
(2014) 04 SHI CK 0027
In the High Court Of Himachal Pradesh
Case No : Cri. M.M.O. No. 41 of 2012

Pritam Singh

APPELLANT

Vs

Nirmala Devi

RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Contract Act, 1872 — Section 23

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(1), 125(1)(a), 125(4), 127

Citation : (2014) CriLJ 4032 : (2015) 2 DMC 367

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Ajay Sharma, Advocate for the Appellant; Digvijay Singh, Advocate for the Respondent

Judgement

Rajiv Sharma, J.—This petition is instituted against the order dated 23.2.2012 rendered by the Additional Sessions Judge (2), Kangra at Dharmshala in Cri. Revision No. 22/2011. "Key facts" necessary for the adjudication of this petition are that respondent was granted maintenance to the tune of Rs. 450/- per month by the Gram Panchayat, Bhatalla vide order dated 25.6.1997 in petition No. 211-IV/93 under section 125 of the Code of Criminal Procedure. Respondent filed an application under section 127 of the Code of Criminal Procedure in the Court of Chief Judicial Magistrate, Kangra at Dharamshala seeking enhancement of the maintenance from Rs. 450/- per month to Rs. 5,000/- per month. Petitioner filed reply to the same. It was specifically averred in the reply that application was not maintainable in view of the compromise in case No. 26-IV/2001 dated 20.10.2001 whereby vide agreement petitioner has given two storeyed Pucca house comprised in Khasra No. 841 situated at Mohal Naddi, Mauza and Tehsil Dharamshala, District Kangra to respondent. It was exclusively owned and possessed by respondent in lieu of maintenance for present and future. He has executed sale deed in favour of respondent vide sale deed dated 10.2.2003. Respondent had also withdrawn a sum of Rs. 50,000/- from Punjab National Bank, Mecleodganj, Dharamshala. She has also kept the valuable

articles with her. Learned Chief Judicial Magistrate, Kangra at Dharamshala enhanced the maintenance from Rs. 450/- to Rs. 3,000/- per month. Petitioner filed revision petition before the Additional Sessions Judge-II, Kangra at Dharamshala. He dismissed the same on 23.2.2012. Hence, the present petition.

2. Mr. Ajay Sharma has vehemently argued that in view of the compromise arrived at between the parties vide Annexure RW-1/B, the application preferred by respondent under section 127 of the Code of Criminal Procedure was not maintainable. He has also contended that his client in lieu of present and future maintenance has also executed sale deed of two storeyed house in favour of respondent. Respondent is owner of the house.

3. Mr. Digvijay Singh has vehemently argued that agreement Ex. RW-1/B was against the public policy.

4. I have heard the learned counsel for the parties and have perused the pleadings carefully.

5. It is not in dispute that a sum of Rs. 450/- per month was granted to respondent by the Gram Panchayat on 25.6.1997. She filed execution petition in the Court of Chief Judicial Magistrate. The matter was compromised between the parties vide Ex. RW-1/B. According to the conditions, enumerated in the agreement, petitioner has transferred two storeyed house comprised in Khasra No. 841 situated at Mohal Naddi, Mauza and Tehsil Dharamshala, District Kangra in the name of respondent for present and future maintenance. She was free to use the premises. She was declared to be owner of the property. Two sons, Ajay Kumar and Vijay Kumar were also permitted to stay in the house. Respondent had undertaken to withdraw the case pending before the Sub-Judge (2), Dharamshala. She had also specifically undertaken that she would not claim any maintenance in future after the transfer of house in her name. The agreement was signed by both the parties in presence of Ajay Kumar and R.S. Rana, Advocate. In sequel to compromise Ex. RW-1/A, Lok Adalat passed the following order:

"20.10.2001:

Present: Petitioner with counsel Sh. K.C. Sharma, Adv.

Respondent with counsel Sh. R.S. Rana, Adv.

Conciliation effected between the parties before the Lok Adalat.

The parties have placed on record Ex. C-1 duly executed compromise deed, which is Ex. C-1, it is ordered that the petitioner shall not press the execution petition for payment of maintenance; hence, the petition is dismissed as unpressed. The file be sent forthwith to the concerned court."

