

Devendra Prasad @ Sidharth Vs. State of Bihar and anr.

Devendra Prasad @ Sidharth Vs. State of Bihar and anr.

SooperKanoon Citation : sooperkanoon.com/134511

Court : Patna

Decided On : Sep-28-2004

Reported in : I(2005)DMC761

Judge : P.K. Sinha, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 125,(1), 125(3), 125(4), 397(3) and 482; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 488, 488(3) and 488(4)

Appeal No. : Cr. Appeal No. 31663 of 2002

Appellant : Devendra Prasad @ Sidharth

Respondent : State of Bihar and anr.

Advocate for Def. : Arun Kumar Singh, A.P.P. for Respondent No. 1 and Niraj Kumar and Kaushal Kumar Singh, Adv. for Respondent No. 2

Advocate for Pet/Ap. : Santosh Kumar Sinha, Adv.

Disposition : Appeal dismissed

Judgement :

1. This is a petition under Section 482 of the Code of Criminal Procedure ('the Code', in short) praying therein for setting aside of quashing the order dated 6.9.2002 recorded by the learned 1st Additional Sessions Judge, Nawadah in Cr.

Rev. No. 3 of 2002/90 of 2000 as well the order dated 17.8.2000 recorded by Shri Bipin Bihari, Judicial Magistrate, First Class at Nawadah in Maintenance Case No. 39 of 1997 corresponding to Trial No. 607 of 2000.

2. The facts, in brief, are that before the learned Magistrate the application for maintenance was brought by the opposite party No. 2, Smt. Manju Dayal against her husband, who is petitioner here, namely, Devendra Prasad @ Sidharth under Section 125 of the Code. On hearing the matter, the application was allowed and the husband was directed to pay a sum of Rs. 500/- per month as maintenance. That matter, thereafter went to revision, aforesaid, which was dismissed giving rise to the instant petition.

3. In this case, at the time of admission stage itself the learned Counsel for the petitioner, learned Additional Public Prosecutor and learned Counsel for opposite party No. 2. Smt. Manju Dayal have been heard and, therefore, this petition is being disposed of at this stage.

4. Two grounds were urged by the learned Counsel for the petitioner in support of his contention. It was submitted that from the evidences of the parties in the Court of the Magistrate it was clear, as also per their statements given in writing, that the instant petitioner was ready to keep opposite party No. 2 with him and was ready to maintain her but she herself had denied to live with him, and finding merit in her denial to live with the petitioner the learned lower Courts had allowed maintenance. The first ground was that whether or not the plea of the opposite party No. 2 was correct for not living with the petitioner, could have been considered only at the stage when order recorded under Section 125(1) was put to execution under the proviso to Sub-section (3) of Section 125 of the Code. For this, the learned Counsel has relied upon a decision of this Court in the case Subhagi Devi v. Murli Pradhan AIR 1968 Patna 139. Second ground was that, in any case, the ground given by the petitioner in the Court of Magistrate for refusing to live with the instant petitioner was not valid or reasonable hence such ground should have been ignored by the learned Magistrate as well by the Revisional Court.

5. Besides these two points a technical point was also taken that when the application was filed in the lower Court for maintenance and when the order was passed, the Family Court had already come into existence debarring the jurisdiction of the Magisterial Courts and, in that view of the matter also the orders recorded by the lower Courts now incompetent and not in accordance with law. However, insofar as this last point is concerned, learned Additional Public Prosecutor pointed out that this case related to the District of Nawadah in which district no Family Court was constituted and, in that view of the matter, an application under Section 125 of the Code, would have to be decided by a Magistrate.

6. Insofar as the first ground propounded by the learned Counsel for the petitioner is concerned, the case of Subhagi Devi (supra) related to Section 488 of the old Code. In that case it was held that Sub-section (3) including its two provisos came into play only after a person has failed, without sufficient cause, to comply with an order passed against him under Sub-section (1) and this was not applicable at the very first stage when the Magistrate was called upon to pass an order under Sub-section (1) of Section 125 of the Code. His Lordship also held that what the Magistrate had to consider at the stage of passing order under Subsection (1) was whether the husband, if possessed of sufficient means, had neglected or refused to maintain his wife, and not whether the wife had refused to live with her husband.

