

Dhan Raj and ors. Vs. Kishni Devi and ors.

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Court : Rajasthan

Decided On : Sep-30-1980

Reported in : 1980WLN(UC)542

Judge : M.B. Sharma, J.

Appeal No. : S.B. Criminal Revision Petition No. 52/1980

Appellant : Dhan Raj and ors.

Respondent : Kishni Devi and ors.

Disposition : Petition dismissed

Judgement :

M.B. Sharma, J.

1. This revision petition is directed against the order dated January 24, 1980, passed by the learned Additional Munsif and Judicial Magistrate, First Class, Sri Ganganagar in proceedings under Section 125 of the Code of Criminal Procedure, It arises in the following circumstances : An application under Section 488 of the Code of Criminal Procedure, 1898 was filed by non-petitioner No. 1, Mst. Kishni Devi for grant of maintenance to her, and her minor daughter Vidya Devi and minor son, Kundanlal. That application was allowed on September, 1975. The petitioner husband filed a revision in the court of Additional Sessions Judge Sri

Ganganagar which was disposed of on May 30, 1977, and there was some modifications in the: amount of maintenance. But, instead of deciding himself as to from which date the maintenance should be payable, the learned Additional Sessions Judge directed the Magistrate to consider the matter and order as to from which date the amount of maintenance should be payable from the date of the order of the learned Magistrate or the date of the application, i.e. July 9, 1968.? The learned Magistrate considered the matter and by his order dated August 1, 1977, ordered that the amount of maintenance shall be payable to Mst. Kishni Devi and her minor daughter and son, with effect from the date of application, i.e. July 9, 1968. A revision was filed against the order, by the petitioner. But, that revision petition was also dismissed on October 9, 1978.

2. On November 13, 1978, an application under Section 125(3) of the Code of Criminal Procedure (new) was filed by Mst. Kishni Devi non-petitioner, & he informed the learned Magistrate, that her husband has failed without sufficient reason, to comply with the order made against him for maintenance, and as such, a warrant for levying the the amount due should be issued. A show-cause notice was given to the petitioner, who raised a plea that the application for the issue of warranty has been filed more than one year after the date the amount became due, and is not maintainable, the court cannot issue any warrant. Thereafter, an application under Section 5 of the Limitation Act, duly supported by the affidavit of Mst. Kishni Devi was filed. An affidavit of the learned advocate was also filed, wherein, the circumstances were mentioned seeking condonation of the delay. The learned Magistrate condoned the delay, and ordered that a warrant be issued for levying the amount of Rs. 15, 400/-, being the amount of maintenance from July 9, 1968 till the date of the application.

3. The first contention of the learned advocate for the petitioners is that Section 5 of the Limitation Act does not apply to an application under Sub-section (3) of Section 125 of the Code of Criminal Procedure (new). His contention is that the proceedings under Sub-section (3) of Section 125 of the Code of Criminal Procedure (new) are of the nature of execution proceedings, and therefore, Section 5 will not apply to such proceedings. But, whatever may be the law prior to the coming into force of the Limitation Act, 1963, after its coming into force, the

position of law is settled that Section 5 of it will apply. A reference may be made to the observations of their Lordships of the Supreme Court in *Mangu Ram and Another v. Delhi Municipality* : 1976 CriLJ179 , wherein their Lordships have laid down that Section 5 of the Limitation Act will apply to all cases unless its applicability is excluded expressly by local law. Therefore, there can be no dispute that Section 5 of the Limitation Act will apply to all cases unless its applicability is excluded expressly by local law. A look at Section 5 of the Limitation Act will show that its applicability is only excluded to an application under any of the provisions of Order 21 of the Code of Civil Procedure 1908. Merely because the provisions of Section 125(3) of the Code of Criminal Procedure, are in the nature of execution proceedings it cannot be said that Section 5 of the Limitation Act will not apply to those proceedings. Therefore, Section 5 will apply to an application under the proviso to Sub-section (3) of Section 125 of the Code of Procedure (new).

