

(1991) 07 BOM CK 0097

In the Bombay High Court

Case No : Criminal Application No. 46 of 1989 with Criminal Application No. 585 of 1991

Smt. Sugandhabai and others

APPELLANT

Vs

Vasant Ganpat Deobhat and another

RESPONDENT

Date of Decision : 09-07-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 127, 482
Hindu Marriage Act, 1955 — Section 10, 13, 25

Citation : (1992) 2 BomCR 560 : (1992) CriLJ 1838 : (1992) 1 MhLj 427 :
(1992) 3 RCR(Criminal) 537

Hon'ble Judges : M.S. Vaidya, J

Bench : Single Bench

Advocate : P.F. Patni and S.A. Kulkarni, for V.R. Wani, for the Appellant; V.B. Nayak, V.J. Dixit and V.S. Bedne, Assistant Public Prosecutor, for the Respondent

Judgement

1. Criminal Application No. 46 of 1989 is a proceedings initiated u/s 482 of the Code of Criminal Procedure, 1973. Criminal Application No. 585 of 1991 was filed initially as Criminal Revision petition, but under the orders passed today, the same was allowed to be converted into an application u/s 482 of the Code of Criminal Procedure. Both of these applications involve a common question of law, and the facts are more or less similar. Therefore, with the consent of the Advocates for the parties, the same are being disposed of by a common judgment. Both of them are petitions made by wives, whose claim u/s 125 of the Code of Criminal Procedure for maintenance has been disallowed by both the Courts below.

2. The facts, as-much-as they are relevant for the purposes of this decision in Criminal Application No. 46 of 1989 are as follows.

The petitioner-wife had preferred an application u/s 125 of the Code of Criminal Procedure, bearing Criminal Misc. Application No. 36 of 1975, in the Court of Judicial Magistrate, First Class, Parner, District Ahmednagar. After hearing, the

same came to be dismissed on 3-3-1979 on the ground that the neglect of the wife by the husband as required by the said section was not proved. Criminal Revision Application No. 78 of 1979 preferred in the Sessions Court at Ahmednagar, came to be dismissed on the same grounds on 4-1-1980. Thereafter, the husband had filed Hindu Marriage Petition No. 25 of 1980 in the Court of Civil Judge, Senior Division, Ahmednagar for divorce u/s 13(1)(i-b) of the Hindu Marriage Act, on the ground of desertion by wife. The said petition came to be decreed on 30-9-1982 and the divorce was given to the husband as prayed for by him. No application for maintenance or permanent alimony was preferred by the wife in that proceeding. After the divorce, the petitioner-wife filed in the Court of Judicial Magistrate, First Class, Parner another application u/s 125 of the Code of Criminal Procedure, bearing No. 90 of 1982, claiming maintenance allowance at the rate of Rs. 350/- per month. She had contended in that petition that she was since a divorcee, who was unable to maintain herself and her former husband-respondent had neglected her. The learned Magistrate dismissed this application on 18-10-1985 on the ground of res judicata. Criminal Revision Application No. 337 of 1985 preferred against that decision came to be dismissed at the hands of 2nd Additional Sessions Judge, Ahmednagar, on 25-1-1988 because the learned Additional Sessions Judge was of the opinion "that in view of the repeated application - the application by the divorced wife alone only because she is a divorced wife is not maintainable and hence the lower Court has rightly dismissed the application. Similarly, though the repeated applications are not barred by principle of res judicata, the applications in which the same facts are alleged and agitated are not maintainable". Having felt aggrieved by this order of dismissal of revision petition, the present petitioner-wife has moved this Court for quashing of the aforesaid order.

