IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 17th DAY OF FEBRUARY 2022

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BEFORE

THE HON'BLE MR. JUSTICE M.NAGAPRASANNA

CRIMINAL PETITION No.101378/2019

BETWEEN

SHIVANAND S

...PETITIONER

(BY SRI R. H. ANGADI, ADV., FOR
SRI MISS JOSHNA P. DHANAVE ADVOCATE)

AND

BASAVVA @ LAXMI

…RESPONDENT

(RESPONDENT-SERVIED)

THIS CRIMINAL PETITION IS FILED U/S 482 OF CR.P.C. SEEKING TO SET ASIDE THE IMPUGNED ORDER PASSED IN CRL.RP.NO.14/2019 DATED 12.06.2019, PASSED BY THE PRL. DIST. & SESSIONS JUDGE, DHARWAD CONFIRMING THE ORDER PASSED IN CRL.MISC.NO.141/2015, DATED 15.10.2018 PASSED BY THE CIVIL JUDGE & JMFC COURT, KALAGHATAGI, AT:KALAGHATAGI & CONSEQUENTLY DISMISS THE PETITION FILED BY THE PETITIONER.

THIS PETITION COMING ON FOR ADMISSION THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The petitioner-husband is before this Court praying to quash the order dated 12.06.2019 passed in Crl.R.P.No.14/2019 by the learned Sessions Judge, Dharwad confirming the order passed by the learned Magistrate in Crl.Misc.141/2015 dated 15.10.2018.

2. Heard Miss.Joshna P Dhanave, learned counsel for the petitioner. Respondent is served and un-represented.

3. *Sans* details, facts in brief germane for a resolution of the dispute in the *lis* are as follows:

The petitioner and the respondent are husband and wife. Marriage between them takes place on 13.04.2001. The marital life between the couple appears to have turned sore, pursuant to which, among other proceedings the respondent-wife files a petition in Crl.Misc.No.2/2009 invoking Section 12 of the Protection of Women from Domestic Violence Act, 2005 ('Act' for short). The learned

Magistrate before whom the miscellaneous case was filed under the Act while entertaining the case awards a maintenance of Rs.1,000/-. After invoking the provisions of the Act, the respondent-wife files a petition in Crl.Misc.No.141/2015 invoking Section 127 of the Cr.P.C. for enhancement of the maintenance amount awarded under the Act. The petition is allowed and the respondent-wife is awarded maintenance of Rs.5,000/- from the date of the order.

4. Feeling aggrieved by the order passed in Crl.Misc.No.141/2015, the petitioner-husband files Criminal Revision Petition in Crl.R.P.No.14/2019 invoking Section 397 of the Cr.P.C. The learned Sessions Judge dismisses the said Revision Petition by his order dated 12.06.2019 confirming the order passed by the learned Magistrate enhancing maintenance to the wife from Rs.1,000/- to Rs.5,000/-. It is these two orders that are called in question in the subject petition.

5. The learned counsel appearing for the petitioner-husband Miss. Joshan P Dhanave would vehemently argue and contend that the respondent once having invoked the provisions of the Act could not have filed an application seeking enhancement under Section 127 of the Cr.P.C. The order passed by the learned Magistrate as affirmed by the learned Sessions Judge are orders without jurisdiction. The learned counsel would seek quashment of the said orders.

6. The respondent-wife is served and remains unrepresented.

7. I have given my anxious consideration to the submissions made by the learned counsel appearing for the petitioner and perused the material on record. In furtherance whereof, the only issue that falls for my consideration is, ***"Whether the maintenance awarded under the Domestic Violence Act can be sought to be enhanced under the Cr.P.C.?"***

8. The afore-narrated facts are not in dispute. The respondent-wife invokes Section 12 of the Act seeking reliefs that are available under Section 12. Section 12 reads as follows:

> ***"12. Application to Magistrate.—(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:***
>
> *Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.*
>
> ***(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:***
>
> *Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.*
>
> *(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.*

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing."

