

**Joydel Kumar Biswas Vs. Maduri Biswas**

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**Court :** Kolkata

**Decided On :** Jul-11-1994

**Reported in :** 1994CriLJ3342,I(1996)DMC12

**Judge :** N.K. Bhattacharyya, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 127 and 127(1)

**Appeal No. :** Cri. Revn. No. 579 of 1993

**Appellant :** Joydel Kumar Biswas

**Respondent :** Maduri Biswas

**Advocate for Def. :** Dipak Sen Gupta and ;A. Ganguli, Advs.

**Advocate for Pet/Ap. :** Ananda Mohan Biswas, Adv.

**Disposition :** Application dismissed

**Judgement :**

**N.K. Bhattacharyya, J.**

1. The present revision is directed against the judgment and order dated 6.1.1993 passed in Misc. Case No. 535 (IV)/91 by the learned Judicial Magistrate, 1st Class, Krishnanagar, 4th Court, Nadia upon an application under Section 127 Cr.P.C. enhancing the maintenance allowance of the wife-opposite party from Rs.

100/- per month to Rs. 400/-.

2. The short background of the case is that the petitioner-opposite party No. 1 is the married wife of the petitioner herein and out of the wedlock a daughter was born. The petitioner failed and neglected to maintain the wife-opposite party and the daughter and for that the wife-opposite party No. 1 herein filed a petition under Section 125 Cr.P.C. before the Court of the Sub-Divisional Judicial Magistrate, Krishnanagar, Nadia and a case being No. 133(IV) of 1978 was registered in that Court and the learned Magistrate by his order dated 12.6.1980 allowed the application of the wife and directed the husband to pay Rs. 100/- per month to the wife and Rs. 75/-per month to her daughter as maintenance. The order was challenged before this Hon'ble Court and this Hon'ble Court by the judgment dated 16.4.1984 in Criminal Revn. 1117 of 1980 modified the order of the learned Sub-Divisional Judicial Magistrate by granting maintenance allowance to the wife and the minor daughter at the rate of Rs. 150/- per month instead of Rs. 175/- per month as was directed by the learned Magistrate.

3. Thereafter the wife made an application under Section 127 Cr.P.C. against the husband for modification of the order of the maintenance praying for enhancement of the said maintenance and ultimately on compromise it was settled that the petitioner shall pay Rs. 6,000/- for the marriage of his daughter and he shall also go on paying maintenance allowance of Rs. 100/- per month to the wife. Sometime thereafter the wife-opposite party No. 1 herein made a second application under Section 127 of the Code of Criminal Procedure praying for modification of the order of maintenance by enhancing the maintenance allowance from Rs. 100/- to 400/- per month and that prayer was allowed by the learned Magistrate by his order and judgment dated 6.1.1993. The husband has challenged this judgment and order in this revision and also prayed for quashing of the proceeding. It will be appropriate to mention here that the said order was passed in Misc. Case 535(IV)/91.

4. The sole contention which was raised before the Trial Court has been raised here by Mr. A. Biswas, learned Advocate for the husband-petitioner. According to him as there was a compromise between the husband and the wife upon hearing

an application under Section 127 Cr.P.C. earlier the second application under Section 127 Cr.P.C. by the wife is not maintainable and that is barred by the principles of estoppel and waiver. Mr. Biswas, learned Advocate through took time to place authority in support of his contention but submitted that inspite of his best effort he could not find out any authority on the point.

5. Mr. Dipak Sen Gupta, learned Advocate for the wife-opposite party No. 1 herein, on the other hand, contended that there cannot be any estoppel against the statute and also the question of waiver does not come as it directly militates against Section 23 of the Indian Contract Act as it is against the public policy. In support of his contention Mr. Sen Gupta placed reliance on a Madras decision in the case of Padmanabham v. Bama, reported in 1988 Cri. L.J. 1386. He also placed reliance on another decision in the case of Ranjit Kaur v. Pavittar Singh, reported in 1992 Cri.L.J. 262 (Punjab and Haryana). After hearing the submissions of the learned Advocate for the parties and considering the materials on record I am unable to accept the contention as raised by Mr. Biswas, learned Advocate for the following reasons.

6. Sub-section (1) of Section 127 Cr.P.C. reads as follows 'on proof of a change in the circumstance of any person, receiving under Section 125 a monthly allowance or order under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit'.

7. So actually the order under Sub-section (1) of Section 127 is by alteration of the allowance or maintenance as granted under Section 125, Cr.P.C. taking into consideration the changed circumstances. On the earlier occasion upon an application of the wife under Section 127 Cr.P.C. the matter was compromised between the parties to the following effect:

'(i) That, the petitioner shall have to pay Rs. 6,000/-for the marriage of his daughter, Rita;

(ii) That, the petitioner shall have to pay Rs. 100/- per month to the opposite party No. 1 as maintenance. The opposite party No. 1 shall never claim any amount

exceeding Rs. 100/- per month under any circumstances since compromise as her maintenance.'

8. Thereafter the wife made another application for enhancement of her monthly maintenance allowance on the ground of change of circumstances. The Madras High Court in the case of Padntanabham v. Bama, (supra) inter alia, held that in an application for maintenance of the wife against the husband the order of the Court fixing the amount of maintenance on the basis of the compromise filed by the parties in Court is an order under Section 125 Cr.P.C. and is executable under Section 125. There is nothing in Section 127 which takes away the jurisdiction of the Court to modify its own order under Section 125 though it was passed on the basis of the compromise. So even if the order was passed on compromise between the parties in an application under Section 125 the same will not operate as a bar for an application under Section 127 of the Criminal Procedure Code.

9. The Punjab and Haryana High Court in the case of Ranjit Kaur (supra), inter alia observed 'therefore, this statutory right of a wife to maintenance cannot be bartered, done away with or negatived by the husband by setting up an agreement to the contrary. Such an agreement in addition to it being against public policy would also be against the clear intendment of this provision. Thereafter, giving effect to an agreement which overrides this provision of law, that is Section 125 Cr.P.C. would tantamount to not only giving recognition to something which is opposed to public policy but would also amount to negation of it. The law makes a clear distinction between a void and illegal agreement and void but legal agreement. In the former case, the Legislature penalises it or prohibits it. In the later case, it merely refuses to give effect to it. This is what exactly Section 23 of the Contract Act provides for. Thus the agreement whereby this statutory right of wife to maintenance was relinquished may not per se be illegal but it cannot be given effect to being a negation of the statutory right as provided for in this section and being opposed to public policy. Clauses (b) and (c) of Section 127(3) do not annihilate or defact the right of the wife to future maintenance'.

10. In the instant case though there was an agreement or compromise upon which the first application under Section 127 of the wife was disposed of it will not

operate as estoppel or waiver in case of subsequent application under Section 127 in a changed circumstance. Section 127 application is for modification of the order passed under Section 125 in a changed circumstances. That is the provision of law and no agreement can put a bar for such an application or subsequent application under Section 127 while there is a changed circumstance.

11. In that view of the matter I find no merits in the present revision application. The present revisional application is thereby stands dismissed.

12. Let a xerox copy of this order be given to the learned Advocates for the parties upon compliance of the required formalities.

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