Before Jaishree Thakur, J.

RAJ RANI AND ANOTHER—*Petitioners*

versus

SH. OM KUMAR KAUSHIK—*Respondent*

CRR (F) No. 215 of 2015 (O&M)

February 14, 2018

Constitution of India, 1950—Art. 15(3) and 39— Code of Criminal Procedure, 1973—S. 125—Hindu Marriage Act, 1955—S. 5—Hindu Adoption and Maintenance Act—S. 20 (3)— "Maintenance" "Second wife" "Daughter"—Criminal Revision—Family Court declined to award interim maintenance under S. 125 of Code of Criminal Procedure—Petitioner No. 1 solemnized marriage with husband of her elder sister—Son and daughter (Petitioner No.2) born from wedlock—Petitioners sought maintenance—Application contested by respondent on the ground second wife not entitled to maintenance and daughter being a major and well qualified not entitled to maintenance—Application for interim maintenance dismissed by Family Court—Petition dismissed qua petitioner No.1 —Held—Term 'wife' cannot be stretched to mean anyone other than legally wedded wife—Marriage performed in contravention of section 5 of Hindu Marriage Act, 1955 is void—Petition allowed qua petitioner No.2—Held—S. 125 Cr.P.C. provides for maintenance to be given to a wife, legitimate or illegitimate minor child—Under S.20(3) of Hindu Adoption and Maintenance Act, there is obligation to maintain unmarried daughter—Petitioner No.2 unmarried major daughter preferred application under S. 125 of Cr.P.C. for maintenance, whereas she is entitled to maintenance under Hindu Adoption and Maintenance Act 1956—To relegate her to that remedy would amount to unnecessary harassment and multiplicity of litigation—Family Court directed to treat application as application filed under Hindu Adoption and Maintenance Act, 1956.

Held that Section 125 of the Code has been enacted to ensure that a wife, minor child or old-age parents are maintained and not subjected to vagrancy and destitution. Grant of maintenance to the wife has been perceived as a measure of social justice by the courts and the said section falls within the Constitutional sweep of Article 15 (3) reinforced by Article 39 of the Constitution of India. It provides speedy remedy for supply of food court clothing shelter to the deserted wife, while ensuring that the husband fulfils his moral and legal obligation to support his family, be it a minor child, wife or aged parents.

(Para 7)

Further held that term "wife" has not been defined, however, the term

cannot be stretched to mean anyone other than a "legally wedded wife". As per Section 5 of the Hindu Marriage Act 1955, a marriage may be solemnized-between any two Hindus, if neither party has a spouse living at the time of the marriage. Therefore, any marriage performed in contravention of Section 5 of the Hindu Marriage Act would be deemed to be a void marriage.

(Para 9)

Further held that second question that would arise for consideration is, whether an unmarried daughter who has attained majority would be entitled to maintenance under Section 125 of the Code. As has been noticed above, the section provides for maintenance to be given to a wife, legitimate or illegitimate minor child, whether married or not, who are unable to maintain themselves.

(Para 13)

Further held that however, it cannot be lost sight of that under Section 20 (3) of the Hindu Adoption and Maintenance Act, 1956, there is an obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends insofar as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

(Para 14)

Further held that since petitioner No. 2 being the unmarried major daughter of respondent, had preferred an application under Section 125 of the Code for grant of maintenance, whereas she would have been entitled to claim maintenance under the Hindu Adoption And Maintenance Act 1956, to now relegate her to that remedy would amount to unnecessary harassment and multiplicity of litigation. It is a well settled principle of law that mentioning an order if the court and/or statutory authority had the requisite jurisdiction thereof

(Para 16)

N.K. Malhotra, Advocate,
for the petitioner.

Kulvir Narwal, Advocate,
for the respondent.

JAISHREE THAKUR, J.

(1) The present revision petition has been filed seeking to challenge order dated 11.06.2015 by which the District Judge, Family Court, Rohtak, has declined to give interim maintenance to the petitioners herein under Section 125 of the Code of Criminal Procedure (for short '**the Code**').

(2) In brief, the facts as stated are, that petitioner No. 1 solemnized her marriage with the husband of her elder sister Dhanpati on 20.2.1977, and out of this wedlock two children were born, a son Deepak and a daughter petitioner No. 2 herein. This marriage was performed on account of the fact that the elder sister gave birth to a deformed child and as per the advice of a tantric the respondent was advised to remarry in case he wanted a normal child. It is stated that the petitioner requires medical treatment for which she has no source of income and that the respondent herein is failing in his duty to maintain her and her daughter, who is unmarried. The application was contested by the respondent on the ground that the petitioner being the second wife would not be entitled to maintenance and the daughter being a major and well qualified would not be entitled to any maintenance at all. The application for interim maintenance was dismissed resulting in the present revision petition.

