Bombay High Court
Ashok Yeshwant Samant vs Smt. Suparna Ashok Samant And ... on 27 July, 1990
Equivalent citations: 1991 (1) BomCR 383, (1990) 92 BOMLR 434, 1991 CriLJ 766, II (1991) DMC 132
Bench: S Puranik
ORDER

1. The petitioner Ashok is the husband of Respondent Suparna. The respondent had filed proceedings u/S. 125 of the Code of Criminal Procedure claiming maintenance from the petitioner sometime in the year 1979. It appears that the said proceedings were decided ex parte in the absence of the petitioner/husband and an order awarding maintenance of Rs. 500/- per month was passed in favour of the respondent/wife.

2. The petitioner who was not intimated about the ex parte order failed to pay the maintenance awarded to the wife. The respondent/wife then approached the trial Court u/S. 125(3) of the Cr.P.C. for recovery of the amount awarded. Even the proceedings for attachment of property of the petitioner proved to be futile as there was no property worth attaching. In these circumstances the petitioner was sentenced to imprisonment by the trial Court, which imprisonment he suffered. It appears that subsequently again the arrears were due and defaulted by the petitioner, for which he had to suffer imprisonment on a second occasion.

3. Ultimately on 1st December, 1987 the petitioner filed application u/S. 127(1) of the Code of Criminal Procedure seeking modification of award of maintenance on the ground of change in circumstances during the intervening period. The respondent/wife was served and she filed her reply to the application. Thereafter the trial Judge proceeded to frame issues and called upon the parties to adduce evidence. The petitioner/husband led his evidence and also examined two witnesses on his behalf in support of the application for modification of the maintenance. The respondent/wife also entered the witness box and she was examined. It was at this stage and before the cross-examination of the respondent that the respondent's counsel requested the Court not to proceed with the proceedings u/S. 127(1) inasmuch as the petitioner has failed to pay arrears of maintenance for the last three years from 1-1-85 to 29-2-88. The respondent's counsel also pointed out that the wife had filed an application u/S. 125(3) of Cr.P.C. on 3-3-88 for the recovery of arrears of maintenance for the period 1-1-85 to 29-2-88. The respondent's counsel relied on the judgment of the Supreme Court in Smt. Kuldip Kaur v. Surinder Singh and urged that the proceedings u/S. 127 Cr.P.C. preferred by petitioner/husband should be stayed or should be proceeded on the condition that all arrears are deposited by him in the Court.

4. The learned trial Judge by his order dated 6th July, 1989 concluded in favour of the respondent/wife and held that the application for change in circumstances to alter the maintenance allowance granted by the Court will proceed further subject to deposit of part arrears.

5. Feeling aggrieved by the said order the respondent carried a revision No. 35/1989 before the Sessions Judge, South Goa at Margao. The said Revision was heard and decided on 27th September, 1989 confirming the order of the trial Court.

6. It is against these two concurrent order of ordering deposit of the arrears as a condition precedent for proceeding with the application for modification u/S. 127 Cr.P.C. that the petitioner, being left with no alternative remedy has approached this Court under Art. 227 of the Constitution. Shri Kakodkar, learned counsel appearing for the petitioner with Shri Diniz, urged that both the Courts below have completely misunderstood the case and have not applied their mind to the pleadings of the petitioner in his application u/S. 127 for modification. He also contended that the case law relied upon by the Courts namely the judgment of the Supreme Court in was not at all applicable in the facts and circumstances of the present case. The said case merely decides that the liability of the husband against whom the maintenance amount has been awarded is never wiped out merely because he has suffered jail sentence for default of arrears.

7. Shri Kakodkar pursuaded me to go through both the impugned orders and urged that both the courts were probably overweighed with the fact that the petitioner/husband was in arrears of a large amount and that the wife's application for recovery under S. 125(3) was also pending at the same time before the trial Court. It appears that without going into the pleadings of the petitioner's application for modification that they have assumed the petitioner is merely asking a reassessment of the maintenance order itself He submitted that the orders have caused grave and material prejudice to the petitioner. They are contrary to law and they also suffer from the infirmity of non-application of mind and for all these reasons the impugned orders deserve to be quashed by a suitable writ or direction under Art. 227 of the Constitution read with S. 482 of the Cr.P.C.

