
(2007) 08 RAJ CK 0001

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 729 of 2004

Yatendra Swaroop

APPELLANT

Vs

Smt. Asha Devi

RESPONDENT

Date of Decision : 27-08-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Criminal Procedure Code, 1973 (CrPC) — Section 125(3)

Citation : (2007) 08 RAJ CK 0001

Hon'ble Judges : Bhagwati Prasad, J

Bench : Single Bench

Advocate : Shailendra Kala, for the Appellant; Bheem Arora, for the Respondent

Judgement

Bhagwati Prasad, J.—Heard.

2. An application was moved by respondent Asha Devi before the Family Court, Jodhpur u/s 125(3) Cr.P.C. for grant of maintenance for herself and her daughter in the year 27.09.1995. The said application was decided by the Family Court, Jodhpur by an order dated 08.12.1997 by virtue of which respondent Asha Devi and her daughter were granted maintenance of Rs.500/- and Rs.300/- respectively. Apart from this, the Court ordered that Rs.250/- be awarded as litigation expenses. Admittedly, this order of the Family Court, Jodhpur dated 08.12.1997 attained finality.

3. Pursuant to this order, payment was not made by the petitioner regularly as has been ordered by the Family Court. Compelled by the circumstances, whereby, the petitioner neglected to adhere to the order passed by the Family Court, an application was moved by the respondent wife for execution of the order passed by the Family Court.

4. While the execution proceedings were going on husband offered to keep the wife and pursuant to that, he took the wife in his fold. They started living together. In the meanwhile, execution proceedings were pending before the

Court. A Court date was fixed. However, the employees of the Court went on strike and after that, the case was not taken up for regular hearing. In the meanwhile, a letter was addressed to the Court purportedly by wife and when after the strike of the employees came to an end, the file was taken up by the Court. When the file was taken up by the Court, the wife could not make herself present because there was no notice issued to the wife for the date on which the Court had taken the file for action. The petitioner also did not make himself present. However, his brother made himself present and made an application for exemption of attendance. In the meanwhile, the attention of the Court was drawn towards the letter received by post. In that letter which was received by post, it was stated that the execution proceedings may be dismissed. The Court took cognizance of such averments made in the letter received by post. On the basis of that letter, the Court came to the conclusion that it would be futile to keep the proceedings pending and the execution proceedings were closed as desired in the letter.

5. The husband who invited the wife to live with him, had once again deserted her after living together for nearly one year. After she was turned out from the house, she moved an application before the Family Court that dismissal of the execution proceedings was not proper. The proceedings should be restored invoking the inherent powers of the Court and in the application, Section 151 CPC was quoted. The Family Court passed an order observing inter alia that the proceedings u/s 125 Cr.P.C. are basically in the nature of civil proceedings and, therefore, taking a liberal and broader view of the proceedings, restored the proceedings. In the present proceedings, it is the order passed by the Family Court which is under challenge.

6. Learned counsel for the petitioner urged that the proceedings u/s 125 Cr.P.C. being the proceedings of criminal nature, therefore, making an application u/s 151 CPC is a procedure adopted by the learned counsel which is unknown to the jurisprudential jargon of the Courts. The proceedings u/s 125 Cr.P.C. are to be governed by the Code of Criminal Procedure and not by the CPC and Section 151 CPC being invoked by the Court, a wrong jurisdiction has been exercised by the Court below which was not vested in it. Such exercise of jurisdiction cannot be considered to be one which is known to the Criminal Law.

7. Learned counsel for the petitioner further urged that this tantamounts to reviewing the order passed by the Criminal Court and jurisdiction to review an order of Criminal Court is not known to the Code of Criminal Procedure. Since the powers of review are not vested in the Criminal Court, such exercise of jurisdiction which is in the nature of reviewing the earlier order could not have been exercised.

8. Learned counsel for the petitioner further urged that not only that there is no power of review vested in the Criminal Court, but also there is a clear prohibition in the Code of Criminal Procedure that such review application cannot be entertained and a reference in this regard may be made to Section 362 Cr.P.C.

which is reproduced hereinbelow for ready reference:

"362. Court not to alter judgment-Save as otherwise provided by this Court or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

9. If the language of Section 362 Cr.P.C. is looked into, then this is clearly made out that a Court shall not alter or review the same except to correct a clerical or arithmetical mistake. Learned counsel for the petitioner emphasises that in exercise of jurisdiction by a Criminal Court, except correction of clerical or arithmetical errors, there is no scope for either altering or reviewing the order passed earlier and, therefore, the exercise of jurisdiction as has been made by the trial court u/s 151 CPC is patently without jurisdiction and deserves to be annulled and set aside.

