IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION NO. 1095 of 2011
With
SPECIAL CRIMINAL APPLICATION NO. 1765 of 2011

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE S.G.SHAH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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VARSHABEN HIMANTLAL VEJANI....Applicant(s)

Versus

STATE OF GUJARAT & 1....Respondent(s)

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Appearance:
MR NIRZAR S DESAI, ADVOCATE for the Applicant(s) No. 1
MR PR ABICHANDANI, ADVOCATE for the Respondent(s) No. 2
MR MANAN MEHTA, APP for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE S.G.SHAH**

Date : 15/07/2016
ORAL COMMON JUDGMENT

Rule. Service of rule is waived by Mr. Manan Mehta, Ld. APP and Mr. Abichandani, Ld.

Advocate for respondent nos. 1 and 2 respectively.

2 Both these petitions are arising out of the same impugned judgment and order dated 31/3/2011 rendered in consolidated judgment in Criminal Revision Application No. 23 of 2010 and Criminal Revision Application No. 34 of 2010 by the Sessions Judge, Bhavnagar and, therefore, they are heard together and being decided by this common judgment.

3 Before the Sessions Court, Criminal Revision Application No. 23 of 2010 was preferred by Varshaben Himatlal Vejani; whereas Criminal Revision Application No. 34 of 2010 was preferred by her husband Rameshkumar Manubhai Sanghavi, wherein both of them have challenged the judgment and order dated 4/3/2010 rendered in Misc. Criminal Application No. 496/2008 by the Judicial Magistrate First Class, Bhavnagar, which was preferred by wife Varshaben with her two minor daughters under section 125 of the Code of Criminal Procedure [for short 'Cr. P.C.'] for maintenance of all of them from her husband and father of minor daughters, namely Rameshbhai Sanghavi. By such order dated 4/3/2010, the Magistrate has directed to increase the amount of maintenance of minor daughters only from Rs.500/-

pm to Rs.2,500/- pm so far as minor daughter Sonal is concerned and from Rs.500/- pm to Rs.2,000/- pm so far as minor daughter Anjali is concerned. Whereas the Magistrate has rejected the application for enhancement of maintenance so far as wife Varshaben is concerned. Therefore, wife has preferred revision before the Sessions Court for her maintenance and husband has preferred revision before the Sessions Court to quash and set aside such order of enhancement of maintenance. However, the Sessions Court has dismissed both the revision applications and, therefore, order of Magistrate dated 4/3/2010 is confirmed. In view of such situation, before this Court, again husband has challenged both the orders, as aforesaid, regarding enhancement of maintenance in favour of the daughters; whereas wife has challenged both the orders by which amount of maintenance is refused to be enhanced in her favour.

4 Special Criminal Application No. 1095 of 2011 is preferred by wife Varshaben, whereas Special Criminal Application No. 1765 of 2011 is preferred by husband Rameshbhai.

5 I have heard learned advocates for both the parties at length and perused the impugned orders and available record. Since such

applications are pending for last five years and notices were already issued before five years, it would not be appropriate to dispose of them on technical ground that practically the impugned orders are not subject to challenge under Article 226 of the Constitution by such Special Criminal Application, but considering the fact that there are concurrent findings of similar nature against both the sides and considering restriction of second revision in case of concurrent findings, such Special Criminal Applications might have been preferred and probably it may be the reason for issuing the notice to the otherside, otherwise there is no reason to entertain any such Special Criminal Application in absence of any glaring illegality or irregularity or miscarriage of justice or arbitrariness or perverseness in the concurrent findings by two Courts below. It is also quite clear and obvious that in such Special Criminal Application, it would not be appropriate for this Court to reappreciate the evidence only because such petitions are filed and to interfere or to modify the impugned judgment and order only because of possibility of arriving at some different interpretation and conclusion based upon the available evidence on record. In other words, the prayer in the petitions is to quash and set aside the impugned orders and, therefore, though

these are Special Criminal Applications, practically right and jurisdiction of this Court is almost similar to that of revisional Court to verify that whether there is any irregularity or illegality on the face of the record so as to interfere with the impugned judgment and order.

6 At the same time, it cannot be ignored that when maintenance is awarded in favour of minor daughters and that too meagre amount of Rs.2,500/- and Rs.2,000/- pm, practically there is no substance even on merits so as to interfere with such order when there are two concurrent decisions against the father. There are also other reasons to say so viz. [1] the father has got alternative remedy under the provisions of the Cr. P.C in the form of Section 127 to apply for modification of such order if there is any change in circumstances and that there might be change in circumstances inasmuch as minor daughters would now have been probably married. In that case, considering the provisions of the statute, when adult son and married daughter are not entitled to claim maintenance from father, the father should have approached the trial Court with requisite evidence for modification of impugned order of maintenance in favour of minor daughters. Therefore, practically there is no substance in the Special Criminal Application No.

