

(2018) 03 BOM CK 0163

In the Bombay High Court

Case No : CRIMINAL WRIT PETITION NO. 295 OF 2017

RAMESHWAR S/O SAND KACHKURE

APPELLANT

Vs

THE STATE OF MAHARASHTRA AND ANR

RESPONDENT

Date of Decision : 16-03-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 125, 125(4)
Indian Registration Act, — Section 17
Hindu Marriage Act, 1955 — Section 5(1)
Indian Contract Act, 1872 — Section 23

Citation : (2018) 03 BOM CK 0163

Hon'ble Judges : K. L. WADANE, J

Bench : Single Bench

Advocate : R.R. Mantri, B.A. Shinde, P.G. Patil, A.B. Gaikwad

Final Decision : Dismissed

Judgement

1. Rule. Rule made returnable forthwith. By consent of the learned counsel for both parties, this petition is taken up for final hearing.
2. The respondent No. 2 filed an application for maintenance under the provisions of section 125 of the Code of Criminal Procedure, bearing Criminal Misc. Application No. 38/2015 before Judicial Magistrate, First Class, Badnapur, District Jalana.
3. It is contended that, respondent No. 2 married with petitioner on 23.01.1993. Respondent No. 2 residing happily with the petitioner for about two months, however, thereafter the petitioner started illtreatment. Therefore, she started to reside with her parents. It is further contended that, the petitioner has not made provision of maintenance of respondent No. 2. Furthermore, the petitioner has performed second marriage.
4. The petitioner appeared in the Trial Court and submitted his say and has

admitted the marriage with respondent No. 2. However, he has denied almost all remaining contents of the petition. It is the specific case of the petitioner that there was divorce between him and respondent No. 2 on 13.08.2004 and the respondent No. 2 has relinquished her right of maintenance and since the date of divorce i.e. 13.08.2004, respondent No. 2 is residing at her parents house on her own will. So according to petitioner the respondent No.2 is not entitled to claim maintenance in view of the divorce and the fact that the parties are residing separately by mutual consent from the date of divorce.

5. Respondent No. 2 filed her oral evidence by way of affidavit (Exh.11). In addition to that she examined her cousin brother at Exh. 19. As against this, the petitioner did not enter into the witness box, however, examined one witness Sudhakar Bodhgire to prove the divorce deed (Exh. 14).

6. Besides the oral evidence of the parties, reliance is placed by the petitioner on documents i.e. divorce deed (Exh. 14), 7x12 extracts (Exh. 15 & 16), copy of sale deed (Exh. 17), registration certificate of two wheeler vehicle (Exh. 18), to contend that the respondent No. 2 is having sufficient means to maintain herself.

7. Considering the evidence on record and after hearing both the sides, learned Judicial Magistrate First Class, Badnapur, has allowed the application on 06.08.2016 and awarded amount of maintenance at the rate of Rs. 1500/- per month from the date of application i.e. from 11.03.2015 together with costs of Rs. 2000/-. That order was assailed before the learned Sessions Judge, Jalna by filing Criminal Revision Application No.113/2016. The same was rejected after hearing both the sides.

8. I have heard the arguments of Mr. Mantri, learned counsel for petitioner and Mr. Patil, h/f Mr. Gaikwad, learned counsel for respondent No. 2.

9. Mr. Mantri, learned counsel, during the course of arguments submitted that after the marriage, the respondent No. 2 resided with the petitioner for a few months and thereafter she left the house of the petitioner and she was started to reside at her parents house and she is looking after her parents.

Mr. Mantri, learned counsel, further argued that there was divorce between the parties and its deed was registered before the Sub Registrar. At the time of execution of the divorce deed the respondent No. 2 relinquished her

right of maintenance. Therefore, now the respondent No. 2 is not entitled to claim any maintenance. He further submitted that since the petitioner and the respondent No. 2 are residing separately, with mutual consent, since the date of the divorce, therefore, the respondent No. 2 is not entitled to claim maintenance in view of the provision of Section 125 sub-section 4 of the Code of Criminal Procedure, which runs as follows :

“No wife shall be entitled to receive an [allowance for the maintenance or the interim maintenance and expenses of proceedings, as the case may be,] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.”

10. As against this, Mr. Patil, learned counsel for respondent No. 2 argued that the execution of divorce deed has been specifically denied by the respondent No. 2 in her oral evidence. Mr. Patil, learned counsel, further argued that the alleged divorce deed is not legal because it was not as per the Law. Therefore, it cannot be treated as valid divorce between the parties. Mr. Patil, learned counsel further argued that the right of maintenance cannot be relinquished by executing a divorce deed. He further argued that even looking to the contents of divorce deed (Exh. 14) there is no reference that some permanent alimony has been given to respondent No. 2 and therefore respondent No. 2 has relinquished the right of future maintenance.