7. In that regard, the learned Counsel also relied upon another decision of the Kerala High Court in the case of Mammad Kunhi v. Rukhiya, 1978 Cr. L.J. 1645, which order was recorded after coming into force of the Code (Act 2 of 1974). Pointing out this decision learned Counsel submitted that His Lordship of Kerala High Court had held that second provision of Section 125(3) of the Code, enabled the husband to make an offer to maintain his wife and that would be a valid answer to the claim. However, His Lordship in that case also dealt with Section 125(4) of the Code, pointing that, out of the three circumstances under which the plea to maintain the wife would stand negatived, one was when the wife refused to live with her husband without sufficient reason. In this decision, obviously, Sub-sections (3) and (4) of Section 125 of the Code have been considered separately, not creating both to be operative only at the stage of execution of the order passed

under Sub-section (1).

8. Sub-section (3) with first proviso, and Sub-section (4) of Section 488 of the Code, 1898 may be reproduced--

"(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 manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance 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, 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."

"(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."

9. Second proviso to Sub-section (3), and Sub-section (4) of Section 125 of the new Code, may also be reproduced:

"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."

"(4) No wife shall be entitled to receive an (allowance for the maintenance of 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."

10. These provisions, in essence, are almost the same as these were in the old Code. Now coming to the first point placed by the learned Counsel for the

petitioner it is clear that in the case of Subhagi Devi (supra) only the provision under Sub-section (3) had been considered and there was no consideration of Sub-section (4) of Section 488 of the Code. Sub-section (3) in the old Code, as was made clear in the Code itself, related to enforcement of the order (recorded under Sub-section (1)). Coming to Sub-section (4), a wife is not entitled to receive an allowance for maintenance under three conditions including that if without any sufficient reason she refuses to live with her husband. Reversely, it means that this ground would not be available to the husband if the wife for sufficient reason refuses to live with him. The second proviso to Sub-section (3) provides that even if a person offers to maintain his wife and she refuses to live with him the Magistrate may consider that ground of refusal stated by her, and may make an order under this provision notwithstanding such offer, if he is satisfied that there is just ground for so doing. Obviously, Sub-section (4) and second proviso to Sub-section (3) cannot be read together to mean that both these provisions relate to the post-order stage under Sub-section (1) of Section 125 of the Code. Had that been so, there was no reason to give almost similar grounds relating to maintenance to a wife when she refused to live with her husband, under two sub-sections of the same section of the Code. Obviously, Sub-section (4) is to be considered while recording an order under Section 125(1) of the Code. If that be not so, an anomalous position would arise whereas a wife, who may have just ground to refuse to live with her husband who may be offering her maintenance if she lived with him, will be disentitled to receive maintenance if such ground of wife cannot be considered under Sub-section (1) while recording order for maintenance. If in such a circumstance, order regarding maintenance cannot be granted under Sub-section (1), then the stage of execution/enforcement of that order will never come into play. Therefore, I find that if the wife for sufficient reason refuses to live with her husband then, even if the husband is ready to maintain her if she lived with him, he can be ordered to pay maintenance to her.

11. Now coming to the second point taken up by the learned Counsel that the grounds given by the wife for refusing to live with her husband could not be said to be cogent also because in her evidence she admitted that if her husband lived at Nawadah she could live with him, obviously Nawadah is the place where her parents lived and where she was living at the time of making the application. This

second point has been considered in the background of the materials on record, by the learned Magistrate and the same was also considered in the revision which was dismissed by the Court of Sessions.

12. A decision of the Apex Court in this regard in the case of *Laxmi Bai Patel v. Shyam Kumar Patel*, 2002 (2) East Cr. C. 293 (SC) may be seen. In that case Their Lordships had examined the jurisdiction of this Court under Section 482 of the Code, and observed that in a case where the Sessions Court exercised revisional power under Section 397(3), Cr.P.C. had dismissed the revision petition by the aggrieved party, a second revision petition by the same party was barred, and that law was well settled that power under Section 482 of the Code, could be exercised by the High Court in rare and exceptional circumstances, where the Court might find that permitting the impugned order to remain undisturbed would amount to abuse of the process of the Court and would result in failure of justice. Their Lordships in that case also had referred to the judgment of the same Court in the case of *Deepti @ Arti Rai v. Akhil Rai and Ors.*, IV (1995) CCR 49 (SC)=(1995) 5 SCC 751, in which the Apex Court had observed as follows:

"It should have also applied its mind to the aspect that second revision, after dismissal of the first one by the Sessions Court is not maintainable and that inherent power under Section 482 of the Code cannot be utilised for exercising powers which are expressly barred by the Code."

In the case of *Deepti Arati Rai* the High Court was found to have erred in upsetting the order of the Magistrate granting the maintenance, confirmed by the Court of Sessions.

13. In overall view of the matter, I am of the opinion that this Court should not interfere with the orders recorded by the Magistrate and by the Revisional Court. This petition, therefore, is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com