8. Shri G. D. Kirtani, appearing for the respondent supported the impugned orders and strongly brought forth the suffering which the respondent/wife has to undergo for non-recovery of the maintenance amount awarded. According to him she is already thrown on the streets by the petitioner/husband and for all these years on one ground or the other the respondent has been protracting the litigation from Court to Court and has deprived her of the bare maintenance amount of Rs. 500/- per month. He submitted that the trial Court was justified in putting a condition of deposit of all past arrears so as to proceed with the petitioner's application for modification. He also contended that this Court should not exercise its writ jurisdiction under Art. 227 of the Constitution inasmuch as the petitioner has already availed of one revision which was available to him and now it is only to circumvent a bar of second revision to the Court that he has preferred this writ petition.

9. Having heard the learned counsel for both the parties and perusing the impugned orders I find that the last objection of the respondent should be discussed first.

10. It is true that ordinarily this Court would not exercise its writ jurisdiction if the two Courts below have passed concurrent orders on facts and law. But it can never be said that merely because a second criminal Revision is barred under the Code of Criminal Procedure, the High Court's jurisdiction under Art. 227 of the Constitution is extinguished nor can it be said that it is only for purposes of circumventing the bar that a petition under Art. 227 is preferred in this Court. The powers of this Court under Art. 227 of the Constitution as also u/S. 482 of Cr.P.C. cannot be thwarted by such presumptions and assumptions against the petitioner but they are to be exercised with due circumspection when in the facts and circumstances of the case this Court finds that a material and grave prejudice has been caused to the party petitioner either by non application of

mind by the Courts below or non-consideration of material facts or for wrong legal approach to the admitted position. In the present case the challenge arguable and will have to be considered merits.

11. Since all the facts leading to the present petition have been stated above, it is interesting to note how this matter was approached by the Courts below. After the order of maintenance was passed in 1979 ex parte against the petitioner/husband and the steps for attachment of property proved futile the proceedings for sending the defaulting petitioner to prison were initiated. As already noted above the petitioner was sentenced to imprisonment on two occasions. As held in the reported judgment, mere sentencing the defaulting party to jail imprisonment does not wipe out the arrears which were outstanding against the petitioner on the two occasions when he was sent to jail. The defaulted arrears continued to be the liability of the defaulting petitioner. Therefore it appears that right from the time the ex parte order in 1979 was passed the petitioner had not paid any amount towards the arrears and remains a defaulter for a huge amount and which liability subsists in spite of the two jail imprisonments.

12. Be that as it may, the petitioner found that the circumstances had so altered that it was necessary to get the order of maintenance modified in view of the changed circumstances. That application was preferred on 1st December, 1987 and was in fact under consideration of the trial Court. The respondent had filed her say and evidence of the petitioner and his witnesses had also been recorded and the respondent had entered the witness box. During these proceedings the respondent/wife had filed an application for recovery of arrears for the period 1st January, 1985 to 29th February, 1988. Having done so she did not also ask the recovery proceedings to be taken up first, but continued with the petitioner's proceedings for modification. It was only after recording of evidence as stated above that in July, 1989 the counsel for the respondent sought an order of a condition precedent for proceeding with the petitioners application u/S. 127. The learned Judge while deciding the said application has observed that the petitioner by his application u/S. 127 is seeking alteration in the allowance on proof of change in the circumstances. In para 4 of the said order he further states as follows :-

No doubt, S. 127 of Cr.P.C. provides for alteration in allowance on proof of change in the circumstances. But in this case the proof of change in the circumstances is that the husband/applicant wants that the order of this Court granting maintenance to the wife be suspended and the case may be reassessed."

13. This observation itself clearly shows a total non-application of mind by the trial Judge to the application u/S. 127 Cr.P.C. A perusal of the application u/S. 127 Cr.P.C. shows the following pleadings at paragraphs 2, 3 and 4 which are reproduced herein below :-

"2. I am earning an amount of Rs. 500/- per month which would be borne out by Income Certificate granted to me by Shri Ramniklal Nanji Shah where I am employed as General Clerk. I have annexed a xerox copy thereof hereto, marked as Exhibit 'A'. Hereto annexed and marked Exh. 'B' is a statement of monthly expenses that is required to be provided by me.

3. There are depending on me, my widowed mother aged 72 years and son aged 16 years and another son aged 12 years. Both the children are schooling and day by day as they grow old and take still higher education and increase cost of commodities the expenses also escalate beyond my capacity. It is not only a moral duty but a legal obligation to maintain my old mother and my minor children, in preference to my wife, the Respondent herein, who has the potentiality and potential capacity to earn should not be taken that she should take the liberty of the orders of the Hon'ble Court to sit idle and not to exploit her talent to spare me to feed my mother and children. They are equally her children and whether the source for the maintenance of the children should be mother or father, is immaterial and amongst the two viz. father and mother, the equity demands that the one whose capacity to provide is virgin should bear the responsibility by sacrificing her own allowance to do justice to the children.

