

(2018) 07 BOM CK 0124

In the Bombay High Court

Case No : Criminal Application (Apl) No.621 Of 2017

Sanjay Vasantao Akotkar

APPELLANT

Vs

Sau. Maya Sanjay Akotkar And Others

RESPONDENT

Date of Decision : 31-07-2018

Acts Referred:

Constitution of India, 1950 — Article 15(3), 39

Code of Criminal Procedure, 1973 &mdash&; Section 117, 125, 125(2), 127, 138, 145, 147, 167(3), 361, 354(c), 354(6), 488

Citation : (2018) 07 BOM CK 0124

Hon'ble Judges : ROHIT B. DEO, J

Bench : Single Bench

Advocate : V.R. Deshpande, A.S. Thotange, M.K. Pathan

Final Decision : Partly Allowed

Judgement

1. Inherent power of this Court is invoked by the applicant's husband whose limited submission is that the revisional Court fell in serious error in

making the order of the learned Magistrate enhancing the maintenance initially granted under Section 125 of the Criminal Procedure Code

(â??Codeâ?? for short) effective from the date of the application.

2. Few uncontroverted facts only need be stated :

3. Non-applicant 1 is legally wedded wife of the applicant and non-applicant 2 is the son born from the wedlock.

4. The wife and son preferred Miscellaneous Criminal Application 50/2006 seeking maintenance under Section 125 of the Code, which came to be

allowed and while the wife was granted monthly maintenance of Rs.800/â?? the son was granted monthly maintenance of Rs.600/â??.â??

5. The wife and son moved an application under Section 127 of the Code

(Miscellaneous Criminal Case 179/2011) seeking enhancement of maintenance.Â This application was partly allowed and the husband was directed to pay enhanced maintenance of Rs.3,000/per month to the wife and Rs.2,000/Â? per month to the son from the date of the order.

6. The husband did not step into the witness box.Â The learned Magistrate noted that when the application under Section 125 of the Code was decided, the net salary of the husband was Rs.7,839/Â per month, while the salary certificates placed on record in enhancement proceedings disclosed that the husband was earning more than Rs.20,000/Â per month in 2014.Â Incidentally, the salary certificate for June 2017, which is placed on record in this application, reveals that the gross salary of the husband is Rs.42,483/Â and the net salary is Rs.32,900/Â.Â The learned Magistrate took notice of the inflation and the ever spiralling cost of living and recorded a finding, and rightly so, that the wife and the son are entitled to enhancement of maintenance.

7. Dissatisfied with the order of the learned Magistrate, the wife and the son preferred Criminal Revision 81/2016 which came to be partly allowed by the judgment and order impugned and the enhanced maintenance was made effective from the date of the application.Â

8. The reasons recorded by the revisional Court for granting maintenance from the date of the application are discernible in paragraph 13 of the judgment and order impugned, which reads thus :

â??13. From the above cited pronouncement, it is clear that there is no an embargo for enhancing maintenance allowance from the date of application.Â From the impugned judgment and order it is manifest that the Trial Court has not assigned any reason whatsoever for giving enhancement in the maintenance allowance from the date of order.Â Award of enhanced maintenance from the date of application is the principle and award of enhanced maintenance from the date of order is an exception.Â The present case to my mind does not fall within an exception.Â

Under such premise, I find that the impugned order to the extent of its effect is not sustainable.Â Having considered the material on record, I find that the trial Court should have enhanced maintenance allowance from the date of the application.Â Therefore, I find that the impugned order to this extent needs to be interfered by this Court.â??Â

9. Shri Ved Deshpande, learned Counsel for the applicant's husband has a two fold submission to make. The first submission is that ordinarily the enhanced maintenance is to be awarded from the date of the order and not from the date of the application. The other submission is that even if it is assumed, arguendo, that maintenance could be made effective from the date of the application, reasons will have to be recorded for such a direction, which the revisional Court failed to do.

10. Shri Ved Deshpande invites my attention to the decision of a learned Single Judge of this Court in Shaikh Rabbani Shaikh Razak v. Farjana Begum

Shaikh Rabbani, 2014(1) Bom.C.R. (Cri.) 95 and in particular to paragraph 15 which reads thus :

15. There is, however, one aspect of the matter, which needs consideration. The learned Counsel for the petitioner submitted that the learned

Magistrate has allowed the enhancement from the date of application, which is rather irregular and that the enhancement ought to have been ordered

from the date of the order passed by the Magistrate. There is, undoubtedly, some substance in the submission in as much as the trend of the

authorities is as follows,

With respect to an application for maintenance, ordinarily the maintenance should be awarded from the date of an application, but with respect to the

application for enhancement, the enhancement is to be ordinarily awarded from the date of the order.

