conceded, there is conceded also anything without which the thing itself cannot exist). Vide Earl Jowitt's Dictionary of English Law 1959 Edn. p. 1797). Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties. The Magistrate, may, however, insist upon an affidavit being filed by or on behalf of the applicant concerned stating the grounds in support of the claim for interim maintenance to satisfy himself that there is a prima facie case for making such an order. Such an order may also be made in an appropriate case *ex parte* pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the Respondent is heard. If a civil Court can pass such interim orders on affidavits there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by Magistrate u/s 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay reasonable sum by way of Interim maintenance subject to the other conditions referred to the pending final disposal of the application. In taking this view we have also taken note of the provisions of S. 72(a) of the Family Courts Act, 1984 (Act No. 66 of 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by Magistrates u/s 125 of the Code to the Family Courts constituted under the said Act.

Thus, it is clear from the aforesaid decision that the court of the Judicial Magistrate 1st Class and the Family Court exercising jurisdiction u/s 7(2)(a) of the Family Court Act exercisable by the Court of the Judicial Magistrate 1st Class u/s 125 of the Code can grant an interim order of maintenance.

9. The Court has an undoubted jurisdiction to grant an *ex parte* order of interim maintenance. That jurisdiction has to be exercised on being *prima facie* satisfied that there is a case for granting interim maintenance. The Supreme Court in the aforesaid decision has indicated that the Magistrate may however, insist upon the affidavit filed on behalf of the applicant concerned stating the ground to satisfy himself that there is a *prima facie* case for making such an *ex parte* order of interim maintenance. It is the common experience that considerable time is spent in the service of notice. Especially in maintenance matters, the attempt of the Respondent husband would be to avoid service of notice and see that the matter is prolonged on the assumption that until the notice is served on him no interim or final order can be passed by a Court. This has also resulted in the pendency of several petitions over the years without the notice being served. When there is a jurisdiction in the Court to pass an *ex parte* order in aid of the final relief sought for in the petition and the person seeking interim relief makes out a *prima facie* case for maintenance, there is no justification whatsoever to hold that even in such cases no *ex parte* order of interim maintenance could be passed. Interim order of maintenance can always be revised on the Respondent applying for it. In that event, the Court can hear both the sides and decide as to what should be the appropriate amount of interim maintenance pending disposal of the main petition. At the interim stage, the decision is upon *prima facie* view of the matter. The Court need not conduct a mini trial of the petition for maintenance. The matter can be decided on affidavits and records, if any, produced by the parties.

10. The Family Court exercising the jurisdiction u/s 7(2)(a) of the Family Court Act in a petition filed u/s 125 of the Code for maintenance, on being satisfied that there is a *prima facie* case for interim maintenance and it is necessary to pass an *ex parte* order of interim maintenance has the jurisdiction to pass an *ex parte* order of interim maintenance. Such interim order can also be revised on being requested by the Respondent by filing an appropriate application. Such an order of maintenance shall always be subject to the final adjudication on merits based on evidence led in the main petition.

11. Consequently the Application is disposed of in the following terms:

It is now open to the applicant to file objections or an application requesting the Family Court to reconsider the same. In that event the Family Court shall consider the request and decide the same in the light of the observations made in this order and in accordance with law.

In the facts and circumstances of the case, there will be no order as to costs.

Order accordingly, this Application is rejected as no interference is warranted

under inherent powers by this Court with the impugned order. Rule discharged.