
(1988) 04 BOM CK 0021

In the Bombay High Court

Case No : Criminal Application No. 502 of 1987

Shrawan Sakharam Ubhale

APPELLANT

Vs

Sau. Durga Shrawan Ubhale and others

RESPONDENT

Date of Decision : 22-04-1988

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 127, 482

Citation : (1988) 3 BomCR 343 : (1990) 1 MhLj 418 : (1990) 3 RCR(Criminal) 69

Hon'ble Judges : V.A. Mohta, J

Bench : Single Bench

Judgement

1. Applicant Shravan Ubhale married non-applicant No. 1 Sau. Durga on 2nd May, 1982. Very soon misunderstanding developed between the two and relations got strained. There was exchange of correspondence. All attempts at reconciliation failed. On 13-6-1983 there was a divorce between the two by mutual consent. Two documents - Divorce deed (Ex. 15) and Consent Deed (Ex. 10) were executed by both. Thereafter both started residing separately. Sau. Durga was pregnant at the time of divorce. She delivered a male child Kailash (non-applicant No. 2) after a month or two. When Kailash attained the age of about 1 1/2 years Sau. Durga filed an application for maintenance u/s 125 of the Code of Criminal Procedure for herself as well as Kailash. Shravan resisted the application inter alia on the ground that Sau. Durga had specifically relinquished her right to claim past and future maintenance.

2. The learned Judicial Magistrate repelling the defence, granted maintenance to Durga at the rate of Rs. 100/- and to Kailash at the rate of Rs. 50/- per month. The said order was maintained by the learned Sessions Judge. Inherent powers of this Court are invoked u/s 482 of the Code of Criminal Procedure on the ground that the proceedings u/s 125, Cr.P.C. were an abuse of process of Court and ends of justice demand that they should be quashed. Having perused Ex. 15 and Ex. 10 and other undisputed position on record, I find considerable substance in the present criminal application filed by Shravan Ubhale as far as

his liability to pay maintenance allowance to Durga is concerned. Taking divorce by mutual consent in this manner is a long standing custom prevailing in certain communities in this region. All terms have to be examined as a whole and as a package deal and no term can be examined in isolation. Indeed many times one term is a consideration for the other. In this light the following agreed terms will have to be examined.

(i) The divorce was being executed because of the disagreement between the parties (ii) Both were free to remarry; (iii) Durga was carrying in her womb a child of about 8 months. His custody was to be given to Shravan as soon as feeding period was over; (iv) Shravan had to recover nothing from Sau. Durga; (v) Durga would not claim any maintenance - either for the past or for the future.

3. The learned Magistrate has not even referred to the consent-deed (Ex. 10) and held that even a divorced wife is entitled to maintenance until her remarriage. The learned Session Judge referring to the consent-deed (Ex. 10) observed thus :

"It does not reveal that she has given up her right for future maintenance. No doubt that she has written that she will not demand any maintenance, but legal right cannot be given up in this manner."

4. That a divorcee is entitled to claim maintenance u/s 125, Cr.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, Cr.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 allowance in such circumstances. Sub-section (4) of section 125, Cr.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 Session Judge that legal right of maintenance cannot be given up. It is pertinent to notice that contracting out of the right u/s 125, Cr.P.C. is not prohibited.

5. In this connection useful reference may be made to the case of Captain Ramesh Chander Kaushal Vs. Mrs. Veena Kaushal and Others, . Two questions arose in that case. (i) Whether maintenance allowance u/s 125, Cr.P.C. can be at the rate higher than the rate at which interim maintenance is granted in divorce proceedings pending in a Civil Court ? (ii) Whether the outer limit of Rs. 500/- "in

the whole" fixed by Section 125, Cr.P.C. is per person ? We are not concerned with the second question in this case. First question was answered in the affirmative and after considering the scheme and purpose and after considering the scheme and purpose of Section 125, Cr.P.C., in the concluding paragraph No. 16 it was observed :

"We have been told by Shri S. T. Desai that the divorce proceeding terminated adversely to his client but an appeal is pending. If the appeal ends in divorce being decreed, the wife's claim for maintenance qua wife comes to an end and u/s 127 of the Code the Magistrate has power to make alterations in the allowance order and cipherise it. We make the position clear lest confusion should breed fresh litigation."

Noticing a patent error which unfortunately crept in the above observation, the legal position was clarified after hearing both sides and a new paragraph was substituted in place of the above paragraph, with the following observation :

"The last paragraph in the judgment concludes with the statement - "If the appeal ends in divorce being decreed, the wife's claim for maintenance qua wife comes to an end and under S. 127 of the Code, the Magistrate has the power to make alteration in the allowance order and cipherise it". The judgment 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 under 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 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.

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 not the wife's claim for maintenance qua wife under the definition contained in the Explanation (b) to S. 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."

The underlined portion remove doubt if any of the true legal position on the question involved. Under the circumstances, Durga was clearly not entitled to any maintenance allowance and the order granting maintenance to her will have to be and is hereby quashed and set aside.

6. But this aspect cannot have any impact on the right of a child Kailash to claim maintenance from his father. There has not been and could not be a relinquishment of his right by his mother to claim maintenance from his father. The term clearly provides that it was the father who was to maintain the child. The term mutually agreed upon between Shravan and Durga created only a personal disability in Durga for claiming allowance for herself and it does not bar

a claim for maintenance for the child. The facts that the child is living with the mother and the claim is made by the mother as a guardian are totally irrelevant to the issue. Rejection of Durga's claim for allowance in regard to herself cannot, therefore, entail the rejection of the claim made by her on behalf of Kailash.

7. In conclusion, the application is partly allowed. I direct that the order of maintenance granted in favour of Durga is quashed and set aside and the order granting maintenance to the minor child Kailash is maintained.

8. Application partly allowed.