1765 of 2011 preferred by the father against the order of enhancement of maintenance in favour of his minor daughters. Whereas so far as denial of maintenance to the wife is concerned, we have to scrutinize the available facts, circumstances and evidence on record and, therefore, it is scrutinized for all purpose and for all claimants i.e. wife and minor daughters of the husband. On scrutiny of available record, it transpires that when the parties have matrimonial dispute, initially husband has agreed to pay Rs.2 lakhs to the wife towards lumpsum maintenance, but ultimately the competent Court has awarded an amount of Rs.1,500/- pm towards maintenance of all the petitioners and such order was in force for pretty long time. Whereas during pendency of Criminal Misc. Application No. 1050 of 1996 there was again compromise between the parties whereby husband has paid Rs.2,50,000/-, but wife has failed to disclose such facts while praying for enhancement of amount of maintenance in this round of litigation. Thereafter, again there was further litigation between the parties in the form of Special Civil Suit No. 247 of 2001, wherein also wife has entered into some settlement and let gone her right of maintenance. Therefore, the trial Court has held that when wife has agreed for settlement and accepted amount for let going her right of maintenance,

now she is not entitled to further maintenance.

7 As against that, it is contended by wife before the trial Court that she has entered into compromise for herself only when amount of permanent maintenance has been exhausted and utilized and she has not settled the dispute regarding right of maintenance of her minor daughters and that she has not signed as their guardian in any such compromise and, therefore, minor daughters are certainly entitled to get maintenance from their father. Therefore, the trial Court has considered that even if there is a disclosure in the divorce deed that wife has let gone the right of maintenance for all of them, it is not binding to minor daughters and, therefore, minor daughters are entitled to claim /maintenance, but the wife is not entitled.

8 However, the trial Court has though held that wife is not entitled to maintenance, it is observed in the impugned judgment that submission by the husband that second application for maintenance is not maintainable when initially application for maintenance has been settled by let going right of maintenance.

9 In any case, all such issues are now well settled by few decisions of different Courts

viz.

[1] Rajesh R Nair v. Meera Babu reported in 2013 Cri. L.J. 3153, wherein Division Bench of Kerala High Court has held that waiver of right to maintenance by an agreement is not permissible because such agreement would be void agreement as against public policy. It would amount to ousting of jurisdiction of Magistrate and Family Court to entertain maintenance claim which cannot be permitted by law. Therefore, such agreement being void would be unenforceable and hence claim for maintenance cannot be rejected on the basis of such agreement of waiver of right to maintenance. Paragraphs 8 and 9 of such judgment read as under:-

> “8 The respondent has filed Exh.P1 claim for maintenance under Section 125 of Cr. P.C. Section 125 of Cr. P.C provides that if any person having sufficient means neglects or refuses to maintain his wife, unable to maintain herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Section 125 of Cr. P.C. is a provision incorporated in the Cr. P.C. by the Parliament enabling certain categories of persons including a wife to claim maintenance. Under this Section, a wife who is unable to maintain herself can claim a

monthly allowance for her maintenance from her husband having sufficient means when he neglects or refuses to maintain her. Thus, the right to claim maintenance provided to the wife is a statutory right created by the Parliament. This is for achieving the goal of protecting a wife who is unable to maintain herself to claim maintenance from her husband having sufficient means when he neglects or refuses to maintain her. The public policy of protecting such women is reflected in Section 125 of Cr. P.C. In other words, it is a benevolent provision enabling a weaker section of the society to earn their livelihood. An agreement by which a wife waives her right guaranteed under Section 125 of Cr. P.C. will only be an agreement against public policy. An agreement against public policy is void. Therefore, a clause of waiver incorporated in Ext.P4 agreement by which the wife has given up her right to claim maintenance from the husband is void and hence, unenforceable.

9 A Magistrate of the First Class is conferred with jurisdiction to deal with a claim for maintenance under Section 125 of Cr. P.C. Now, a Family Court can also exercise the jurisdiction exercisable by a Magistrate of the First Class under Section 125 of Cr. P.C. as provided under clause (a) of sub-section (2) of Section 7 of the Family Courts Act. Thus, a Magistrate or a Family Court has jurisdiction to deal with the claim of a wife for maintenance. This jurisdiction is conferred on such courts by the Parliament. By the act of parties, the courts cannot be deprived of such jurisdiction. In other words, the parties cannot agree to oust the jurisdiction of a Magistrate or a Family Court to entertain a claim for maintenance preferred by a wife against her husband. For this reason as well, the clause of waiver incorporated in Ext.P4 agreement by which the

respondent has given up her right to claim maintenance from the petitioner cannot hold good in the eye of law. Therefore, the contention raised by the learned counsel for the petitioner that in view of the waiver of the right to claim maintenance by the respondent, Ext.P1 claim preferred by her is not maintainable is liable to be rejected and hence, we do so."