4. Before it is considered as to whether the non-petitioner had any sufficient cause for preferring an application under the first Proviso to Sub-section

(3) of Section 125 of the Code of Criminal Procedure (new), beyond the period of one year, it is to be first seen as to when the amount of maintenance became due. A look at the first provision to Sub-section

(3) of Section 125 of the Code of Criminal Procedure new, will show that issue of warrant for levying the amount due has to be made to the court within a period of one year from the date on which it became due. The contention of the learned advocate for the petitioners that the amount of maintenance became due on August, 1, 1977, when the learned Magistrate directed the amount is payable from the date of the application, i.e., July 9, 1978, and therefore, an application for issue of warrant for levying the amount should have been made within one year, but, as it was made on November 10, 1978, i.e., beyond one year, the same was time-barred, and no warrant for levying the amount could have been issued by the court. After the order Dated August 1, 1977, was made by the learned Magistrate, the petitioner preferred a revision petition before the learned Additional Sessions Judge, and during the pendency of that revision petition the petitioner sought time to make the payment of the amount. The revision petition was decided on October

4, 1978, and an application for issue of warrant for levying the amount of maintenance was made on November 10, 1978, i.e. within one month and six days of the disposition of the revision petition by the learned Additional Sessions Judge. When the petitioner himself undertook to make the payment before the learned Additional Sessions Judge in the revision petition and sought time, could the non-petitioner think that the payment would not be made Therefore, to my mind in proceedings under Section 125 of the Code of Criminal Procedure (new), if a revision is pending, it cannot be said that the proceedings have become final and if a party awaits the decision of the revision petition and then files an application within one year of its decision, the application will be in time. In *Devodeen Chenaji, applicant, v. Mankibai Devideen, Opposite Party* 1966 Cr. L.J. 1089, a Single Judge of the Madhya Pradesh High Court interpreted the words 'from the date of which it becomes due.' The learned Single Judge observed that the words 'from the date on which it becomes due' should be interpreted to mean from the date on which she could successfully make an, application, i.e., from the date when the Court holds she is entitled to recover. When the husband raises a plea to maintain his wife on condition of her living with him, the previous order passed under Section 488 is substituted by the subsequent order. It cannot be said that in such circumstances the amount does not become due from the date of the decision of the revision petition. Therefore, in the instant case also it can be said that the amount became due on October 4, 1978, when the revision petition was disposed of by the learned Additional Sessions Judge. Therefore, the application for issue of warrant for levying the amount of maintenance having failed on November 10, 1978, that is, within one month and six days of the disposition of the revision petition, it can be said that it was within one year from the date on which the amount became due. There was an affidavit of the advocate to the effect that he was under impression that till the revision petition is disposed of, the amount does not become due. Even assuming that the amount of maintenance had also become due from August 1, 1977, the date of the order of the Magistrate, the application could have been made by August 1, 1978. It was made on November 10, 1978, i.e., after three months and nine days. The affidavit was filed by the advocate and it has been held by the courts below that there was sufficient cause to condone the delay. The learned advocate for the petitioner has placed reliance

on

(1) Badrinarain, appellant v. Chandanmal, respondent AIR 1950 Raj. 2

(2) Dr. Srinibas Sunder Das, petitioner, v. Land Acquisition Collector and other, opposite parties AIR 1970 Orissa 197; and

(3) The Rajputana Trading Co. Pvt. Ltd., applicant v. Malaya Trading Agency, respondent : AIR1971 Cal313 . The learned advocate for the non-petitioner has placed reliance on the State of West Bengal, appellant v. The Administrator Howrah Municipality and Ors. etc., respondent : [1972]2SCR874a and submits that the advice of the advocate was the sufficient cause to condone the delay.

5. Wherever a party to the case seeks to condone the delay, it has to satisfy the court that there was sufficient cause in making the application. In the instant case the advocate advised that because the revision was pending, unless it is disposed of, it will not be proper to make an application. In fact, the revision was pending and an application during the pendency of the revision petition could have been filed, but as per the advice of the advocate it was not done. Therefore, though I have held above that the application filed under Sub-section (3) of Section 125 Criminal Procedure Code (new) was within limitation even assuming it was filed after one year sufficient cause for delay has been furnished and the learned court therefore rightly condoned it.

6. There is no force in this revision and it is hereby dismissed.

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