

(1982) 02 BOM CK 0003

In the Bombay High Court

Case No : Criminal Revision Application No. 379 of 1982

Prakash Awadhut Kulkarni

APPELLANT

Vs

Rekha Prakash Kulkarni (Smt.) and Another

RESPONDENT

Date of Decision : 28-02-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 127

Citation : (1983) 2 BomCR 476

Hon'ble Judges : M.P. Kanade, J

Bench : Single Bench

Advocate : B.B. Panse, J.A. Barday, P.P, for the Appellant;

Judgement

M.P. Kanade, J.—By this Criminal Revision Application the order passed by the learned Joint C.J. & Judicial Magistrate, First Class, Dhule dated April 30, 1982 enhancing the maintenance amount to the respondent Rekha Prakash Kulkarni, is challenged.

2. Few facts leading to this revision application are :

That the petitioner and the respondent got married on December 24, 1974. It appears that for some time they could smoothly go on with their marital relations. There was registered agreement of divorce between them, on September 20, 1978. Releasing the futility of the said agreement, the respondent Rekha filed an application for restitution of conjugal rights in Suit No. H.M.P. No. 7 of 1980. That application was dismissed on September 30, 1980. In the said application it was found by the learned Assistant Judge, that the respondent was much more responsible for the strained relations between the husband and wife. While considering the maintenance or alimony, as the case may be, the learned Assistance Judge found that the grant of maintenance by the Magistrate was sufficient. It is necessary to mention about the application filed by the respondent u/s 125 of the Code of Criminal Procedure. The respondent filed the said application u/s 125 of the Code of Criminal Procedure, bearing No. 164 of

1976 on October 20, 1967. The learned Magistrate on consideration of evidence before him passed an order in favour of the respondent on May 12, 1978 granting her maintenance at the rate of Rs. 80/- per month. During the pendency of those proceedings u/s 125, it appears that the petitioner filed an application bearing Suit No. H.M.P. 72 of 1981 for divorce against the respondent. That application was allowed and decree for divorce was granted by the learned District Judge, Dhule by judgment and order dated March 24, 1982. It is thereafter the respondent filed an application u/s 127 of the Code of Criminal Procedure on October 27, 1980, bearing No. 161 of 1980, and the same was decided by the learned Judicial Magistrate, First Class, on April 30, 1982, enhancing the maintenance at the rate of Rs. 150/- per month. The legality and correctness of that order is challenged in this criminal revision application.

3. Shri B.B. Panse, the learned Counsel appearing in support of this petition, contended that the order enhancing the maintenance in favour of the respondent is illegal on two grounds. Firstly, once the Civil Court has decided the quantum of maintenance in a matrimonial case it is not open to the Magistrate to enhance the compensation contrary to the decision of the Civil Court, and secondly, that there was no change of circumstances which would empower the Magistrate to enhance the amount of maintenance. It is submitted that in an application for restitution of conjugal rights bearing No. 7 of 1980 the Civil Court by judgment and order dated September 30, 1980, held that the order passed by the Magistrate was correct and maintenance at the rate of Rs. 80/- was appropriate and no enhancement was called for. In a divorce petition, bearing Case No. 72 of 1931, the order passed by the Magistrate was considered to be proper and reasonable. It is only within one month after the judgment of the District Judge, in Case No. H.M.P. No. 7 of 1980, the present application u/s 127 of the Code of Criminal Procedure was filed and within that short period there cannot be any change of circumstances in order to empower the learned Magistrate to enhance the maintenance amount.

4. Reliance is placed by Shri Panse on two cases. Firstly, in case of Nagendra Iyer Vs. Premavathi and Others, of Madras High Court, it is observed that---

"An order for maintenance is not automatically wiped out by a subsequent Civil Court degree for maintenance. Although the Magistrate has jurisdiction to entertain a petition for alteration of the allowance, even after the Civil Court has quantified the maintenance, yet he will not be exercising his jurisdiction judicially, if, without referring the parties to the Civil Court, he should proceed to consider the altered circumstances with a view to alter the quantum of maintenance already fixed by the Civil Court. In order to prevent conflict of decisions and with a view to avoid an unseemly confrontation between the Civil and the Criminal courts, the Magistrate will be wise in such circumstances to refuse to reduce or enhance the allowance when there is a binding Civil Court's decree fixing the quantum of maintenance. The proper thing to the Magistrate to do is to refer the party to the Civil Court."

