

Nirmal Kumar Jana Vs. the State

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Court : Kolkata

Decided On : Feb-22-2002

Reported in : (2002)3CALLT270(HC),I(2003)DMC495

Judge : Pradip Kumar Biswas, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 125(3), 127, 401 and 482

Appeal No. : Crl Rev No. 332 of 1996

Appellant : Nirmal Kumar Jana

Respondent : The State

Advocate for Pet/Ap. : Saswata Gopal Mukherjee, Adv.

Judgement :

P.K. Biswas, J.

1. The learned counsel appearing for the petitioner is present.

2. This is an application under Section 401/482 of the Code of Criminal Procedure filed at the instance of Nirmal Kumar Jana, the petitioner herein, against the opposite party seeking to set aside the impugned order No. 63 dated 20th September, 1995 passed by the learned Judicial Magistrate, 1st Court, Contai in

Misc.(P)2 of 1995 (T.R. No. 43/95) under Section 127 of the Criminal Procedure Code.

3. The short facts leading to the filing of this revisional application are as under:

Rs. 175/- per month was awarded in favour of the wife/opposite party by the learned Judicial Magistrate, Contai against the present petitioner on the basis of the application filed under Section 125 of the Criminal Procedure Code by the wife/opposite party.

4. Immediately, after passing of the aforesaid award on 27.5.86 both the petitioner and the wife/opposite party resolved to effect a private settlement by way of a compromise petition and on 20.6.86 they filed such an application effecting compromise agreeing thereby that at the behest of the well wishers the petitioner has paid of Rs. 9,000/- lump sum to the wife/opposite party on whose interest she will have provision of future monthly maintenance and the wife of her own volition without any force, fraud or coercion being acted upon her surrendered her future claim on receiving/accepting the lump sum amount tendered to her by the present petitioner. The learned Magistrate by his order No. 54 dated 20.6.86 was pleased to accept the compromise petition filed by both the parties and directed the same to be made part of the order.

5. Subsequently, on 11.7.88 the wife/opposite party filed an application under Section 125(3) of the Code of Criminal Procedure claiming the amount of original award granted to her earlier at the rate of Rs. 175/- per month. On the basis of the said petition by the wife Miscellaneous Execution Case No. 37/88 was started and the petitioner pursuant to the same filed a written objection on 15.9.88 before the learned Magistrate and stated amongst others that he had already paid Rs. 9000/- agreed by the parties. But the learned Magistrate after hearing both the parties by his order No. 8 dated 7.12.88 was pleased to reject the objection petition filed by the petitioner and allowed the prayer of the wife/opposite party for realising the amount of overriding the earlier compromise effected between the parties.

6. Being aggrieved by and dissatisfied with the aforesaid order dated 7.12.88 the petitioner preferred one revisional application before this Hon'ble Court being

Criminal Revision No. 9 of 1989 and the same was disposed of by Justice Amal Kumar Chatterjee (as His Lordship then was) and on 29th January, 1990 by setting aside the impugned order and directing the learned Magistrate to treat the petition of compromise filed before him by the parties as an application under Section 127 of Cr.PC for cancellation of the order made under Section 125 of the Code of Criminal Procedure and to dispose of it in accordance with law. As per the aforesaid direction, the application filed by the present petitioner was treated as an application under Section 127 of the Code of Criminal Procedure and the same was registered being Miscellaneous (P)2 of 1995. Petitioner only adduced evidence and thereafter the learned Magistrate after hearing the parties by his order No. 63 dated 20th September, 1995 was pleased to dismiss the aforesaid Miscellaneous case preferred by the present petitioner and allowed the prayer of the wife for continuing with the execution case for realising the amount overriding the earlier legal compromise, effected in between the parties.

7. Being aggrieved by and dissatisfied with the aforesaid order this present revisional application has been filed alleging thereby that the learned Magistrate did not exercise judicial discretion in accordance with law in deciding the instant petition under Section 127 of the Code of Criminal Procedure filed by the petitioner. It has further been contended on behalf of the petitioner that the learned Magistrate also failed to appreciate that the proceeding under Section 125 of the Code of Criminal Procedure are in the nature of civil proceeding and the compromise effected between the parties has obtained its legal sanctity and has merged with the present order of maintenance and as such there was no question of re-opening the aforesaid order of compromise, effected between the parties at the relevant point of time. Hence, this prayer.

