

Kailashben Arvindkumar Joshi Vs Arvinbhai Ratilal Joshi and Another

Court: Gujarat High Court

Date of Decision: Jan. 1, 1985

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 125, 125, 126, 127, 127

Citation: (1985) 2 GLR 761

Hon'ble Judges: M.B. Shah, J

Bench: Single Bench

Judgement

M.B. Shah, J.

Being aggrieved and dissatisfied by the judgment and order dated 17th August, 1984 passed by the Metropolitan

Magistrate (Court No. 17), Ahmedabad in Miscellaneous Criminal Application No. 37 of 1984 the petitioner has filed this Revision Application.

2. It is the case of the petitioner-wife that the Judicial Magistrate First Class. Mehmedabad had passed an order in her favour u/s 488 of the

Criminal Procedure Code (Old) and had awarded maintenance at the rate of Rs. 110/- per month. She is residing at Ahmedabad, but she was

compelled to file application for maintenance before the Judicial Magistrate First Class at Mehmedabad, District Kaira because her husband was

residing at Mehmedabad. After the amendment of the Criminal Procedure Code u/s 126 of the Code she is entitled to file an application for

maintenance where she is residing. She. therefore, filed Miscellaneous Criminal Application No. 37 of 1984 before the Metropolitan Magistrate at

Ahmedabad u/s 127 of the Code for enhancement of maintenance because of change of circumstances, increase in price and increase in income of

opponent No. 1.

3. Opponent No. 1 objected to the said application by filing an application exhibit 3 wherein he contended that the Court at Ahmedabad had no

jurisdiction to deal with the said matter. The said contention of opponent No. 1 was upheld by Metropolitan Magistrate (Court No. 17) by

referring to AIR Commentaries on Criminal Procedure Code wherein it is mentioned that the maintenance application for enhancement was not

maintainable in any other Court except the Court which passed the said order. It should be noted that he has not discussed any decision. Against

the said judgment and order the petitioner has filed this Revision Application.

4. Rule was issued to the other side. Opponent No. 1 remained present on one date, subsequently he remained absent. Thereafter as the question

of law was required to be decided the learned advocate Shri A. D. Shah was asked to appear as Amicus Curiae on behalf of Opponent No. 1.

5. The question which requires determination in this case is whether the application for enhancement of maintenance u/s 127(1) of the Code is

maintainable in the district where wife resides or whether it is maintainable only before the Court which passed the order of maintenance u/s 125 of

the Code.

6. Section 125 of the Code prescribes who can file an application for maintenance. in which set of circumstances the maintenance should or should

not be awarded and from which date it should be awarded. Section 126 of the Code provides for procedure of deciding the maintenance

application.

The said section reads as under:

126. Procedure:

(1) Proceedings u/s 125 may be taken against any person in any district(a) where he is, or (b) where he or his wife resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed

to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for

summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully

avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so

made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including

terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications u/s 125 shall have the power to make such order as to costs as may be just.

This Section 126 in terms provides that the wife is entitled to file application at the place where she resides. Prior to the amendment of the Code

u/s 488(8) wife was not entitled to file application for maintenance where she resided and to obviate harassment and difficulties to the wife Section

126 provides for it.

7. The objects and reasons for amendment of Section 488 as recommended by the Law Commission are as under:

Under Sub-section (8), the place where the wife resides after desertion by the husband is not material as regards the venue of the proceedings,

though the place where the husband resides even temporarily is relevant; often deserted wives are compelled to live with their relative far away

from the place where the husband and wife last resided together. They would be put to great harassment and expenditure Unless the venue of the

proceedings is enlarged so as to include the place where they may be residing on the date of the application. ""With reference to Sub-section (8)

there is the following controversy. Is it sufficient if the husband resides in the district in which the proceedings are instituted must itself be one having

jurisdiction over the place where the husband resides. The Bombay view is that a proceeding u/s 488 instituted in any competent Court within the

district in which the husband resides, or is, or in which he last resided with his wife. This is also the Patna view and Kerala view. The Madras High

Court has, however, taken a different view. In our opinion the Bombay view is correct, as the wording of the subsection does not seem to justify

the addition of any further restriction. We think the language is clear and needs no amendment on this point.

Now from these objects and reasons it is clear that to avoid the harassment to the deserted wives who are compelled to live with their relatives far

away from the place where the wife and husband last resided together and also the expenditure, u/s 126(1)(b) it is provided that the wife is entitled

to file an application where she resides. The aforesaid quotation, further says that the Bombay High Court has taken the view that the proceedings

u/s 488 can be instituted in any competent Court within the district in which the husband resides and it was not necessary that the application

should be filed only before the Magistrate at the place where the husband resides and the view of the Bombay High Court was also approved by

the Law Commission by observing that the wording of sub-section does not seem to justify the addition of any further restriction and the language

is clear and needs no amendment on that point.