6. In addition to agreement Ex. RW-1/B and order dated 20.10.2001, respondent, Ajay Kumar and Vijay Kumar have also executed affidavit dated 10.2.2003 not to claim any maintenance from their father vide mark "R".

However, despite compromise Ex. RW-1/B and order Ex. RW-1/C, respondent filed fresh application under section 127 of the Code of Criminal Procedure against the petitioner.

7. Respondent has appeared as AW-1. According to her, petitioner has retired from Army. He was getting pension of Rs. 18,000/- - 20,000/-. She has no independent source of income. She has admitted about the agreement. According to her, since arrears were not paid, petitioner has given her old house. She was staying in the house with her two sons, namely, Ajay Kumar and Vijay Kumar. The house is in a dilapidated condition. The house is situated on 2⁷ Marlas of land. She has not kept any tenant. There is no shop in the premises. She was never paid Rs. 50,000/- by the petitioner. In her cross-examination, she has initially deposed that no agreement was executed on 20.10.2001, but later on admitted that compromise was arrived at between the parties. She has admitted that the house situated on khasra No. 841 was transferred in her name in lieu of maintenance. She has withdrawn the case pending before the court of Chief Judicial Magistrate, Dharamshala after the agreement. She has denied the suggestion that as per agreement she would not claim any future maintenance. She has denied the suggestion that she has stated that she would not claim any maintenance in future after the transfer of house in her name. She has admitted that entire property, including house at Naddi, was under her ownership. Later on, volunteered that she was only in possession of the house. She has admitted that the sale deed was executed. According to her, there were only 5-6 small rooms. She has denied the suggestion that she has given the shop on rent. She has admitted categorically that when the house was transferred in her name, petitioner had purchased the papers.

8. AW-2 B.S. Rana has proved the pension of petitioner vide Ex. AW-2/A. AW-3 Madho Ram has deposed that the pension of the petitioner was between Rs. 18,000/- to 20,000/-. Petitioner was not paying any maintenance to the respondent. Respondent has no independent source of income. He has admitted that respondent's son was a driver. He has admitted that there is a shop in the house at Naddi. The house is two storeyed and it is pucca.

9. RW-1 Madhu has proved Ex. RW-1/A and copy of agreement Ex. RW-1/B.

10. RW-2 R.S. Rana has deposed that he is one of the witnesses of Ex. RW-1/B. He knew the parties. He has scribed the agreement. He has also got the signatures of petitioner, respondent and Ajay Kumar appended on the agreement. According to him, the value of the house transferred in the name of respondent was 50 lakhs. It has also shops. According to him, as per the conditions of agreement, respondent would not claim any future maintenance also.

11. Respondent has appeared as RW-3. According to him, compromise was arrived at between the parties on 20.10.2001. He has transferred the possession of two storeyed house at Naddi in the name of respondent. Respondent has

withdrawn the cases on the basis of compromise Ex. RW-1/B. He has given up his right over the amount deposited in the Bank and Post Offices. She has never asked for maintenance till 2010. According to him, the house at Naddi has 14 rooms. Value of the house is about one crore. She has also given shops on rent. Marriage between the parties was solemnized on 20.11.1967. He has given the property to respondent vide Ex. PA.

12. What emerges from the facts enumerated hereinabove is that marriage between the parties was solemnized in the year 1967. The Gram Panchayat, Bhatalla has allowed maintenance of Rs. 450/- per month in favour of the respondent. Respondent filed petition for enhancement of maintenance. The matter was compromised as per Ex. RW-1/B between the parties. It is clear from the recital of Ex. RW-1/B that respondent had agreed not to claim any present and future maintenance in lieu of transfer of house at Naddi in her favour. Petitioner has executed gift deed in favour of respondent. The house is two storeyed. Though according to petitioner, the house has 14 rooms, however, respondent has admitted that there are 5-6 small rooms in the house. It has come on record that the house is abutting the road and there are shops also. Petitioner has transferred two storeyed house in favour of respondent. The agreement Ex. RW-1/B has been signed by petitioner, respondent and her son Ajay Kumar. It was scribed by RW-2 R.S. Rana. There is a recital in para. 3 of Ex. RW-2/A that respondent would not claim any future maintenance in lieu of transfer of house. The matter was compromised before the Lok Adalat as per order dated 20.10.2004. She has also withdrawn the proceedings pending before the Sub-Judge-II, Dharamshala.

