

(2002) 09 CAL CK 0007
In the Calcutta High Court
Case No : C.R.R. No. 877 of 2002

Sanyasi Halder

APPELLANT

Vs

Bharati Halder

RESPONDENT

Date of Decision : 12-09-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125
Hindu Adoptions and Maintenance Act, 1956 — Section 20(3)

Citation : 108 CWN 102

Hon'ble Judges : Maloy Kumar Basu, J

Bench : Single Bench

Advocate : Ranjit Kumar Roy, for the Appellant; Souvik Mitra, for the Respondent

Final Decision : Dismissed

Judgement

Malay Kumar Basu, J.—This revisional application is directed against the judgment and order dated 29th December. 2001 passed by the learned Additional Chief Judicial Magistrate Sealdah South 24 Parganas in case No. M-29/2000. By this order the learned Magistrate allowed a petition u/s 125 Criminal Procedure Code filed by the wife, Bharati Halder, claiming maintenance for herself and for her daughter. The learned Magistrate while allowing this petition awarded a sum of Rs. 800/- as maintenance for the wife-petitioner and Rs. 500/- for the daughter every month payable by the O. P. with effect from the month of order. It was further directed by the learned Magistrate that the amount if any already paid by the husband towards interim maintenance should be treated as cost of the case and the same would not be adjusted with the amount of maintenance. Being aggrieved by that order the husband has preferred this revisional application on the ground that the wife having independent source of income and having resided separately from the husband of her own accord, the husband has no responsibility in the matter of her staying away his house and therefore he has never neglected in the matter of providing maintenance to her and under such circumstances the ingredients of the

provisions of Section 125 Criminal Procedure Code having not been fulfilled, the petition was liable to be rejected. But the learned Magistrate having allowed the same has committed an error of law and fact and the impugned order should therefore be set aside.

2. Mr. Roy, learned Advocate for the revisional applicant-husband has strenuously tried to convince the court that there was absolutely no negligence on the part of the husband in the matter of providing maintenance to the wife since he had to leave the house where he and his wife used to reside along with the children born out of the wedlock on being asked by the wife. Mr. Roy points to the cross-examination of the P.W. 1, the wife, where it has been suggested by the husband to her that he left the residence at the instance of the petitioner-wife. But looking into the statements of the P.W. 1 in her cross-examination I do not find anywhere that any such suggestion has been accepted by her. On the other hand she has denied such a suggestion in her cross-examination and after such denial of her there has been no further cross-examination and the contention of Mr. Roy that this is in evidence that the husband had to leave the matrimonial home at the instance or instigation of the wife has not been proved to be true at all. It is in evidence that the husband, Sanyasi Halder, left the house where he used to live with the petitioner-wife and their children in 1978 (while the marriage took place in 1971) and started living elsewhere separately and the petitioner-wife became compelled to work as a maid-servant in order to have her both ends meet and also to bring up the three children who were born out of that wedlock. It is in evidence that at that time the wife did not file any petition claiming maintenance and went on struggling to survive with three children with her own earnings. Mr. Roy has argued that when she did not claim any maintenance for such a long time namely about 20 years, if she could survive without any monetary assistance provided by her husband, it should be assumed and presumed that she had no necessity and she had sufficient means for providing her own maintenance and the maintenance of her children with her own earnings and the petition at this belated stage would be untenable in the eye of law. This contention of Mr. Roy is simply absurd. When a wife having been forced to live without the maintenance being provided by the husband and to fight for survival of herself as well as her children, while the husband who married that wife and further those children did not care to take the responsibility of maintaining them, if she does not claim any maintenance for long years and goes on struggling hard, that does not debar her under any stretch of law or logic from claiming maintenance from her husband on a subsequent date. It is in evidence that she did not get or claim any maintenance from her husband on any single occasion during this long period. It is the case of the husband that on several occasions he sent money by postal money order in the name of the petitioner-wife. Thus that rather shows that she became needy and required monetary assistance during this period and the husband is giving recognition to such a requirement. Secondly, Mr. Mitra in this connection has pertinently referred to a decision of the Apex Court reported to 1999 J. T. (5) 29 (Rajati vs. C. Ganeshan) wherein it has

been enjoined under similar circumstances that when a helpless wife having had to earn some money by working as a maid-servant in order to struggle for survival such an effort should not be construed as an index of the fact that she has an Independent source of Income. So the contention of Mr. Roy cannot be accepted that the fact of her earning some money by working as a maid servant in different houses should be taken as her independent source of income and that on that score she is not entitled to get any maintenance from the husband. Moreover, perhaps it has escaped the notice of Mr. Roy that it is the settled principle that it is the husband's burden of proof that the wife is not unable to maintain herself as alleged by him. In the abovementioned ruling of the Apex Court in its paragraph 7 it has been observed as follows:

"The High Court unnecessarily put the burden on the wife to prove that she was unable to maintain herself. The words unable to maintain herself would mean available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after the desertion to survive somehow. Section 125 Criminal Procedure Code is enacted on the premises that it is the obligation of the husband to maintain his wife, children and parents. It will therefore be for him to show that he has no sufficient means to discharge his obligation and that he did not neglect or refuse to maintain them or any one of them".

It has been further held in the said ruling as follows:

"Even though the wife was unable to prove that the husband had remarried, the fact remains that the husband was living with another woman. That would entitle the wife to live separately and would amount to neglect or refusal on the part of the husband to maintain her. The statement of the wife that she is unable to maintain herself would be enough and it would be for the husband to prove otherwise.

