
(2006) 05 CAL CK 0036

In the Calcutta High Court

Case No : C.R.R. No. 2458 of 2003 and CRAN No. 11 of 2006

Tapash Kumar Paul

APPELLANT

Vs

Soma Pal and Another

RESPONDENT

Date of Decision : 05-05-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(4), 127, 401, 482
Penal Code, 1860 (IPC) — Section 498A

Citation : (2006) 2 CALLT 590

Hon'ble Judges : Pravendu Narayan Sinha, J

Bench : Single Bench

Advocate : Pratik Bhattacharya, for the Appellant; Kaushik Chanda and Debomitra Chanda, for the Respondent

Final Decision : Allowed

Judgement

Pravendu Narayan Sinha, J.—This revisional application u/s 401 read with Section 482 of the Code of Criminal Procedure (hereinafter referred to as the Code) filed by the husband petitioner is directed against the Judgment, and order dated 12.9.03 passed by the learned Additional Sessions Judge, 13th Court, South 24-Parganas at Alipore in Criminal Motion No. 436/01 thereby allowing the application u/s 125 of the Code filed by the Opposite Party (in short O.P.) wife after setting aside the order of the learned Judicial Magistrate, 2nd Court, Sealdah in Misc. Case No. 45/2000 dismissing the application filed by the wife u/s 125 of the Code.

2. During pendency of the present revisional application, the O.P. wife, on 24.4.05 married one Partha Bhattacharya and the husband petitioner also obtained a decree for divorce against the wife from the Court of the learned Additional District Judge, 9th Court, Alipore on 4th September, 2004 in Matrimonial Suit No. 48/01. The Husband petitioner accordingly filed the application being CRAN No. 11/06 thereby praying for modifying the order dated 19.11.03 and 19.1.04 passed by this Court and also for setting aside the order

dated 12.9.03 passed by the learned Additional Sessions Judge and for dismissing the Misc. Execution Case No. 29/03 pending in the Trial Court.

3. As the application being CRAN No. 11/06 has been filed by the husband petitioner supported by affidavit disclosing subsequent events, I intend to dispose of both the revisional application being CRR No. 2458 of 2003 and CRAN No. 11/06 as I think that the High Court is competent enough to consider the subsequent events when attention of the High Court has been drawn by the husband by filing the application supported by affidavit and there is no need of referring the matter back to the learned Court below for decision exercising power u/s 127 of the Code. In order to avoid multiplicity of proceeding this Court is competent enough to exercise the powers of Section 127 of the Code considering the subsequent events on the basis of application filed by the husband.

4. The facts giving rise to the criminal revisional application may be summarised as follows:

5. The O.P. wife as petitioner in the Court of learned Magistrate filed an application u/s 125 of the Code against the husband petitioner and it was registered as Misc. Case No. 45/2000. The allegation of the O.P. wife was that she was married with the husband petitioner on 24.11.99 according to their Hindu rites and customs and the marriage was registered on 13.12.99. On the very night of "fulsajja", the husband petitioner told the wife that he does not like to lead conjugal life with her and he has one girl friend. The wife would lead a life remaining in his house as a maid servant and she would be provided with food, clothings etc. Two days thereafter, the wife told the matter to her mother-in-law but, she received a slap from her mother-in-law. On 3.1.2000 she was driven out of her matrimonial home after assault. Thereafter, she went to her father's house and her father brought her back again to matrimonial home on 7.1.2000 but, the husband and his family members did not accept her properly and did not behave well with her and, ultimately drove her out of matrimonial home on 21.1.2000. It was alleged by the wife that during this period the husband and his parents compelled her to write under threat that she was involved with one person and had illicit relation with that man. After being driven out, the wife filed one FIR at Chitpur Police Station and subsequently, she filed the application u/s 125 of the Code praying for maintenance @ Rs. 1000/- per month. She in her application alleged that her husband is an employee of a contractor of Calcutta Telephones and earns Rs. 5000/- per month and is also running a dancing school from where he earns Rs. 6000/- per month.