13. Both the courts below have not correctly appreciated agreement Ex. RW-1/B. Agreement Ex. RW-1/B cannot be termed against the public policy as argued by Mr. Digvijay Singh. The agreement is valid and respondent has been compensated by transferring house at Naddi in her favour. She is getting regular income from the house. The house has been given to respondent and her sons, who are residing in the house. She was estopped from filing petition under section 127 of the Code of Criminal Procedure for enhancement after the execution of agreement Ex. RW-1/B. Terms and conditions of the agreement are not vague. The agreement arrived at between the parties is binding on them.

14. Learned single Judge of Allahabad High Court in Smt. Kastoori Devi Vs. Chheda Lal Sharma, has held that compromise whereby husband and wife agreed that the amount of maintenance agreed to be paid by husband to wife will not be enhanced at any time will not defeat provision of section 23 of the Contract Act, 1872. Learned single Judge has held as under:

"11. Next my attention was drawn to Madan Mohan Vs. Ram Chander Rao, and Mukul Dutta Gupta and Others Vs. Indian Airlines Corporation, . These rulings lay down that it is not open to the parties to contract themselves out of statute. Here none of the parties have contracted themselves out of any statute. There is no statute which prohibits husband and wife entering into an agreement to the

effect that maintenance allowance once fixed will not be enhanced.

12. From the discussion made above it is clear that none of the rulings relied upon by the learned counsel for the applicant is applicable to the facts of the present case. The term "law" in clause (ii) of S. 23, Contract Act, in my opinion, should be understood in a somewhat limited sense. It covers statute law. If any agreement is arrived at in contravention of a statute, that agreement would be void and not enforceable under law. The question is whether the second part of the agreement before us contravenes the provisions of S. 389 of the Code of Criminal Procedure which is undoubtedly a statute. All that S. 489 provides is that on proof of a change in the circumstances of any person, receiving maintenance allowance under S. 488, the Magistrate may make such alteration in the allowance as he thinks fit. The provision contained in this section, to my mind, is an empowering one, and not a mandatory one. It just gives a power to the aggrieved spouse to move the Magistrate for making alteration in the allowance when there is a change of circumstances. The aggrieved spouse may or may not move the Court even when the change has taken place. There is no element of compulsion placed on any of the parties in this regard. Further, one will notice that it nowhere prohibits husband and wife entering into an agreement to the effect that maintenance allowance once fixed will not be altered. Therefore, if husband and wife enter into an agreement and make a stipulation in that agreement that maintenance allowance once fixed will not be altered, that agreement cannot be said to be in contravention of the provisions of S. 489, Cr.P.C. Therefore, as it is, I am certain in my mind that second part of the agreement in the present case in no way defeats the provision of S. 489 Cr.P.C. It is a valid agreement and the parties are bound by it."

15. Learned single Judge of Allahabad High Court in Hashim Hussain Vs. Smt. Rukaiya Bano, has held that section 125 of the Code of Criminal Procedure does not prescribe any particular form in which the final order of the Magistrate should be passed while granting maintenance allowance to the wife and where the Magistrate mentioned in the order that the case was decided in terms of the compromise and the terms of the compromise were not vague it obviously implied a direction that each and every condition incorporated in the compromise would be a part of the order and binding upon the parties. Learned single Judge has held as under:

"4. I have given my anxious consideration to the respective submission of the learned Counsel for the parties. It is not disputed that a compromise was arrived at on 2nd September, 1975 between the husband and the wife. It is not disputed that this compromise was filed in court. It is clear from the terms of the compromise that Hashim Husain had admitted the case set forward by Shrimati Rukaiya Bano and had agreed to keep her with him and to maintain her by supplying her clothes and food and by treating her respectfully. He had also agreed to transfer a part of the land owned by him in her favour. All these conditions were imposed upon Hashim Husain. They had to be complied with by

