

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 250 OF 2008

Mr. Kishor Fulchand Pawar,
Age : 28 years, Occu. At present Nil,
Residing at – 32/19, Indira Nagar Upper
Bibvewade, Pune-37.

..Petitioner

VERSUS

Mrs. Nanda @ Komal Kishor Pawar,
Age - 27 years, Occu. Household,
Residing at – C/o. Madhukar Jadhav
At/Post - Belwadi, Taluka – Lohara,
District – Osmanabad.

..Respondent

...

Advocate for Petitioner : Mr. Gopal C. Navandar
Advocate for Respondent : Mr. Prashant K. Deshmukh

...

CORAM : S.G. MEHARE, J.

DATED : SEPTEMBER 25, 2024

JUDGMENT :-

1. Heard learned counsel for the applicant and learned counsel for the respondent.
2. The respondent/wife had filed an application under Section 125 of the Criminal Procedure Code for maintenance against the petitioner/husband on the allegations that she was ill-treated since she was unable to procure a child due to thyroid. She filed the application on 21.11.2005. However, during the pendency of the application under Section 125, the facts came before the learned Magistrate that the decree of divorce under Section 13(1)(ia) of the

Hindu Marriage Act was passed against the petitioner. These facts were admitted to both sides. However, the learned Trial Court ignoring the facts and rights arising out of the divorce to the ex-wife held that the respondent/wife failed to prove that she was refused and neglected to maintain and finally dismissed the application. The respondent/wife preferred a revision against the order of the Magistrate dated 06.07.2007 in Criminal Revision Application No.167 of 2007. The learned Adhoc Additional Sessions Judge quashed and set aside the order of the Magistrate by recording the finding that the learned Judicial Magistrate has brushed aside the subsequent fact of divorce and her entitlement to the maintenance under Explanation (b) to sub-section (1) of Section 125 of the Criminal Procedure Code. On 08.04.2008, he allowed the revision application and directed the petitioner to pay the monthly maintenance of Rs.1200/- per month from 21.11.2005.

3. Learned counsel for the petitioner/husband has vehemently argued that unless the pleading is amended in an application under Section 125, the Court cannot go into the question of entitlement of the maintenance to the wife under Explanation (b) to sub-section (1) of Section 125 of the Criminal Procedure Code. The learned Magistrate was right in considering the required ingredients under Section 125 of the Criminal Procedure Code. The respondent/wife failed to establish that she was refused and

neglected to maintain by the petitioner/husband. However, the learned Adhoc Additional Sessions Judge exceeded its jurisdiction and granted maintenance in the absence of pleadings. However, he fairly conceded that the divorcee is entitled to the maintenance as provided under Section 125 of the Criminal Procedure Code. He has referred to the findings of both Courts and prayed to quash and set aside the judgment and order of the learned Adhoc Additional Sessions Judge dated 08.04.2008.

4. Per contra, learned counsel for the respondent/wife has vehemently argued that in view of the ratio laid down by the Hon'ble Supreme Court in the case of Rohtash Singh Vs. Smt. Ramendhri and others, 2000 Cri.L.J. 1498, the respondent/wife being a divorcee is entitled to the maintenance under Section 125 Explanation (b) to sub-section (1). He also argued that the learned Revisional Court has considered the relevant provisions of law and correctly recorded the findings that the entitlement of the divorcee has been brushed aside by the Trial Court. He argued that the change in the situation was to the knowledge of both sides and it was an undisputed fact. Therefore, her right to claim the maintenance being a divorcee was accrued. In the circumstances, the Revisional Court did not erred in law in granting the maintenance.

5. The first question raised by the learned counsel for the petitioner is that in the absence of pleading or amending the pleading about her divorce and entitlement, the Court can consider these facts.

6. The simple rule of pleading is that one party has to aver the facts and another party has to deny it. Where there is a question of fact, then rule of pleading is strictly applied. So far as the proceeding under Section 125 of the Criminal Procedure Code is concerned, it is a summary proceeding. If prima facie material is available on record to believe the case under Section 125, the Court may surely consider it particularly if the facts are admitted.

7. Since there was no dispute about divorce and it was a ground available for maintenance under Section 125 Explanation (b), the learned Magistrate could have considered these subsequent developments. Explanation (b) to sub-section (1) of Section 125 of the Criminal Procedure Code was dealt with by the Hon'ble Supreme Court in Rohtash Singh (supra) and recorded the finding in para 9 that on account of the Explanation quoted above, a woman who has been divorced by her husband on account of a decree passed by the Family Court under the Hindu Marriage Act, continues to enjoy the status of a wife for the limited purpose of claiming maintenance allowance from her ex-husband.

8. There is no dispute on the law that such a right of divorcee exists till she remarries. There is no such averment that the

respondent/wife was remarried. In view of the facts of the case and admitted position, the Court is of the view that the rule of pleading would not strictly apply in such cases. Therefore, the subsequent development of divorce has been correctly considered by the learned Revisional Court. Though the respondent/wife failed to establish that she was refused and neglected to maintain, the subsequent facts of divorce gave her a new ground which may be considered during the pendency of the application and the learned Magistrate ought to have considered it. The learned Revisional Court has corrected the errors of law of the Magistrate. However, the learned Revisional Court erred in granting the maintenance from 21.11.2005. If the right of the wife was accrued under Explanation (b) to sub-section (1) of Section 125 of the Criminal Procedure Code after the divorce and she was not entitled to the maintenance on the ground available under Section 125(1), she would not be entitled to the maintenance from the date of the desertion or filing the petition. Except this error, the judgment and order of the learned Revisional Court is legal, proper and correct. In view of the above, the following order is passed :

ORDER

- (i) The revision application is partly allowed.
- (ii) The order of the learned Adhoc Additional Sessions Judge, Osmanabad dated 08.04.2008 directing to pay the maintenance from 21.11.2005 is modified as “the

respondent/wife was entitled to the maintenance as per the quantum determined by the Revisional Court from 18.01.2006.”

(iii) No order as to costs.

(iv) Record and proceeding be returned to the learned Trial Court.

(v) Rule is made partly absolute in above terms.

(S.G. MEHARE, J.)