

clause has been brought to my notice in that document from which it can be inferred that the Bank contracted itself out of the obligation imposed by section 151 regarding the machinery, I hold accordingly.

(22) The fourth question that has been raised is that the plaintiff is entitled to a decree against defendant No. 3 on the basis of equitable mortgage. This question, in view of the finding that defendant No. 3 stands discharged from his liability to pay the balance amount, does not arise and, therefore, it is not necessary to deal with it.

(23) The last question is whether the plaintiff is entitled to the interest from the defendants from the date of institution of the suit till the date of realisation. It is provided in section 34 of the Code of Civil Procedure that where a decree is for payment of money arising out of the commercial transaction, the Court can grant interest from the date of the suit till the date of realisation of the decretal amount at the rate of interest not exceeding the contractual rate of interest between the parties. In view of the aforesaid section, I am of the view that the plaintiff is entitled to recover the interest from defendants Nos. 1 and 2 at the contractual rate of interest from the date of institution of the suit till the date of realisation of the decretal amount.

(24) For the aforesaid reasons, I partly accept the appeal and decree the suit of the plaintiff-appellant for the recovery of Rs. 3,275.20 with costs throughout and interest at the contractual rate from the date of institution of the suit till the date of realisation against defendants Nos. 1 and 2, and dismiss the suit against defendant No. 3 with no order as to costs.

N. K. S.

Before S. S. Sandhwalia, C.J. & D. S. Tewatia, J.

CHANAN SINGH,—*Petitioner.*

versus

JANGIR KAUR,—*Respondent.*

Criminal Revision No. 134 of 1980.

December 17, 1982.

Code of Criminal Procedure (II of 1974)—Section 125—Punjab High Court Rules and Orders Volume III, Chapter 7-A, Rule 1—Proceedings

Chanan Singh v. Jangir Kaur (S. S. Sandhwalia, C.J.)

under section 125—Nature of—Whether criminal—Technicalities of construing civil proceedings—Whether attracted to an application under section 125—Applicant not pleading that she was unable to maintain herself—Absence of such a plea—Whether fatal to her claim.

Held, that a reading of sections 125 to 128 contained in Chapter IX of the Code of Criminal Procedure, 1973 leaves no manner of doubt that these provide a self-contained Code for the right, procedure, grant, alteration and execution of an order of maintenance. Sub-section (2) of section 126 provides that evidence under this Chapter has to be taken in the presence of a person against whom an order is claimed and is to be recorded in a manner prescribed for summons cases. This in itself is an indication that the proceedings are criminal proceedings and not civil proceedings. Attention is also called to sub-section (3) of section 125 which provides for the execution of an order of maintenance by issuing a warrant for levying the amount due in the manner provided for levying fines and further empowers the Magistrate to sentence such a person for the whole or any part of each month's allowance remaining unpaid. The forum for the adjudication of an order of maintenance is prescribed to be that of a Court of Magistrate First Class. The power of revision against the same would lie with the court of Session under section 399. Equally, the High Court's power of revision thereof would be derived from section 401 of the Code. This matter seems to be further reinforced by the provisions of rule 1 in Chapter 7-A of the Rules and Orders of the Punjab High Court, Volume III dealing with the maintenance cases. It is true that the respondent in these proceedings is not an accused person facing trial and consequent conviction and sentence, but that by itself does not take away from the essential character of the criminal nature of these proceedings. It is, therefore, held that the proceedings in Chapter IX specifically contained in the Code of Criminal Procedure are, on the face of it, criminal in nature.

(Paras 4, 5, 6 & 7).

Held, that niceties of construing formal civil pleadings would not be attracted to an application under section 125 of the Code. Even assuming that a written application may be necessary thereunder, the said section does not prescribe its contents or any formal mode of presentation. Plainly enough it has not to be verified as a formal civil pleading. Consequently, neither the Code of Civil Procedure or the principles thereunder can in any way be attracted nor the strict rules of civil law that the evidence beyond pleadings should be ignored can come into play. Again a reference to section 125 makes it plain that the corner-stone of the right is the neglect or refusal of a person having sufficient means to maintain his wife or child or parent, as the case may be. Once such neglect or refusal has been established before the Magistrate, he is empowered to make an order for monthly allowance for maintenance. The quantum of such an allowance is, however, a subsidiary issue to be based upon the status and the means of the parties. On larger principle, it appears that an application under section 125 of the Code has implicit in itself the essential ingredient that the claimant is unable to maintain herself. This inability or absence of means

is a negative incident and usually, if not inflexibly, the burden of proving the negative is not to be rested on a party. Once the claimant establishes neglect or refusal which is the foundation-stone of the claim, it is for the respondent to show positively that she has ample means to maintain herself. Lastly, it must be borne in mind that the provisions of Chapter IX of the Code have a larger social purpose behind them. They are intended to provide immediate succour to destitute wives, children and parents. It is apt that such beneficent legislation should not be narrowly construed so as to defeat its purpose on mere technicalities. It is, therefore, held that the technicalities of construing civil pleadings are not attracted to an application under section 125 of the Code. Consequently, it is further held that in such an application, the absence of an express pleading that the claimant is unable to maintain herself or himself is in no way fatal to the claim.