him. Clause 6 included a contingency whereby Hashim Hussain was to pay Rupees 200/- per month as maintenance allowance to his wife in the event of breach of the conditions of the compromise by him. From the order of the Judicial Magistrate dated 2-9-1977, referred to above, it is also clear that he had decided the application for maintenance filed by Shrimati Rukaiya Bano in terms of the compromise. It obviously means that the terms of the compromise formed a part of the order of the Magistrate. Section 125, Cr.P.C. does not prescribe any particular form in which the final order of the Magistrate should be passed while granting maintenance allowance to the wife. The only restriction placed is that the maintenance allowance should not exceed a sum of Rs. 500/-. In the instant case the husband has agreed to take back the wife and to maintain her and to look after her, failing which he has incurred a liability of payment of Rs. 200/- per month, which is well within the limit permissible under the section. It was open to the Magistrate while deciding the case in terms of the compromise to specify each and every condition in his order which was included in the compromise. But when he has mentioned that the case is decided "in terms of the compromise" it obviously implies a direction that each and every condition incorporated in the compromise shall be a part of the order and binding upon the parties. No other inference is reasonably possible. The terms and conditions of the compromise are not in any manner vague. They have been clearly specified. As such, I am of the opinion that the order passed by the Magistrate on 2nd September, 1975 is a valid order passed in accordance with law, under Section 125(1), Cr.P.C."

16. Learned single Judge of Bombay High Court in Shrawan Sakharam Ubhale Vs. Sau. Durga Shrawan Ubhale and others, , has held that when there is divorce by way of mutual consent and the wife voluntarily surrendering right to maintenance, she cannot claim it under section 125 of the Code of Criminal Procedure. Learned single Judge has held as under:

"4. That a divorcee is entitled to claim maintenance under section 125, Cr.P.C. admits of no debate. The term "wife" used in section 125(1)(a) includes divorcee who is not remarried, under Explanation (b) to sub-section (1) of Section 125. Therefore, the fact of mere divorce without anything more is no defence to the claim for maintenance allowance by a wife. Crucial question is, is she entitled to maintenance even if she chooses to live separately by mutual consent and voluntarily surrenders her right to maintenance? Combined reading of the scheme of Section 125 and Section 127, Cr.P.C. in general and sub-section (4) of Section 125 and clause (c) of sub-section (3) of section 127 in particular would clearly provide an answer against maintainability of a claim for maintenance allowance in such circumstances. Sub-section (4) of section 125, Cr.P.C. clearly mentions that no wife shall be entitled to receive allowance from her husband, inter alia, if "they are living separately by mutual consent". Clause (c) of sub-section (3) of Section 127 mentions that order of maintenance will have to be cancelled in case "the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce". In this background it is difficult to sustain the view taken by the learned Session

Judge that legal right of maintenance cannot be given up. It is pertinent to notice that contracting out of the right under section 125, Cr.P.C. is not prohibited.

5. In this connection useful reference may be made to the case of Captain Ramesh Chander Kaushal Vs. Mrs. Veena Kaushal and Others, . Two questions arose in that case, (i) Whether maintenance allowance under section 125, Cr.P.C. can be at the rate higher than the rate at which interim maintenance is granted in divorce proceedings pending in a Civil Court? (ii) Whether the outer limit of Rs. 500/- "in the whole" fixed by Section 125, Cr.P.C. is per person? We are not concerned with the second question in this case. First question was answered in the affirmative and after considering the scheme and purpose and after considering the scheme and purpose of Section 125, Cr.P.C., in the concluding paragraph No. 16 it was observed:

"We have been told by Shri S.T. Desai that the divorce proceeding terminated adversely to his client but an appeal is pending. If the appeal ends in divorce being decreed, the wife's claim for maintenance qua wife comes to an end and under section 127 of the Code the Magistrate has power to make alterations in the allowance order and cipherise it. We make the position clear lest confusion should breed fresh litigation."

Noticing a patent error which unfortunately crept in the above observation, the legal position was clarified after hearing both sides and a new paragraph was substituted in place of the above paragraph, with the following observation:

"The last paragraph in the judgment concludes with the statement--"If the appeal ends in divorce being decreed, the wife's claim for maintenance qua wife comes to an end and under S. 127 of the Code, the Magistrate has the power to make alteration in the allowance order and cipherise it".