3. In Criminal Application No. 585 of 1991, the facts were as follows.

The petitioner-wife was married to the respondent-husband on 17-3-1989 (sic) and one daughter was born of the marriage on 6-3-1980. The petitioner-wife had filed on 3-1-1983, Hindu Marriage Petition No. 1 of 1983 for restitution of conjugal rights and the same petition came to be decreed on 29-4-1983. After the decision of that proceeding, the wife preferred an application u/s 125 of the Code of Criminal Procedure on 23-11-1983, bearing Criminal Misc. Application No. 257 of 1983 in the Court of Judicial Magistrate, First Class, Jalgaon, claiming maintenance for herself and her child. The same was decided on 17-2-1987, granting maintenance allowance only to the child, but rejecting that relief for the wife on the ground that she had deserted her husband. After this decision, the respondent-husband preferred on 27-9-1987, Hindu Marriage Petition No. 334 of 1987 in the Court of Civil Judge, Senior Division, Jalgaon for divorce. The same was decreed on 1-12-1988 and the divorce was granted to him on the ground of desertion. Civil Appeal No. 355 of 1988 preferred by wife to the District Court came to be dismissed on 30-7-1990. Pending this appeal, the wife preferred Criminal Revision Application No. 96 of 1987 in the Sessions Court, Jalgaon, against the decision in Criminal Misc. Application No. 257 of 1983, dismissing her

application for maintenance. The same was dismissed on 19-1-1989, in spite of the fact that in the said proceeding, the factum of divorce between the husband and wife was brought to the notice of the revisional Court vide Exhibit 7 therein (copy of the judgment and order passed in Hindu Marriage Petition No. 334 of 1987). The learned Additional Sessions Judge, Jalgaon, who decided the aforesaid revision petition, relied upon the decision of a single Judge of this Court in *Shantabai Saitwal v. Jindas Baburao Saitwal* 1985 (2) Cri (Bom) 901. The observations from the aforesaid ruling relied upon by the learned Additional Sessions Judge read thus :

"Sub-section (2) of Section 127 expressly provided that where it appeared to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made u/s 125 should be cancelled or varied, he was entitled to cancel the order or vary same. In the instant case the decree of divorce passed on the ground of desertion meant that the husband had proved that the wife had left him without any reasonable cause and, therefore, she was not entitled to maintenance u/s 125 of the Code of Criminal Procedure. I respectfully agree with the reasoning in the judgment of Their Lordships of the Division Bench and in any event I consider myself bound by the Division Bench judgment."

The Division Bench judgment which was referred to in the aforesaid observations was the judgment in *Sharadchandra Satbhai v. Indubai Satbhai* 1978 Mah LJ 123. Having felt aggrieved by this decision, the petitioner-wife had preferred to this Court Criminal Revision Application, which was, as stated above, allowed to be converted into an application u/s 482 of the Code of Criminal Procedure.

4. Thus, in both the cases, which are now before this Court, the question was whether or not, a divorced wife who was divorced on the ground of desertion of her husband by her, was entitled to claim maintenance allowance u/s 125 of the Code of Criminal Procedure. The point whether or not such an application was barred by principle of *res judicata* in view of the previous unsuccessful application made by the wife, was not pressed before this Court in view of the ruling in *Sunanda v. Chandrakant* 1988 M LJ 610 : 1989 Cri LJ 398.

5. The learned Advocates arguing this case before this Court had invited our attention to a recent ruling of a single Judge in this Court in *Sushila Namdeo v. Namdeo Bahenkar*, 1991 M LJ 536, and submitted that as the view taken in that ruling was in direct conflict with the ruling of another single Judge in *Shantabai Saitwal v. Jindas Baburao Saitwal* 1985 (2) Crim 901, the matter should be referred to a larger Bench to set right the conflict. It was also submitted that it was evident from the observations made by the learned Addl. Sessions Judge, Jalgaon while deciding Criminal Revision Application No. 96 of 1987, that the lower Courts considering the relevant point were, in any event, confused by the observations made in the judgment in *Shantabai Saitwal v. Jindas Baburao Saitwal* and that, therefore, it was, at least necessary, to have clarified the legal position on the point. Several rulings were cited before this Court and the need to refer the issue to a larger Bench was pressed for. However, on considering the

rulings which were cited before this Court, it is found unnecessary to refer the matter to a larger Bench, because the position of law on the point appears to have been since settled.

