

(1978) 03 BOM CK 0049

In the Bombay High Court

Case No : Criminal Revision Application No. 114 of 1977

Vithalrao Marotrao Awadhut

APPELLANT

Vs

Ratnaprabha Awadhut and Others

RESPONDENT

Date of Decision : 08-03-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 127

Citation : (1978) CriLJ 1406 : (1978) MhLj 393

Hon'ble Judges : M.D. Kamli, J

Bench : Single Bench

Advocate : G.M. Joshi, for the Appellant; V.P. Salve and N.R. Sarin for non-applicants Nos. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

M.D. Kamli, J.—This revision application filed by the applicant husband is directed against the order dated 20-4-1977 passed by the Judicial Magistrate, First Class, III Court, Nagpur, in Misc. Criminal Application No. 789 of 1975, holding that the second application for maintenance filed by the non-applicant No. 1 wife was maintainable under law.

2. The facts giving rise to this application are as follows :---The non-applicant No. 1 is legally married wife of the applicant. Their marriage took place at Nagpur in 1962. Two daughters were born to them. The elder is living with the sister of the present applicant and the younger daughter i.e. non-applicant No. 2 is living with non-applicant No. 1 at Nagpur. The non-applicant No. 2 had filed an application u/s 488 of the Criminal Procedure Code for grant of maintenance in the Court of the Judicial Magistrate, F.C., Wardha wherein the learned Magistrate had ordered that the applicant husband should pay Rs. 40/- to the non-applicant No. 1 and Rs. 10/- to non-applicant No. 2 per month from the date of the order.

3. In her second application filed in the Court of the Judicial Magistrate, F.C., III Court at Nagpur, which gives rise to this revision application. The non-applicant

No. 1 alleged that the applicant is very irregular in making the payment of the maintenance allowance and every time she has to approach the Court for getting the arrears of maintenance and that the applicant has not paid maintenance amount to her since last three years. Non-applicant No. 1 further alleged that the applicant husband is now residing at Etapalli, District Chandrapur, with another woman namely, Malti and does not care to maintain the non-applicant. She alleged that the applicant is a Government servant being a Wireless Operator and is drawing Rs. 450/- per month. It was also alleged by her that she is residing with her parents at Nagpur, she has no other source of income and, therefore, she is unable to maintain herself and her child non-applicant No. 2 and hence she prayed for maintenance allowance of Rs. 250/- per month for her own maintenance and that of non-applicant No. 2.

4. The applicant filed his say at Exhibit 5 to the aforesaid application. Contending therein that the order of maintenance passed u/s 488 of the Criminal Procedure Code by the Court of the Judicial Magistrate, First Class, Wardha in favour of the non-applicants operated as res judicata; that the application was, therefore, misconceived and was liable to be dismissed.

5. The non-applicant No. 1 filed her reply to applicant's aforesaid say at Exhibit 5, alleging therein that inspite of the order of the Judicial Magistrate, First Class, Wardha the applicant did not pay maintenance for a period of several years and hence she has a fresh cause of action and therefore, her second application file in the Court of the Judicial Magistrate, First Class at Nagpur was is not barred by principles of res judicata. She contended that the applicant has filed say, Exhibit 5, with an intention to delay the proceedings.

6. On hearing the arguments advanced on behalf of the both the parties, through their respective Counsels, the learned Judicial Magistrate, First Class, III Court, Nagpur, held that the second application filed by the non-applicant No. 1 on behalf of herself and non-applicant No. 2 was maintainable under law. He rejected the contention advanced on behalf of the applicant that the second applicant for grant of maintenance allowance was barred by res judicata or general principles of res judicata being aggrieved, the applicant has preferred this application in revision.

7. In coming to the conclusion that the second application of non-applicants was not barred by the general principles of res judicata the learned Magistrate placed reliance upon the provisions of sections 126 and 127 of the new Criminal Procedure Code (hereinafter referred to as the Code). He also relied upon some observations in a case of Punjab High Court in Ram Chand Saudagar Ram Vs. Jiwan Bai,

8. Mr. Joshi the learned Counsel for the applicant, contended that it was not competent for the Court of the Judicial Magistrate, First Class, Nagpur to entertain second application for maintenance filed by the non-applicants so long as the earlier order passed by the Judicial Magistrate, First Class, Wardha was in

force. According to him, this application in substance is an application for enhancement of the maintenance allowed granted by Judicial Magistrate, First Class, Wardha. Such an application, according to the learned Counsel, can be filed only in the Court of the learned Magistrate, who has made an initial order. It is contended by the learned Counsel for the applicant that no second application for maintenance allowance can be filed on the same facts when the earlier application has been adjudicated upon on merits.