The judgment would seem to indicate that once divorce is decreed the wife ceases to have any right to claim maintenance and that such an impact can be brought about by an application under S. 127 of the Code. It is clear that this conclusion contradicts the express statutory provision. The advocates on both sides agree that this is patent error and further agree that the law may be correctly stated and the contradiction with the statute eliminated. Therefore, we direct that in substitution of the last paragraph, the following paragraph will be introduced.

We have been told by Shri S.T. Desai that the divorce proceeding has terminated adversely to his client but that an appeal is pending. Whether the appeal ends in divorce or not the wife's claim for maintenance qua wife under the definition contained in the Explanation (b) to S. 125 of the Code continues unless parties make adjustments and come to terms regarding the quantum or the right to maintenance. We make the position clear that mere divorce does not end the right to maintenance."

The underlined portion remove doubt if any of the true legal position on the

question involved. Under the circumstances, Durga was clearly not entitled to any maintenance allowance and the order granting maintenance to her will have to be and is hereby quashed and set aside.

6. But this aspect cannot have any impact on the right of a child Kailash to claim maintenance from his father. There has not been and could not be a relinquishment of his right by his mother to claim maintenance from his father. The term clearly provides that it was the father who was to maintain the child. The term mutually agreed upon between Shravan and Durga created only a personal disability in Durga for claiming allowance for herself and it does not bar a claim for maintenance for the child. The facts that the child is living with the mother and the claim is made by the mother as a guardian are totally irrelevant to the issue. Rejection of Durga's claim for allowance in regard to herself cannot, therefore, entail the rejection of the claim made by her on behalf of Kailash."

17. Learned single Judge of Bombay High Court in Smt. Sushilabai Patil Vs. Shri Ravan Elji Patil and another, has held that when the wife has agreed for consolidated amount of maintenance, she is barred from claiming maintenance periodically under section 125 of the Code of Criminal Procedure. Learned single Judge has held as under:

"4. A question has been raised before me as to whether a wife who was neglected to maintain by her husband, who once agreed for a consolidated amount of maintenance by surrendering her right to get maintenance periodically under section 125 of the Cr.P.C., can subsequently claim maintenance? The learned Counsel appearing for the parties brought to my notice that similar question was referred to by the Division Bench (Nagpur Bench) of this Court and reported in (1990 Mh L.J. 81), and same has been answered by the Division Bench (Nagpur Bench) comprising of Justice V.A. Mohta & Justice G.D. Patil by its judgment dated 11-1-1991. It appears from the judgment that two criminal revision applications bearing Nos. 200 of 1989 and 218 of 1989 were referred to the Division Bench for decision. As per the judgment of Division Bench it has been held that a wife can enter into an agreement for consolidating payment of maintenance by surrendering her right to get maintenance under section 125 of the Cr.P.C. The Division Bench has observed in para. No. 4 of the said judgment that:--

In Criminal Revision Application No. 218 of 1989 basic facts are that the wife was granted maintenance by the trial Court under section 125, Cr.P.C. despite divorce by mutual agreement under the terms of which the wife had waived her right to maintenance on receiving Rs. 5,000/-. Aggrieved by the said decision, revision was preferred by the husband before the Sessions Judge, who, relying upon the case of Shravan (supra) came to the conclusion that there was a divorce by mutual consent on certain terms and conditions, one of which was payment of Rs. 5000/- in full and final settlement of the claim for maintenance past and future and hence there was no justification whatsoever for claiming maintenance. It seems to us that the approach adopted by the learned Sessions Judge is

faultless. This application, therefore, has no substance and is, therefore, dismissed."

18. Learned single Judge of this Court in Jaipati Vs. Gian Chand, has held that the lump sum amount does not debar the enforcement of order of maintenance. Learned single Judge while relying upon Bhupinder Singh Vs. Daljit Kaur, has held as under:

"7. The Supreme Court in Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another, has held that no settlement of claims which does not have the special statutory right of the divorce under Section 125 can operate to negate that claim. Again in Bhupinder Singh Vs. Daljit Kaur, it has been held that any defence against an order passed under Section 15 must be founded on a provision in the Code. Section 125 is a provision to protect the weaker of the two parties, namely, the neglected wife. If an order for maintenance has been made against the deserted husband, it will operate until vacated or altered in terms of the provision contained in the Criminal Procedure Code, itself. If the husband has a case under Section 125(4), (5) or Section 127 of the Code, it is open to him to initiate appropriate proceedings. But until the original order of the maintenance is modified or cancelled by a higher Court or is varied or vacated in terms of Section 125(4) or (5) or Section 127, its validity survives, and it is enforceable and no plea that there has been a compromise between the parties can hold good as a valid defence.