6. In *Shantabai Saitwal v. Jindas Baburao Saitwal*, a maintenance order u/s 125 of the Code of Criminal Procedure had come to be passed prior to divorce, and the same was confirmed by the Sessions Court in Revision Petition, which was decided on 31-7-1979. The divorce was sought by the husband in that case on the ground of adultery and desertion on the part of the wife, a relief which was denied by the trial Court under an order passed on 9-12-1978. This relief was granted by the High Court on 31-11-1978, on the ground of desertion only. After this decree for divorce, the husband had preferred an application u/s 127(2) of the Code of Criminal Procedure, for cancellation of the order of maintenance granted earlier in favour of the wife, in view of the changed circumstances, and the husband had succeeded in the matter. When the matter had come up before a single Judge of this High Court, reliance was placed by the Advocate for the husband on the observations in *Sharadchandra Satbhai v. Indubai Satbha* 1978 M LJ 123. The learned single Judge pointed out that the facts involved in Satbhai's case were almost identical, with those in the case which was before him with one exception, that whereas in Satbhai's case, the husband had obtained a decree for judicial separation prior to the wife's application for maintenance u/s 125 of the Code of Criminal Procedure, in the proceeding before the learned single Judge, the husband had obtained a decree for divorce on the ground of desertion after the order of maintenance had been passed. The learned single Judge proceeded to observe that, that could make no material factual difference, and the principle laid down in the Division Bench judgment of this High Court in Satbhai's case would apply to the facts before him. Pointing out how the circumstances had changed since the passing of the order for maintenance in favour of the wife, the learned single Judge had proceeded to observe :

"In the instant case, the decree for divorce passed on the ground of desertion meant that the husband had proved that the wife had left him without any reasonable cause and against his wish and without his consent and, therefore, she was not entitled to maintenance u/s 125 of the Code of Criminal Procedure. I respectfully agree with the reasoning in the judgment of their Lordships of the Division Bench and in any event, I consider myself bound by the Division Bench judgment."

The observations from the Division Bench judgment, which were relied upon by the learned single Judge read thus :

"It is, however, open to a wife who is unable to maintain herself, and her husband has sufficient means to maintain her but nevertheless neglects or refused to do so, to make an application u/s 125, Criminal Procedure Code, 1973, and seek an order for maintenance, subject to the conditions and limitations of that section. Explanation (b) of Section 125(1) clarifies that even if

she is a divorcee, she can claim maintenance provided she is not remarried. Sub-section (4) disentitles a wife to receive allowance in certain cases, one of them being "if, without any sufficient reason, she refused to live with her husband". This sub-section governs the whole of S. 125. Now, in a case like the present one, when the Civil Court has determined the issue of desertion and held that the wife has left her husband without reasonable cause and against his wish and without his consent can it be said that she is still entitled to maintenance u/s 125 and not hit by sub-section (4) ? It is plain and simple that she has refused to live with her husband without any sufficient reason and, therefore, disentitled herself to receive maintenance under S. 125. The effect of the decree for judicial separation on this particular ground of desertion cannot be overlooked by the Magistrate dealing with an application u/s 125 because he has to bear in mind the disability created by sub-section (4) of that section. The fact that a decree for judicial separation has been passed in favour of the husband on the ground of desertion means that the wife is guilty of refusing to live with her husband. In our judgment, Indubai is not entitled to maintenance u/s 125, Criminal Procedure Code, 1973, as she had no reasonable ground not to live with her husband."