6. The husband petitioner contested the Misc. Case by filing written objection denying therein all the material averments of the application u/s 125 of the Code filed by the wife. The husband petitioner inter alia contended that his marriage with the O.P. wife was settled on the basis of advertisement in newspaper and on condition that there would be no demand for dowry from their side. The wife created pressure on him to live separately and when he refused the request of

his wife, his wife left his house on her own sweet will. He was a casual employee of Calcutta Telephones but subsequently he lost that service. He is not running any dancing school and has no income from any dancing school. He was unnecessarily involved in a criminal case u/s 498A of the Indian Penal Code (in short IPC) as a result of which he lost his job. The husband contended that as he has no income and as the wife was living in adultery and as she left the matrimonial home voluntarily, the wife was not entitled to receive any maintenance u/s 125 of the Code.

7. It appears that, in the Court of the learned Magistrate four witnesses were examined by the wife including herself as P.W. 1 Soma Pal. The other witnesses were P.W.2 Jyotsna Biswas, P.W.3 Sasanka Sekhar Biswas (father of P.W.I) and P.W.4 Bhaskar Sen, the S.D.O.(P), Cossipore Telephone Exchange. On behalf of the husband only one witness namely D.W.I Tapas Kumar Pal, the husband was examined. The learned Magistrate after consideration of evidence and materials on record placed reliance on ext. A, the alleged writing of the wife admitting her living in adultery with one Samir Chandra and dismissed the application u/s 125 of the Code filed by the wife.

8. The wife being aggrieved by and dissatisfied with the order of rejection of her application u/s 125 of the Code preferred Criminal Motion No. 436 of 2001 before the learned Sessions Judge at Alipore which was finally heard and disposed of by the learned Additional Sessions Judge, 13th Court, South 24-Parganas, Alipore on 12.9.03. The learned Additional Sessions Judge came to the decision that ext. A, the alleged writing of the wife Soma Pal was not voluntary and she was forced by the husband to write it, and ultimately, came to the conclusion that the husband was negligent and he drove out his wife from matrimonial home and accordingly allowed the application u/s 125 of the Code after setting aside the order of dismissal passed by the learned Magistrate. The learned Additional Sessions Judge granted maintenance @ Rs. 1000/- per month in favour of the wife and made the order of maintenance effective from the date of filing of the application u/s 125 of the Code. Besides that, the learned Judge granted Rs. 1000/- towards litigation costs.

9. Thereafter, the husband petitioner being aggrieved by and dissatisfied with the order of the learned Additional Sessions Judge preferred the present revisional application in this Court and it was taken up for admission during motion stage on 19.11.03. At the time of admitting the revisional application this Court stayed the order of the learned Additional Sessions Judge on condition that the husband petitioner shall go on paying Rs. 500/- per month as maintenance to the wife in the Court below until further order and in case of failure to make payment stay order shall automatically stand vacated. At the same time, this Court stayed further proceeding of Misc. Execution Case No. 29/03 pending in the Court of the learned Magistrate.

10. During pendency of the revisional application the husband petitioner filed the application being CRAN No. 11/06 when he learnt that the O.P. wife has married

one Partha Bhattacharya on 24.4.05. It was disclosed in the said application that the O.P. wife has withdrawn maintenance amount even upto 19.4.05 in spite of publishing advertisement for her marriage in the "Anandabazar Patrika" on 13.3.05. Accordingly, the wife is no more entitled to get any maintenance and she should make refund of the maintenance amount received by her from petitioner along with interest.

11. Mr. Pratik Bhattacharya, the learned advocate for the husband petitioner laboriously contended that the learned Judicial Magistrate after considering the evidence of the parties and ext. A. the writing of the wife on the night of "fulsajja" admitting her illicit relation with one Samir Chandra rightly dismissed the application u/s 125 of the Code. The learned Additional Sessions Judge, who heard the revisional application, preferred by the O.P. wife against the order of dismissal of application u/s 125 of the Code committed grave error in appreciating the evidence of witnesses and made mistake and illegality in disbelieving ext. A. Section 125(4) of the Code clearly lays down that no wife shall be entitled to receive maintenance allowance from husband, if she is living in adultery or without sufficient reason has refused to live with her husband. In the instant case from evidence and from ext. A it was proved that the O.P. wife was living in adultery with one Samir Chandra and it was further established in evidence that she left matrimonial home voluntarily and was living in her father's house; and thereafter, she has married Partha Bhattacharya subsequently on 24.4.05. Mr. Bhattacharya contended that the learned Additional Sessions Judge failed to appreciate evidence and committed illegality in allowing the application u/s 125 of the Code filed by the wife and the order of the learned Additional Sessions Judge amounts to miscarriage of justice. The order of the learned Additional Sessions Judge accordingly should be set aside.

