

Calcutta High Court

Sailendra Nath Ghosh vs State Of West Bengal And Anr. on 14 August, 1997

Equivalent citations: 1998 (1) ALT Cri 17, I (1998) DMC 487

Author: D B Dutta

Bench: D B Dutta

JUDGMENT Dibyendu Bhusan Dutta, J.

1. The instant application under Section 482 of the Criminal Procedure Code is directed against the order dated 30.11.96 passed by the learned Judicial Magistrate, Seventh Court, Uluberia in Misc. Case No. 42 of 1995.

2. The said case arose out of an application filed by the opposite party No. 1, Anita Ghosh under Section 125, Cr.P.C. The petitioner is her husband. Their marriage was solemnised according to Hindu rites and customs on 18.2.92. After the marriage, they lived together in the matrimonial home for some time. The opposite party No. 2 being infertile was undergoing medical treatment. There was no issue born out of their marriage. The opposite party No. 2 abandoned her matrimonial home on 30.10.94. The petitioner filed a matrimonial suit for divorce against the opposite party No. 2, being Mat. Suit No. 321 of 1994 in Second Court of Additional District Judge, Hooghly. The opposite party No. 2 lodged a complaint on 25.1.95 in Chandernagore Court alleging matrimonial cruelty against the petitioner. The opposite party No. 2 filed an application under Section 125 of the Criminal Procedure Code praying for maintenance allowance against the petitioner in the Court of Sub-Divisional Judicial Magistrate, Uluberia. Both the matrimonial suit and the complaint case are pending. In the matrimonial suit, the opposite party No. 2 had obtained an order being order No. 17 dated 8.7.96 directing the petitioner to pay alimony pendente lite at the rate of Rs. 700/- per month as well as litigation cost of Rs. 1500/- to the opposite party No. 2 and the petitioner has been paying the alimony pendente lite in terms of that order. During the trial of that case under Section 125, Cr.P.C., the petitioner gave evidence in support of the payment of alimony at the rate of Rs. 700/- per month to the opposite party No. 2. But the learned Magistrate by his impugned judgment and order disposed of the case under Section 125, Cr.P.C. awarding maintenance allowance at the rate of Rs. 800/- in favour of the opposite party No. 2 without, however, considering the fact that the opposite party No. 2 was already receiving a sum of Rs. 700/- towards alimony pendente lite by virtue of the order passed in the matrimonial suit, as a result of which, the opposite party No. 2 is getting maintenance allowance from the petitioner twice a month.

3. Mr. A. Goswami, the learned Counsel appearing for the petitioner contended that the learned Magistrate ought to have made provision in the impugned order for adjustment of Rs. 700 /-, the amount which the opposite party No. 2 is getting by way of maintenance pendente lite in terms of order dated 8.7.96 passed in the matrimonial suit against the amount of Rs. 800/- which he awarded in her favour towards her maintenance allowance. If this adjustment is not allowed, the petitioner will be unjustly saddled with a liability to make payment of maintenance allowance to the opposite party No. 2 twice a month. Accordingly, Mr. Goswami wants this Court to modify the impugned order by making provision for adjustment of the maintenance pendente lite.

4. Mr. Goswami placed his reliance on two Single Bench decisions of our High Court. One is reported in 96 CWN 861 in the case of Gosai Ch. Das v. Beauty Das and State of W.B., and the other is a subsequent unreported decision dated 16.6.96 in Criminal Revision No. 2504 of 1995 in the case of Manoj Kr. Chowdhury v. Jharna Chowdhury.

5. Mr. Amit Talukdar, appearing for the opposite party No. 2, sought to resist the claim for adjustment. He argued that the two proceedings, namely the proceeding under Section 24 of the Hindu Marriage Act and the proceeding under Section 125, Cr.P.C. are two different proceedings. The order granting maintenance pendente lite in the matrimonial suit is not a final determination so as to be entitled to any serious weight in the proceeding under Section 125, Cr.P.C. The mere fact that the opposite party No. 2 is receiving maintenance pendente lite from the Matrimonial Court cannot disentitle her to the order of maintenance allowance from the Magisterial Court under Section 125, Cr.P.C. Mr. Talukdar also submits that the two decisions cited on behalf of the petitioner must be construed as per inquirium inasmuch as the Supreme Court decision in the case of Ramesh Chander v. Veena Kaushal, reported in 1979 Cr.L.J. 3 corresponding to has not been considered or referred to in the said two decisions and as such, the said two decisions will be of no avail to the petitioner in claiming adjustment. Mr. Talukdar relies on the aforesaid Supreme Court decision as well as the decision of Andhra Pradesh High Court reported in 1996 Cr.L.J. 2284, T. Rajender Singh v. Maya Devi.