[2] In Rishikesh Singh alias T.R. Singh v. Kiran Gautam reported in 2015 Cri.L.J. 126, Chhattisgarh High Court has confirmed that decree of divorce obtained by mutual consent would be no ground to deny maintenance until wife has not remarried after divorce. It is further held that even if wife is junior advocate, it cannot be held that she is able to maintain herself and, therefore, she would be entitled for the maintenance.

[3] Smt. Vanamala v. H.M. Ranganatha Bhatta reported in [1995] 5 SCC 299, wherein the Hon'ble Supreme Court has also taken the same view that wife, who obtains divorce by mutual consent cannot be denied maintenance by virtue of section 125[4] and thereby restored the order of the Sessions Court, which has concluded that wife was entitled to maintenance notwithstanding divorce by mutual consent and remanded the matter to the trial Court for determining quantum of maintenance. Thereby, the Hon'ble Supreme Court

has set aside the order of the High Court which held that wife is not entitled to maintenance once she has divorced her marriage by mutual consent. It would be appropriate to recollect here that for coming to such conclusion, the Hon'ble Supreme Court has relied upon as many as three other decisions of different High Courts, which are quoted in such reported case and approved by the Hon'ble Supreme Court. Therefore, as on date, there are at least as many as five judgments including judgment of the Hon'ble Supreme Court, which confirm that a wife who obtains divorce by mutual consent cannot be denied maintenance by virtue of section 125 [4] of the Cr. P.C.

10 In view of such facts and circumstances, so far as observations regarding wife, confirming that she is not entitled to maintenance by the trial Court as well as the Sessions Court are unwarranted and to that extent those observations are hereby quashed and set aside. However, so far as enhancing the amount of maintenance or awarding maintenance is concerned, in absence of any cogent and reliable evidence on record, it would not be possible for this Court to evaluate the requirement of the wife and capacity of the husband and, therefore, it would not be possible to fix any amount of maintenance, that can be

enhanced or paid in favour of the wife. At the same time, it is also clear that if the amount of maintenance is decided at this stage in Special Criminal Application, then the husband would lose his right to challenge such quantum of maintenance before a Court within his reach i.e. either Sessions Court or High Court in appropriate revisional jurisdiction and, therefore, so far as the amount of maintenance in favour of the wife is concerned, though that part of order refusing maintenance to wife is quashed and set aside; for the aforesaid reason, the matter needs to be remanded to the Court of Judicial Magistrate First Class, else wife would not be entitled to any amount of maintenance from the date of filing of such application till date, if we direct her to file fresh application for enhancement of amount of maintenance before the Competent Court. To that extent, Special Criminal Application No. 1095/2011 is allowed and thereby order dated 4/3/2010 in Criminal Misc. Application No. 496 of 2008 by the Judicial Magistrate First Class, so also order in Criminal Revision Application No. 23 of 2010 by the Sessions Court, Bhavnagar, are quashed and set aside and the matter is remanded to the Court of the Judicial Magistrate First Class, Bhavnagar, for deciding amount of maintenance for wife purely on evidence that may be adduced by both

the parties before it, in accordance with law. Rule made absolute accordingly.

11 For the purpose, both the parties are at liberty to adduce evidence before the trial Court. The trial Court shall decide such application within six months from the date of receipt of writ of this order. However, it is also made clear that if the trial Court is unable to proceed with such application in reasonable time, then wife may be free to file fresh application with relevant facts and evidence for modification of earlier order or for getting maintenance afresh.

12 So far as revision against order of maintenance in favour of minor daughters is concerned, considering the amount of maintenance being Rs.2,500/- and Rs.2,000/- pm, there is no substance in such petition so as to interfere with the same after five years. On the contrary, after such long time, in fact even such amount of maintenance needs to be enhanced or increased considering the inflation and devaluation of rupee, so also requirement of daughters because of their age. However, it is made clear that if at all daughters are married in between, then it would be appropriate for the petitioner – father to apply for cancellation of such order before

the trial Court and in that case, the trial Court shall decide it in accordance with law. It cannot be ignored that for increasing the amount of maintenance in favour of daughters, the trial Court as well as the Sessions Court have considered the available evidence on record, wherein it has been recorded that the petitioner – husband is earning Rs.11,000/- pm at the relevant time. Therefore, amounts of Rs.2,500/- and Rs.2,000/- pm are reasonable amounts for maintenance of minor daughters.

13 Therefore, there is no substance in Special Criminal Application No. 1765 of 2011 and hence it stands dismissed. Rule is discharged in Special Criminal Application No. 1765 of 2011, whereas Rule is made absolute in above terms so far as Special Criminal Application No. 1095 of 2011 preferred by wife is concerned.

(S.G.SHAH, J.)

* Pansala.