12. Mr. Bhattacharya further submitted that during pendency of the present revisional application the wife married for the second time one Partha Bhattacharya on 24.4.05. This Court while admitting the main revisional application directed payment of Rs. 500/- per month by the husband petitioner to the wife and the husband has complied with the said order. As the order of the learned Additional Sessions Judge was bad in law and as the wife has married for the second time during pendency of the revisional application, the wife was not entitled to claim any amount of maintenance and she must refund the amount of maintenance which she has received in the meantime from husband petitioner. Mr. Bhattacharya submitted that the wife has so far received Rs. 14000/- as maintenance approximately and, she should refund the said amount to the petitioner along with interest.

13. Mr. Bhattacharya further contended that it was the duty of the O.P. wife to inform the Court that during pendency of the revisional application in this Court she has married for the second time on 24.4.05. He submitted that in view of provisions of Section 127 of the Code, the wife had the duty to inform the Court about her re-marriage and as she failed to inform the Court concerning the fact

of her second marriage, she is bound to refund the total maintenance amount received by her from the present petitioner along with interest. Mr. Bhattacharya also submitted that the husband petitioner filed Matrimonial Suit No. 48 of 2001 against O.P. wife for divorce and obtained a decree for divorce on 4.9.04 from the Court of learned Additional District Judge, 9th Court, Alipore and from 4.9.04 there was no existence of marital tie between husband petitioner and O.P. wife. Accordingly, both the revisional application and the application being CRAN No. 11/06 should be allowed and necessary order should be passed in favour of the petitioner and against the O.P. wife.

14. Mr. Kaushik Chanda, the learned advocate appearing for the O.P. wife submitted that after her second marriage, the O.P. did not take any money as maintenance from the petitioner. He submitted that from April, 2005 the O.P. did not claim any money and did not withdraw any money as maintenance from petitioner. He submitted that the petitioner obtained decree for divorce ex parte on 4.9.04. In view of provisions of Section 125 of the Code the term "wife" includes a divorce wife. A divorced wife is entitled to claim maintenance till she is remarried. Therefore, no question of refund of maintenance amount received by the O.P. arises as in law she was entitled to claim maintenance.

15. Mr. Chanda further submitted that the learned Magistrate failed to appreciate the evidence properly and committed grave error in relying upon ext. A and failed to realise that ext. A was obtained by the husband petitioner from the O.P. by force under threat. The learned Additional Sessions Judge rightly appreciated the evidence and disbelieved ext. A as voluntary writing of the wife. The learned Additional Sessions Judge decided the matter in accordance with law on proper appreciation of evidence and rightly allowed the application of O.P. u/s 125 of the Code. There is no ground to set aside the order of the learned Additional Sessions Judge.

16. Mr. Chanda also contended that the language of Section 127 of the Code does not indicate that it was the duty of the wife to inform the Court that she has married for the second time for which the amount of maintenance should be altered, modified or set aside. The language of Section 127 of the Code shows that on proof of a change in the circumstances of any person, receiving u/s 125 a monthly allowance, the Magistrate may make such alteration in the allowance as he thinks fit. It clearly indicates that the person who is aggrieved by the order of granting maintenance should approach the Court for alteration of maintenance allowance, and naturally, in this matter it was the duty of the husband to file an application u/s 127 of the Code for alteration, modification of maintenance order or for setting aside the maintenance order. The wife cannot be blamed for not informing the Court about her second marriage and the wife voluntarily and with bonafide intention stopped taking any further maintenance amount from her previous husband viz., the present petitioner, from April, 2005 i.e. after her marriage on 24th April, 2005. There is no question of refund of maintenance amount with interest, and if proper calculation was made, the O.P. wife was

entitled to get some more, amount from petitioner.

17. I have duly considered the submissions made by the learned advocates for the parties and perused the materials on record and the contents of the revisional application and annexures as well as the contents of the application being CRAN No. 11/06. I have also carefully perused relevant provisions of Sections 125 and 127 of the Code. Certified copies of the evidence adduced by the parties in the Trial Court was filed before this Court and I have gone through the evidence of P.W. 1 Soma Pal, P.W.2 Jyotsna Biswas, P.W.3 Sasanka Sekhar Biswas. P.W.4 Bhaskar Sen and OPW 1 Tapas Kumar Pal. P.W.I is the O.P. wife and OPW 1 Tapas Kumar Pal is the present petitioner. P.W. 3 is the father of O.P. After appreciating the evidence of the witnesses and the alleged document marked as ext. A over which the husband petitioner placed much reliance, I am of opinion that the learned Judicial Magistrate totally misread the evidence adduced by the parties and committed illegality as well as gross irregularity in placing reliance on ext, A. After appreciating the evidence of witnesses and materials on record I find that the learned Additional Sessions Judge rightly appreciated the evidence adduced by the parties, and very rightly ext. A.