10. Learned counsel emphasises that in his petition, he has only challenged the order u/s 151 CPC. There is no challenge to the earlier order passed u/s 125 Cr.P.C. for award of maintenance which has attained finality. However, when the learned counsel was put to a question as to whether a Court can rely on the letter received by post to pass an order annulling a proceeding, then the learned counsel was at loss to show any law whereby, any proceeding can be annulled on the basis of a letter received by post. The learned counsel for the petitioner graciously submitted that both the orders; one passed u/s 151 CPC and the other passed after referring a letter received by post to dismiss the execution proceedings, be set aside.

11. Per contra, learned counsel for the respondent wife submitted that it is incorrect and erroneous to presume that the proceedings u/s 125 Cr.P.C. are purely criminal in nature and no part of civil jurisprudence can be invoked to do any kind of treatment of these proceedings. Learned counsel for the petitioner has placed reliance on a Supreme Court decision in the matter of Vijay Kumar Prasad Vs. State of Bihar and Others, wherein, Hon''ble Supreme court has held that proceedings in the matter of Section 125 Cr.P.C. are civil in nature.

12. Learned counsel for the respondent wife further urged that what was pending before the Court was only execution proceedings and the basic order passed for maintenance u/s 125 Cr.P.C. was not challenged. Therefore, whatever order passed by the Court would neither eclipse or shadow the order passed u/s 125 Cr.P.C. The order passed u/s 125 will subsist in its all power valour and strength and so long as the order u/s 125 subsists, the liability of the petitioner husband continues. The dismissal of the execution proceedings are in-consequential because execution proceedings will not in any way have any impact on basic order. Some times the execution orders get diluted for various reasons but that does not affect the basic order and the basic order of granting maintenance to the wife and child continues and the liability of the petitioner to pay maintenance subsists.

13. Learned counsel for the respondent further submitted that merely the execution application being dismissed, does not absolve the husband of his liability which has been incurred by him having obtained an order against himself u/s 125(3) CPC. If any further development has taken place, then that development has to be brought to the notice of the Court and recourse has to be taken to subsequent Sections like Section 125(4), 125(5) and 127 Cr.P.C. to get the order altered in the fashion as provided by the subsequent provisions in Section 127 Cr.P.C. Such recourse having not been taken, the entire exercise as sought by the learned counsel for the petitioner can be termed as to be misuse of the jurisdiction of the Criminal Court. Any jurisdiction u/s 482 Cr.P.C. can be exercised in favour of the petitioner, if there is a misuse of the jurisdiction as conferred on the criminal court.

14. Section 482 Cr.P.C. can be invoked in the circumstances where the High Court came to the conclusion that there is an abuse of the process of Court and prevent such abuse, powers u/s 482 Cr.P.C.. can be exercised. They can otherwise be exercised to secure the ends of justice. According to learned counsel for the respondent, learned counsel for the petitioner has not been able to show that there was any abuse of the process of Court or any event or circumstance made out by the learned counsel where it can be said that there was abuse of process of Court.

15. Learned counsel for the respondent submitted that abuse made by is writ large on the face of it which is being practised by him who being under obligation to maintain the wife under the orders of the Court is not fulfilling it. Therefore, his conduct disentitles him to pray to this court to invoke its extra-ordinary jurisdiction u/s 482 Cr.P.C. which empowers this Court to secure the ends of justice. In the instant case, ends of justice are being not meet as claimed by the petitioner having not given any money to the respondent wife since an order was passed against the husband, except on few occasion when very meagre amount has been paid to her. Therefore, the conduct of the petitioner disentitles him to invoke the inherent powers of this Court.

16. I have heard the learned counsel for the parties and have given my thoughtful consideration to the arguments raised by the parties.

