

Bombay High Court

Tejaswini D/O Anandrao Tayade And ... vs Chandrakant Kisanrao Shirsat And ... on 25 February, 2005

Equivalent citations: 2005 (3) MhLj 137

Author: S Kharche

Bench: S Kharche

JUDGMENT S.T. Kharche, J.

1. This petition takes an exception to the common judgment and order dated 10-6-2002 passed by the learned Additional Sessions Judge in Criminal Revision No. 53-A/2000 filed by the petitioner-wife claiming enhancement in maintenance allowance under Section 125 of the Code of Criminal Procedure and Criminal Revision No. 60/2000 filed by the respondent-husband for quashing entire order of maintenance, whereby the learned Additional Sessions Judge dismissed the criminal revision filed by the wife and allowed the criminal revision filed by the husband and set aside the order passed by the learned Judicial Magistrate, First Class on 30-11-1999 in Misc. Criminal Case No. 507/98 directing the husband to pay maintenance @ Rs. 500/- per month to wife. However, so far as the order regarding grant of maintenance to petitioner No. 2 Rahul, who is the son of petitioner No. 1 is concerned, it has been confirmed by the learned Additional Sessions Judge.

2. Brief facts are required to be stated as under:

The petitioners had filed Misc. Criminal Case No. 507/98 under Section 125, Criminal Procedure Code for grant of maintenance on the allegations that the respondent-husband having sufficient means, refused and neglected to maintain them who were unable to maintain themselves. The learned Magistrate on consideration of the evidence adduced by the parties, had granted maintenance @ Rs. 500/- per month each to the wife and the son from the date of the application by his order dated 30-11-1999. Being aggrieved by this order, the petitioner-wife had filed criminal revision No. 53-A/2000 for enhancement of the maintenance allowance and the respondent-husband had also filed criminal revision No. 60/2000 for quashing the entire order of maintenance on the ground that the wife had executed the customary divorce deed as well as the consent deed (Exh.23) on 25-11-1995 and relinquished her right to claim past and future maintenance before the learned Additional Sessions Judge. The learned Additional Sessions Judge by his common order dated 10-6-2002 dismissed the revision filed by the wife for enhancement of maintenance allowance and allowed the criminal revision filed by the husband and quashed and set aside the order granting maintenance to the petitioner No. 1-wife. This order is under challenge in this petition.

3. Mr. C.A. Joshi, the learned counsel for the petitioners-wife and son contended that the customary deed of divorce under which the wife is said to have given up her claim for maintenance cannot be enforceable in law as the custom has not acquired any force of law nor it is backed by any custom and in absence of any proof of the custom or that the deed of divorce is legally valid, the said alleged customary divorce deed has no evidentiary value in the eyes of law and, therefore, the relinquishment which is said to have been made by the wife for the claim of past and future

maintenance is invalid. He contended that though in the consent deed (Exh.23) it has been mentioned that the wife has given up her claim for past and future maintenance, nothing has been mentioned as to how much amount in lump sum was paid to her in the said consent deed. He contended that the husband claims to have paid the amount of Rs. 40,000/- in lump sum towards the past and future maintenance of the wife, but this fact has not been duly established. He contended that the husband had filed the petition claiming divorce under Section 13 of the Hindu Marriage Act, 1955 which was registered as Hindu Marriage Petition No. 44/91 on the ground that the wife was suffering from mental disorder and this petition was dismissed on 21-6-1993.

4. He contended that the husband is working as a Clerk in the State Government, i.e. in the department of Employment Exchange and getting monthly salary of about Rs. 5,000/-, he has to maintain his second wife and son only and the maintenance awarded @ Rs. 500/- per month is very meagre amount which needs to be enhanced to the tune of Rs. 1,000/- per month. He contended that in such circumstances the impugned judgment and order passed by the learned Additional Sessions Judge, quashing the order of maintenance granted to wife is not sustainable in law and the learned Additional Sessions Judge ought to have allowed the criminal revision No. 53-A/2000 filed by the wife for enhancement of the maintenance. In support of these submissions, he relied on the decision of the Single Bench of this Court in the case of Kaushalyabai Dinkar Mule v. Dinkar Mahadeorao Mule, 2001 Cri.L.J. 2292.