6. In the Supreme Court case of Ramesh Chander (supra), the husband sought divorce through the Civil Court and the wife claimed maintenance through the Criminal Court. As an interim measure, the District Court awarded maintenance and the High Court fixed the rate at Rs. 400/- per month. Meanwhile, the Magistrate, on the evidence before him, ordered ex-parte, monthly maintenance at the rate of Rs. 1,000/- for the wife and her two children together. Two points were urged before the Supreme Court on behalf of the husband. First, the Civil Court's determination of the quantum is entitled to serious weight and the Criminal Court in its summary decision fell into an error in ignoring the former. The second point that was urged was that the awardable maximum for the wife and children as a whole under Section 125 of the Code was Rs. 500/- having regard to the text of the Section.

7. The Supreme Court virtually answered the first point only at paragraphs 6 and ^ thus: "Broadly stated and as an abstract proposition, it is valid to assert that a final determination of a civil right by a Civil Court must prevail against a like decision by a Criminal Court. But here two factors make the principle inapplicable. Firstly, the direction by the Civil Court is not a final determination under the Hindu Adoptions and Maintenance Act but an order pendente lite under Section 24 of the Hindu Marriage Act to pay the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable. Secondly, this amount does not include the claim for maintenance of the children although the order does advert to the fact that the respondent has their custody. This incidental direction is no comprehensive adjudication.

Therefore, barring marginal relevance for the Magistrate it does not bar his jurisdiction to award a higher maintenance. We cannot, therefore, fault the Magistrate for giving Rs. 100/- on this score".

8. The Supreme Court appears to have dealt with the second point in the remaining paragraphs of the reported judgment. While dealing with the question of awardable maximum under Section 125 and interpreting the meaning of expression "in the whole" appearing in that Section, the Supreme Court made the following observations : "This provision of Section 125, Cr.P.C. is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. It also observed that the brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it had to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause - the cause of the derelicts".

9. In our case, we are not concerned with any such interpretation. No question had really arisen in the Supreme Court case as to whether the husband was entitled to any adjustment of the amount of maintenance allowance awarded by the Matrimonial Court against the maintenance allowance awarded by the Criminal Court under Section 125, Cr.P.C. The Supreme Court enunciated the abstract principle that a final determination of a civil right by a Civil Court must prevail against a like decision by the Criminal Court. But the Supreme Court made that principle inapplicable to that case for two reasons. One is that the direction by the Matrimonial Court was only an order pendente lite under Section 24 of the Hindu Marriage Act to pay not only maintenance but also the expenses of the proceeding and was not a final determination under the Hindu Adoptions and Maintenance Act. The second reason that weighed with the Apex Court in making the principle inapplicable was that the amount awarded by the Matrimonial Court did not include the claim for maintenance of the children. In our case, the order that was passed under Section 24 of the Hindu Marriage Act directed the payment of Rs. 700/- exclusively towards maintenance allowance which did not include any expense of the proceeding since the said order directed the payment of a separate amount towards the expenses of the proceeding. Moreover, the sum of Rs. 700/- awarded by way of maintenance was meant for maintenance of the Opposite party- wife alone and not of any other children since it is admitted that there was no issue born out of the marriage between the petitioner and the opposite party No. 2. It is with reference to the facts of the case of Ramesh Chandra (supra), that the Supreme Court did not fault the Magistrate for giving Rs. 1,000/- towards monthly maintenance for the wife and two children together holding inter alia that the order under Section 24 of the Hindu Marriage Act did not bar the jurisdiction of the Magistrate to award a higher maintenance, but it must be pointed out here that the Apex Court while making the observation at paragraph 7 did not categorically hold that the order under Section 24 of the Hindu Marriage Act was totally irrelevant vis-a-vis the order under Section 125, Cr.P.C. It is significant to note here that the Apex Court used the expressions "barring marginal relevance for the Magistrate" at paragraphs 7 of the reported judgment. It suggests that the Apex Court did consider the order under Section 24 of the Hindu Marriage Act to be of some relevance for the Magistrate, however, marginal it might be, while he exercises his jurisdiction to award maintenance under Section 125, Cr.P.C.