11. With due respect to the learned Single Judge, who decided Shaikh Rabbani Shaikh Razak v. Farjana Begum Shaikh Rabbani, I am unable to fall in

line with the view that enhancement of maintenance is to be ordinarily awarded from the date of the order. Shaikh Rabbani Shaikh Razak v.

Farjana Begum Shaikh Rabbani proceeds on the premise that it is a rule of practice, convenience and propriety that enhancement of maintenance is to

be ordinarily awarded from the date of the order.

12. Section 125 of the Code which is enacted with the salutary object of preventing destitution and vagrancy is a piece of social welfare legislation and

as held in Capt. Ramesh Chander Kaushal v. Veena Kaushal, (1978) 4 SCC 70 falls within the constitutional sweep of Article 15(3) reimposed by

Article 39 of the Constitution of India. The Hon'ble Apex Court, while interpreting the scope and ambit of Section 125 of the Code, has in Shail

Kumari Devi v. Krishan Bhagwan Pathak, (2008) 9 SCC 632 observed thus :

30. Now, no direct decision of this Court is available on the point as to from which date a Magistrate may order payment of maintenance to wife,

children or parents. We may, however, refer to decisions of some High Courts.

31. It seems that there is a cleavage of opinion on the question. According to one view, since sub-section (2) of Section 125 declares that

maintenance shall be payable ""from the date of the order"", or, ""if so ordered, from the date of application for maintenance"", normal rule is that a

Magistrate should pass an order directing payment of maintenance only from the date of the order. If he decides to deviate that course and makes an

order granting maintenance not from the date of the order but from the date of application for maintenance, he must record reasons in support of such

order (vide Mohd. Inayatullah Khan v. Salma Bano, Rameshwar v. Ramibai, Lachhmani v. Ramu, Qamruddin v. Smt. Rashida, Shyamlal v. Mansha

Bai, Mohd. Ismail v. Bilquees Bano, Nitha Ranjan Chakraborty v. Smt. Kalpana Chakraborty and Samaydin v. State of U.P.)

32. The High Court, in the impugned order, also referred to a decision in Bijay Kapri v. Kanishta Devi wherein it was held that such order could be

necessitated if the party shows 'dire need' of the money for the purpose of maintaining herself for which she had raised debts during the period

when the application had been pending. No such material had been brought on record. Rather, the applicants were getting interim maintenance from

November, 1998 by an order passed by the Magistrate though such provision of interim maintenance had been brought in the statute book for the first

time by the Amendment Act, 2001 with effect 24-9-2001.

33. In Samaydin, the High Court of Allahabad observed that there may not be a discussion of such circumstances which warranted the Court to allow

it to grant maintenance from the date of application. But, no other inference is permissible in the light of the language of sub-section (2) of Section

125. The Court, by way of illustrative cases considered certain situations, such as, 'dilatory tactics adopted by the husband in the disposal of the

proceeding', 'untold cruelty practised against wife', etc. In absence of special circumstances, however, maintenance cannot be ordered from the date

of application.

34. Some other High Courts, have taken a contrary view. It was held that

normally, maintenance should be granted from the date of the application and not from the date of the order. If the Magistrate is inclined to make an order granting maintenance from the date of the order and not from the date of application, he should record reasons to do so.

35. In *Gnanaselvi & Ors. v. Illavarasan*, the High Court of Madras observed that when the wife approaches a Court claiming maintenance by filing application on the ground that she is not able to maintain herself, it is for her to prove such inability from the date of application. Hence, when the Court ultimately decides after conducting the inquiry that she is entitled to maintenance, the said decision must necessarily be based upon the material showing that the wife was unable to maintain herself when she filed an application. As a general rule, therefore, the Magistrate should pass an order directing maintenance from the date of application. It was also observed that the remedy is a speedy remedy and summary procedure is provided by the statute. Despite this, usually, in such proceedings, the Court notices that the husband does not allow the proceedings to go on by raising one objection or the other. The Court is required to deal with all such objections, which takes time. Again, even after the order is passed, the husband rushes to the higher forum and challenges it. Sometimes, he obtains interim orders which results in further delay. The deserted wife and children are the sufferers who seek shelter of the protective umbrella provided by Section 125 of the Code. If maintenance is not granted from the date of application, the weaker sections are sure to lose confidence in the justice delivery system. The Court noted the deep concern expressed by this Court in *P.N. Duda v. P. Shiv Shankar*, that "justice cries in silence for long, far too long".