(3) The learned counsel appearing on behalf of the petitioners contend that the respondent, who has retired as foreman from Electricity Department, Government of Haryana, has more than adequate means of supporting petitioner No. 1, who might be his second wife but would still be entitled to claim maintenance being his legally wedded wife . It is argued that petitioner No. 2 is unmarried without a job and wholly dependent upon her father and, therefore, would be entitled to maintenance under Section 125 of the Code of Criminal Procedure. Reliance in this regard is placed upon a judgment rendered in ***Badshah*** versus ***Sou. Urmilla Badshe Ghoshe***[1] where it has been held that even second wife would be entitled to maintenance. Furthermore, learned counsel for the petitioner relies upon a judgment rendered in ***Chand Patel*** versus ***Bismillah Begum***[2], where the Supreme Court held in a situation where a Muslim husband married his wife's sister when wife was alive and marriage subsisted, the marriage was held to be irregular but not void and second wife and child born to her would be entitled to maintenance under Section 125 of the Code.

(4) Per contra, Mr. Kulvir Narwal, learned counsel appearing on behalf of the respondent submits that the aforesaid judgment cannot be relied upon as it is not applicable to the facts of the present case. It is argued that in the case of ***Badshah*** (supra), it was a case where a second marriage was solemnized without disclosing to his wife of his

[1] (2014) 1 SCC 188
[2] 2008 (2) RCR (Criminal) 321

prior marriage, which is not so in the instant case.

(5) I have heard the counsel for the parties and with their assistance have perused the pleadings of the case.

(6) Two questions arise for determination by this court namely:-

i) Whether a second wife can claim maintenance under Section 125 of the Code, especially when she has performed all duties as that of a legally wedded wife?

ii) Whether a daughter, who has attained majority, can claim maintenance from her father?

(7) Section 125 of the Code has been enacted to ensure that a wife, minor child or old-age parents are maintained and not subjected to vagrancy and destitution. Grant of maintenance to the wife has been perceived as a measure of social justice by the courts and the said section falls within the Constitutional sweep of Article 15 (3) reinforced by Article 39 of the Constitution of India. It provides speedy remedy for supply of food court clothing shelter to the deserted wife, while ensuring that the husband fulfils his moral and legal obligation to support his family, be it a minor child, wife or aged parents.

(8) Section 125 Cr.P.C. reads as under:

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 not exceeding five hundred rupees in the whole, 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. 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.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(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 allowances 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 allowance 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.

(9) The term "wife" has not been defined, however, the term cannot be stretched to mean anyone other than a "legally wedded wife". As per Section 5 of the Hindu Marriage Act 1955, a marriage may be solemnized between any two Hindus, if neither party has a spouse living at the time of the marriage. Therefore, any marriage performed in contravention of Section 5 of the Hindu Marriage Act would be deemed to be a void marriage.

(10) Learned counsel appearing on behalf of the petitioner has placed reliance upon a judgment rendered in ***Badshah*** (supra) and ***Chand Patel*** (supra) to contend that the second wife would be entitled to maintenance. A reading of the said judgment would reflect that the facts are not applicable to the instant case. In the case referred to, the contention of the husband that second marriage being void under the Hindu Marriage Act 1955 would not entitle the second wife to maintenance as she was not his legally wedded wife, was negated since the husband had not informed his second wife that he was married earlier. It was held that husband cannot be permitted to take advantage of his own wrong by raising the aforesaid contention. In Badshah's case (supra), the Supreme Court held as under:-

> "13.2. Secondly, as already discussed above, when the marriage between respondent No. 1 and petitioner was solemnized, the petitioner had kept the respondent No. 1 in dark about her first marriage. A false representation was given to respondent No. 1 that he was single and was competent to enter into martial tie with respondent No. 1. In such circumstances, can the petitioner be allowed to take advantage of his own wrong and turn around to say that respondents are not entitled to maintenance by filing the petition under Section 125,Cr.P.C. as respondent No. 1 is not "legally wedded wife" of the petitioner? Our answer is in the negative. We are of the view that at least for the

> purpose of Section 125 Criminal Procedure Code, respondent No. 1 would be treated as the wife of the petitioner, going by the spirit of the two judgments we have reproduced above. For this reason, we are of the opinion that the judgments of this Court in Adhav and Savitaben cases would apply only in those circumstances where a woman married a man with full knowledge of the first subsisting marriage. In such cases, she should know that second marriage with such a person is impermissible and there is an embargo under the Hindu Marriage Act and therefore she has to suffer the consequences thereof. The said judgment would not apply to those cases where a man marriages second time by keeping that lady in dark about the first surviving marriage. That is the only way two sets of judgments can be reconciled and harmonized."

(11) In ***Chand Patel's*** case (Supra) the facts are not applicable to the case in hand. A question of law arose "whether a marriage performed by a person professing the Muslim faith with his wife's sister, while his earlier marriage will be other sister was still subsisting, would be void in law or merely irregular or voidable even though the subsequent marriage may have been consummated''. An application had been preferred seeking maintenance under Section 125 of the Code. The applicant Bismillah Begum was the younger sister of Mashaq Bee the wife of Chand Patel. She stated that her marriage had been performed with the appellant with the consent of the first wife by reading a 'Nikkanamah' and after the marriage was consummated daughter was born from the wedlock. Over a passage of time the relationship between the appellant and Bismillah Begum deteriorated and he started neglecting the applicant and the minor daughter who had no means to support themselves. It was in this background that an application under Section 125 of the Code was filed. It was urged on behalf of Chand Patel that Muslim law specifically prohibits 'unlawful conjugation' which has been interpreted to mean that a man could not marry his wife's sister in his wife's lifetime and, therefore, even if marriage had been performed the same was void in law and would not confer any rights upon the applicants. After discussing the distinction between void and irregular marriages under the Muslim faith it was held "that the bar of unlawful conjugation (jama bain–al-mahramain) renders a marriage irregular and not void. Consequently, under the Hanif law as far as Muslims in India are concerned, and an irregular marriage continues to subsist till terminated in accordance with law and

