

Kuldeep Kumar Vs. Chander Kanta

Kuldeep Kumar Vs. Chander Kanta

SooperKanoon Citation : sooperkanoon.com/691313

Court : Delhi

Decided On : Nov-17-1983

Reported in : 1984CriLJ550; 1984(2)Crimes173; 1984(6)DRJ67; 1984RLR136

Judge : M.L. Jain, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 25; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 125, 127(2), 397, 399 482 and 488

Appeal No. : Criminal Revision Appeal No. 334 of 1982

Appellant : Kuldeep Kumar

Respondent : Chander Kanta

Advocate for Pet/Ap. : B.J. Nayya

Judgement :

M.L. Jain, J.

(1) The parties were married on 20-2-1980. Their marriage was dissolved by the Additional District Judge on 6-1-1982. The wife was granted under Section 25 of the [Hindu Marriage Act, 1955](#) (the Act) a monthly maintenance of Rs. 200.00 per month with effect from 21-9-1981. In spite of this order, the learned Metropolitan Magistrate, in a petition under Section 125 of the Code of Criminal Procedure 1973 (the code) by his order dated 1-7-1982 granted maintenance at the rate of

Rs. 300.00 per month with effect from 20-11-1980. It was submitted before the learned Magistrate that he could not make the order of maintenance because a competent civil court has already adjudicated the matter and has granted maintenance to the wife. The learned Magistrate rejected this argument. On appeal, the learned Additional Sessions Judge in his order dated 17-11-1982 agreed with the submission of the husband that after the permanent alimony has been fixed by the civil court under the Act, the proceedings under Section 125 of the Code cannot be initiated nor can any maintenance be fixed. He, however, thought that the question did not call for any serious examination in this case and he resolved the conflict between the order of the Additional District Judge and that of the Metropolitan Magistrate by reducing the amount of maintenance granted by the Magistrate from Rs.300.00 per month to Rs. 200/ per month. The learned Additional Sessions Judge did so in order to avoid the difficulties in execution of either orders simultaneously or one after the other. The husband still feels aggrieved by this order and has filed the present petition under Section 397 of the Code.

(2) Before I proceed to deal with the main contention, I must dispose of the preliminary objection raised by the learned counsel for the respondent wife. She submitted that in view of Sub-see. (3) of Section 397 and Sub-section (3) of Section 399 of the code the husband having availed of and lost the remedy of revision is not entitled to make the second revision petition. Faced with this difficulty, the learned counsel for the husband submitted that his petition be treated as a petition under Section 482 of the Code. He maintains that such a petition can be made in spite of the bar under Section 397(3) and 399(3) of the Code. The learned counsel for the respondent contended that this is not permissible in view of State of Orissa. Ram Chander, : 1979 CriLJ33 , Smt. Sooraj Devi v.Pyara Lal and another, : 1981 CriLJ296 , wherein it was laid down that the provisions of Section 561A (482 new) of the code cannot be invoked for exercising a power, the exercise of which is expressly prohibited by the Code. In K.P. Kapur v. The State of Punjab, : 1960 CriLJ1239 , and Pampapathy v. State of Mysore (1966) Supp. Scr 477, it has been held that inherent powers cannot be exercised in regard to matters which are specifically covered by or which are inconsistent with, any other specific provision of the code. The court ought to apply the provisions of the

statute which are made advisedly to govern the particular subject matters : Palamiappa Gounder v. State of Tamil Nadu, : 1977 CriLJ992 .

(3) The learned counsel for the petitioner on the other hand relies upon Chandra Prakash Gupta v. State of U .P. and others 1979 All L.J. 1344. in which it was held that the provisions of Section 397 and 399 of the Code could not be a bar to the application under Section 482. That seems to be the correct position. This court cannot be made a prisoner of procedure. In Raj Kapoor and others v. Benoyendra Nath Chatterjee, it has been held that even where the High Court cannot revise an order, it is entitled to examine the matter under Section 482. I would, therefore, reject this objection.