9. Mr. Salve, the learned Counsel for the non-applicants, submitted that an order u/s 488 of the Criminal Procedure Code does not bar a second application under that section, on these same facts, on the general principles of res judicata. It was contended by Mr. Salve that section 403 of the Criminal Procedure Code has no application to the proceedings for maintenance u/s 488. The second application, therefore, on these same facts is perfectly maintainable.

10. On considering the submission made by the learned Counsels on both the sides. I am inclined to hold that the present application filed by the non-applicants is not maintainable when an application for maintenance filed by her has been heard and adjudicated upon on merits. It is true that section 403 of the Code of Criminal Procedure has no application to the proceedings u/s 488 of the Code, but when an application under this section has been once decided on merit it would be against the general principles of rule of res judicata that a subsequent application on the same facts should be entertained.

11. Now, in this case, it cannot be said that the present application has been made on different facts. All that is alleged in this second application and in the rejoinder filed to applicant's application. Exhibit 5, is that the applicant is very irregular in making the payment of maintenance and every time she has to approach the Court for getting the arrears of maintenance and that the applicant has not paid maintenance amount to her since last three years. Obviously, these averments do not amount to new facts. If the applicant is irregular in making payments of maintenance allowance in pursuance of the first maintenance order, the maintenance order passed in favour of the non-applicants in the present second application will not improve the matters. The non-applicants will have to resort to the proceedings for recovery of the amount under the second maintenance order also in these same way in which she can recover the amount on the strength of the first order. The second order will not obviously put the non-applicants on any better footing so far as the recovery of the amount is concerned.

12. Obviously, the learned Magistrate at Nagpur cannot sit in appeal over the order already passed by the Judicial Magistrate, First Class, Wardha. I asked Mr. Salve, the learned Counsel for the non-applicants, whether it would be open for the learned Magistrate at Nagpur to hold that the non-applicants are not entitled to maintenance in the face of the earlier order passed by the Judicial Magistrate, First Class, Wardha, and whether the earlier order passed by the learned Judicial Magistrate, First Class, Wardha holding the applicant liable to pay maintenance

allowance will not be binding on the applicant, if the learned Magistrate at Nagpur comes to the conclusion on hearing the parties on merits that the non-applicants are not entitled to maintenance Mr. Salve submitted that it will not be open to the learned Magistrate at Nagpur go arrive at a finding that the non-applicants are not entitled to maintenance as there is an order in favour of non-applicants already passed in the earlier proceedings entitling them to maintenance allowance. He, however, submitted that it will be open to the learned Magistrate at Nagpur to enhance the amount of maintenance allowance granted by the learned Magistrate at Wardha. In short, the contention of Mr. Salve was that so far as the entitlement of the non-applicant to maintenance was concerned the earlier order passed by the Judicial Magistrate, First Class, Wardha will operate as or by way of res judicata against the applicant. However, that order will not operate as or by way of res judicata against the non-applicant so far as the amount of maintenance is concerned.

13. Now, the question that would arise is that assuming that the Judicial Magistrate at Nagpur comes to the conclusion that the two non-applicants are entitled to maintenance amount of Rs. 40/- only, the learned Magistrate at Wardha having made an order granting maintenance amount of Rs. 50/-, Rs. 40/- for non-applicant No. 1 and Rs. 10/- for non-applicant No. 2 will the order made by the learned Magistrate at Nagpur have the effect of setting aside the earlier order passed by the Judicial Magistrate, First Class, at Wardha granting maintenance amount to at the higher rate ? Obviously, the learned Magistrate at Nagpur cannot sit in appeal or has no jurisdiction to set aside or modify the order made by the another Judicial Magistrate exercising the same powers. If it is held that another Judicial Magistrate holding same powers can pass a fresh order granting different amount of maintenance, there would be more than one decision, operating at the same time, however, inconsistent they may be. It is true that there is no provision in the Code which bars second application u/s 488, but when an application under this section has once been heard and decided on merits it would certainly be not proper to allow the parties to agitate the questions which have been once decided, and to take chance of fresh favourable orders either as regards entitlement to maintenance or the quantum of maintenance allowance, when no new substantial fact are alleged and proved.

14. Even though the provisions for recovery of maintenance allowance find place in the Code of Criminal Procedure the relief given under the relevant provisions is essentially of a civil nature and the proceedings are also of civil nature (see para 9 in the Supreme Court decision) in Nandlal Misra Vs. K.L. Misra, Though, therefore, the second application for maintenance is not barred under any provisions of the Code of Criminal Procedure when once an application under the relevant provisions has been heard and decided it would in my view be against the general principles of rule of res judicata or at any rate it would not be proper that the subsequent application on the same facts should be entertained unless there are some special circumstances, pleaded and proved by the parties.