11. From the scrutiny of record it appears that, the respondent No. 2 in her oral evidence i.e. in para No. 5 of the affidavit it has been specifically deposed that petitioner had taken respondent No. 2 in the office of Sub-Registrar Badnapur and the petitioner posed that he is purchasing some landed property in the name of respondent No. 2, therefore, respondent No. 2 was asked to sign on some documents. Subsequently, she came to know that the petitioner has registered the divorce deed, which according to respondent No. 2 is illegal.

12. Mr. Mantri, learned counsel for the petitioner in support of his contention has relied upon the observations in case reported in 2003 Bom.C.R.

(Cri.) 1122 (Popat Kashinath Bodke V/s. Kamalbai Popat Bodke & others), in which it is observed in para No. 3 that:

“there may be debate in context with the said document and its value as a

document of divorce. There may be debate whether it may be accepted as a relinquishment deed in respect of her right over alimony and property on account of it being not registered as required by provisions of Section 17 of the Indian Registration Act, but it can be used for collateral purpose and it would be unequivocally heralding that after the said deed both petitioner and Kamalbai were separating from each other by mutual consent.â??

13. So looking to the facts and observation of above case, it appears that the above case was pertaining to the facts that the husband and wife were residing separately by mutual consent.

14. Mr. Mantri, further relied upon the observations in Criminal Writ Petition No. 403/2009 Â (Bhaskarrao Uttamrao Patil (Chopde) V/s. Sau.

Sumanbai

@ Kokilabai Bhaskarrao Patil (Chopde), wherein it is observed in para No. 3 that :

â??The only question involved in the present case is whether the respondent's wife is disentitled to claim maintenance in terms of sub-section (4) of

Section 125 of the Criminal Procedure Code. The petitioner relied upon the consent terms dated 24.08.1979 at Exhibit 39, and this was disputed by the respondent's wife. The Trial Court holds that the consent terms are proved, whereas the Revisional Court holds that the consent terms become

unenforceable in view of Section 5(1) of Hindu Marriage Act, 1955 read with Section 23 of the Indian Contract Act, 1872.â??

Again, it is a case relating to the fact that wife was living separately from husband by mutual consent and without sufficient cause or reason.

15. Mr. Mantri, further relied upon observations in case reported in 2005 (2) Bom. C.R. (Cri) 776 (Gajanan Pandurang Solanke Vs. Sheela

Gajanan Solanke & others) wherein it is held that â??wife who chooses to stay separate cannot claim maintenance under section 125 of

Cri.P.C.â??

16. Mr. Mantri, learned counsel, further relied upon the observations in case reported in 1988 (3) Bom. C.R. 343 (Shrawan Sakharam Ubhale V/s.

Durga (Sau.) w/o Shrawan Ubhale & others) wherein it is observed that :

â??That a divorcee is entitled to claim maintenance under section 125 Cri.P.C.

admits of no debate. The term wife used in section 125(1)

(a) includes divorcee who is not remarried, under Explanation (b) to sub-section (1) of section 125. Therefore, the fact of mere divorce without

anything more is no defence to the claim for maintenance allowance by a wife. Crucial question is, is she entitled to maintenance even if she chooses

to live separately by mutual consent and voluntarily surrenders her right to maintenance. Combined reading of the scheme of section 125 and section

127 Cri.P.C. in general and sub section (4) of section 125 and Clause (c) of sub-section (3) of section 127 in particular, would clearly provide an

answer against maintainability of a claim for maintenance allowances in such circumstances. Sub-section (4) of section 125 Cri.P.C. clearly mentions

that no wife shall be entitled to receive allowance from her husband inter alia, if they are living separately by mutual consent. Clause (c) of sub-

section (3) of section 127 mentions that order of maintenance will have to be cancelled in case the woman has obtained a divorce from her husband

and that she had voluntarily surrendered her rights to maintenance after her divorce. In this background it is difficult to sustain the view taken by the

learned Sessions Judge that legal right of maintenance cannot be given up. It is pertinent to notice that contracting out of the right under section 125

Cri.P.C. is not prohibited.??

The crucial question before the Court was whether the wife chooses to live separately by mutual consent and voluntarily is not entitled to claim

maintenance and surrender her right to maintenance can claim the maintenance and that question is answered in negative.

17. Looking to the facts and observations of all the above referred cases, it appears that all the cases were pertaining to the fact that wife and

husband were residing separately by mutual consent. In the present case whether the respondent No. 2 and the petitioner are residing separately by

mutual consent or otherwise and to determine this material aspect it is material to refer the contents of the alleged divorce-deed (Exh. 14).

18. On perusal of the contents of the alleged divorce-deed (Exh. 14) it appears that it is mentioned in divorce-deed that the petitioner and respondent

No. 2 resided for about six months and thereafter quarrel started between them consistently on account of trifle reasons. Therefore, the respondent

No. 2 went to reside her parents' house. Further it is mentioned in the

deed that the petitioner had not paid any amount of maintenance. So on plain reading of the contents of the divorce deed (Exh. 14) it appears that, the respondent No. 2 was constrained to reside separately at her parents house due to the consistent quarrel between her and the petitioner. So looking to the aforesaid contents it cannot be said that the husband and wife are residing separately by mutual consent. More so, when the respondent No. 2 has denied the execution of the deed of divorce itself. The respondent No. 2 has denied the execution of such deed and as referred earlier the validity or legality of that document (divorce deed) is not a question which is to be determined here.