10. In our case, the husband petitioner has not at all challenged the jurisdiction of the Magistrate in awarding a higher maintenance of Rs. 800/- as against the lower amount of Rs. 700/- awarded pendente lite under Section 24 of the Hindu Marriage Act. In Ramesh Chancier's case (supra), no question of any adjustment of maintenance pendente lite under Section 24 of the Hindu Marriage Act against the maintenance awarded under Section 125 of Cr.P.C. was specially raised or fell for

consideration by the Apex Court nor did the Apex Court hold in that decision that the order under Section 24 was not relevant for claiming adjustment against the maintenance to be awarded under Section 125. In my view, the decision in Ramesh Chander's case (supra) is not an authority for the proposition that the plea of adjustment is not at all entertainable by the Magistrate while he awards maintenance under Section 125, Cr.P.C. That being so, the two decisions cited by Mr. Goswami cannot be categorised as per inquirium merely because of the fact that the Supreme Court decision in case of Ramesh Chander (supra) was not considered therein.

11. In *Gossai Ch. Das v. Beauty Das* (supra), it was contended in the revisional application filed before the High Court that the wife's application under Section 125, Cr.P.C. was not maintainable since an application under Section 24 of the Hindu Marriage Act was pending before the Matrimonial Court concerned and that pending the disposal of the application under Section 24, the proceeding under Section 125 should remain stayed. Justice J.N. Hore, as his Lordship then was, held that a proceeding under Section 125 of the Code of Criminal Procedure, 1973 is an independent proceeding unaffected by the provisions of Sections 24 and 25 of the Hindu Marriage Act, and Sections 18 and 20 of the Hindu Adoption and Maintenance Act, 1956 and that it cannot be held that an application under Section 125 of the Code of Criminal Procedure is not maintainable simply because an order of alimony pendente lite has been passed under Section 24 of the Hindu Marriage Act, 1955 in a matrimonial proceeding between the parties, and that there is also no question of staying the proceeding under Section 125 of the said Code till the disposal of the matrimonial suit. But his Lordship, at the same time, held that the amount paid as alimony pendente lite in the matrimonial suit by the husband to the wife may be adjusted against the maintenance payable under Section 125 and accordingly directed suitable modification of the Magistrate's order under Section 125, Cr.P.C.

12. In the unreported decision of our High Court in connection with the criminal revision NO. 2504 of 1995, cited by Mr. Goswami, it was urged on behalf of the revisionist husband that the Magistrate did not consider the interim maintenance which was granted to the wife in the matrimonial suit and has, accordingly, committed an error and his lordship, while dealing with the question of quantum of maintenance allowance, was of the view that the amount awarded by the Magistrate was liable to be reduced in view of the maintenance pendente lite granted in favour of the wife in the matrimonial suit, so long the order of maintenance pendente lite in favour of the wife remained in force and allowed the husband's plea of adjustment with liberty to the wife to make suitable application before the appropriate Court for modification of the quantum of maintenance, in the event of any change in the quantum of maintenance in the matrimonial suit or of the disposal of the suit itself.

13. It may be useful here to refer to a Division Bench decision of our High Court presided over by A.M. Bhattacharjee, J. as his Lordship then was, in *Geeta Chatterjee v. Probhat Kr. Chatterjee*. The respondent-wife in the appeal before the High Court filed an application under Section 24 of the Hindu Marriage Act for maintenance pendente lite and expenses of the appeal against the appellant-husband. In the Court below, the husband did not contest the wife's application for maintenance pendente lite and the Court passed an order directing the husband to pay to the wife Rs. 350/- as maintenance during the trial. Before the High Court in the appeal, however, the application by the wife for maintenance pendente lite and also for expenses for the appeal was

