

(2012) 02 GUJ CK 0014

In the Gujarat High Court

Case No : Special Criminal Application No. 517 of 2007

Shri Jivan Narsinh Buhecha

APPELLANT

Vs

Labhu Narsi Wala and 1

RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

Constitution of India, 1950 — Article 227

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

Citation : (2012) 02 GUJ CK 0014

Hon'ble Judges : Mukesh R. Shah, J

Bench : Single Bench

Advocate : H.R. Prajapati, for the Appellant; L.B. Dabhi, APP, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice M.R. Shah

1. The present petition under Article 227 of the Constitution of India has been preferred by the petitioner herein - husband to quash and set aside the impugned judgement and order dated 20/02/2007 passed by learned Additional Sessions Judge, Junagadh in Criminal Revision Application No. 101 of 2006 as well as the order dated 15/04/2006 passed by learned 6th Additional Civil Judge (S.D) and Judicial Magistrate, First Class, Junagadh in Criminal Misc.Application No. 700 of 2002 enhancing the amount of maintenance u/s.127 of the Code of Criminal Procedure from Rs. 500/- per month to Rs. 1500/- per month, which came to be reduced from Rs. 1500/- per month to Rs. 1,000/- per month by impugned judgement and order passed by learned Revisional Court.

2. Facts leading to the present petition, in nutshell, are as under:

2.1 That the petitioner herein got married with respondent No. 1 herein in the year 1967. Thereafter there was customary divorce between the parties by executing agreement of divorce dated 16/10/1991. It appears that thereafter the petitioner got remarried on 17/10/1991 with another lady. That thereafter

respondent-wife (First wife) submitted maintenance application u/s.125 of the Code of Criminal Procedure being Criminal Misc.Application No. 346 of 1993. It appears that there was compromise between the parties and petitioner agreed to pay Rs. 300/- per month to the respondent-wife and accordingly, the said maintenance application u/s.125 of the Code of Criminal Procedure came to be disposed of.

2.2 It appears that thereafter, the respondent-wife submitted Criminal Misc.Application No. 394 of 1994 u/s 127 of the Code of Criminal Procedure for enhancement of the maintenance and learned Judicial Magistrate, First Class, Junagadh partly allowed the said application and enhanced the amount of maintenance from Rs. 300/- per month to Rs. 500/- per month. It appears that thereafter there were some criminal and civil proceedings between the parties (which are not relevant for determination of the present proceedings).

2.3 Thereafter in the year 2002, respondent-wife submitted another application u/s.127 of the Code of Criminal Procedure for enhancement of amount of maintenance before learned Chief Judicial Magistrate, Junagadh being Criminal Misc.Application No. 700 of 2002. That the learned Judicial Magistrate, First Class, Junagadh vide judgement and order dated 30/05/2005 allowed the said application and enhanced the amount of maintenance from Rs. 500/- per month to Rs. 1,000/- per month.

2.4 It appears that thereafter the petitioner herein-husband preferred Criminal Misc.Application No. 52 of 2005 before learned Revisional Court and learned Revisional Court by impugned judgement and order dated 30/11/2005 has allowed the said Revision Application and remanded the matter to the learned Judicial Magistrate, First Class, Junagadh for fresh consideration. That thereafter, on remand, learned Magistrate enhanced the amount of maintenance from Rs. 500/- per month to Rs. 1,500/- per month.

2.5 Being aggrieved by and dissatisfied with the order dated 15/04/2006 passed by learned Judicial Magistrate, First Class, Junagadh enhancing the amount of maintenance from Rs. 500/- per month to Rs. 1500/- per month, the petitioner herein husband preferred Criminal Revision Application No. 101 of 2006, which came to be partly allowed by the learned Revisional Court and modified the order passed by learned Magistrate awarding maintenance at the rate of Rs. 1000/- per month instead of Rs. 1500/- per month as awarded by the learned Trial Court. Being aggrieved by and dissatisfied with the impugned orders passed by learned Judicial Magistrate, First Class, Junagadh as well as learned Revisional awarding the amount of maintenance at the rate of Rs. 1000/- per month, the petitioner - husband has preferred the present petition under Article 227 of the Constitution of India.