5. Mr. Soman, the learned counsel for the respondent-husband contended that the marital tie between the parties had come to an end by execution of the customary divorce deed on 25-11-1995 and the criminal proceedings filed by the wife under Section 498A of the Indian Penal Code were compromised before the Loknyayalaya and, therefore, the criminal prosecution was withdrawn in consequence of the consent deed (Exh.23) wherein it has been clearly stipulated that the wife has relinquished her right to claim past and future maintenance in view of the fact that the lump sum amount of Rs. 40,000/- was paid to her on 25-11-1995. He contended that the husband and wife are living separately by mutual consent and in such circumstances, the wife has lost her right to claim alimony from the husband in view of the provisions of Section 125(4) of the Code of Criminal Procedure. In support of these contentions he relied on three decisions of the Single Bench of this Court in the cases of ; (1) Popat Kashinath Bodke v. Kamalabai Popat Bodke, 2003(2) Mh.L.J. 608 = 2003 All MR (Cri) 868, (2) Vitthal Hiraji Jadhav v. Harnabai Vitthal Jadhav, 2003(4) Mh.L.J. 23 = 2003 All M.R. (Cri) 1094 and (3) Gajanan Pandurang Solanke v. Sheela Gajanan Solanke, 2005(1) Mh.L.J. 348 = 2005 All M.R. (Cri) 314.

6. This Court has given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. It is not in dispute that Tejaswini is legally wedded wife of respondent No. 1 Chandrakant Shirsat and their marriage was solemnized in the year 1985. The couple is blessed with one son Rahul, the petitioner No. 2. The learned Magistrate granted maintenance @ Rs. 500/- per month to son Rahul from the date of the application and this order passed by the Magistrate has been confirmed by the learned Additional Sessions Judge.

7. It is necessary to reproduce Sub-section (4) of Section 125 of the Criminal Procedure Code which contemplates as under :

"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."

8. In *Popat Kashinath Bodke v. Kamalabai* and in *Vittal Hiraji Jadhav v. Harnabai Vitthal Jadhav* (cited supra), the ratio has been laid down that, "...when the spouses entered into an agreement after matrimonial dispute, the texture of the document is to be seen. Words, sentences used are to be considered. Intention expressed by the language of the document has to be noted and the Court should come to a conclusion as to what the spouses are expressing by such agreement and document executed between them. The document may be a document of customary divorce, the document may be for the purpose of giving a lump sum amount to the wife as alimony or the document may be for residing separately permanently and adjusting the assets and liabilities of the pair. The Court has to come to an appropriate conclusion. If by such an agreement or document the spouses are expressing to live separately by consent, it has to be considered appropriately in a matrimonial case. If the spouses are residing separately permanently by consent, then in view of Section 125(4) of Criminal Procedure Code. The wife would not be having a right to claim, alimony from the husband after the date of execution of said agreement if that agreement has been acted on and appropriate provision for maintenance has been made."

9. Similarly, in the case of *Gajanan Panduraang Solanke v. Sheela Gajanan Solanke*, 2005(1) Mh.L.J. 348 - 2005 All MR (Cri) 314 this Court observed that, "wife after taking divorce agreed to stay separately and give up her claim of maintenance such a wife is not entitled to claim maintenance under Section 125 of the Code of Criminal Procedure."

10. The ratio laid down by this Court in the above cited decisions would obviously be not applicable to the facts and circumstances of the present case.

11. However, in *Kaushalyabai Dinkar Mule v. Dinkar Mahadeorao Mule*, 2001 Cri.L.J. 2292, this Court observed in para 5 as under:

"The crucial question which is required to be determined in the case under consideration is, whether the Deed of Divorce under which the applicant is said to have given up her claim for maintenance has either the backing of law or custom. The respondent No. 1 had not taken any plea whatsoever in the reply filed by him to the application under Section 125, Criminal Procedure Code. That the Deed of Divorce had sanction of law and custom. No evidence of whatsoever kind was led by respondent No. 1 that the Deed of Divorce is backed by custom. In the absence of any proof of custom or that the Deed of Divorce is legally valid, the Divorce Deed has no value in the eyes of law. Once we find that the Divorce Deed is invalid, it obviously follows that any relinquishment made under invalid Divorce Deed cannot be enforced in law. In the light of this, it is not necessary to deal with further controversy on the subject. The Divorce Deed being illegal, has no effect and the relinquishment of maintenance thereunder, is of no consequence."