(4) The learned counsel for the respondent next submitted that the petitioner is not entitled to be heard because he has paid nothing except Rs. 703.00 to the respondent in spite of the orders of the courts below and of the specific direction made by this court on 8-3-1983. The petitioner on the other hand, asserted that by the order of the Additional District Judge, 1/3rd of the salary of the petitioner is under attachment and Rs. 116.00 are deducted out of it every month with effect from 30-6-1982, and thus some more amount has been remitted by cheques to the court of the Additional District Judge by his employers. But all that even if true is not sufficient to carry out the orders of the learned Additional District Judge or that of the learned .Magistrate I 69 would have, therefore, in ordinary course refused to hear the petitioner in exercise of the inherent jurisdiction. However, the point raised being of legal importance, I have heard the learned counsel in detail.

(5) The first contention of the learned counsel for the petitioner is that after the order of the competent civil court on 6-1-1982 the learned Magistrate should not have made the order of maintenance on 1-7-1982. He draws support for his contention from Section 127(2) of the Code which reads as follows : '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.'

(6) It may be noticed that Section 127(2) does not require that the order of the civil court should be subsequent to the order of the Magistrate. The sub-section will

apply even where the order of the civil court is antecedent but was brought to the notice of the Magistrate later on. It is urged on this basis that if an order made under Section 125 of the code has got to be varied or cancelled in consequence of a decision of a competent civil court, then such an order cannot and should not be made at all.

(7) In respect of Section 488 of the repealed code the predecessor of Section 125, it was said that the Magistrate's jurisdiction to settle maintenance is only auxiliary to that of the civil court: *Raghubar v. Emperor* Air 1915 Oudh 113. The order of the Magistrate under Section 125 of the code is a summary order. The Magistrates cannot usurp the jurisdiction in matrimonial disputes possessed by the civil court and the provisions of Chapter IX (new) of the code are subject to any final adjudication made by a civil court between the parties regarding status and civil rights ; *Sethurathinam Pillai v. Barabaraa Dolly Sethurathinam* (1970) 1 Scwr 589, *Bhagwan Dutt v. Kamla Devi & another* (1974) 2 Scwr 469 and *Venkayya v. Paidanna and another* Air 1923 Mad 707. In *Capt. Ramesh Chander v. Venna Kaushal*, : 1979 CriLJ3 , it was observed that broadly a final determination of a civil right by a civil court must prevail against a like decision by a criminal court. But the provisions of Section 125 of the code are a measure of social justice and fall within the constitutional sweep of Article 12 reinforced by Act 39. So, an order under Section 125 of the Code was held to prevail over an interim order under Sec 24 of the Act because the latter was not a final determination such as the one under the Hindu Adoption and Maintenance Act, 1956. It was contended that since an order under Sec 25 of the Act was a final determination, it must displace an order under Section 125 of the Code and if it has to be displaced, better it was not made. The learned counsel further relied upon a decision of the Punjab & Haryana High Court in *Bhagwant Singh v. Surjit Kaur* . In that case, the Magistrate had awarded to the wife a maintenance of Rs 50.00 per month which was later increased to Rs. 65.00 per month by the Additional Sessions Judge. Dissatisfied with this dispensation, the wife filed a regular suit for maintenance but that was dismissed. Thereupon, the husband moved an application under Section 127(2) of the Code. The Additional Chief Judicial Magistrate took the view that he has a discretion to follow the decree of the civil court or not and dismissed the application of the husband. Aggrieved, the husband preferred a criminal revision petition which was set for