15. Now, coming to the decisions of other High Courts on this point, I will first refer to the decision of a Single Judge in Kumari Nafees Ara Vs. Asif Saadat Ali Khan, , in which it has been observed :---

"An application u/s 488 of the Code of Criminal Procedure is not a trial and final order, is neither a conviction nor an acquittal However, I did not accept that any Magistrate would reconsider the matter without there being any change in the circumstances to be taken notice of, but that does not mean that second application is barred. That second application would normally not be allowed on the same facts and on the same circumstance".

Again in a decision of Single Judge in Shri Laisram Nipamchasingh v. Smt. Khaidem AIR 1965 Man 49, it has been observed :---

"There is no provision in the Code which bars a second application u/s 488 but when an application under this section has been heard and adjudicated upon it is against the general principles of rule of res judicata that a subsequent application on the same facts should be entertained. Subject to this prior application does not a bar a second application if the prior application was dismissed for default without adjudicating on merits."

16. Repelling the contention that the second enquiry into the same allegation which has once been already enquired into and adjudicated upon by the competent Court is not barred a Single Judge of the Lahore High Court in Sudruddin v. Mr. Musahib, AIR 1917 Lah. 154, observed :

"I have no hesitation in following Allahabad ruling. To do otherwise would mean that as I have already pointed out there would be no finality of decision in such cases when one Magistrate has fully enquired into and adjudicated on a certain charge and second Magistrate holds the very enquiry into the same charge. The effect is in practice much the same as if the second Magistrate exercises the rights of Appellate Court, though of course, there is this difference that the parties produce evidence de novo".

These decision support the view which I am inclined to take.

17. The learned Magistrate placed reliance upon the provisions of sections 126 and 127 of the Code of Criminal Procedure, (New), in coming to the conclusion that second application is maintainable under law. Section 126 provides that the proceedings under that section may be taken against any person in any district where he (husband) or she (wife) resides. The learned Magistrate observed that the non-applicant No. 1 is residing at Nagpur. Section 126 specifies the places where a proceedings for recovery of maintenance amount can be initiated by the wife or the child. The provisions in this section cannot be interpreted to mean that a wife will be able to file a fresh application on the same facts every time she change her place of residence. Similarly, the learned Magistrate placed reliance upon the provisions of section 127 of the Code Criminal Procedure. That section inter alia provides :---

"On proof of a charge in the circumstances of any person, receiving u/s 125 a monthly allowance or order under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit."

18. A bare look at this provisions will show that the Magistrate contemplated by section 127 of the Code is the Magistrate who passed initial order. Obviously, the effect of alteration in the allowance made under this provision will be to modify the earlier order. As I have indicated above, another Magistrate having co-extensive jurisdiction would not be able to pass an order which would have the effect of modifying the earlier order passed by another Magistrate. The reliance place by the learned Magistrate upon the provisions of sections 126 and 127 of the Code for arriving at the conclusion that second application by the non-applicant is maintainable is obviously erroneous.

19. The learned Magistrate relied upon the case of Punjab High Court reported in *Ramchandra Saudagar v. Jeevanbhai* (supra). However, the observations in that case suggesting that a second application u/s 488 of the Code of Criminal Procedure is not barred by the general principles of *res judicata* have to be understood in the context of the facts obtaining in that case. A careful reading of the report of that case would show that the learned Judge who decided the case did not dispute that it may not be just or legal for the second Magistrate to give contrary finding on the basis of the same facts. As I have pointed out above, no new facts have been alleged in this case except the averment that the applicant is very irregular in making the payment of maintenance on the basis of the earlier order. This averment, in my view, does not amount to new facts on which second application for maintenance would be competent.

20. The order made by the learned Magistrate holding that the present application is maintainable is in my view unsustainable. This revision application will, therefore, have to be allowed. I am satisfied that there is much substance in the contention raised on behalf of the applicant that there is much substance in the contention raised on behalf of the applicant that this is in substance an application for enhancement of the maintenance allowance granted under the earlier order by the other Magistrate. If at all non-applicants are entitled to have the maintenance allowance enhanced, their remedy in my opinion is not to file a fresh application in the Court of another Magistrate having co-extensive jurisdiction but to move the same Magistrate, who passed the earlier order.

21. In the result, the Revision Application is allowed and the application filed by the non-applicants in the Court of the Judicial Magistrate, First Class at Nagpur is dismissed.