(Paras 8, 9, 10 & 13).

Bishambhar Dass vs. Smt. Anguri and another, 1978 CrL J. 385.

DISSENTED FROM:

Case referred by a Single Bench consisting of Hon'ble Mr. Justice D. S. Tewatia on 13th May, 1982 to a Larger Bench for deciding the important question of law arising in this case. The Larger Bench consisting of the Hon'ble the Chief Justice Mr. S. S. Sandhawalia and Hon'ble Mr. Justice D. S. Tewatia after deciding the question again referred this case on 17th December, 1982 to a Single Judge. The Single Judge consisting of Mr. Justice D. S. Tewatia finally decided the case on 19th January, 1983.

Petition under section 401 Cr. P. C. for the revision of the order of the court of Shri Nirpinder Singh Sessions Judge, Bhatinda dated the 31st November, 1979 reversing the judgment of Shri D. S. Chatha, Judicial Magistrate 1st Class, Bhatinda, dated the 30th September, 1977 setting aside the judgment of the trial court and allowing the application of the claimant and directing the respondent to pay Rs. 50 per mensem as maintenance to Jangir Kaur with effect from the date of her application.

J. R. Mittal with Pawan Bansal, Advocate, for the Appellant.

T. S. Sangha, Advocate, for the Respondent.

S. S. Sandhawalia, C.J.

(1) Whether the technicalities of construing civil pleadings are equally attracted to an application for maintenance by a wife under section 125 of the Code of Criminal Procedure, 1973 is the significant question which has necessitated the reference.

2. For the limited purpose of adjudicating on the aforesaid issue it suffices to mention that the respondent-wife had claimed maintenance at the rate of Rs. 200 per mensem under section 125 of the

Code. Her application was dismissed by the Judicial Magistrate, Ist Class, primarily on the ground that the parties were living separately by mutual consent. On a revision preferred by the respondent-wife the Sessions Judge, Bhatinda reversed the judgment and granted maintenance at the rate of Rs. 50 per mensem only. He also specifically rejected the plea on behalf of the husband that because the wife had not expressly pleaded in her application that she was unable to maintain herself, this by itself would be fatal to her claim. Both the spouses have come up against the aforesaid order of revision which was first placed before my learned brother Tewatia, J. Noticing the significance of the question whether in the petition under section 125 it was incumbent on the wife to plead that she was unable to maintain herself and some conflict of judicial opinion in the other High Courts on the said point the matter was referred for an authoritative decision.

3. As a matter of legislative history, it may be noticed that section 125 of the Code is the successor provision of section 488 of the Code of Criminal Procedure of 1898. In the new Code this section along with the connected ones has been recast and rationalised and now incorporated in the self-contained Chapter IX thereof. As the heading plainly indicates it provides in a consolidated form for the maintenance of wives, children and parents. The detailed provisions contained in the five sub-sections of section 125 spell out both the right and the pre-requisites for an order of maintenance. The succeeding section 126 lays out the procedure to be followed in these proceedings including the mandate that the evidence therein shall be recorded in the manner prescribed for a summons-case. Section 127 then provides for any alteration in the maintenance allowance ordered earlier on a proof of change in the circumstances whilst the last section 128 in the Chapter empowers any Magistrate to enforce an order of maintenance at any place where the person against whom it is made, may be.

4. Now a larger conspectus of the four sections contained in Chapter IX would leave no manner of doubt that these provide a self-contained Code for the right, procedure, grant, alteration, and execution, of an order of maintenance. Sub-section (2) of section 126 provides that evidence under this Chapter has to be taken in the presence of the person against whom an order is claimed and is to be recorded in the manner prescribed for summons-cases. This in itself is an indication that the proceedings are criminal proceedings and not civil proceedings. Attention is also called to sub-section (3) of section 125 which provides for the execution of an

order of maintenance by issuing a warrant for levying the amount due in the manner provided for levying fines and further empowers the Magistrate to sentence such a person for the whole or any part of each month's allowance remaining unpaid. The forum for the adjudication of an order of maintenance is prescribed to be that of a court of magistrate first class. The power of revision against the same would lie with the court of session under section 399. Equally, the High Court's power of revision thereof would be derived from section 401 of the Code.

