

Hari Narayan Vs. Mt. Rani Devi

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Court : Madhya Pradesh

Decided On : Dec-05-1949

Reported in : 1952CriLJ574

Judge : Dixit, J.

Appellant : Hari Narayan

Respondent : Mt. Rani Devi

Judgement :

ORDER

Dixit, J.

1. This is an application in revision from an order of the Sessions Court Raj Garh refusing to make a reference to this Court for setting aside the order dated 22.6.49 of Sub-Divisional Magistrate, Panchhor in certain maintenance proceedings. On 20th June 1947, the applicant Hari Narayan was directed by the Sub-Divisional Magistrate, Sarangpur to pay maintenance to his children and wife Mt. Rani Devi. The order of maintenance passed by the Sub-Divisional Magistrate was affirmed by the Dewas (Junior) High Court with slight modification. The applicant did not pay the maintenance ordered for the period from 6.5.48 to 28.3.49 and on 31.3.49, Mt. Rani Devi applied to the Sub-Divisional Magistrate, Pachhor to enforce the order under Section 488(3), Criminal Procedure Code. The applicant objected to the execution of the order on the ground that his wife Mt. Rani Devi, without

sufficient cause refuses to live with him. The Sub-Divisional Magistrate took the view that it was not open to the applicant to raise such a contention when execution of the order is applied for and that if the applicant desired that the order should not be executed, he must first apply under Section 488(5) and have the order against him set aside. The Magistrate, therefore, ordered the execution of the order. The Sessions Judge, Rajgarh to whom an application was made in revision agreed with the view taken by the Sub-Divisional Magistrate and further held that even if the order for maintenance is subsequently cancelled under Section 488(5) the cancelling order would not have retrospective effect so as to affect the arrears due up to the date of the order.

2. The order of the Sub-Divisional Magistrate, Panchhor directing the execution of the maintenance order without considering the objections of the applicant is, in my opinion, clearly wrong. The words in Section 488(3) 'if any person so ordered fails without sufficient cause to comply with the order, etc.' clearly indicate that when an execution of the order is applied for the husband or the father can show cause why the order should not be executed. The Magistrate must then consider judicially the sufficiency of the cause alleged by the counter-petitioner and make an order granting or refusing the execution of the maintenance order. The contention of the non-applicant that the applicant cannot be permitted to show cause against the execution of the order, unless and until he gets the maintenance order cancelled under Sub-section (5) cannot be accepted; for such a construction would mean ignoring the words 'failing without sufficient cause' which occur in Sub-section (3) and also the Sub-section (4) which lays down that a wife is not entitled to receive an allowance, if, without any sufficient reason, she refuses to live with her husband. I, therefore, think the Sub-Divisional Magistrate should have considered the grounds alleged by the applicant against the execution of the order and having regard to all the circumstances then determined whether the order should be executed or not.

3. As regards the question whether if the order of maintenance is cancelled under Section 488 (5) the cancellation order can affect the arrears due up to the date of the order, it seems to me from the language used in Sub-sections (3) and (4) that if sufficient cause for non-payment is shown and the Magistrate is satisfied that the

wife, without sufficient reason refuses to live with her husband the order of maintenance cannot be enforced in the manner provided in Sub-section (3) and the wife is not entitled to receive the amount of maintenance allowance; and that must apply to arrears Of maintenance due under an order. It is true that Sub-section (5) does not deal with the question of execution of the order for maintenance but provides for cancellation of the original order for payment of maintenance and the use of the word 'cancel' does not necessarily import that the cancellation order has retrospective effect. But if an order for payment of maintenance which is cancelled under Sub-section (5) on proof that the wife, without sufficient reason refuses to live with her husband, is also incapable of execution on same ground under Sub-section (3) it seems to me difficult to hold that the arrears of maintenance allowance due up to the date of the cancellation order can be recovered. I am fortified in the view I have taken, by a decision of a Division Bench of the Bombay High Court reported In Sangawa v. Gulappa AIR 1942 Bom 258. The learned Counsel for the non-applicant has relied on Bhag Sultan v. Md. Akbar Khan AIR (17) 1930 Lah 99, which was followed in Tari Bala v. Kibal Ram AIR (25) 1938 Cal 144. In these cases it has been held that the cancelling order has no retrospective effect so as to disallow the prior allowed maintenance and that the maintenance order stands good until it is cancelled. The learned Single Judges of the Lahore and Calcutta High Courts have not given, any reasons in support of their conclusions and with all due deference to them, I find myself unable to agree with their view that the order of cancellation takes effect from the date of the order and has no retrospective effect.

4. For these reasons, I think, the Magistrate erred in summarily making an order for the payment of the arrears of maintenance allowance. The orders, therefore, of the Sessions Judge and. the Magistrate directing the execution of the order are set aside and I direct the Sub-Divisional Magistrate that the application for execution and the counter-petition of the applicant be heard and disposed of by him in the light of the observations I have made.