18. From evidence of the parties and from materials on record it appears that the petitioner and O.P. were married on 24.11.99 which was subsequently registered on 13.12.99. From the evidence of P.W. 1 and P.W.3 it appears that the wife was driven out of husband's house finally on 21.1.2000, though initially before that she was once driven out on 3.1.2000. Her father sent her back to her matrimonial home on 7.1.2000 and finally she was again driven out on 21.1.2000. It is clear, therefore, that at least from 24.11.99 till 21.1.2000 the O.P. wife was in her matrimonial home. The alleged writing of the wife admitting illicit relation with Samir Chandra was written over on an old diary of 1994 on the page of date 15th November. It is without any date as to when it was written. On the right side of ext. A, the name Soma Biswas appears and, on the left side the name Soma Pal appears and it was a writing consisting of four lines and in the last line there was something over written or pen through. If it is taken into consideration that on very night of "fulsajja" it was written by the wife i.e. on 26.11.99, the petitioner would have disclosed it to his parents at least within 2/3 days of such writing after departure of relatives who attended marriage ceremony. On the other hand, from evidence it is clear that the husband came to her in-laws house to perform "astamangala" and thereafter returned back to his own house with his wife. At that time there was no disclosure at all about ext. A. Appreciating the evidence I find that it was the husband who on the very night of "fulsajja" told the wife that she would be provided with food, clothing and other articles but, would not expect anything more and would be treated as maid servant in their house as he has relation with a girl. P.W. 3, the father of O.P, wife totally denied existence of any illicit relation of his daughter with Samir Chandra. Considering the entire evidence, materials on record and circumstances I am firm in my opinion that ext. A is not a voluntary writing of O.P. wife and she was forced or compelled to make those writings under the threat of her husband. The

learned Additional Sessions Judge accordingly, rightly disbelieved ext. A.

19. It has not been proved that the O.P. wife was living in adultery with another person which disqualified her from getting maintenance u/s 125(4) of the Code. The evidence establishes the fact that, the husband petitioner and other in-laws drove out. the wife on 21.1.2000, and thereafter, she lodged the FIR against the husband and other in-laws which resulted into starting of a criminal case u/s 498A of the IPC against the husband and other in-laws. After being driven out of her matrimonial home it appears from evidence that the husband did not take care of her and did not take any information of her and did not pay her any money or maintenance. It was thus established that the petitioner neglected to maintain his wife. O.P. wife was entitled to claim maintenance from husband petitioner staying in her father's house as from evidence it has been proved that she did not voluntarily leave matrimonial home but, she was driven out of matrimonial home.

20. Wife's claim was that her husband earns Rs. 5000/- per month and works as a casual labourer under Telephone Department and also earns Rs. 5000/- per month from a dance school. Evidence of P.W.4 goes against the wife so far as it relates to income of Rs. 5000/- per month being casual worker under Telephone Department. P.W.4 is S.D.O.(P), Cossipore Telephone Exchange and his evidence reveals that the petitioner Tapas Pal is not their employee and he works as a casual labourer of their contractor "Lokenath Enterprise". No man of "Lokenath Enterprise" was examined by the wife to establish monthly income of husband petitioner. The wife also could not produce any paper or document or any witness of dance school to prove that the petitioner used to earn at least Rs. 5000/- per month from dance school. Accordingly, the amount of maintenance @ Rs. 1000/- per month granted by the learned Additional Sessions Judge was to some extent excessive, and accordingly after considering the entire evidence, materials on record and circumstances, I am of opinion that the amount of Rs. 500/- per month as was ordered by this Court dated 19.11.03 is the proper amount which the O.P. wife was entitled to receive as maintenance from her husband at the relevant time when she was entitled to get maintenance in accordance with law. In my opinion she was entitled to get the amount of maintenance @ Rs. 500/- per month from the date of her application and she was entitled to get it till the date of her re-marriage.