5. Within this jurisdiction the matter seems to be further reinforced by the provisions of rule 1 in Chapter 7-A of the Rules and Orders of the Punjab High Court Volume III dealing with the maintenance cases. Therein it has been provided in terms as follows:--

“Proceedings under section 488 of the Code of Criminal Procedure are of a criminal character, and its provisions must be strictly followed. The section is not intended to provide for all possible cases in which a wife may be entitled to receive separate maintenance from her husband and it in no way overrides the Civil law or excludes the jurisdiction of the civil courts.....”.

6. Reference inevitably must be made to *Nand Lal Misra v. Kanhaiya Lal Misra*, (1), wherein a solitary passing observation was made that as the proceedings were of a civil nature, the Code did not contemplate any preliminary enquiry. In this case their Lordships were adjudicating on the narrow question whether under section 488(6) of the old Code the Magistrate could hold a preliminary enquiry as to the paternity of the child claiming maintenance before issuing notice to the alleged putative father. It was in this context that their Lordships whilst holding that the provisions of Chapter XXXVI were a self-contained code never the less drew the distinction that the proceedings were not pristinely criminal in the sense of a trial of an accused person on a charge. This, however, would indeed be a far cry from holding that these proceedings become inherently civil proceedings or farther that the relevant provisions of the Civil Procedure Code or the niceties of construing pleading thereunder would be attracted to this jurisdiction. It is true that the respondent in these proceedings is not an accused

(1) AIR 1960 S. C. 882

Chanan Singh v. Jangir Kaur (S. S. Sandhwalia, C.J.)

person facing trial, and consequent conviction and sentence, but that by itself does not take away from the essential character of the criminal nature of these proceedings for the reasons recorded earlier. Though the matter appears to be plain on Principle and on the language of the relevant provision there is high authority for holding that these proceedings are in essence criminal. In *Smt. Harbhajan Kaur v. Major Sant Singh*, (2) Dua, C.J., after fully considering the observations in *Nand Lal's case* held as under:—

“ * * *. I have little hesitation in holding that proceedings under section 488, Cr. P. C., do fall within the contemplation of criminal proceedings within the meaning of Article 134. The expression ‘criminal proceedings’ in this Article, seems to me to be wide enough to include maintenance proceedings adjudicated upon by Magistrates initiated under Chapter XXXVI. Such maintenance proceedings are, in my view, criminal proceedings, designed by way of summary process to provide to deserted wives and neglected children, adjudication of their civil right of maintenance up to a limited amount, enforceable through criminal Courts, to avoid the notorious delays of civil proceedings, which may still be utilised for fuller relief under the general law in the ordinary civil Courts”.

(7) It would, thus, seem manifest both on precedent and principle that the proceedings under Chapter IX specifically contained in the Code of Criminal Procedure are, on the face of it, criminal in nature.

(8) Now once it is held as above, it would necessarily follow that the niceties of construing formal civil pleadings would not be attracted to an application under section 125 of the Code. Even assuming that a written application may be necessary thereunder, the said section does not prescribe its contents or any formal mode of presentation. Plainly enough it has not to be verified as a formal civil pleading. Consequently, neither the Code of Civil Procedure or the principles thereunder can in any way be attracted nor the strict rules of civil law that evidence beyond pleadings should be ignored can come into play. This view seems to be sound on principle and is equally buttressed by authority. In *Norbet*

Kispatta v. Mst. Tersa Kerketa (3) while construing the analogous provisions of section 488 of the Old Code it was observed as follows:—

“But all the same the proceedings under the said Chapter are not civil proceedings so as to attract the provisions of the Civil P. C. as the said proceedings are wholly governed by the provisions of the Criminal P. C. That being so, the provisions of Orders VI, VII and VIII, Civil P. C., relating to pleading in a civil suit, do not apply to a petition under S. 488, Criminal P. C.”

(9) Again reference to section 125 makes it plain that the corner-stone of the right is the neglect or refusal of a person having sufficient means to maintain his wife or child or parent, as the case may be. This is, indeed, well-settled and it is not necessary to elaborate the same in view of the recent reiteration by the final court itself in *Bai Tahira v. Ali Hussain Fissalli Chothia and another* (4) in the following words:—

“Section 125 requires, as a sine qua non, for its application, neglect by husband or father. The Magistrate’s order proceeds on neglect to maintain.”