36. In *Amarjit Kaur v. Sartaz Zingh*, the High Court of Punjab & Haryana held that sub-section (2) of Section 125 does not require the Magistrate to record special reasons for granting maintenance from the date of application. What it says is that if the order is silent as to the date from which such maintenance is payable, it has to be paid from the date of the order. Where, however, the maintenance is to be paid from the date of the application itself, then there should be a specific order in that behalf by the Court. There is nothing in the statutory provision to hold that the Magistrate must record special reasons if he is to order that maintenance shall be payable from

the date of application.

37. In *Krishna Jain v. Dharam Raj Jain*, the Division Bench of High Court of Madhya Pradesh considered the ambit and scope of sub-section (2) of

Section 125 in the light of other provisions of the Code. It overruled *Mohd. Inayatullah Khan*, *Rameshwar* and *Lachhmani* referred to above and held

that plain reading of sub-section (2) of Section 125 makes it clear that allowance of maintenance can be awarded from the date of the order or from

the date of the application. To hold that, normally maintenance should be made payable from the date of the order and not from the date of the

application unless such order is backed by reasons would amount to inserting something more in the sub-section which the Legislature never

intended. The Court observed that it was unable to read in sub-section (2) laying down any rule to award maintenance from the date of the order or

that the grant from the date of the application is an exception.

38. Regarding recording of reasons, the Bench observed that in either case i.e. grant of maintenance from the date of the order or from the date of

the application, the Court is required to record reasons. The Court referred to sub-section (6) of Section 354 of the Code which reads thus:

354(6) Every order under Section 117 or sub-section (2) of Section 138 and every final order made under Section 125, Section 145 or Section 147

shall contain the point or points for determination, the decision thereon and the reasons for the decision. " " (emphasis supplied)

It was, therefore, observed that every final order under Section 125 of the Code [and other Sections referred to in sub section (c) of Section 354] must

contain points for determination, the decision thereon and the reasons for such decision.

39. Our attention was also invited to a decision in *K. Sivaram v. K. Mangalamba*. In *K. Sivaram*, a single Judge of the High Court of Andhra Pradesh

negatived the argument on behalf of the husband that the maintenance could be awarded from the date of the order and such maintenance could be

granted from the date of the application only by recording special reasons. The Court held that it is the discretion conferred on the Court by the Code

to award maintenance either from the date of the order or from the date of the petition as per the circumstances of the case. The Code also noted that

wherever Parliament wanted special reasons to be recorded for passing a

particular order, specific provision has been made to that effect [See subÂ?

section (3) of Section 167 of the Code (default bail), Section 361 (refusal to grant probation) etc].

40. In our considered opinion, the High Court is not right in holding that as a normal rule, the Magistrate should grant maintenance only from the date

of the order and not from the date of the application for maintenance. And if he intends to pass such an order, he is required to record reasons in

support of such order. As observed in K. Sivaram, reasons have to be recorded in both the eventualities. The Court was also right in observing that

wherever Parliament intended the Court to record special reasons, care had been taken to make such provision by requiring the Court to record such

reasons.

41. Moreover, duration of litigation is not within the power or in the hands of the applicant and entitlement to maintenance should not be left to the

uncertain date of disposal of the case. Keeping in view this hard reality, this Court in Savitri held that in absence of prohibition to grant 'interim'

maintenance such power could be read in the salutary provision of Section 125 of the Code ensuring maintenance to unable (sinc enable) the wife to

maintain herself during the pendency of proceedings. Even Parliament took into account the reality and by the Amendment Act, 2001 express

provision has been made for the purpose.

42. Again, maintenance is a right which accrues to a wife against her husband the minute the former gets married to the latter. It is not only a moral

obligation but is also a legal duty cast upon the husband to maintain his wife. Hence, whenever a wife does not stay with her husband and claims

maintenance, the only question which the Court is called upon to consider is whether she was justified to live separately from her husband and still

claim maintenance from him? If the reply is in the affirmative, she is entitled to claim maintenance. It is, therefore, open to the Magistrate to award

maintenance from the date of application and there is nothing which requires recording of 'special reasons' though he must record reasons as

envisaged by subÂ? section (6) of Section 354 of the Code in support of the order passed by him.