seriously opposed by the husband-appellant on the ground that he has come to learn that the wife owns valuable lands in Calcutta and could not be regarded as one who "has no independent income sufficient for her support" within the meaning of Section 24 of the Hindu Marriage Act so as to be entitled to invoke that Section. The question arose as to whether in ordering maintenance pendente lite under Section 24, the Court shall have regard only to the income of the applicant and not to her or his asset or property. The High Court answered the question in the affirmative. It was of the view that the amount of Rs. 350/- ordered by the Court below, was quite reasonable. The High Court was also of the view that the husband should pay to the wife a sum of Rs. 500/- as expenses of the proceedings before the High Court. It was brought to the notice of the High Court during the hearing of the appeal that the wife obtained an order in her favour under Section 125 from the Criminal Court directing the husband to pay the wife Rs. 200/- per month and the High Court allowed the adjustment of the said sum of Rs. 200/- against the sum of Rs. 350/-. It directed the husband to pay to the wife a sum of Rs. 350/- after deducting therefrom the amount that he would be paying in compliance with the order of the Criminal Court. It is thus clear that the Division Bench allowed adjustment of the lower amount (Rs. 200/-) awarded by the Magistrate against the higher amount (Rs. 350/-) awarded by the Matrimonial Court.

14. Reference may also be made to two other decisions of the Allahabad High Court on this point. They are reported in I (1985) DMC 175; *Puspa Devi v. Anup Singh* and I (1990) DMC 38, *Khem Chand v. State*.

15. In I (1985) DMC 175 (supra), the wife filed an application before the Judicial Magistrate under Section 125, Cr.P.C. for maintenance allowance. During the course of that proceeding, the husband filed an objection on the ground that in a divorce proceeding between the parties the wife was already getting monthly allowance. The Magistrate rejected the application of the opposite party-husband. Aggrieved by the order of the Magistrate, the husband filed an application before the Sessions Judge. The Sessions Judge dismissed the application under Section 125 on the ground that the applicant is already getting maintenance allowance in the divorce proceeding under Section 24 of the Hindu Marriage Act. Aggrieved by this order of dismissal, the wife came up in the revision before the High Court and it was contended on behalf of the applicant- wife that the allowance awarded under Section 24 is for a temporary period during the pendency of a divorce case and that the said allowance cannot be considered to be the maintenance allowance inasmuch as it covers the part of the expenses. The High Court observed that the proceeding under Section 125, Cr.P.C. and Section 24 of the Hindu Marriage Act are quite independent proceedings and the maintenance allowance under Section 24 is for a temporary period and that the order under Section 24 of the Hindu Marriage Act, cannot override the order of Section 125, Cr.P.C. But, at the same time, the High Court was of the view that the Magistrate while passing an order under Section 125 may give such direction so that the amount awarded by the Civil Court under Section 24 may be adjusted during such 'period for which the order directing maintenance allowance under Section 24 subsists. Accordingly, the case was sent back to the Court of trial Magistrate for rehearing with the direction to give due weight to the order passed under Section 24, as indicated above.

16. In the later decision of the Allahabad High Court in *Khem Chand v. State and Anr.* (supra), the High Court was hearing a revision by the husband directed against an order granting maintenance

allowance to the wife under Section 125, Cr.P.C. and it was contended on behalf of the husband that he has already filed a petition for divorce and in that divorce proceeding, he has been directed to pay maintenance to the wife. The High Court directed adjustment of the amount paid towards maintenance in the matrimonial proceeding against the maintenance payable under Section 125, Cr.P.C. The Court held that double payment of maintenance is not intended by law and that if any money has been deposited towards the payment of maintenance in the divorce proceeding the same was liable to be adjusted in the payment of maintenance ordered under Section 125, Cr.P.C.

17. In the Andhra Pradesh High Court decision in *T. Rajender Singh v. Maya Devi*, reported in 1996 Cr.L.J. 2384, which was cited by Mr. Talukdar, it was held that during the operation of the order of interim maintenance under Section 24 of the Hindu Marriage Act, the maintenance granted by the Criminal Court under Section 125, Cr.P.C. shall also continue to be paid and that both the orders of matrimonial Court and Criminal Court are required to be complied with till the final decision is rendered by the Civil Court and that it is only after the rights of the parties are finally decided, that the party can approach the Criminal Court under Section 127 of the Cr.P.C. for cancellation or variation of the order under Section 125. The question whether or not any adjustment between the two amounts—one awarded under Section 24 by the Matrimonial Court and the other awarded under Section 125 by the Criminal Court - would be permissible does not appear to have been specifically raised nor considered in the said decision and as such, this decision will not be of much avail to the opposite party on the question of admissibility of the plea of adjustment which is confronting us in the present case.