Therefore, once such neglect or refusal has been established before the Magistrate, he is empowered to make an order for monthly allowance for maintenance. The quantum of such an allowance is, however, a subsidiary issue to be based upon the status and the means of the parties. On larger principle, it appears to me that an application under section 125, Cr. P. C. has implicit in itself the essential ingredient that the claimant is unable to maintain herself. This inability or absence of means is a negative incident and usually, if not inflexibly, the burden of proving the negative is not to be rested on a party. Once the claimant establishes neglect or refusal which is the foundation-stone of the claim, it is for the respondent to show positively that she has ample means to maintain herself.

(10) Lastly, it must be borne in mind that the provisions of chapter IX of the Code have a larger social purpose behind them. They are intended to provide immediate succour to destitute wives, children and parents. It is apt that such beneficent legislation

(3) 1971 CrI. L. J. 1496 (Orissa).

(4) AIR 1979 S. C. 362

should not be narrowly construed so as to defeat its purpose on mere technicalities. This aspect has been equally highlighted by *Bai Tahira's case* (supra) by the following observations:—

“In this appeal, by special leave, we are called upon to interpret a benign provision enacted to ameliorate the economic condition of neglected wives and discarded divorcees, namely, S. 125, Cr. P. C. Welfare laws must be so read as to be effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like destitute women, the spirit of Art. 15 (3) of the Constitution must belight the meaning of the Section. The Constitution is a pervasive omni-presence brooding over the meaning and transforming the values of every measure. So, S. 125 and sister clauses receive a compassionate expansion of sense that the words used permit.”

“In this generous jurisdiction, a broader perception and appreciation of the facts and their bearing must govern the verdict not chopping little logic or tinkering with burden of proof.”

(11) Adverting now to the precedent directly governing the point it would appear that the weight of authority is tilted heavily in favour of the view I am inclined to take. In a recent Division Bench judgment of the Karnataka High Court in *Smt. Malan v. Baburao Yeshwant Jadhav* (5) all discordant notes have been set at rest by the following authoritative enunciation:—

“If that is so, the strict rules of pleadings applicable to the pleadings in a civil suit cannot be applied to a petition under Section 125 of the new Code. Hence, merely because the wife has not averred in her petition that she is unable to maintain herself, her petition cannot be dismissed. It is for both the parties to adduce evidence on that point and it is for the Court to decide whether the wife is able or unable to maintain herself.”

The Division Bench expressly over-ruled the contrary Single Bench view both in *Smt. Zebedaibi vs. Abdul Khader* and in *Smt. Hausanbai vs. Balkrishna Krishna Badigar* (7).

(5) 1981 CrL. L. J. 184.

(6) 1978 CrL. L. J. 1555.

(7) 1981 CrL. L. J. 110.

(12) A contrary view, however, has undoubtedly been expressed by a learned Single Judge of the Allahabad High Court in *Bishambhar Dass vs. Smt. Anguri and another* (8). A perusal of the judgment, however, reveals that the matter was not adequately canvassed and neither principle nor precedent has been cited for what appears to me as an overly strict view. The issue seems to have been treated as one of first impression and with the greatest deference I would record a dissent therefrom. It calls for notice that opinion does not appear to be uniform in the Allahabad High Court as well, because a learned Single Judge of the said High Court in *Abdul Salim vs. Smt. Najima Begum and another* (9) has upheld the order or maintenance, even though in the application under section 125 of the Code it was not even remotely pleaded that the wife was unable to maintain herself.

(13) To conclude the answer to the question posed at the very outset is rendered in the negative and it is held that the technicalities of construing civil pleadings are not attracted to an application under section 125 of the Code. Consequently, it is further held that in such an application, the absence of an express pleading that the claimant is unable to maintain herself or himself is in no way fatal to the claim.

(14) The meaningful legal question having been settled as above, the criminal revision petitions would now go back before the Single Bench for a decision on merits, in accordance therewith.

N. K. S.

Before S. S. Sandhawalia, C.J. & I. S. Tiwana, J.

RAM KUMAR and others,—Petitioners.

versus

THE STATE OF HARYANA and others,—Respondents.

Civil Writ Petition No. 1578 of 1982.

January 10, 1983.

Punjab Police Rules, 1934 (as applicable to Haryana)—Rules 13.1, 13.7 and 13.8—Promotion of a Constable to the next rank of Head Constable—Preparation of list B. 1 in terms of Rule 13.7—Whether forms part of the

(8) 1978 CrI L. J. 385.

(9) 1980 CrI. L. J. 232.