decision by a Division Bench. The learned Judge held that though the opening part of Section J 127(2) of the Code undoubtedly vests a certain discretion in the Magistrate, yet on the language of that section as also on principle and precedent it would be obligatory for a Magistrate to follow the judgment of a competent civil court. One immediate result of this decision was that the wife was deprived even of the meagre sum awarded to her by the Magistrate. That was an interpretation which did not advance the cause of the derelicts as laid down in Capt. Ramesh Chancier (supra) and with great respect, I regret I have not been able to persuade myself to follow the foot prints of Punjab. Indeed, if there is a discretion vested in the Magistrate, then no obligation can be imposed upon him to follow the judgment of a competent civil court. The two jurisdictions are independent of each other and where a person refuses or neglects to maintain the parents, the wife even though divorced, and children even though illegitimate, the Magistrate, subject to the condition and limitations Stated in the Code has an obligation to make provision for them in order to prevent penury, vagrancy and misery. These wholesome provisions were enacted as early as the Act 25 of 1861. Even Section 4 of the Act does not stand in their way. That section renders all laws inapplicable if made before the Act and are inconsistent with any provisions of the Act. Section 125 was enacted after the Act and was not inconsistent with Section 25 of the Code can stand side by side : see Nanak Chand v. Chandra Kishore Aggarwal and others, : 1970 CriLJ522 . Their scope and purpose are different. A mere order of permanent alimony or maintenance is not equivalent to maintaining the wife and cannot oust or take away the jurisdiction of the Magistrate L.C. Kent v. E.E.L. Kent Air 1926 Mad. 59. Such an order will, of course, be relevant only in considering what form of order the Magistrate should make. Sec 125 contains no direction that an order under .that section cannot be made if there is a decree for maintenance of a civil court. In re Taralaksmi Manuprasad Air 1938 Bom. 499. Even an agreement between the parties will not of itself be a bar to an order under Section 125 of the Code : Prabhu Lal v. Rami ILR (1902) All. 165. The Magistrate has a real discretion and though he must exercise it judicially, he cannot be asked to surrender it even where the civil court is satisfied that the husband is bona fide prepared to maintain the wife. therefore, it has been held that a decree of restitution of conjugal rights obtained

with the object to get the Magistrate's order for maintenance cancelled, will not justify the Magistrate to cancel his order. Pavakkalv-Athappa Goundan Air 1925 Mad 1218, Fakruddin Shamsuddin Saiyed v Bai Jenab : AIR1944 Bom11 , and Kunti Bala Dassi v. Nobin Chandra Das, : AIR1955 Cal108 , where a decree passed by the civil court becomes inexecutable for some reason or other, an order under Section 125 can be made and maintained ; vide Mohamed Ali Mithabai In re Air 1930 Bom. 144, and Govindasami Mudaliar v. Muthulakshmi Ammal . Even where there is no strict proof of marriage and parties went through some form of marriage and lived as husband and wife, the Magistrate can apply factum valet and raise a presumption of a valid marriage. Parvathy Ammal v. Gopala Gounder and another 1956 Mlj 468, and Pachigolla Srinivasarao v. Pachigolla Samudram and others 1975 C.L.J. 1581. The question whether a decree or an order of a civil Court would bear an order under Section 125 of the Code would, therefore, depend upon the facts and circumstances of each case. Natarajan J. in Linga Gounder v. Raman , held that Section 125 does not lay down either that the existence of a decree for maintenance passed by a civil court will bar the jurisdiction of a Magistrate to entertain a petition for maintenance or that if there had been an earlier decree by a civil court, a Magistrate must confine his award only to the quantum fixed by the civil court. I am in respectful agreement with the views stated in Linga Gounder (supra). The purpose and emphasis under Section 125 of the code of that a man is possessed of sufficient means and yet neglects or refuses to maintain his wife, children and parents who are unable to maintain themselves. He can be compelled to make a monthly allowance for their maintenance. It has nothing to do with their rights to maintenance. The civil court's determination as to relationship and maintenance may be taken into consideration while making, varying or cancelling the order. The order of the learned Magistrate was eminently justified in this case because the husband was persistently refusing to pay the maintenance in spite of the order of the civil court under Section 25 of the Act ; and even the attachment of his salary was not sufficient to comply with that order. I am, therefore, not prepared to interfere with the order. The learned Additional Sessions Judge has already reduced the amount to Rs. 200.00 per month. If the order of the Magistrate is set aside, one of the obvious results would be that the wife will be deprived of maintenance for about ten months because

while the civil court directed maintenance to be paid from 21-9-1981 the Magistrate directed it to be paid with effect from 20-11-1980. That apart, refusal to pay the arrears obliging the wife of file an execution petition is in itself an evidence of the intention on the part of the husband to refuse to maintain the wife. The first submission is, therefore, rejected.

(8) The alternative submission of the learned counsel is that this court should direct that the two orders should not be executed simultaneously. Such a direction will be totally unnecessary if the petitioner were paying the amount without driving the wife to seek execution. However, I do wish to make it clear that the total amount paid in virtue of the civil court's order or that of the criminal court's order shall in no case exceed Rs. 200.00 per month and consequently the amounts paid by the husband in execution of any maintenance order or otherwise will be given credit in execution in respect of the order of the civil court or that of the criminal court. The petitioner will not be required to pay twice over.

(9) Accordingly, the petition is rejected.