7. It appears, with respect, that the learned single Judge had mis-applied the ratio laid down by the Division Bench in *Sharadchandra Satbhai v. Indubai Satbhai*. In that case, the litigant couple had married in 1963 and had lived last up to April, 1969 at Indore in Madhya Pradesh. Two children were born of the marriage and on or about 14th April, 1969, the wife had left the house with her two minor children without informing the husband. The efforts made by the husband to bring her back had failed on account of persistent refusal of the wife to go to him. Under such circumstances, the husband had filed a Civil Suit in the Court of District Judge, at Indore for a decree for judicial separation on the ground of desertion by wife for more than two years and the petition was decreed ex parte, with a finding that the wife had lawfully deserted the petitioner for a continuous period of over two years before the presentation of the petition for judicial separation. After that decision, the wife had filed in 1974, an application in the Court of Judicial Magistrate, First Class, Dhule for maintenance allowance u/s 125 of the Code of Criminal Procedure. The same was rejected by the learned Magistrate on the ground that he could not sit in judgment over the order of the learned District Judge of Indore, holding that the wife had deserted the petitioner. The revisional Court of the Sessions Judge at Dhule had reversed this order, holding that the Magistrate could not reject the application of the wife for maintenance, simply because the husband had produced a decree for judicial separation, thus, ignoring the decree for judicial separation on the ground of desertion by the wife for a continuous period of over two years. It was against this order, that the husband had come to the High Court in Criminal Application No. 3-237 of 1967. The specific point which fell for decision before the Division Bench, under the circumstances stated above, was whether or not a wife, against whom a decree for judicial separation had been passed by the Civil Court on the

ground of desertion of her husband by her, was entitled, in view of the provisions contained in Section 125(4) of the Code of Criminal Procedure, to claim maintenance allowance u/s 125 of the same Code. The point was answered by the Division Bench in the negative emphasizing the fact that during the subsistence of the decree for judicial separation, the wife was governed by the provisions contained in Section 125(4) of the Code of Criminal Procedure, which governed the earlier provisions of Section 125 of the said Code and that, therefore, she was not entitled to succeed in the application for maintenance allowance made by her u/s 125(1) of the Code of Criminal Procedure. The ratio of the ruling depended merely on the subsistence of the relationship of the husband and wife during the subsistence of the decree for judicial separation. What was, in essence, laid down by the said ruling was that, whatever be the rights of the wife under the Civil Law governing her, she was not entitled to pursue the summary remedy provided by the Code of Criminal Procedure in Section 125. Indeed, the judgment of the Division Bench itself proceeded to observe explicitly as follows :

"It is true that a divorcee is entitled to approach the Magistrate u/s 125 for speedy remedy. So could a wife against whom a decree for judicial separation is passed, but a wife who has deserted her husband within the meaning of the Explanation to Section 10(1) of the Hindu Marriage Act, 1955, as discussed above, is not entitled to apply u/s 125 of Criminal Procedure Code, 1973."

It is necessary to point out here, with emphasis, that the Division Bench did not consider the substantive right of a woman against whom a decree for judicial separation was passed by a Civil Court, to claim the maintenance allowance, but it considered only the question whether or not, in view of the provisions contained in Section 125(4) of the Code of Criminal Procedure, she was entitled to pursue the summary remedy provided by Section 125 of the Code of Criminal Procedure for woman.

8. So far as the substantive right of a woman who had disobeyed the decree for restitution of conjugal rights to claim the maintenance allowance from her husband is concerned, reference may be made to the ruling in *Patel Dharamshi Premji Vs. Bai Sakar Kanji*, . in that case also the spouses were Hindus and the question that fell before the Division Bench of the Gujarat High Court for decision was, whether or not, an erring wife who had not obeyed the decree for restitution of conjugal rights passed against her by Civil Court could claim permanent alimony u/s 25 of the Hindu Marriage Act, 1955. It was held that u/s 25, permanent alimony can be granted even to an erring spouse and mere fact that the wife did not comply with the decree for restitution of conjugal rights and that was the cause for passing of a decree against her cannot, by itself, disentitle her to claim permanent alimony under the section. It was pointed out that there was no rule which says that where a decree for judicial separation or divorce was passed against a wife on the ground that she was guilty of a matrimonial offence, she could not be entitled to receive any permanent alimony from the husband.

Reference was made to two important English rulings, which decided the cases that were concerned with the parties, who were non-Hindus. Both of the aforesaid rulings were also relied upon before this Court for the purposes of the decision. The first one was *Sydenham v. Sydenham and Illingworth* 1949 (2) All Eng L Re 196 in which Lord Justice Denning had observed at page 198 :

"There is nothing in the statute to say that the wife against whom a decree has been passed cannot be awarded maintenance, and there is nothing in it about discretion being exercised "in favour of one side or the other or about a compassionate allowance". All it says is that on a decree of divorce the Court may award maintenance to the wife. This includes a guilty wife as well as an innocent one, but in awarding maintenance the Court must have regard, of course, to the conduct of the parties."

