

(1954) 08 KL CK 0001
In the High Court Of Kerala

Mohammed Kunju Asya Umma Kunju and Another	APPELLANT
Vs	
Moideenkunju Mohammad Kunju	RESPONDENT

Date of Decision : 18-08-1954

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 369

Citation : AIR 1954 Ker 29 : AIR 1954 Ker 110 : (1955) CriLJ 316

Hon'ble Judges : K. Sankaran, J

Bench : Single Bench

Judgement

Sankaran, J.—The question raised in this revision petition is as to what extent an order for maintenance passed by a Magistrate u/s 488 of Code of Criminal Procedure could be interfered with by the same Magistrate. The petitioners are the wife and the minor son of the counter-petitioner. They had filed miscellaneous case No. 26 of 1952 on the file of the First Class Magistrate's Court at Karunagappally against the counter-petitioner alleging that he was neglecting to maintain them and claiming specified amounts separately for the maintenance of the mother and the child. By the order passed in that case on 23-6-1952, the counter-petitioner was directed to pay maintenance at the rate of Rs. 15/- per month to the wife and at the rate of Rs. 10/- per month to the son.

Because of the non-compliance with these directions, the petitioners applied to the court to issue coercive steps against the counter-petitioner. On 6-1-1953 he filed an objection petition contending that the claim was already settled and a registered receipt taken from the 1st petitioner) and that the order for maintenance may be cancelled. That petition was at first rejected on the ground that the question of the alleged adjustment prior to the order for maintenance cannot be looked into or recognised.

But the matter was reconsidered on the strength of another petition put in by the counter-petitioner's counsel on 8-1-1953 and the Magistrate accepted, the case of satisfaction pleaded by the counter-petitioner and passed an order on 3-3-1953 cancelling the prior order awarding maintenance. The petitioners filed

Criminal Revision Petition No. 38 of 1953 before the District Magistrate at Quilon against that order. The District Magistrate dismissed that revision petition holding that the first Class Magistrate's Order is legal and proper. The correctness of these orders is challenged in this revision petition.

2. The point raised in this revision petition is confined to the order awarding maintenance to the minor child at the rate of Rs. 10/- per month. That order was passed on 23-6-1952. According to the petitioner, the claim for maintenance of the mother and the child had been satisfied by an adjustment on 19th June 1952 and a receipt taken from the 1st petitioner. It is stated that she received a sum of Rs. 75/- towards the maintenance of the child for a period of 7 years. The question for consideration is whether the order for awarding maintenance to the minor could be reviewed or modified or cancelled on the strength of such an alleged adjustment. Ordinarily a criminal court has no jurisdiction to review or alter its judgment except to correct a clerical error. Section 369 of the Code of Criminal Procedure states that:

Save as otherwise provided by this Code or by any other law for the time being in force... no court when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

There are provisions In Sections 488 and 489 of the-Code indicating the extent of some of the exceptions

proof that any wife in whose favour an order has been made under this section, is living in adultery, or that without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent, the Magistrate shall cancel the order.

But the section does not contain any provision empowering the Magistrate to cancel the order directing payment of maintenance to a minor child. Section 489 has to be invoked for interfering with such an order. Sub-section 1 of this section states that the Magistrate may make an alteration in the allowance fixed by his earlier order if it is shown that a change in the circumstances of either party calls for such an alteration in the rate. Sub-section 2 states that the Magistrate shall cancel or vary his earlier order in the light of a decision of a competent civil court on the question of such maintenance.

It is obvious that the adjustment pleaded by the counter-petitioner in respect of the maintenance ordered to be paid to the minor child cannot come under any of these sub-sections. It cannot also be taken into account as a change of circumstances subsequent to the order awarding such maintenance, because the adjustment pleaded is of an anterior date. So far as the 2nd petitioner is concerned, the order for maintenance was passed in the interests of and for welfare of the minor child. Such a purpose cannot be allowed to be defeated by any adjustment or contract entered into by the mother with the counter-petitioner. It is not competent for the mother to barter away the rights of the minor child as against the father.

Thus it is clear that the acceptance of the plea of adjustment put forward by the counter-petitioner and the cancellation of the order awarding maintenance for the minor child, are not warranted by the provisions contained in Sections 488 and 489 of the Code of Criminal Procedure. The lower courts appear to have been under the impression that Section 369 of the Code may be totally ignored so far orders Under Sections 488 and 489 are concerned. Any such assumption is clearly erroneous and unwarranted.

The general rule is enunciated in Section 369 and as such any deviation from that rule would be justified only when it can be brought under any of the exceptions specially provided for. The cancellation complained of in the present instance does not come under any such exception. It follows therefore that the Magistrate was acting without jurisdiction in cancelling his earlier order fixing the amount of maintenance to be paid to the minor child.

3. The result is that this revision petition is allowed and in reversal of the impugned orders, the first order for maintenance is restored.