43. We, therefore, hold that while deciding an application under Section 125 of the code, a Magistrate is required to record reasons for granting or

refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of the order, or, if so ordered, from the

date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary.

No special reasons, however, are required to be recorded by the Court. In our Judgment, no such requirement can be read in sub section (I) of Section

125 of the Code in absence of express provision to that effect.â??

13. In *Jaiminiben Hirenbbhai Vyas and Another v. Hirenbbhai Rameshchandra Vyas and Another*, (2015) 2 SCC 385, after considering *Shail Kumari*

Devi v. Krishan Bhagwan Pathak, the Hon'ble Apex Court observes thus :

â??5. Section 125 CrPC, therefore, impliedly requires the court to consider making the order for maintenance effective from either of the two dates,

having regard to the relevant facts.Â For good reason, evident from its order, the court may choose either date.Â It is neither appropriate nor

desirable that a court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of

maintenance.Â Thus, as per Section 354(6) CrPC, the court should record reasons in support of the order passed by it, in both eventualities.Â The

purpose of the provision is to prevent vagrancy and destitution in society and the Court must apply its mind to the options having regard to the facts of

the particular case.

6. In *Shail Kumari Devi v. Krishan Bhagwan Pathak* this Court dealt with the question as to from which date a Magistrate may order payment of

maintenance to wife, children or parents.Â In *Shail Kumari Devi* this Court considered a catena of decisions by the various High Courts, before

arriving at the conclusion that it was incorrect to hold that, as a normal rule, the Magistrate should grant maintenance only from the date of the order

and not from the date of the application for maintenance.Â It is, therefore, open to the Magistrate to award maintenance from the date of

application.Â The Court held, and we agree, that if the Magistrate intends to pass such an order, he is required to record reasons in support of such

order.Â Thus, such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the

case may be.Â For awarding maintenance from the date of the application, express order is necessary.â??

14. Section 125 of the Code reads thus :

125. Order for maintenance of wives, children and parents (1) If any person having sufficient means neglects or refuses to maintain

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental

abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the First Class may, upon proof of such neglect or refusal, order such

person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks

fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her

majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-

section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of

such proceedings which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall,

as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation For the purposes of this Chapter

(a) 'minor' means a person who, under the provisions of the Indian majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

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

(2) Any such allowance for the maintenance or interim maintenance and

expenses of proceedings shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a

warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each

monthâ??s [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the

execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such

amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate

may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is

just ground for so doing.

Explanation Â If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wifeâ??s

refusal to live with him.

(4) No wife shall be entitled to receive an [allowance for the maintenance or the interim maintenance and expenses of proceeding, 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.

(5) On proof that any wife in whose favour an order has been made under this section in living in adultery, or that without sufficient reason she

refuses to live with her husband, or that they are living separately by mutual consent.â??

SubÂsection (2) of Section 125 of the Code mandates that if the maintenance is to be made payable from the date of the application, a specific order

making the maintenance payable from the date of the application shall be made.Â The limited implication of subsection (2) is that if the maintenance

is not specifically made payable from the date of the application, it shall be construed and deemed as payable from the date of the order.Â The

enunciation of law by the Hon'ble Apex Court in Shail Kumari Devi v. Krishan Bhagwan Pathak and Jaiminiben Hirenbbhai Vyas and Another v.

Hirenbbhai Rameshchandra Vyas and Another is that both the options are available to the Court and there is no law or principle or rule of practice or

convenience that ordinarily the maintenance must be made payable from the date of the order.

15. Maintenance granted under Section 125 of the Code may, with the passage of time or change in circumstances, be rendered inadequate, unjust

and indeed even illusory.Â This is precisely why Section 127 of the Code is on the statute book.Â The object is to provide succour to the woman,

child or infirm parents etc. who are confronted with economic distress due to passage of time or change in circumstances.Â Considering that

Sections 125 and 127 of the Code constitute a statutory scheme of which the underlying philosophy is to ensure that a speedy remedy is provided to

the wife, children or parents who are unable to maintain themselves, the enunciation of law by the Hon'ble Apex Court as regards the scope and ambit

of Section 125 of the Code would apply with equal vigor to Section 127 of the Code.