the wife and the children of such marriage would be entitled to maintenance under the provisions of section 125 of the Code of Criminal Procedure.'' Therefore, the case relied upon is not relevant to the facts of the instant case.

(12) The Supreme Court in ***Yamunabai Anantrao Adhav*** versus ***Anantrao Shivram Adhva***[3] and in ***Savitaben Somabhai Bhatiya*** versus ***State of Gujrat***[4] has held that a Hindu lady who married after coming into force of the Hindu Marriage Act 1955, with a person who had a living lawfully wedded wife, cannot be treated to be the legally wedded wife. It is only in the exception where the second marriage takes place while keeping the second wife in dark about the subsistence of the first marriage, that maintenance has been allowed as in the case of ***Badshah*** (supra). Therefore, the petitioner herein being the second wife of respondent who married the respondent with full knowledge that his first wife was still alive and no divorce had been granted, will not be entitled to maintenance. She may have recourse under another statute but not maintenance under Section 125 of the Code.

(13) The second question that would arise for consideration is, whether an unmarried daughter who has attained majority would be entitled to maintenance under Section 125 of the Code. As has been noticed above, the section provides for maintenance to be given to a wife, legitimate or illegitimate *minor child,* whether married or not, who are unable to maintain themselves. In ***Amarendra Kumar Paul*** versus ***Maya Paul and others***[5], it has been held that once children attain majority, they would cease to get any benefit under Section 125 of the Code. The High Court of Karnataka in ***Bhagamma Alias Bhagyashree*** versus ***Bhimraya***[6] has gone to the extent of holding that the term 'injury' as defined under section 125 (1) (c) of the Code is to be interpreted in a wider sense and not to be construed only in its legal sense of physical or mental injury, but could also include an economic or financial deprivation.

(14) However, it cannot be lost sight of that under Section 20(3) of the Hindu Maintenance and Adoption Act 1995, there is an obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends insofar as the parent or the

[3] (1988) 1 SCC 530
[4] (2005) 5 SCC 636
[5] (2009) 8 SCC 359
[6] 2017 ILR Karnataka 3090

unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

(15) Petitioner No. 2 is undoubtedly the unmarried daughter of the respondent from his second wife. As long as she remains unmarried and unable to support her herself, even though qualified, an obligation is cast upon her father respondent herein to maintain her. In ***Jagdish Jugawat*** versus ***Manjula lata***[7] it has been held as under:-

> "4. Applying the principle to the facts and circumstances of the case in hand, it is manifest that the right of a minor girl for maintenancefrom parents after attaining majority till her marriage is recognised in section 20 (3) of the Hindu Adoption And Maintenance Act. Therefore, no exceptions can be taken to the judgment/order passed by the Ld. single judge for maintaining the order passed by the family court which is based on a combined reading of section 125 CR PC and section 20 (3) of the Hindu adoption and maintenance act. For the reasons aforesaid stated we are of the view that on facts and in the circumstances of the case no interference with the impugned judgement/order of the High Court is called for.''

(16) Since petitioner No. 2 being the unmarried major daughter of respondent, had preferred an application under Section 125 of the Code for grant of maintenance, whereas she would have been entitled to claim maintenance under the Hindu Adoption And Maintenance Act 1955, to now relegate her to that remedy would amount to unnecessary harassment and multiplicity of litigation. It is a well settled principle of law that mentioning of a wrong provision or non-mentioning of a provision does not invalidate an order if the court and/or statutory authority had the requisite jurisdiction thereof. Reliance is placed upon ***N. Mani*** versus ***Sangeetha Theatres & Ors.***[8] *and* ***P.K.Palanisamy*** versus ***N.Arumugham & Anr.***[9]. Therefore, this court is of the view that the impugned order qua petitioner No. 2 deserves to be set aside.

(17) For the reasons stated above, the present revision is dismissed qua petitioner No.1, however, allowed qua petitioner No.2. Consequently, the parties are directed to appear before the Family Court, Rohtak, on the 28.2.2018, who is directed to treat the

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[7] (2002) 5 SCC 422
[8] (2004) 12 SCC 278
[9] 2007(9) SCALE 197

application filed as an application for maintenance under the Hindu Maintenance and Adoption Act 1955 and proceed to decide the maintenance payable to petitioner No.2. However, before parting with this judgment the Family court is to decide the matter on its own merit and not be influenced by any observations made herein. All pleas, rights and defence on merits are left open for adjudication.

(18) The petition stands partly allowed with the aforesaid observation.

J.S. Mehndiratta