18. Thus, following the three decisions of our High Court referred to above, namely, *Geeta Chatterjee v. Probhat Chatterjee*, (supra); *Gossai Ch. Das v. Beauty Das* (supra) and the unreported decision in the case of *Manoj Chowdhury v. Jharna Chowdhury* as well as the two decisions of the Allahabad High Court reported in *Puspa Devi v. Ann? Singh* (supra), and *Khem Chand v. State* (supra), it can be safely held that the plea of adjustment is quite maintainable and the Supreme Court decision in *Ramesh Chancier* (supra) does not, in my opinion, militate against this view.

19. The matter can also be looked at from another angle. Obviously, the object of Section 125 is meant to achieve a social purpose. The object is to prevent vagrancy and destitution and also to provide quick and summary remedy to a class of persons who are unable to maintain themselves. It is true that this is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution, as observed by the Supreme Court in the *Ramesh Chander's* case (supra). But then, Section 125, Cr.P.C. can be invoked by a wife only when she is unable to maintain herself. The expression "unable to maintain" connotes that the wife, has no other means or source to maintain herself. Inability on the part of the wife to maintain herself is undoubtedly a sine qua non for the grant of maintenance allowance under Section 125, Cr.P.C. If a particular wife has some other means or source sufficient to maintain herself, there would be no point in awarding any further allowance in her favour so long such means and source continues to subsist. In the instant case, the wife has already obtained an order from the Matrimonial Court directing the husband to make payment of Rs. 700/- per month towards her own maintenance pendente lite under Section 24 of the Hindu Marriage Act and another order (the impugned order) from the Magistrate's Court under Section 125, Cr.P.C.

directing payment of a sum of Rs. 800/- per month by the husband towards her maintenance. It has not be contended on behalf of the wife-opposite party that the amount of Rs. 800/- that has been awarded by the Magistrate under Section 125, Cr.P.C. by the impugned order is not at all sufficient to meet the requirements of her maintenance according to her standard of life. She has not assailed the impugned order of the Magistrate with regard to the quantum of allowance that has been awarded by the impugned order. We can, therefore, take it for granted that, for the present, a sum of Rs. 800/- would be sufficient for her maintenance per month. Viewed from this angle, allowing the plea of adjustment, in such a case, would not in my opinion, militate against the object of Section 125, Cr.P.C.

If, on the other hand, the husband petitioner's plea of adjustment be negated only on the ground that the order under Section 24 of the Hindu Marriage Act is a temporary order and not a final determination of the exact quantum to which the wife would be entitled as of right towards her maintenance allowance or on the ground that the Magistrate's jurisdiction to grant maintenance allowance under Section 125 remains unaffected by the order under Section 24 of the Hindu Marriage Act, it would virtually mean saddling the husband-petitioner with a liability to comply with both the orders and make the double payment of maintenance allowance, irrespective of the question other actual requirements of her maintenance. I am afraid, such a course would not be in consonance with the fundamental concept of justice, equity and good conscience.

The order under Section 24 may be temporary and not a final determination and it is true that if an order for permanent alimony is made under Section 125, it will automatically supersede the alimony pendente lite. But, if the amount of maintenance pendente lite is discernible from the order under Section 24 and if the said amount is paid by the husband there is no reason for disallowing adjustment of such payments against the amount awarded under Section 125, even if the latter amount is quite sufficient for the wife's maintenance. If such payment is temporary, the adjustment will also be temporary and will continue to be made as long as the payment would be made. The mere fact that the order under Section 24 is temporary cannot thus constitute a good ground for making claim for adjustment inadmissible if it is otherwise admissible for the purpose. Adjustment cannot, however, be allowed as a matter of course. Whether such a plea would be admissible would depend upon facts and circumstances of each particular case.

20. Thus, having regard to the facts and circumstances of this case, I am inclined to hold that the amount paid by the petitioner-husband to the opposite party-wife towards her maintenance in pursuance of the order passed by the Matrimonial Court under Section 24 of the Hindu Marriage Act is liable to be adjusted against the amount payable under Section 125 of Cr.P.C. towards her maintenance.

21. In such view of the matter, the impugned order is liable to be made subject to the modification to the effect that the amount paid as alimony pendente lite in the matrimonial suit by the petitioner-husband to the opposite party No. 2 be adjusted against the maintenance payable under the impugned order. In the result, the revisional application succeeds and is hereby allowed subject to the modification of the impugned order as directed above.