Relying on the aforesaid observations in *Clear v. Clear*, 1958 (2) All Eng L R 353, and after quoting Lord Justice Denning as above, it was observed :

"As it stands now, the record of the court shows that the wife has committed adultery. It shows that she has by that action at any rate forfeited her common law right to be maintained, because her adultery was not condoned or connived at, and that she could not get any maintenance in a court of summary jurisdiction. It is only by virtue of divorce legislation that she is enabled to get maintenance at all, and in such cases the court will consider whether she ought to have maintenance."

While deciding the case, which was before the Gujarat High Court, it was also pointed out that while considering the wife's entitlement to maintenance or permanent alimony in such cases, it was an error to take into account the needs and requirements of the son in determining the amount of permanent alimony to be awarded to the wife, because that was an "extraneous or irrelevant factor". It was held that it was necessary to consider the needs of both the wife as well as the children separately while determining the amount. What such factors could be was indicated in another English ruling. *Dailey v. Dailey* 1947 (1) All Eng LR 847, in which a decree nisi of nullity of marriage was obtained by the husband on the ground of the wife's refusal to consummate the marriage, but that question need not detain us in this particular matter, because in any event, the present proceedings before this Court have not arisen out of the assertion of the substantive right of the erring wife to claim the maintenance allowance.

9. In *Rajagopalan Vs. Kamalammal*, , also the question whether or not an erring wife against whom a decree of divorce was passed on the ground of non-compliance by a wife with a decree of restitution of conjugal rights fell for consideration of the court and she was held to be entitled to claim maintenance allowance and permanent alimony under S. 25 of the Hindu Marriage Act.

10. Thus, it is clear that while dealing with the question before it, in *Satbhai's* case, the Division Bench of this High Court did not dwell upon the substantive right of an erring wife to claim maintenance allowance in Civil Court, whether or

not, a decree for divorce was passed against her. All that it was concerned with was decision of the issue, whether or not during the subsistence of the relationship between the husband and wife, the erring wife was entitled to pursue the summary remedy which was provided for u/s 125 of the Code of Criminal Procedure, and this question was answered in the negative by the Division Bench.

11. The question whether or not a divorced woman was entitled to pursue the summary remedy for her maintenance allowance, whatever be the reason for her divorce, had fallen for decision in some other cases. In *Vinod v. Smt. Mangala*, 1981 Bom CR 962, a decree for dissolution of marriage was passed in favour of the husband (though ex parte) on the allegations of the wife was suffering from, what was designated before the Court as, sexually transmitted disease (originally venereal disease). In spite of the provision in the Hindu Marriage Act, enabling the respondent-wife to apply for the maintenance, the wife had not made such an application for maintenance either pendente lite or after decision for permanent maintenance. The wife had then preferred an application for maintenance allowance u/s 125 of the Code of Criminal Procedure, 1973. The question was whether or not, in view of section 125(4) of the Code of Criminal Procedure, the wife could be granted maintenance allowance. Pointing out that Sec. 125(4) was the only bar to "a wife" being granted maintenance and since the marriage had been dissolved by a decree of divorce, there was no question of wife living in adultery or wife refusing to live with the husband, the later because no divorced wife could be compelled to stay with erstwhile husband. It was, therefore, held that the divorced woman, despite the finding of the Civil Court in the nullity proceeding, was entitled to claim maintenance allowance u/s 125 of the Code of Criminal Procedure. The same was accordingly granted.

