

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.22165 of 2016

=====

Md. Akil Ahmad, Son of Abdul Wahid, resident of Plot No. 35/401, Zakir Nagar West, Okhla, P.S. Zamia Nagar, New Delhi-110025.

.... Petitioner

Versus

1. The State of Bihar.
2. Bibi Fauzia Ishrat, W/O Md. Akil Ahmad & D/O Asif Alam, resident of Village- Ibrahimpur, P.S. Tarapur, District- Munger.

.... Opposite Parties

=====

Appearance :

For the Petitioner : Mr. Pratik Kumar Sinha, Advocate.

For the Opposite Party : Mr. Dilip Kumar Sinha, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

C.A.V. ORDER

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

6 16.09.2016.

In the present application, challenge is made to the order dated 10.02.2016, passed by the learned Principal Judge, Family Court, Munger, in connection with Maint. Case No. 352 of 2013, by which the petitioner has been directed to pay monthly allowance of Rs. 15,000/- for the interim maintenance of his wife(opposite party no. 2) in addition to the amount of Rs. 15,000/- being paid monthly as per the order of this Court passed in Cr. Misc. No. 16224 of 2013. Initially, against the order under challenge, a Miscellaneous Appeal bearing No. 349/2016 was filed by the petitioner (appellant herein), whereupon the matter was placed before the Bench on 09.05.2016, regarding maintainability of the appeal against the order of interim



maintenance passed by the Family Court, in terms of Section 125 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). The learned counsel for the petitioner sought permission to convert the Miscellaneous Appeal into an application under Section 482 of the Code, whereupon such permission was accorded and necessary corrections were made. After conversion, the matter was taken up on 19.05.2016 by a learned Single Judge as a Criminal Miscellaneous Case under Section 482 of the Code, but taking note of the order dated 09.05.2016, the learned Single Judge asked the Registry to place the matter before the appropriate Bench, thus again this matter has come up before us, on the orders of the Hon'ble Acting Chief Justice (as he then was).

The 'issue' before us for determination, is, the maintainability of application under Section 482 of the Code against the order of the interim maintenance passed by the Family Court during the pendency of the proceedings of maintenance, under Chapter IX of the Code.

Prior to, Amendment Act 2001 (Act 50 of 2001) of the Code of Criminal Procedure, Section 125 of the Code did not expressly empower the Magistrate to pass an interim order of maintenance, though having regard to the nature of jurisdiction to pass order for maintenance, it was held that the Magistrate had

implied power to make such order of interim maintenance.

In the case of Savetri –Vs- Govind Singh, reported in AIR 1986 SC 984, the Hon'ble Supreme Court observed that there was no provision in the Code authorizing a Magistrate to make an interim order of maintenance, but the Code also did not expressly prohibit the making of such an order. Hence, considering the aim and object behind the legislation, His Lordship Justice VENKATARAMIAH (as he then was) rightly observed:

“In view of the foregoing it is the duty of the Court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. It is quite common that application made under Section 125 of the Code also take several months for being disposed of finally. In order to enjoy the fruits of the

proceeding under Section 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the Court. Every court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim 'ubi a liquid conceditur, conceditur et id sine quo res ipsa esse non potest (where anything is conceded, there is conceded also anything without which the thing itself cannot exist) Vide Earl Jowitt's Dictionary of English Law 1959 Edn. P. 1797. Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorized in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until

the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties. The Magistrate may, however, insist upon an affidavit being filed by or on behalf of the applicant concerned stating the grounds in support of the claim for interim maintenance to satisfy himself that there is a prima-facie case for making such an order, such an order may also be made in an appropriate case ex parte pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the respondent is heard. If a Civil Court can pass such interim orders on affidavits, there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The

W
NO



affidavit may be treated as supplying prima-facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, We feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other condition referred to the pending final disposal of the application". (Emphasis supplied).

Parliament considering the legal position as also the fact though the remedy is of summary nature, the applicant has to wait for 'several years' for getting the relief. It, therefore, amended the provision expressly authorizing the Magistrate to grant interim maintenance.

Obviously, the order under challenge dated 10.02.2016 is an order of interim maintenance passed in favour of opposite

party no. 2 by the learned Principal Judge, Family Court, Munger.

Now the question arises for adjudication to this Court that if the petitioner is aggrieved by the order of interim maintenance passed in favour of opposite party no. 2, then under the law, what recourse is available to him?