8. Section 127 provides that the application for alteration in the allowance can be filed by the wife, child, father or the mother. Sub-section (2)

provides that the Magistrate may cancel or vary any order u/s 125 in consequence of any decision of a competent civil court. Sub-section (3)

provides that the order u/s 125 can be cancelled in certain set of circumstances such as divorce or remarriage. Sub-section (4) provides that the

civil court shall take into account the sum which has been paid to or recovered by way or maintenance.

9. Section 128 provides that a copy of the order of maintenance shall be given without payment to the person in whose favour the order is made

and such order can be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being

satisfied as to the identity of the parties and the non-payment of the allowances due. Section 128, therefore, empowers that even if the order is

passed by any Magistrate the maintenance order can be enforced by the Magistrate in a place where the person against whom it is made, is found.

So far as the execution is concerned there is no restriction and it empowers any Magistrate to execute the said order wherever the person against

whom it is made resides. Therefore, the limited question is whether u/s 127 an application can be filed before the Magistrate who had not passed

maintenance order u/s 125.

10. As stated above u/s 128 of the Code any Magistrate is entitled to execute the award of maintenance and as such there is no restriction that

execution application could be filed only before the Magistrate who passed the said order. In the case of In Re: Kalavantibai Tekchand Bhavani,

the Bombay High Court has interpreted the provisions of Sections 488 and 490 of the Criminal Procedure Code and held that even in an execution

application u/s 489 the Magistrate is entitled to enhance or alter the maintenance amount on proof of change in the circumstances of any person

receiving the maintenance. The Court further observed as under:

If in the consideration of an application u/s 490 the Magistrate is satisfied that there has been a change of circumstances which justifies him in

exercising his jurisdiction u/s 489. in my view, it is open to him to modify the order after taking into account the change of circumstances and to

award such maintenance as may be just. I am unable to accept the view of the learned Magistrate that once one of the dependants for whose

benefit the order was passed died the whole order must be deemed to be vacated. If the jurisdiction to modify or amend the order in view of the

change of circumstances be granted, it is difficult to understand why in the case where a consolidated order has been passed, death of one of the

beneficiaries may not be regarded as a change of circumstances inviting the exercise of the jurisdiction u/s 489.

In my view there is no justifiable reason for holding that the application for enhancement would be maintainable Only before the Magistrate who

passed the said order. u/s 127 of the Code there is no specific bar laying down that the application u/s 127 would be maintainable only before the

Magistrate who passed the said order.

11. There is also no reason for holding that the word ""Magistrate"" used in Section 127 should be interpreted narrowly by holding that the

Magistrate who has decided the application u/s 125 only would have jurisdiction to decide the application u/s 127.

12. As stated above the object of amending Section 488(8) is to see that there is no harassment and expenditure to the wives who are compelled

to live with their relatives far away from the place where they last resided together with their husbands. If narrower meaning is given by holding that

the venue of enhancement application would be the Court which passed the award of maintenance u/s 125, the object of the amendment would be

frustrated.

13. Further u/s 127 no other procedure is prescribed for deciding the application which may be filed for alteration or enhancement, or cancellation

of maintenance order. Chapter IX which consists of four sections which provides for complete procedure for deciding maintenance application

nowhere provides that u/s 127 the Magistrate is not required to follow the procedure prescribed u/s 126. While deciding the application u/s 127

the Magistrate is, therefore, required to follow the procedure prescribed u/s 126 and once it is held that the Magistrate is required to follow the

procedure prescribed u/s 126 it would follow as a necessary consequence that the wife is entitled to file an application for enhancement u/s 127 in

the district where she resides as per Section 126(1)(b).

14. It is further well settled by the series of decisions that the provisions of Section 125 of the Criminal Procedure Code are for the welfare of the

neglected wives, children and parents and the object is to prevent the harassment and that provisions should be construed liberally.

15. In the case of Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another, the Court has held as under:

The point must be clearly understood that the scheme of the complex of provisions in Chap. IX has a social purpose. Ill-used wives and desperate

divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of

Section 127. Where the husband, by customary payment at the time of divorce, has adequately provided for the divorcee, a subsequent series of

recurrent doles is contra indicated and the husband liberated. This is the teleological interpretation, the sociological decoding of the text of Section

127. The key note thought is adequacy of payment which will take reasonable care of her maintenance.

The Court, has further held that. no construction which leads to frustration of the statutory project can secure validation if the court is to pay true

homage to the Constitution. The Court also observed that the law is dynamic and its meaning cannot be pedantic but purposeful.