Thus the above verdict of the Apex Court has settled the question first to the effect that the burden of proof that the wife has independent source of income is on the husband and secondly that the neglect of the husband in providing the maintenance to the wife should be construed where the wife was compelled to live separately from the husband for the reason that the husband was living with another woman. In the present case both these principles will be applicable with full force, because the circumstances here are identical. Here also the wife petitioner alleged that the husband had married for the second time and under such circumstances" she would not come to the husband's house. In the evidence the wife has not been able to spell out the details of any alleged marriage and therefore it has been argued by Mr. Roy that the allegation of second marriage is totally a failure. But even if it is indicated from the materials on record that the alleged second marriage has not been established, even then from the "admission of the husband himself (vide his testimony as O. P. W. 1) it is clear that one woman named Sima Halder has been looking after him for long ten years and, furthermore, from the evidence of P.W. 2 it has been revealed that

the said husband nominated this Sima Halder as the would be recipient of his provident fund amount and other retiral benefits. There has been no explanation in the evidence or in the pleadings as to under what circumstances the husband named such a female person who is neither a relation nor a married wife of him as the nominee in respect of huge benefits and in the absence of such an explanation it must be presumed that he either has married her or has kept her as his mistress and in either case the married wife will be entitled to have the presumption in her favour that the husband neglected to provide maintenance to her.

3. Lastly, so far as the question of his financial capacity to provide maintenance is concerned it has been the argument of Mr. Roy that an amount of Rs. 1300/- is excessive and harsh compared to the income which he is now drawing by way of pension amounting to Rs. 2000/- and odd only per month. Here again, regard being had to the entire evidence, I find that the actual financial capacity of the husband is not reflected in this amount of pension. From the unchallenged evidence of P.W. 2 it is disclosed that the husband got a lumpsum amount of Rs. 2,58,000/- and from the admission of the husband (O.P.W. 1) that he got a sum of Rs. 92,000/- after his requirement. This means that in all he received a lumpsum of Rs. 3,50,000/-. It must therefore be held that in the absence of any evidence as to what he did with that money it must be presumed that he has deposited the same in bank account and has been receiving interest from such savings and such interest must be treated as income and he having not made any disclosure and remaining silent as to this important aspect of the matter the Court must presume that the amount which the Court below has fixed is quite a reasonable amount of maintenance payable by him in consideration of all his earnings transpiring from the evidence and this Court should not interfere with such a finding of fact.

4. Lastly it has been emphatically argued by Mr. Roy that even if for the sake of argument it is assumed that the wife is entitled to get maintenance from her husband, the amount of maintenance awarded by the Court below in favour of the daughter who is admittedly aged 24 years has been palpably erroneous in view of the legal position that u/s 125 Criminal Procedure Code only a minor child can be entitled to get maintenance and an adult can never be so entitled. Here also I am unable to be at one with Mr. Roy in view of a very recent Apex Court judgment relied upon by Mr. Mitra. This judgment is reported in 2002 S.C. Cases (CrI) 1147 wherein their lordships have pronounced this landmark decision by enjoining that Section 125 does not fix liability of parents to maintain children beyond attainment of majority, but right of minor girl for maintenance from parents after attaining majority till her marriage recognised u/s 20(3) of Hindu Adoptions and Maintenance Act and therefore, a combined reading of the two provisions held. High Court was justified in upholding the order of Family Court, by which it granted maintenance u/s 125 to the daughter even after her attaining majority but till her marriage, taking the view that it would avoid multiplicity of proceedings as otherwise the party would be forced to file another petition u/s

20(3) of the said Act for further maintenance. In view of this judgment of the Hon'ble Supreme Court there is no denying the legal position that even a daughter who has crossed the age minority and has become a major will continue to be entitled to get maintenance from her father u/s 125 Criminal Procedure Code till her marriage. In the present case it is undisputed that the daughter in question is still unmarried and therefore in view of this legal position settled by the Apex Court there is no alternative for this Court but to accept the contention of Mr. Mitra, the learned Advocate for the O.P. wife, that the daughter will also be equally entitled to get maintenance from her father just like the wife. Because, if she has to file a petition under the Hindu Adoptions and Maintenance Act 1956, there will be unnecessary multiplicity.

5. In view of the entire discussion made above I am to hold that all the ingredients of Section 125 Criminal Procedure Code have been fulfilled and the learned Magistrate was perfectly justified in extending the benefits of the Section to both the mother and the daughter and I have absolutely no reason for interfering with the impugned order

6. Mr. Roy argues that in the petition the petitioner has nowhere stated that she is unable to maintain herself but what has been stated by her is that she has been maintaining herself with great difficulty and this statement should not be equated with a statement like that she is unable to maintain herself and that being so there is a distinct non-compliance with the ingredients of Section 125 Criminal Procedure Code which requires that the wife must be unable to maintain herself in order to get maintenance herself. But this argument does not impress me in the least. What is meant by the expression "I am to maintain my family with great difficulty" is practically the same as conveyed by the expression I am unable to maintain myself. It should not be forgotten that it is the basic obligation of the husband to maintain the wife and the wife has no obligation to do any work to maintain the family. In the present case the wife means to say that having been left and neglected by the husband in the matter of their maintenance she has to work as a maidservant in the houses of others and while doing so she has made this statement that she has been maintaining herself and her children with great difficulty. I do not find any difference between the two expressions so as to come to the conclusion that ingredients of Section 125 Criminal Procedure Code have been wanting here. Shri Bhagwan Dutt Vs. Smt. Kamla Devi and Another, but on a careful perusal of that judgment I find that the same has absolutely no application to the present case. Accordingly, the revisional application be dismissed and the impugned order be upheld. Interim order, if any, stands vacated.