8. A question whether a wife has voluntarily surrendered her right to maintenance in divorce proceedings would not be entitled to claim subsequently maintenance allowance under Section 125 of Code of Criminal Procedure arose before the Division Bench of the Punjab & Haryana High Court in Ranjit Kaur Vs. Pavittar Singh, . The Division Bench following the ratio laid down by the Supreme Court held that the jurisdiction of the Magistrate under Section 125, Code of Criminal Procedure, is not ousted by any agreement between the parties if the facts and circumstances of the case otherwise justify the grant of maintenance. In every case, the Magistrate is bound to examine whether there has been neglect or refusal on the part of the husband to maintain the wife. If the Magistrate finds that the wife is being so neglected or so refused to be maintained despite the agreement for grant of maintenance at a particular rate of denying the same, he duty bound to award appropriate maintenance under this section. The agreement pleaded being opposed to public policy and against the clear intendment of Section 15, Code of Criminal Procedure, cannot be enforced or be a shield in a Court of law. To the similar effect is the decision in Smt. Shakshi Vs. Vijay Kant, .

9. In view of the law stated above, it is held that the agreement alleged to have been arrived at between the parties during the execution proceedings whereby the petitioner is alleged to have received a lump sum amount of Rs. 10,000/- towards maintenance will not debar her either to enforce the order of maintenance dated 15.12.1990 or in claiming enhancement in the amount of

maintenance."

19. The facts of this case are distinguishable. In this case, wife had filed petition under section 125 of the Code of Criminal Procedure against her husband before the learned Sub Divisional Judicial Magistrate, Rohru on 24.7.1989. It was allowed and maintenance of Rs. 250/- per month was granted in her favour. However, during the course of proceedings for the enforcement of order dated 15.12.1990, some compromise was arrived at between the parties whereby a lump sum amount of Rs. 10,000/- was paid to the wife by the husband towards maintenance and on receipt of such amount, wife has given up her right to future maintenance. The wife again approached the learned Additional Chief Judicial Magistrate by way of petition under section 125 of the Code of Criminal Procedure seeking enhancement in the amount of maintenance of Rs. 250/- per month, which was granted in her favour on 15.12.1990. The petition was opposed by the husband that since the wife has received a sum of Rs. 10,000/- earlier and had foregone her future right of maintenance, she was not entitled to claim any maintenance from him. The Magistrate upheld the objection raised by the husband and consequently dismissed the petition by holding that in view of the compromise and the receipt of lump sum amount of Rs. 10,000/-, wife was estopped from claiming any future amount.

20. In the case in hand, compromise has arrived at between the parties during the pendency of the proceedings. Compromise Ex. RW-1/B was signed by the parties and wife had given up her future maintenance. In Jaipati's case, a sum of Rs. 10,000/- was paid to the wife as lump sum. However, in the present case, husband has given pucca house to the wife and the wife is getting regular income from the house. It is not the case of the wife that the compromise Ex. RW-1/B was outcome of coercion or undue influence. The order was passed on 20.10.2001. She has filed petition for maintenance after a period of ten years. It is also not clear from the facts of Jaipati's case whether a written agreement was ever entered between the parties. In the case in hand, respondent along with her sons have sworn in affidavit also that they would not claim any future maintenance. Accordingly, in view of the analysis and discussion made hereinabove, the petition is allowed. Orders dated 23.2.2012 passed by the Additional Sessions Judge-II, Kangra at Dharamshala in Criminal Revision No. 22/11 and dated 29.10.2011 passed by the Chief Judicial Magistrate, Kangra at Dharamshala in Criminal Misc. Application No. 68-IV/2010 are set aside. Pending application(s), if any, also stands disposed of.