4. In the premises, that since the passing of the order in 1984, there had been change in the circumstances viz. the increased expenditure towards my children and expenses for medicine and good diet for my mother, and hence, there is a fit case for the intervention of this Hon'ble Court to re-assess the case and suspend the impugned order sine die."

14. I have purposely reproduced the impugned pleadings of the application for modification of maintenance and to demonstrate how the learned trial Judge has misunderstood the application and thought that it was merely for reassessment. It is well settled that an application is not to be considered by the heading or title or even by the wording of the prayer but the substance, of the application and the material pleadings seeking relief in the matter. If the application is read at paras 2, 3 and 4 it will clearly indicate what the petitioner meant by the word 'reassessment' is merely reconsideration of the quantum of maintenance in the altered circumstances as pointed therein. The learned trial Judge as well as the Revisional Court were probably misled by the word 'reassessment' and they thought that since the order of maintenance was duly confirmed up to the highest Court there was no question of reassessment and therefore they were totally prejudiced against the petitioner.

15. The other aspect of the reasonings of the two courts below is that they were overweighed with the fact that a large amount of arrears was due and the wife's application for recovery of three years of arrears for the period 1-1-85 to 29-2-88 was pending before the trial Court. The learned trial Judge probably was of the opinion that at any rate unless and until the order of maintenance is modified and since the liability is not wiped out the petitioner/husband can be directed to deposit the defaulted amount as a condition to proceed with the application u/S. 127 Cr.P.C. It is for this purpose it appears the two Courts below have relied on the authority stated supra. However, they have failed to realise that the proceedings u/S. 127 Cr.P.C. are independent proceedings vis-a-vis the recovery proceedings u/S. 125(3) of Cr.P.C. Even assuming that the two can be taken up together then it is for the trial Judge to decide the manner in which the recovery proceedings should be initiated. If the Magistrate decides to give priority to the recovery proceedings rather than the proceedings for modification then he must follow the tenet of S. 125(3) of Cr.P.C. which says that if any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's

allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made. I have particularly underlined the words "without sufficient cause" to emphasise that even while proceeding to direct recovery by a coercive process or for sending a defaulter to prison the trial Judge must afford opportunity to the defaulter to show cause why the warrant for levying the amount or for sentencing him to imprisonment should not be issued It is only if the defaulter fails to show sufficient cause that he may then take the steps for recovery by coercive process or by sentencing to imprisonment.

16. In fact in the instant case the petitioner/husband had filed a reply even to the proceedings u/S. 125(3) for recovery. He has stated that he has no means or source of livelihood beyond a sum of Rs. 500/- per month and he relied upon the pleadings in his application dated 1st December, 1987 under S. 127 Cr.P.C. to avoid repetition.

17. It is thus very clear that the petitioner/defaulter in reply to the recovery had in fact shown sufficient cause in writing which he could have substantiated by adducing evidence. He has also alluded to his pleadings in the proceedings u/S. 127(1) of Cr.P.C. so as to avoid repetition. This matter was therefore very much before the trial Court and even for ordering payment or depositing of the amount the learned trial Judge ought to have first given opportunity to the defaulter to show sufficient cause and establish his changed circumstances and to find out the bona fides about his claim of inability to discharge the liability. Both the Courts below have failed to look into these pleadings which were available on record.

18. It is needless to add that I see no provision either u/S. 125(3) or S. 127(1) Cr.P.C. to enable the trial Judge to proceed with these applications on a condition of deposit of part or whole of the arrears. The trial Judge must act according to the Code of Criminal Procedure and it has no other discretionary or inherent powers under the Code. The inherent powers u/S. 482 are available only to the High Court. In the absence of any provision therefor, the learned trial Judge was wrong in directing the petitioner to deposit the amount of arrears as a condition precedent to proceed with his application for modification of the impugned order.

19. In the result therefore both the orders of the Courts below even though concurrent in nature deserve to be quashed and set aside. The impugned orders are accordingly quashed with the following directions :-

In view of the long standing arrears and the fact that the petitioner's application for modification also is pending since 1987, the parties are directed to appear before the trial Court on 16th August, 1990. The learned trial Judge is directed to club both the applications of the petitioner and of the respondent together and shall consider the pleadings of the petitioner u/S. 127 as pleadings in defence to the proceedings u/S. 125(3) of Cr.P.C. The parties will be allowed to adduce evidence and the Court shall dispose of the applications within a period of three months by a common order. Rule absolute as above.

20. Rule made absolute.