The relief that is granted by the learned Magistrate is awarding of maintenance of Rs.1,000/- to be paid by the husband-petitioner to the respondent-wife. Maintenance under the said order was all along being paid.

9. Things standing thus, the respondent-wife files a petition in Crl.Misc.141/2015 invoking Section 127 of the Cr.P.C. seeking enhancement of an amount awarded under the Act. The learned Magistrate allows the petition and enhances the maintenance from Rs.1,000/- to Rs.5,000/-. The learned Magistrate enhances the maintenance amount awarded under the Act in a petition filed for enhancement under the Cr.P.C. The Sessions Judge, in revision, affirms the view taken by the learned Magistrate.

10. In order to resolve the issue, it is germane to notice Sections 125 and 127 of the Cr.P.C. and they read as follows:

"125. Order for maintenance of wives, children and parents.—(1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or 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 or such child, father or mother, at such monthly rate [66][* *], as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:*

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

[67][Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.]

Explanation.—For the purposes of this Chapter,—

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[68][*(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.*]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [69][*allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,*] *remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:*

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an [70][*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.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

127. Alteration in allowance.—[73]***[(1) On proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.]***

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,—

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to [74][maintenance or interim maintenance, as the case may be,] after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a [75][monthly allowance for the maintenance and interim maintenance or any of them has been ordered] to be paid under Section 125, the civil court shall take into account the sum which has been paid to, or recovered by, such person [76][as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of] the said order."

Section 125 of the Cr.P.C. enables the wife to seek maintenance at the hands of the husband *inter alia*. Invoking this provision, the learned Magistrate can award maintenance. Section 127 of the Cr.P.C. deals with alteration in allowance. A maintenance that is awarded under Section 125 of the Cr.P.C. can be varied in an application filed under Section 127 of the Cr.P.C. What is *sine qua non* is that an order of maintenance should precede a petition under Section 127 of the Cr.P.C., failing which, a

petition under Section 127 of the Cr.P.C. seeking enhancement of maintenance is not available.

11. It is an undisputed fact that the respondent-wife invoked the provisions of the Act in which maintenance was awarded. It is also an admitted fact that there is no proceeding initiated by the respondent-wife invoking Section 125 of the Cr.P.C. Therefore, without there being any determination of maintenance under Section 125 of the Cr.P.C., petition under Section 127 of the Cr.P.C. is not maintainable.

12. The language employed in Section 127 of the Cr.P.C. is unequivocal as on a proof of change in the circumstances of any person receiving allowance under Section 125 of Cr.P.C. can maintain a petition under Section 127 of the Cr.P.C. A proceeding under Section 125 of the Cr.P.C. therefore should precede a proceeding under Section 127 of the Cr.P.C.

13. The fact that provisions of Act was invoked for grant of maintenance and provisions of Cr.P.C. are invoked

seeking enhancement of maintenance cannot be countenanced in law. Therefore, the order passed by the learned Magistrate enhancing maintenance under Section 127 of the Cr.P.C. was without jurisdiction and a nullity in law. The foundation being a nullity in law, a super structure to it affirming the order of the learned Magistrate, by the learned Sessions Judge will have to follow suit – is to be declared a nullity in law.

14. Therefore, on a coalesce of the aforesaid provisions that falls for consideration in the case at hand and the undisputed facts, would lead to an unmistakable inference that both the orders of the learned Magistrate and the learned Sessions Judge are to be obliterated.

15. For the aforesaid reasons, the following:

ORDER

(i) The Criminal Petition is allowed.

(ii) The order passed by the learned Magistrate in Crl.Misc.141/2015 dated 15.10.2018 and the

order dated 12.06.2019 passed by the learned Sessions Judge in Crl.R.P.No.14/2019 stand quashed.

(iii) Quashment of the aforesaid orders will not preclude the respondent-wife in initiating any such proceeding in a manner known to law.

Sd/-
JUDGE

Vb/-