17. What stands out boldly in this case is that the order passed by the Court below u/s 125 Cr.P.C. has attained finality which has not been challenged by the petitioner in any proceedings. The order subsists and the subsisting effect of the order passed u/s 125(3) Cr.P.C. remained in existence and fastens the liability in the perpetual nature on the head of the petitioner and he under law is under obligation to pay what he has been ordered to pay. Having not done so, his neglectful conduct is writ large and the petitioner is guilty of flouting the orders of the Criminal Court passed u/s 125(3) Cr.P.C. If the conduct of the petitioner is looked into, then the Court has to see whether extraordinary powers of this Court are required to be exercised in favour of such a petitioner. The answer would be in negative.

18. A person invoking inherent powers of this Court has to show a exemplary conduct of himself and pass through the test of reasonableness before he asks this Court that there is breach of law against him and abuse of process of Court. In the instant case, the petitioner having not fulfilled this legal obligation of maintaining the wife, as ordered by this Court, is guilty of such a neglect that he cannot be permitted to raise a question of abuse of process of Court, notwithstanding the fact that he has obtained a decree in his favour u/s 9 because his conduct which has been noticed by the Court is to the effect that when he was faced with the difficulty of making payment in the face of order u/s 125(3) Cr.P.C., he permitted his wife to come to his fold and no sooner the proceedings got dismissed on the basis of a letter received by post, he had the audacity of turning out the wife out of matrimonial home. In such a background, any plea of abuse of process of Court in the opinion of this Court, cannot be sustained. Thus, the plea raised by the petitioner is considered to be mis-conceived.

19. The proceedings were terminated by the Court on the basis of a letter received by post. If the Courts start taking cognizance of the letters received by post, this Court feels that not only there will be mis-carriage of justice but such circumstance will create a catastrophe because sending letters to the Court with many kinds of allegations and counter allegations has become such frequent practice that litigants now take this as a ritual to write whatever they feel, whenever they feel and in whatever manner they want to exercise their feelings and, therefore, any letter received should be kept out of consideration of the Courts. It is to be treated as nothing which has to do with any proceedings of the Court because at times it cannot be certified whether the letter received is bona fide or mala fide or of such a nature that it wants to send the Court on a track which is not known to the jurisprudential discipline for which the Courts are meant. There was no certification available and there was no guarantee that the letter was written by the person who is purportedly the author of the letter. Therefore, the order passed by the Court in dismissing the execution proceedings is per se an order which is based on such material which is not liable to be looked into and, therefore, is non est.

20. Any order passed subsequently to an order which has been held to be non est u/s 151 CPC will be of non consequence. The basic order suffers from infirmity of being based on such a material which could not have been looked into by the Court. Therefore, the material being one which could not have been considered, the order suffers from the vice of being passed on a material which can clearly be said to be extraneous and any order passed on the material which is extraneous is liable to set aside. A fresh execution application can always be filed. If a fresh execution application can be filed in the matter of an order which is subsisting, then the earlier filed execution application which was dismissed on the ground which was not available to the Court, cannot be considered to be one which is bona fide passed by that Court.

21. This is also very important to note that the clerical staff of the Court had gone on strike on the date on which the Court was to take up. The date on which the order was passed was not the date on which the case was to be taken up. The respondent wife had no notice of that date. The correct course of the court was to issue notice to her to appear on a date when the matter was to be taken up. But the matter having been taken up without the knowledge of the wife, again suffers from the vice of such a nature which can be said to be abuse of the process of Court. Therefore, this Court feels that the litigant had no notice of the date, the Court passed an order adverse to that party and in that light also, the order passed by the trial court whereby, the execution proceedings were dropped was again an order without jurisdiction. In any case, the learned counsel for the petitioner was gracious enough to say that both the orders may be set aside. In that view of the matter, the order passed by the Family Court u/s 151 CPC dated 18.09.2003 being not required to be passed because the order for which it was passed was an order without jurisdiction. Therefore, the order dated 26.04.2000 passed in the executing proceedings set aside being non est. The subsequent order dated 18.09.2003 u/s 151 CPC was not required to be passed and should be ignored. The execution proceedings will commence from the day they were ordered to be dismissed on the basis of the letter.

22. With these observations, the misc. petition is disposed of. The petitioner will pay a cost of Rs.2000/- as litigation expenses to the respondent wife.