19. Mr. Patil, learned counsel for respondent No. 2 has relied upon the observations in case reported in 2013 Cri.L.J. 3593 (Ramesh Dagaa Landge Vs. Sau. Sindhubai Ramesh Landge and others) in which reference of the case reported in (2005 (3) Mh.L.J. 137), Bombay High Court (Tajaswini d/o Anandrao Tayade Vs. Chandrakant Kisanrao Shirsat), wherein it is observed :
“that if as per the law, marriage cannot be dissolved unless there is a decree of divorce passed by the competent Court, such consent document of divorce cannot dissolve the marriage. This Court further held that such document cannot be used to hold that there has been relinquishment of right of maintenance. Thus, this Court held that the facts of Tejaswini's case cited (supra) were different from the case of Popat cited (supra) decided already by this Court. It is already observed that in view of the object behind the provisions and the nature of defences available to the husband, each case needs to be decided on the facts of that case.”

20. Lastly, Mr. Patil, learned counsel for respondent No. 2 has relied upon the observations in case of Special Criminal Application No. 174/2008 (Narendrabhai Shah V/s. State of Gujrat & another). The facts of the cited case are identical with the facts of the present case wherein it is observed that :

“18.5 Not only catering of decisions discussed hereinabove clearly and unequivocally insisted upon the right of the wife who is in a destitute condition to get maintenance from her husband and in the wake of compromise pursis entered into by and between the parties under Order XXIII

Rule 3 of the Code of Civil Procedure, 1908, the Court has rightly held that the wife cannot be deprived of her legal dues if otherwise she is found to

be in a destitute condition.

18.6 It is to be recognised that no amount has been paid towards permanent alimony or otherwise to the respondent No. 2's wife of the petitioner

herein when the pursis of compromise was finalised. Although it is claimed that the petitioner has been one of the witnesses at the time of purchase of

the property by the respondent No. 2's wife, the amount of Rs. 25,000/ has been paid towards consideration of such property was parted with by the petitioner

herein. In absence of any proof to that effect, such contention cannot be upheld. Much dispute is raised with regard to the validity of the marriage. It

is also contended that no essential rites as per the Hindu religion have been performed and, therefore, in absence of those rites, the Hindu marriage

cannot be held to be a valid marriage. Had there been no legal marriage, which was non-existent or valid ab initio, the petitioner could not have preferred

Civil Suit No. 229 of 1980 for getting declaration against the respondent No. 2 and entered into a compromise so incidentally. It is a different aspect

altogether that the wife has challenged such a decree before the competent Civil Court. The performance of the Court conducting the matter under

section 125 of the Code cannot be dependent upon the outcome of such Civil Suit when otherwise the registration of marriage of the parties at Nadiad

in the year 1977 is also evident from the documents produced on record. With nothing coming on record to indicate any amount of maintenance having

been given to the respondent No. 2 by the petitioner, both i.e. the JMFC, Kapadwanj and Additional Sessions Judge, Kheda, rightly held that clauses 4

and 6 of the consent terms arrived at between the parties are contrary to the provisions of section 23 of the Indian Contract Act. As rightly held by

the JMFC, Kapadwanj, that the agreement which is supposed to be against the public policy is not enforceable in the Court of law in the given set of

circumstances. Any clause in the agreement that the wife will not be entitled to claim maintenance is against the provisions of section 125 of the Code

and such relinquishment of right to maintenance by wife cannot preclude the wife to claim maintenance under section 125 of the Code. As mentioned

hereinabove, the very object of the said provision is to prevent destitution and to maintain an orderly society. When the act of the petitioner is in the

realm of illusory maintenance, the Courts have rightly held that no defence can be sustained.??

21. Mr. Patil, learned counsel for respondent No. 2 further points out that the decision of the Gujrat High Court cited (supra) was challenged before

the Apex Court and the husband/petitioner in that case has withdrawn the Special Leave Petition and therefore, the learned counsel has contended

that the finding recorded by the Gujrat High Court in case cited (supra) in this context attains finality.Â Â Â Â Â Â Â Â Â Therefore,Â noÂ

contraryÂ view can be taken, than the view taken by the Gujrat High Court.

22. On perusal of the facts and circumstances of the case and the law discussed by the various High Courts, it appears that, respondent No. 2 is

entitled for the maintenance amount from the petitioner inspite of the alleged relinquishment of right of maintenance in the alleged divorceÂ?deed.

23. Apart from the above facts, it is not established by the petitioner that the respondent No. 2 is residing separately with mutual consent, more

particularly, on her own wish. To prove this fact the petitioner did not enter into witness box.

24. In view of the above, the Writ Petition is liable to be dismissed. Accordingly it is dismissed with no costs.

25. Rule is discharged.