8. I have perused the impugned order passed by the learned Magistrate and I have also heard the learned counsel appearing for the present petitioner. It appears from the order itself that the learned Magistrate relying upon a decision reported in 1982 Cr LJ 262 (Ranjit Karr v. Paritav Singh) and another decision reported in 1979 Cri.LJ 3(SC), 1979 CrL. L.J. 151 (SC) has observed that maintenance being a statutory right which the legislature has framed irrespective of nationality caste or creed of parties and the statutory liability imposed by

Section 125 is, therefore, distinct from the liability under any other law. Thus where it is proved to the satisfaction of the Court that there was refusal or neglect on the part of the husband to maintain his wife, children or parents, none of them can be deprived of the maintenance. This right being a right to survival on livelihood essentially survives and lives every moment of life of the person entitled to be maintained and ultimately he was of the view that this right as envisaged in Sub-section (1) of Section 125 cannot be taken away by the husband by setting up an agreement between the parties. But, here in this case, there was a compromise effected between the parties on their own volition and the wife after accepting a lump sum amount agreed to compromise the aforesaid claim of maintenance including her future claim of maintenance. Wife, however, has not challenged the aforesaid petition by filing an application under Section 127 of Cr.PC assailing therein that due to change in circumstances she is entitled to maintenance whatsoever but straightway she came forward with an application praying for execution of maintenance order, awarded in the maintenance proceeding which was earlier compromised between the parties and that compromise award has not been set aside by any competent Court as yet. It is only the present petitioner who upon receipt of the notice in that execution proceeding came up with an objection that the wife is not entitled to put the aforesaid order of maintenance into execution due to the reason that she agreed on her own to compromise the aforesaid matter and the learned counsel appearing on behalf of the petitioner drawing my attention to the decision reported in : AIR1941 Cal558 in *Debjani Biswas v. Rasik Lal Biswas and Anr.* decision in *Ramsashi Mondal v. Nirode Barani Dasi*, reported in AIR (35) 1948 Calcutta 186 has submitted before me that when an order lawfully made by a Magistrate under Section 488, (now under Section 125 of Cr.PC), whether on compromise or otherwise must be deemed to be enforceable in the manner provided by Section 488(3) (now in the new Code under Section 125(3) of Cr.PC) and here in this case, so long that Order of compromise is not being set aside or varied by any competent Court it cannot be enforced under Section 125(3) of Cr.PC. He has further submitted that taking ratio of the decision as reported in AIR (35) 1948 Calcutta 186 (supra), it can be said with certainty that when the petitioner and the opposite party entered into a compromise and which has been accepted by the Court and which has not been set aside and varied as

yet, the same cannot at all be enforced by way of execution proceeding.

9. Now upon perusing the aforesaid decisions, cited on behalf of the present petitioner and the decisions as referred to above in the judgment of the learned lower Court, I am of the clear opinion that in the instant case when the compromise effected between the parties in relation to the maintenance case has not been set aside and varied as yet by any competent Court then in the absence of any specific condition, incorporated in the said compromise order, the same cannot be enforced by putting the said order into execution and accordingly, the execution proceeding started by the wife-petitioner on the strength of the aforesaid compromise order cannot at all be allowed to be continued.

10. I am, however, not unmindful with regard to the fact whether or not the wife/opposite party can claim maintenance afresh upon pleading any change in the circumstances but here in this case, I am not confronted with any such question.

11. So, upon assessing the entire materials available before this forum, I am plainly of the opinion that the wife-opposite party cannot put the order of maintenance of this case into execution for realisation of the same from the husband-petitioner since earlier by effecting compromise on their own she gave up her claim for future maintenance after receiving a lump sum amount of Rs. 9000/-.

12. That being the position of this case, I find that the impugned order passed by the learned Court below is not sustainable in law and as such it should be set aside and the execution case filed by the wife-opposite party for recovery of arrear maintenance and the execution filed by the opposite party is, therefore, struck off.

Accordingly, this revisional application stands disposed of.

Let an urgent xerox certified copy of this Order, if applied for, be made available to the parties within shortest possible time.