3. Mr.Prajapati, learned advocate appearing on behalf of the petitioner herein - husband has vehemently submitted that the respondent-wife was impotent and in view of customary divorce with consent, the respondent-wife was not entitled

to get maintenance u/s.125 of the Code of Criminal Procedure. Therefore, it is submitted that as such initial order passed by learned Magistrate u/s.125 of the Code of Criminal Procedure itself was erroneous. Learned Magistrate ought not to have passed the order u/s.125 of the Code of Criminal Procedure. In support of his above submission, learned advocate appearing on behalf of the petitioner has relied upon the decision of the learned Single Judge rendered in the case of Jyotsnaben Ratilal V/s. Pravinchandra Tulsidas reported in 2003(2) GLH 81. By making above submissions and relying upon above decision, it is requested to allow the present petition.

4. Mr.L.B.Dabhi, learned Additional Public Prosecutor appearing on behalf of respondent-State has submitted that as such earlier order passed by learned Magistrate awarding maintenance to the respondent-wife at the rate of Rs. 300/- per month is consent order and, therefore, it is now not open for the petitioner to challenge the initial order that too in the proceedings u/s.127 of the Code of Criminal Procedure. In the facts and circumstances of the case, learned Revisional Court has not committed any error and/or illegality in enhancing the amount of maintenance at the rate of Rs. 1,000/- per month. Therefore, it is requested to dismiss the present petition.

5. Though served, nobody appears on behalf of the respondent No. 1-wife.

6. Heard Mr.Prajapati, learned advocate appearing on behalf of the petitioner herein - husband and Mr.L.B.Dabhi, learned Additional Public Prosecutor for the respondent-State and considered the orders passed by both the Courts below.

7. Only submission made by learned advocate appearing on behalf of the petitioner is that the respondent-wife was impotent, she was not entitled to get maintenance u/s 125 of the Code of Criminal Procedure due to consent divorce, which took place in the year 1991 and, therefore, it is the case on behalf of the petitioner that first order passed by the learned Magistrate u/s.125 of the Code of Criminal Procedure awarding maintenance to the respondent-wife at the rate of Rs. 300/- per month itself is erroneous and, therefore, the impugned order passed by learned Magistrate u/s.127 of the Code of Criminal Procedure deserves to be quashed and set aside, cannot be accepted. At the outset, it is required to be noted that initial order passed by learned Magistrate awarding maintenance to the respondent-wife u/s.125 of the Code of Criminal Procedure was consent order and the petitioner agreed to pay the maintenance to the respondent - wife at the rate of Rs. 300/- per month. Therefore, now it is not open for the petitioner-husband to contend and challenge the first order passed by the learned Magistrate u/s.125 of the Code of Criminal Procedure. Even otherwise in the present proceedings arising out of the order passed by the learned Magistrate u/s.127 of the Code of Criminal Procedure, which was for enhancement of the amount of maintenance initiated by the respondent-wife, the petitioner-husband cannot challenge the earlier order passed by learned Magistrate u/s.125 of the Code of Criminal Procedure, which has attained the finality as the same has not been challenged by the petitioner-husband. In the

proceeding u/s.127 of the Code of Criminal Procedure, which is for enhancement of the maintenance awarded to the wife, it is not open for the petitioner-husband to challenge the earlier order passed u/s.125 of the Code of Criminal Procedure more particularly when the same has attained the finality. Reliance placed by learned advocate appearing on behalf of the petitioner upon the decision rendered in the case of Jyotsnaben Ratilal (supra), the same shall not be applicable to the facts and circumstances of the case. As stated hereinabove, this Court is not required to consider the legality and validity of the initial order passed by learned Magistrate u/s.125 of the Code of Criminal Procedure as the said order is not under challenge and the said order has attained the finality. The present petition is arising out of the proceeding u/s.127 of the Code of Criminal Procedure, which was for enhancement of the maintenance awarded to the respondent wife. Under the circumstances, the aforesaid decision is not applicable to the facts of the present case.

8. In view of the above and for the reasons stated hereinabove, the present petition fails and the same deserves to be dismissed and is accordingly dismissed. Rule is discharged. Ad interim relief, if any, stands vacated forthwith.