12. In the present case, the customary divorce deed and the consent deed (Exh-23) is a contemporaneous document which is said to have been executed on 25-11-1995. Perusal of the contents of the consent deed (Exh-23) would reveal that covenant has been mentioned that the wife had given up her claim for past and future maintenance. However, the customary divorce deed was also brought into existence on the same day, but it is now settled position of law that the deed of divorce under which the wife is said to have given up her claim for maintenance, cannot be enforced in law because the said customary divorce deed is illegal and has no effect on the relinquishment of maintenance thereunder is of no consequence. The marital tie between the parties cannot be put to an end by execution of the customary divorce deed and the parties can avail the remedies under the civil law if at all they want to compromise the matter by mutual consent. It is obvious that unless there is a decree of divorce passed by the competent Court under Section 13-A or 13-B of the Hindu Marriage Act, 1955, it is not possible to accept that the marriage can be dissolved by entering into the consent deed and/or divorce deed. Therefore, this is a case wherein it is not possible to accept the contentions that the parties are living separate by mutual consent and, therefore, the wife is not entitled to claim maintenance by virtue of Sub-section (4) of Section 125 of the Code of Criminal Procedure.

13. What is interesting to note in this case is that the husband claims that he has paid the amount of Rs. 40,000/- to the wife on 25-11-1995 upon which the wife has relinquished her past and future claim for maintenance and also did agree to withdraw the criminal prosecution launched against the husband for the offence punishable under Section 498A of the Indian Penal Code. But, then if it was so, nothing prevented the parties to make a mention of the same either in the consent deed or in the customary deed. In absence of any evidence on record except bare words of the husband to show that the amount of Rs. 40,000/- was paid to the wife, it is not possible to accept that the consent deed executed by the wife was voluntary. The learned Magistrate has considered these circumstances and recorded the finding that in the aforesaid circumstances it is very difficult to digest that the wife voluntarily executed the consent deed and divorce deed and to relinquish her right of maintenance for past and future. The circumstances reveal that the wife might have put her signature on the consent deed and divorce deed without reading the contents thereof. Moreso, because that before executing the aforesaid documents, the husband had filed the Hindu Marriage petition for divorce in the competent Court which came to be dismissed on 21-6-1993. The compromise memo filed in criminal prosecution launched by the wife for the offence punishable under Section 498A read with Section 34, Indian Penal Code clearly discloses that the matter was compounded between the parties on the condition that the husband was ready to maintain the wife at his house and in the aforesaid circumstances, the possibility cannot be ruled out that the husband had taken the signature of his wife on the consent deed making her to understand that he would behave properly with her and would not subject her to cruelty and ill-treatment. In such circumstances, the Magistrate had rightly recorded the findings that the wife cannot be said to have executed the consent deed voluntarily and that she has given up her right to claim past and future maintenance.

14. The learned Additional Sessions Judge has committed an error in reaching the conclusion that since the wife is living separate by mutual consent and that since she had obtained the divorce and relinquished her claim for past and future maintenance, she is not entitled to claim any

maintenance under Section 125(4) of the Code of Criminal Procedure. He did not apply his mind while considering the decision of this Court in the case of *Prabhavati v. Nivrutti*, 2001(1) Mh.L.J. 202 and, therefore, the impugned order has resulted in to miscarriage of justice and cannot be sustainable in law. In this Single Bench decision of this Court it has been held that;" the Revisional Court had not applied its mind properly to the evidence with respect to the alleged divorce deed. The husband did not establish that there was such a custom amongst their community. In fact, it was nowhere on record as to what community the parties belonged and whether there was a custom amongst their community to put an end to the relationship of husband and wife by way of mutual consent. The Revisional Court erred in applying the law as far as right of the wife to maintenance under Explanation (b) to Section 125(i) of the Code of Criminal Procedure, 1973, assuming that there was a divorce by mutual consent. Since the petitioner-wife had not remarried after her alleged divorce, she is included in the definition of "wife" as per Explanation (b) to Section 125(1) of the Code of Criminal Procedure, 1973. There is no exception even though divorce was allegedly by mutual consent. Order of the Sessions Judge, set aside restoring the order of Judicial Magistrate, First Class, granting maintenance."

