

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 1096 of 2019

Smt. Sima Ghosh

-Vs.-

Ashim Bose & Anr.

For the petitioner : Mr. Prasenjit Mukherjee.

For the Opposite Party No.1 : Mr. Ranjan Kumar Roy.

For the State : Ms. Debjani Sahu.

Heard on : 04.02.2022, 15.02.2022, 17.02.2022,
01.03.2022 & 03.03.2022.

Judgment on : 22.04.2022

Tirthankar Ghosh, J:-

The present revisional application has been preferred by the petitioner/wife challenging the judgment and order dated 10.01.2019 passed by the learned Chief Judicial Magistrate, North 24 Parganas in Misc. Case No. 143 of 2016 arising out of M. Case No. 48 of 2009 under Section 127 of the Code of Criminal Procedure. Wherein the learned Chief Judicial Magistrate, North 24 Parganas, was pleased to hold that the petitioner is not entitled to get any maintenance and as such allowed the application under Section 127 of the Code of Criminal Procedure.

The background of the case relates to an application under Section 125 of the Code of Criminal Procedure preferred at the instance of the wife/petitioner herein being M. Case No. 48 of 2009 which was rejected after contested hearing by an order dated 23.12.2010 passed by the learned Chief Judicial Magistrate, North 24 Parganas. The petitioner thereafter preferred a revisional application before the Hon'ble High Court at Calcutta being CRR 542 of 2011, however, the same was not interfered by the Hon'ble High Court by its order dated 27.09.2013 and as such the petitioner preferred an appeal before the Hon'ble Supreme Court against the said order by way of Special Leave to Appeal being Criminal Appeal No(s). 161-162 of 2015 (@ SLP (CRL.) No. 8083-8084/2014). The Hon'ble Supreme Court by its judgment and order dated January 19, 2015 was pleased to award maintenance of Rs.7,500/- per month from the date of filing of the application under Section 125 of the Code of Criminal Procedure. By the same order the Hon'ble Apex Court was pleased to direct payment of arrears of maintenance to be paid in equal quarterly instalments within a period of one year.

The other part of the matrimonial dispute relates to Matrimonial Suit No. 64 of 2008 wherein by a judgment dated 18th August, 2018 the learned Additional District Judge, Fast Track Court No.3, Barasat, North 24 Parganas was pleased to order as follows:

“The marriage in between Sima Ghosh and Ashim Bose solemnised on 12.06.2008 be and the same is annulled from this date of the judgment.”

It has been observed by the learned Additional District Judge, Fast Track Court No.3, Barasat, North 24 Parganas that the suit was filed for decree of nullity and/or in the alternative decree of divorce on the ground of cruelty. The facts stated therein reflected that initially the husband instituted a suit praying for decree for restitution of conjugal rights in terms of Section 9 of the Hindu Marriage Act and the wife after appearance filed written statement along with counter claim. Subsequently, husband withdrew his prayer for restitution of conjugal rights and the counter claim was accepted as cross-suit and the same was proceeded. The Learned Civil Judge after relying upon the evidence set out the issues and while concluding observed as follows:

“This court, therefore, come to the conclusion that even when a person is generally potent but is impotent with respect to his own spouse and is unable to consummate marriage, he may be presumed to be impotent for the purpose of Section 12(a) of the H.M. Act.

It further appears from the record that the parties to the suit are now residing separately since more than last 10 years and there is no further chance for their reconciliation. It is to be mentioned here that the record suggest that this court tried to reconcile the matter in between the parties on several occasions but in vain.

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From the aforesaid discussion it is abundantly clear that the marital tie in between the parties is now a dead subject. As such nobody will be prejudiced if the marriage in between the parties solemnised on 12.06.2008 be annulled in terms of Section 12 of the H.M. Act.”

After the Learned Additional District Judge, Fast Track No. 3, Barasat, North 24-Parganas passed the judgment in MAT Suit No. 64 of 2008 the husband took up such contention before the learned Chief Judicial Magistrate, North 24 Parganas in the pending application under Section 127 of the Code of Criminal Procedure being M.P. Case No. 143 of 2016 and the learned Chief Judicial Magistrate, North 24-Parganas by its judgment dated 10.01.2019 was pleased to rely upon the judgment passed by the Civil Court in MAT Suit No. 64 of 2008 and was pleased to hold:

“...I do not find any reason to discuss any other issues involved in this case and it can safely be hold that the Opposite Party is not entitled to get any maintenance from the petitioner who is not bound to maintain the Opposite Party in view of the order passed in Mat. Suit No. 64 of 2008.”

Mr. Prasenjit Mukherjee learned Advocate for the petitioner submits that the judgment delivered by the Civil Court under Section 12 of the Hindu Marriage Act, 1958 (hereinafter referred to as the ‘H.M. Act’) is a voidable marriage and it has been decided by the Hon’ble Supreme Court in Badshah – Vs. – Urmila Badshah Godse & Anr., (2014) 1 SCC 188 that in such cases wife cannot be deprived of maintenance. The following paragraph was relied upon by the learned Advocate:

“20. Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in Heydon case [(1584) 3 Co Rep 7a : 76 ER 637] which

became the historical source of purposive interpretation. The court would also invoke the legal maxim construction of ut res magis valeat quam pereat in such cases i.e. where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125 CrPC, such a woman is to be treated as the legally wedded wife.”