21. In view of the description of "wife" as embodied in Section 125 it includes a woman who has been divorced by or has obtained a divorce from her husband and has not re-married. It is clear, therefore, that a wife who has been divorced by her husband is entitled to claim maintenance from her husband. In the present matter, therefore, even after the petitioner obtained decree of divorce from the Court of the learned Additional District Judge, 9th Court. Alipore on 4.9.2004 in MAT Suit No. 48 of 2001, the O.P. wife was entitled to claim maintenance at the aforesaid rate till her re-marriage. From the application being CRAN No. 11/06 it appears that the O.P. has re-married on 24.4.05. Therefore,

the O.P. wife was entitled to claim maintenance from the present petitioner upto 23.4.05.

22. Provisions of Section 127 of the Code nowhere lays down that it was duty of a wife after her re-marriage to inform the Court granting maintenance the fact of her re-marriage and to request the Court to alter or cancel the order of maintenance. The true spirit of Section 127 of the Code gives clear indication that it is the aggrieved person against whom an order of maintenance has been passed, who should move the Court for alteration, modification or cancellation of maintenance order due to change of circumstances. Accordingly, the argument advanced by Mr. Pratik Bhattacharya that it was the duty of the wife to inform the Court u/s 127 of the Code about her re-marriage is not at all acceptable. There is no question of refund of Rs. 14.000/-approximately obtained by the wife as maintenance from petitioner with interest. If proper calculation was made relating to maintenance amount from date of application in 2000 upto 23.4.05, the wife was entitled to get some more amount from the husband. But as she has re-married on 24.4.05 the O.P. wife is no more entitled to claim any further maintenance amount from her ex-husband, the present petitioner. It is expected that O.P. wife would live happily with her present husband and would not claim or press for payment of balance maintenance amount, if any.

23. In view of the discussion made above, this Court finds no merit at all in the revisional application being CRR No. 2458/03 and the revisional application stands dismissed except with the modification of the maintenance amount as indicated above. That is, the order of the learned Additional Sessions Judge granting maintenance to the O.P. wife @ Rs. 1000/- per month is modified and the amount of maintenance u/s 125 of the Code in favour of the wife would remain operative a Rs. 500/- per month from the date of application u/s 125 of the Code till 23.4.05 i.e. the date prior to her remarriage on 24.4.05.

24. In view of the discussion made above, the application filed by the petitioner being CRAN No. 11/06 stands allowed in the light of the indications made above. In view of the submission made by the learned advocate for the O.P. wife that after her re-marriage, the wife did not claim or withdraw any maintenance from the present petitioner question of refund of maintenance does not arise and husband's prayer in this respect stands rejected. After the re-marriage of the O.P. Soma Pal with Partha Bhattacharya on 24.4.05. the O.P. Soma Pal is not entitled to get any amount of maintenance w.e.f. 24.4.05 and the maintenance order will cease to exist or would become ineffective from 24.4.05. In view of the discussion made above, the continuation of Misc. Execution Case No. 29/03 pending in the Court of the learned Magistrate would be an abuse of process of law and accordingly Misc. Execution Case No. 29/03 stands quashed and disposed of.

Both the revisional application being CRR No. 2458/03 and the application being CRAN No. 11/06 stand disposed of in the light of the observations made above.

All interim order passed earlier stand vacated.

Criminal section is directed to send a copy of this order to the learned Additional Sessions Judge, 13th Court, South 24-Parganas, Alipore and to the learned Judicial Magistrate, 2nd Court, Sealdah for information and necessary action.

Later:

After the order is passed Mr. Pratik Bhattacharya, learned advocate for the husband petitioner submits that in terms of order of this Court the husband petitioner has deposited in the Court of learned Magistrate maintenance allowance at the rate of Rs. 500/- per month from April, 2005 upto February, 2006. In the aforesaid order I have made it clear that after her remarriage the wife is not entitled to claim any maintenance allowance. Accordingly, the husband petitioner is at liberty to make necessary prayer before the learned Magistrate at Sealdah to pray for withdrawal of the maintenance allowance deposited by him for the period from 24th April, 2005 to February, 2006 and if any such prayer is made learned Magistrate will pass necessary order in accordance with law.

Let xerox certified copy of this order be given to the parties within two weeks from the date of making of such application on payment of proper fees and charges.