16. In the case of Sirajmohmedkhan v. Hafizunnisa Yasinkhan reported in AIR 1981 SC 1972, while considering the provisions of Section 125 of

the Code, the Supreme Court made the following observations:

Moreover, the Madras decision as also the earlier decision seem to have followed the outmoded and antiquated view that the object of Section

488 was to provide an effective and summary remedy to provide for appropriate food, clothing and lodging for a wife. This concept has now

become completely outdated and absolutely archaic. After the International Year of Women when all the important countries of the world are

trying to give the fair sex their rightful place in society and are working for the complete emancipation of women by breaking the old shackles and

bondage in which they were involved, it is difficult to accept a contention that the salutary provisions of the Code are merely meant to provide a

wife merely with food, clothing and lodging as if she is only a chattel and has to depend on the sweet will and mercy of the husband.

Therefore, the object of Section 126 which provides that the wife is entitled to file application where she resides would be frustrated if narrow

interpretation is given by holding that u/s 127 of the Criminal Procedure Code she can file application before the Magistrate who has passed an

order u/s 125. In this set of circumstances if the said Section 127 is liberally construed without any violence to the language of the section, it cannot

be said that u/s 127 of the Code the application is not maintainable before the Magistrate where woman resides.

17. The learned advocate for opponent No. 1 however, relied upon a decision of the Bombay High Court in the case of Dayanoba v. Housabai

reported in 1983 Cri. L.J. 562 wherein the Court has observed that u/s 127 of the Code application for alteration in the order of maintenance

ought to be made to the same Magistrate, who had passed the order of maintenance as far as possible. No reason is given by the learned Judge in

arriving at the said conclusion. The learned Judge has used the phrase ""as far as possible"" which would indicate that in certain cases the application

before the other Magistrate is also maintainable.

18. The learned advocate for opponent No. 1 further relied upon the decision of the Bombay High Court in the case of Vithalrao Marotrao

Awadhut Vs. Ratnaprabha Awadhut and Others, where the Court has observed as under:

19. A bare look at this provision will show that the Magistrate contemplated by Section 127 of the Code is the Magistrate who passed initial

order. Obviously, the effect of alteration in the allowance made under this provision will be to modify the earlier order. As I have indicated above,

another Magistrate having co-extensive jurisdiction would not be able to pass an order which would have the effect of modifying the earlier order

passed by another Magistrate. The reliance placed by the learned Magistrate upon the provisions of Sections 126 and 127 of the Code for arriving

at the conclusion that second application by the non- applicants is maintainable is obviously erroneous.

19. Here also the only reason given by the Court is that another Magistrate having co-extensive jurisdiction would not be able to pass an order

which would have the effect of modifying the earlier order passed by another Magistrate. With respect in my view, it is difficult to agree with the

said reasoning given by the learned Judge. Normally in enhancement application the Magistrate would be required to consider the change of

circumstances and whether the income of the person against whom the order u/s 125 is passed has increased or not and it cannot be said that

these questions cannot be decided by another. Magistrate of competent jurisdiction. In any set of circumstances the modification or alteration in the

order would normally be after a lapse of some time and it cannot be presumed that the same Magistrate would be presiding over the said Court

after the lapse of that much time.

20. The learned advocate for opponent No. 1 has also relied upon the decision the case of G. Balrai v. Malamma reported in 1984 Cri. L.J. 1170

here the Court has held that Section 127 of the Code which is for alteration in the amount is completely different and for this Section 126 has no

application. The Court held that the words "the Magistrate" would mean the Magistrate who had passed the first order of maintenance. The Court

further held that the interpretation given by it was strengthened by the provisions of Section 128 which is the section for enforcement of the order

which specifically provides that such petition may be presented before any Magistrate. As discussed above and as held by the Bombay High Court

in In Re: Kalavantibai Tekchand Bhavani, , in an application for execution or enforcement of the order u/s 125, the Court has jurisdiction to

enhance the maintenance if there is change of circumstances. Apart from this, in my view, as discussed above, there is no provision which provides

that the application u/s 127 would be maintainable only before the Magistrate who has passed the order u/s 125 or that Section 126 has no

application to it. This would be too narrow interpretation.

21. As discussed above, Section 127 does not provide for any other separate procedure for deciding the application. The procedure provided in

Section 126 is the only procedure applicable to the proceedings u/s 127 of the Code. Further there is no specific bar that the application for

enhancement or alteration of maintenance award cannot be filed before the Court where the wife resides. In any set of circumstances by giving

interpretation to the provisions of Section 127 by holding that for modification or alteration the wife is entitled to file application where she resides

as provided u/s 126 of the Code, no violence is caused to the statutory provisions and as this Chapter IX is for the welfare of deserted and

neglected wife, children or parents there is no reason to give narrow interpretation to the said provisions as contended.

In the result the Revision Application is allowed. Rule is made absolute. It is directed that the learned Magistrate would decide the application filed

by the petitioner as far as possible within three months from the date of the receipt of the writ of this Court.