15. I am in respectful agreement with the view taken by the Single Judge of this Court in the aforementioned case. In that case this Court followed the decision of the Apex Court in the case of *Smt. Vanamala v. H. M. Ranganatha Bhatta*, 1995(2) Mh.L.J. (SC) 740 = (1995) 5 SCC 299, wherein it has been held that, "The expression "wife" in Sub-section (4) of Section 125 does not have the extended meaning of including a woman who has been divorced. This is for the obvious reason that unless there is a relationship of husband and wife there can be no question of a divorcee woman living in adultery or without sufficient reason refusing to have with her husband. After divorce where is the occasion for the women to live with her husband? Similarly there would be no question of the husband and wife living separately by mutual consent because after divorce there is no need for consent to live separately. In the context, therefore, Sub-section (4) of Section 125 does not apply to the case of a woman who has been divorced or who has obtained a decree for divorce. Therefore, a wife who obtains divorce by mutual consent cannot be denied maintenance by virtue of Section 125(4)." This decision would be squarely applicable to the facts and circumstances of the present case.

16. In such circumstances, in the present case it is not possible that the parties were living separate by mutual consent and the wife has lost her right to claim maintenance under Sub-section (4) of Section 125 of the Code of Criminal Procedure. In such circumstances the findings of the learned Additional Sessions Judge that there was a customary divorce and the consent deed was executed in which the wife has relinquished her claim for maintenance for past and future and the wife who has obtained divorce and relinquished her maintenance, is not entitled to claim maintenance under Section 125, Criminal Procedure Code, cannot be sustained in law and, therefore, the impugned judgment and order passed by the learned Additional Sessions Judge rejecting the claim of maintenance to the wife is liable to be quashed and the order that has been passed by the Magistrate deserves to be restored.

17. So far as the quantum is concerned, the learned Magistrate granted maintenance @ Rs. 500/- per month to the wife from the date of the application. The learned counsel for the husband does not

dispute that the husband is working as a Clerk in the office of Employment Exchange and he is drawing monthly salary of Rs. 8,000/- He also does not dispute that the parents of the husband are dead. It would also reveal from the evidence that the wife is able bodied lady of the age of 30 years and must be doing some labour work for earning her livelihood. But, that by itself would not be sufficient to maintain herself. It is obvious that the husband is working as a Clerk in the State Government office and drawing salary, and, therefore, his wife is also entitled to live in the same status in which the husband is living and, therefore, it is clear that the wife would not be in a position to maintain the standard of living and to meet both the ends and to educate her son within the meagre amount of Rs. 500/- per month. The wife is claiming maintenance @ Rs. 1,000/- per month which is 1/8th of the salary appears to be most fair and reasonable. Therefore, this Court is of the considered opinion that the learned Additional Sessions Judge ought to have allowed the criminal revision filed by the wife for enhancement of maintenance allowance.

18. In the result, this petition succeeds and is allowed. The impugned order passed by the learned Additional Sessions Judge dismissing the Criminal Revision No. 53-A/2000, filed by the wife for maintenance, is set aside and the said Criminal Revision is allowed. The respondent-husband is directed to pay the maintenance @ Rs. 1,000/- (rupees one thousand only) per month to the petitioner-wife from the date of the application and he is directed to deposit all the arrears of maintenance after deducting the amount already paid in this Court, within four weeks. In default, the petitioner-wife would be at liberty to move this Court for contempt, if any.

19. The order passed by the learned Additional Sessions Judge in Criminal Revision No. 60/2000, filed by the husband for quashing and setting aside the order of maintenance passed by the Magistrate, is dismissed and that of the learned Magistrate is restored with the modification as indicated earlier in this para of the judgment.