Learned counsel for the petitioner submitted that there is nothing as such in the Family Courts Act, 1984, which may prevent this Court to exercise its, inherent power under Section 482 of the Code, even in relation to the order of interim maintenance, passed under Section 125 of the Code. In support of the aforesaid submission, the learned counsel for the petitioner has placed reliance on paragraph 10 of the judgment of the Hon'ble Supreme Court rendered in the case of Madhu Limaye –Vs- State of Maharashtra, reported in (1977) 4 SCC 551, which reads as under:

“10. As pointed out in Amar Nath's case(supra) the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding, is to bring about expeditious disposal of the cases finally. More often than not, the revisional power of the High Court was



resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The Legislature in its wisdom decided to check this delay by introducing sub-section (2) in Section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code. On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include sub-section (2) of Section 397 also, “shall be deemed to limit or affect the inherent powers of the High Court”. But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will

have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. Take for example a case where a prosecution is launched under





the Prevention of Corruption Act without a sanction, then the trial of the accused will be without jurisdiction and even after his acquittal a second trial, after proper sanction will not be barred on the doctrine of autrefois acquit. Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order, does it stand to reason to say that inherent power of the High Court cannot be exercised for stopping the criminal proceeding as early as possible, instead of harassing the accused up to the end? The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible. ”



The learned counsel for the petitioner also relied upon a Division Bench judgment of this Court reported in (2008) (4) PLJR 817 (Raj Kumar Sah -Vs- The State of Bihar). At this juncture, itself, we express our opinion that the issue was quite different before this Court in the case of Raj Kumar Sah (referred above). It was relating to the nomenclature of revision petition filed in terms of Section 19(4) of the Family Courts Act and this Court, therefore, held that the revision under Section 19(4) of the Family Courts Act will be registered as a criminal revision application. Therefore, the reliance of the petitioner upon the said decision of this Court would serve no fruitful purpose relating to the issue involved in the present matter.

For contra, the learned counsel for the State submitted that the application under Section 482 of the Code will not be maintainable against the order of interim maintenance passed under Chapter IX of the Code inasmuch as provisions of the Code is not applicable in the matter of Family Courts Act as to test the propriety and correctness of the interim order of maintenance, passed under Section 125 of the Code by the Family Court.

Firstly, we may take note of Chapter V of the Family Courts Act, 1984 (hereinafter referred to as 'the Act'), wherein, there are provisions for appeals and revisions. Section 19 of the

Family Courts Act, 1984 reads thus:

“19. Appeal.-(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment and order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties (or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)).

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this Section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any



proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more judges”.

Now, we may also take note of Section 125(1) of the Code, which reads thus:

“125.(1) If any person having sufficient means neglects or refuses to maintain-

- (a) his wife, unable to maintain herself, or
- (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
- (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental

abnormality or injury unable to maintain itself,

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, or such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under the sub-section, order such person to make monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly

allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation- for the purpose of this Chapter,-

- (a) “ minor” means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;
- (b) “wife” includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.”

From the provisions referred above, it is obvious that the order under challenge dated 10.02.2016 having nature of interim order, for the reason that it would be operated during pendency of the proceedings of Section 125 of the Code, as engrafted under second proviso of Section 125 of the Code.

As per Black’s Law Dictionary (1990) P. 814, the word “interim” means “for the time being”, “in the meantime”, “meanwhile”, “temporary”, “provisional”, “not final”, “intervening”. The word “interim” means “intervening” when it is used as a noun and when used as an adjective it means “temporary” or “provisional”. As per advanced law lexicon



(2005) Vol. II “interlocutory” means, not that which decides the cause, but that which only settles some intervening matter relating to the cause; a decree or judgment given provisionally during the course of legal action. The expression “interlocutory order” has not been defined but the term is used in a restricted sense. It denotes orders of a purely interim or temporary nature, which do not decide or touch the important rights or liabilities of the parties and any order which substantially affects the right of the parties is not an interlocutory order, the word “interlocutory order” being not converse to final order. Thus interim or interlocutory orders are those orders passed by a Court during the pendency of a proceeding, which do not determine the ‘issue’ finally.

Such interlocutory order is neither amenable to appeal under Section 19(1) of the Act nor revision envisaged under Section 19(4) of the Act, and further sub-section 5 of Section 19 of the Act, puts an express bar regarding the appellate and revisional jurisdiction in the matter of judgment, order or decree of a Family Court, except as provided under Section 19 of the Act.

A Bench of this Court in the case of Arvind Kumar Singh, reported in 2014(4) PLJR 587 has held that the order granting of

interim maintenance is found and held to be interlocutory order and on account thereof, revision in terms of Section 19(4) of the Family Courts Act is barred. We also find no reason to differ with the said decision of this Court.

So far the decision rendered by the Hon'ble Supreme Court in the case of Madhu Limaye –Vs- State of Maharashtra as referred above, which has been relied by the counsel for the petitioner, is concerned, there being discussion in respect of bar engrafted under Section 397(2) of the Code as the issue involved therein was relating to sub-section (2) of Section 199 of the Code i.e., the power of taking cognizance by the Court of Sessions without the case being committed to it, as also, the sanction given therein was bad on account of the fact that it was not given by the competent authority. So, in that case there were some procedural illegality, apart that their Lordships were of the opinion that the type of the order, which was under challenge in that proceeding, even though it was not final in one sense, was surely not interlocutory so as to attract the bar of sub-section (2) of Section 397 of the Code. Therefore, the said decision would be of no help, in the facts and circumstances of the case, as also, the issue involved herein.