The second case relied on by Shri Panse is of Captain Ramesh Chander Kaushal Vs. Mrs. Veena Kaushal and Others, In this case it is observed that:

"The judgement would seem to indicate that once divorce is decreed the wife ceases to have any right to claim maintenance and that such an impact can be brought about by an application u/s 127 of the Code. It is clear that this conclusion contradicts the express statutory provision. The advocates on both sides agree that this is a patent error and further agree that the law may be correctly stated and the contradiction with the statute eliminated. Therefore, we direct that in substitution of the last paragraph the following paragraph will be introduced."

The substitute paragraph is stated in paragraph No. 22 of the said judgment and the same reads as under---

"We have been told by Shri S.T. Desai that the divorce proceeding has terminated adversely to his client but that an appeal is pending. Whether the appeal ends in divorce or no, the wife's claim for maintenance qua wife under the definition contained in the explanation (b) to section 125 of the Code continues unless parties make adjustments and come to terms regarding the quantum or the right to maintenance. We make the position clear that mere divorce does not end the right to maintenance."

5. In the Madras Case it is held that once the Civil Court decides the question as to the quantum of maintenance under the provisions of Hindu Marriage Act, the Criminal Court must accept that finding and should not interfere with the said finding as to the quantum of maintenance made, in the alternative as provided by sub-section (2) of Section 127 and parties may be directed to approach the Civil Court. With respect I agree with the proposition laid down by the Madras High Court. However, the facts of this case are different. The maintenance application u/s 125 of the Code of Criminal Procedure was decided on May 12, 1978 and Rs. 80/- was awarded as maintenance. It is thereafter in case bearing No. H.M.P. 7 of 1980 that the Civil Court held that the amount fixed by the learned Magistrate was sufficient for the maintenance of wife. That judgment was delivered by the Assistant Judge on September 30, 1980. That judgment accepts the finding recorded by the learned Magistrate than to fix its own amount of maintenance on consideration of the evidence. Similarly in the divorce petition filed by the petitioner in Case No. H.M.P. 72 of 1981, the learned Judge accepted the amount fixed by the learned Magistrate. In the instant case the position is reverse. The learned Judges of the Civil Court have accepted the finding of maintenance of the learned Magistrate without themselves deciding the quantum of maintenance under the provisions of Hindu Marriage Act. Now if that is the factual aspect of this case, then it cannot be said that the learned Judge had not accepted the finding of the learned Magistrate in the matter of granting maintenance to wife. Further I find in this case, that there cannot be any confrontation between the Civil or a Criminal Court, but the law appears to be settled that if it is a decision of Civil Court in respect of quantum of maintenance

or alimony under the provisions of Hindu Marriage Act, the Magistrate shall honour such a finding or in the alternative refer the parties to the Civil Court of get the same adjudicated by the competent Court.

6. The second submission of Shri Panse that there was no chance of circumstances in order to empower the Magistrate to great enhancement of maintenance to the respondent. I am unable to persuade myself to the point that the learned Magistrate had no jurisdiction to enhance the amount of maintenance in the changed circumstances. The learned Magistrate observed that---

"Now after the judgment of Divorce Petition No. 72/81, which was declared during the pendency of this application, and now the applicant is a divorced wife of the opponent. The applicant's only allegation is that, she was already given maintenance, but as the prices of essential commodities have been raised twice to thrice than which were prevailing at the time of awarding this maintenance of Rs. 80/- per month and the opponent's salary has been increased to the tune of Rs. 900/-. On the contrary the opponent's main contention is that, the applicant has caused cruelty and desertion to the opponent, and therefore, only divorce was obtained and in such circumstances she is not entitled for maintenance."

Section 127 of the Code of Criminal Procedure empowers the Magistrate to enhance the amount of maintenance of a proof of change in circumstances. Now the reason given by the learned Magistrate for enhancement of maintenance allowance is justified by the record of the case. Admittedly the salary of the petitioner has reached to the tune of Rs. 900/- and the notice can be taken of the fact that the prices have gone up and it is rather difficult for oneself to maintain within a paltry sum of Rs. 80/-. These facts seem to have been taken into consideration by the learned Magistrate and accordingly enhanced the maintenance allowance. In this view of the matter find no error whatsoever in the exercise of the power to increase the maintenance allowance as found fit by the learned Magistrate.

7. Lastly, it was urged by Shri Panse that the Civil Court which decided the divorce petition or a petition for restitution of conjugal rights alone can decide the increase or enhancement of the maintenance allowance. It is further submitted that the petitioner himself can make an application to that Court to determine the maintenance or alimony. It is open to the petitioner to make such an application and get the matter decided but that by itself will not oust the jurisdiction of the Magistrate to entertain the application u/s 127 of the Code of Criminal Procedure. In this view of the matter this criminal revision application deserves to be dismissed.

8. Accordingly, the criminal revision application fails, and the same is dismissed and rule is discharged. In the facts and circumstances of the case, there will be no order as to costs.