16. It would be apposite to refer to a decision of a learned Single Judge of this Court in Prakash Shankar Shinde v. Rekha Prakash Shinde and

another, 1996(2) Mh.L.J. 624, particularly paragraph 3 thereof, to which my attention is drawn by the learned Counsel for non-Applicants 1 and 2 Shri

A.S.Thotange.

Paragraph 3 of the said judgment reads thus :

â??3. Learned Counsel appearing for the husband has raised two fold submissions.Â He submitted that the learned Judge was in error in enhancing

the maintenance allowance from the date of the application under section 127 of the Code. He submitted that even if the maintenance was to be

increased that should have been allowed from the date of the order and not from the date of the filing of the petition.Â The order under challenge is

ex parte.Â Section 127(1) of the Code read thus :

â??127(1). On proof of a change in the circumstances of any person, receiving under section 125 a monthly allowance, or ordered under the same

section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance

as he thinks fit :

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.â??

The section provides that where an order of maintenance is passed under section 125 of the Code, the amount can be increased or decreased on proof

of change of circumstances of the person receiving or of the person paying the amount. The wife has proved that she was allowed monthly

maintenance allowance at the rate of Rs.45/Â in the year 1982 and she is unable to maintain herself with this meager allowance as the prices of

essential items have increased manifold and there is substantial increase in the salary of her husband.Â The learned trial Judge upheld the wife's plea.

It is true that it is not specifically stated in section 127 of the Code that order thereunder can relate back to the date of the application.Â There is no

embargo in the section that the order under that section cannot relate back to the order. This Court in Hiralal Valavdas vs. Bai Amba, (1926) 28

Bom.L.R. 669 has laid down that an order passed under section 127 of the Code can relate back to the date of the application.Â This Court rejected

similar contention observing thus :

â??This is an application in revision against the order of a Magistrate increasing the maintenance allowance of the applicant Bai Amba, under section

488 of the Criminal Procedure Code, from Rs.8Â?4Â?0 to Rs.18 per mensem, the order to take effect retrospectively from the date of the application.

It has been argued that the Magistrate had no jurisdiction to make the order.Â Under section 488, the Magistrate has power to make the maintenance

payable from the date of the application.Â We cannot see why he should not have the same power to direct, if he thinks fit, when an application is

made to vary the order as regards the maintenance payable, that maintenance at the increased rate should be paid from the date of the application.â??

Learned Counsel for the petitioner could not bring to my notice any judgment of this Court taking the contrary view. The first submission of the

learned Counsel is thus devoid of merit.â??

17. In the light of the discussion supra, I am not persuaded to hold that ordinarily enhancement of maintenance must be made effective from the date

of the order and not from the date of the application.

18. The other submission is that the judgment and order impugned is bad in law since no reasons are recorded for making the enhanced maintenance

effective from the date of the application.Â The submission is not entirely correct.Â The reason given by the revisional Court is noted supra.Â

Pertinently, the learned Magistrate has not given any reason for making the enhanced maintenance effective from the date of the order. However, the

revisional Court has given a reason, which, in my opinion, is unsustainable in law since there is no law or principle that ordinarily the enhanced

maintenance must be made effective from the date of the application.Â As held by the Hon'ble Apex Court while considering the scope and ambit of

Section 125 of the Code and on the basis of the same jurisprudential logic while enhancing the maintenance, the Court is entitled to choose either of

the two dates, and the maintenance may be made payable from the date of the order or from the date of the application.

19. The Court is not obligated to record any special reason for awarding the maintenance from the date of the application.Â However, reasons must

indeed be recorded.Â Since the reasons recorded by the revisional court are found to be inconsistent with the legal position, rather than remitting the

proceedings to the revision Court for recording reasons, I have deemed it appropriate to examine the material on record from the perspective of

ascertaining the date from which the enhanced maintenance needs to be given effect to.

20. The wife entered the witness box and brought on record the circumstances which justified enhancement of maintenance.Â The circumstances

existed as on the date of the application.Â The husband has not stepped into the witness box in rebuttal. It is not even the case of the husband that

the proceedings under Section 127 of the Code are unduly prolonged, much less for reasons attributed to the wife.Â In this view of the matter, I do

not see any infirmity in the ultimate conclusion of the revisional Court that the enhanced maintenance needs to be made payable from the date of the

application.

21. However, the limited modification which is required is to permit the applicant's husband to pay the arrears of maintenance if there are arrears, in

ten equal monthly installments commencing from 01.08.2018.

Subject to the aforesaid observation and direction, the application is rejected.Â Â
Â Â Â Â