For deciding the issue as referred above, we may take

notice of Section 10 of the Act, which reads thus:

“Section 10. Procedure generally-(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings other than the proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made there under, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.”

From bare reading of Section 10(2) of the Act, it appears that the provisions of Code of Criminal Procedure 1973 or the



rules made there under are made applicable to the proceedings under Chapter IX of the Code, only before a Family Court. Therefore, in terms of sub-section 2 of Section 10 of the Act, the provisions of the Code of Criminal Procedure are not applicable before the High Court as to test the propriety and correctness of any order passed under the proceedings of Chapter IX of the Code, by a Family Court. An appeal against the judgment or order of the Family Court is filed before the High Court in terms of Section 19(1) of the Act, not under the provisions of Code of Criminal Procedure; similarly, a revision application is filed against an order of the Family Court, relating to proceedings of Chapter IX of the Code, under Section 19(4) of the Act not under the provisions of Code of Criminal Procedure. Therefore, the application of provisions of the Code of Criminal Procedure is confined only to the Family Court in the proceedings under Chapter IX of that Code.

It is worth to take notice of Section 20 of the Family Courts Act, which reads thus:

“20. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than

this Act.”

From the conjoint reading of Section 10 and Section 20 of the Act, we are of the view that inherent power of the High Court under Section 482 of the Code cannot be invoked, against the order granting interim maintenance under Section 125 of the Code inasmuch as the applicability of provisions of the Code of Criminal Procedure is confined only before the Family Court under the proceedings of Chapter IX of the Code.

Now the question remains as to whether the petitioner who being aggrieved by the order dated 10.02.2016, granting interim maintenance to opposite party no. 2 is remediless under the law. The answer is in the negative.

Under the similar situation a Full Bench of this Court had occasion to determine the issue: “Whether an appeal would be available under Section 19 (1) of the Family Courts Act, 1984 against an order passed under Section 24 of the Hindu Marriage Act, 1955?” This Court while delivering judgment, reported in AIR 2010 Patna 184, held that an order passed by the Family Court, being interlocutory in nature, would be amenable to the writ jurisdiction under Article 227 of the Constitution of India.

We would also like to refer a decision of this Court reported in 1990(2) PLJR 693, rendered by a larger Bench of this

Court. In the said decision, Their Lordships, in paragraph 16, held as under:

“16. Whether the High Court can exercise such power of superintendence only when no appeal or revision has been provided under the Code against orders passed by such criminal courts or even in cases where the persons concerned have availed the remedy provided under the Code for setting aside such orders? It may be urged that in the aforesaid two Full Bench decisions of this Court and in the case of Chandra Shekhar Singh & Another (supra) before the Supreme Court, no internal remedy by way of appeal or revision had been provided, rather there was a bar so far exercise of appellate or revisional power of this Court under the old Code is concerned, in my view whether a bar has been placed or not on exercise of the appellate or revisional power under the Code itself is not of much consequence so far as the power of this Court under Article 227 of the Constitution is concerned. But there may be three situations under which the power under Article 227 may be invoked. Firstly, where no appeal or revision has been provided against the order in question, secondly, where the person aggrieved has already filed a revision application before Sessions Judge and his revision application to this Court against the order passed by the Sessions



Judge is barred under Section 397(3) of the Code. The third eventuality may be where although a revision application or an application under Section 482 of the Code is maintainable before this Court, still an application under Article 227 is filed. In my view, there is no question exercise of power under Article 227 in the third category of cases, the remedy being available to petitioner under the provisions of the Code itself. So far the cases falling in the first category i.e., where no appeal or revision has been provided as has been said by the Supreme Court, it will require an exceptional case before power under Article 227 is to be exercised. In respect of the cases coming under second category i.e., the revision application have already been dismissed by the Sessions Judge, and bar under Section 397(3) is applicable for interference under Article 227, very exceptional circumstances must exist in view of the judgment of the Supreme Court in the case of Jagir Singh(Supra)".

In view of the discussions made above, we are of the view that the only remedy, available to the petitioner, is to make an application under Article 227 of the Constitution of India before this Court, if he is so aggrieved by the order of the interim maintenance dated 10.02.2016 passed by the Principal Judge, Family Court, Munger.

Therefore, this application is not maintainable, and is accordingly, dismissed with the liberty to the petitioner, to file an appropriate application before this Court under Article 227 of the Constitution of India.

(Sudhir Singh, J)

I agree.
(Ramesh Kumar Datta,J)

(Ramesh Kumar Datta, J)

U.K./- A.F.R.

U		T	
---	--	---	--