12. In *Sushila Namdeo v. Namdeo Bahenkar* 1991 M LJ 536, a decree for divorce was passed against the wife u/s 13(1)(ib), of the Hindu Marriage Act on the ground of desertion on 30-7-1983, on the petition filed by the husband in April, 1981. Thereafter, the wife had filed an application u/s 125 of the Code of Criminal Procedure, as she was unable to maintain herself. Admittedly, the husband had not paid any maintenance to the wife since the passing of the decree of the divorce. The Magistrate to whom an application u/s 125 of the Code of Criminal Procedure was made had allowed that application, granting a maintenance allowance of Rs. 300/- per month. In the revision, the Additional Sessions Judge had set aside that order, in view of the fact that the wife was guilty of desertion. It was held by a Single Judge of this Court that, when there was a decree for divorce, there was no obligation upon the said divorcee to go and stay with her husband or to say why she did not stay with him. It was pointed out that the obligation cast on the wife by Section 125(4) of the Code of Criminal Procedure, depended upon her liability to stay with her husband and that, when the same had not survived, the husband was liable to pay the maintenance allowance to the divorcee-wife. While deciding the matter, a reference was made to the decision in *Sharadchandra Satbhai v. Indubai Satbhai*,

1978 M LJ 123, and it was pointed out that the distinguishing factor between the facts of that case and the facts of the case which had fallen for decision was that, in Satbhai's case there was only a decree for judicial separation. It was observed, "As against this, if there is a decree for divorce, there is no obligation upon the said divorcee to go and stay with her husband or to say why she does not stay with him. This being, with respect, the distinguishing feature, I find that the reliance placed upon this decision by the learned counsel for the non-applicant No. 1, is not correct.

13. Indeed, the crux of the matter lay there. Therefore, while deciding the case in Smt. Shantabai Saitwal v. Satbhai Baburao Saitwal, 1985 (2) Crim 901, it was observed that; whereas in the case of Sharadchandra Satbhai v. Indubai Satbhai "the husband has obtained a decree for judicial separation prior to the wife's application for maintenance u/s 125 of the Code of Criminal Procedure, in this case the husband had obtained a decree for divorce on the ground of desertion after the order of maintenance had been passed. That, to my mind, can make no difference and the principle laid down in the Division Bench Judgment of this Court (in Satbhai's case) would apply in the instant case." That observation did not contain again with respect correct statement of law. The ruling in Saitwal's case was not cited before the Court at the time of decision in Sushila Namdeo v. Namdeo Bahenkar and, therefore, at that time the Court had no occasion to consider the said ruling. Indeed, it was this circumstance that was urged before me by the learned Advocates for the husbands appearing in the two cases, for submitting that the issue involved should now be referred to a Larger Bench. In the circumstances discussed above, it was not necessary to refer the issue to the Larger Bench.

14. Finally, there has been an authority of the Supreme Court on the point, in Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another, and the observations of the Supreme Court were rightly relied upon by this Court in Sushila Namdeo's case. With advantage, the said quotation may be reproduced here :

"Section 125 requires, as a sine qua non for its application, neglect by husband or father. Where in a petition by a divorced wife u/s 125 the husband did not examine himself to prove that he was giving allowances to the divorced wife, his case, on the contrary, was that she had forfeited her claim because of divorce and the earlier consent decree; it was held that the husband had no case of non-neglect and hence the basis condition of neglect to maintain was satisfied."

15. With the aforesaid conclusions on the law point involved, it is clear that the impugned orders of the Magistrate as well as the Additional Sessions Judge in Criminal Application No. 46 of 1989 deserve to be set set aside and the matter needs to be remanded to the Magistrate with a direction to allow the parties to adduce the evidence on the points involved and to decide the matter according to law. Similarly, the orders passed by the Magistrate as well as the Additional Sessions Judge in Criminal Application No. 585 of 1991 also are required to be set aside and the matter is required to be sent to the Magistrate with a direction

to allow the parties to adduce the appropriate evidence and to dispose of the matter according to law.

16. In both the matters, the petitioners/wives and the respondents/husbands are directed to appear before the Court of the concerned Magistrate on 12th of August, 1991. The concerned Magistrates are directed, in view of the chequered history of the proceedings, to hear the matters expeditiously and dispose them of according to law before 30th September, 1991.

Rules made absolute accordingly.

17. Order accordingly.