Learned Advocate for the petitioner stressed on the purposive construction of provision of Section 125 of the Code of Criminal Procedure and submitted that the purpose for which Section 125 of the Cr.P.C. has been enacted do not disentitle the wife to receive any maintenance because the grounds on which the marriage was annulled amounts to cruelty. Learned Advocate draws the attention of a Division Bench judgment of the Kerala High Court in T.K. Surendran –Vs. – P. Najima Bindu & Anr., 2012 Cri LJ 1960 and drew the attention of this Court to paragraphs 74 and 75 which are as follows:

“74. *We must note in this context that all the precedents cited above relate to the pre-DVA era. Revolutionary changes have been brought about and entrenched concepts prevalent in society have been Shaken by the enactment of the DVA. Subsequent statutory instrumeiits*

must certainly persuade the courts to understand contemporary meaning of expressions in statutes enacted in a bygone era. It would be myopic for a court to attempt to understand the meaning of the expression “wife” in the inclusive definition under Sec. 125(1)(b) Cr.P.C. today without imbibing the current legal norms prevalent in society in respect of the claim of maintenance by a woman sharing a domestic relationship with the respondent. The endeavour of all courts at all times must be to innovate and understand the language of legislations in tune with the norms currently prevalent in society ushered in and accepted by subsequent pieces of legislations. In this view of the matter, we are satisfied that in the post DVA era attempt cannot be made to understand Explanation (b) to Sec. 125 Cr.P.C. divorced of the current context in societal and legal development.

75. *To conclude, we hold that Explanation (b) to Sec. 125(1) Cr.P.C. must receive an interpretation consistent with the laudable legislative purpose, object and rationale - to prevent vagrancy and avoid destitution. We take the view that “the wife” under Explanation (b) must include any woman whose marriage has been brought to severance by acts of spouses including a decree passed by court at their instance under Sec. 12 or Sec. 13 of the Hindu Marriage Act. The accent is that such wife in a terminated marriage unilaterally or by intervention of court must remain unmarried to claim inclusion within the ambit of deemed wife under Explanation (b). The realistic acceptance of the tact that the wife in an annulled marriage cannot in fact be placed by law to her position of *niaidenhood*/spinstership prior to marriage demands and warrants such an expansive interpretation of the expression “wife” in Explanation (b). The fact that consequences of an annulment are not declared in the Hindu Marriage Act specifically and the fact that for the purpose of Secs. 16, 25 and 15 the law realistically accepts that such marriage cannot be ignored, overlooked or forgotten and has to be*

equated to a marriage dissolved under Sec. 13 does also help us to accept the wider meaning for the expression “wife” in Explanation (b). The fact that under the personal law applicable to the parties, there is a liability for the husband in an annulled marriage to pay permanent alimony and maintenance to the wife under certain circumstances does also embolden us to include the wife in an annulled marriage also within the ambit of a deemed wife under Explanation (b). We take the view that such a woman falls within the sweep of the definition of “wife” under Explanation-(b).”

Mr. Ranjan Kumar Roy learned Advocate appearing for the husband/opposite party disputes the contention raised by the petitioner/wife and submits that after the marriage ties have been annulled the decree is a nullity and the wife as such has no right to claim any maintenance under Section 125 of the Code of Criminal Procedure and the same being a change circumstances within the meaning of Section 127 of the Code of Criminal Procedure was brought to the notice of the Learned Trial Court and the learned Trial Court accepted such contention which is a settled proposition of law.

Learned Advocate drew the attention of this Court and relied upon paragraph 8 of Smt. Yamunabai Anantrao Adhav –Vs. – Anantrao Shivaram Adhav & Anr., AIR 1988 SC 644 which is as follows:

“8. *We, therefore, hold that the marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is not entitled to the benefit of S. 125 of the Code.”*

The Opposite Party/husband also relied upon a decision of Hon'ble Delhi High Court in Krishan Gopal -Vs. - Smt. Usha Rani, 1982 CRI. L. J. 901 and referred to paragraph 15 of the said judgment which is as follows:

“15. *It is obvious, therefore, that parties whose marriage has been annulled can no longer enjoy the status of husband and wife under the provisions of S.125 of the Code. To come within the definition of Explanation (b) to S.125(1) of the Code qua Hindus, "divorced wife" is a wife who has been divorced or has obtained divorce under S.13 of the Act.”*

Learned Advocate also relied upon a decision of the Hon'ble Jharkhand High Court in Prem Chand Mahto -Vs. - Laxmi Devi & Anr, 2003 Cri. LJ 3242 and referred to paragraph 11 therein which is as follows:

“11. *On careful consideration of discussions made above, it is clear that O.P. No. 2 from the inception cannot be said to be legally married wife of the petitioner as her marriage with the petitioner has been annulled by a decree and, therefore, she will not be entitled to maintenance. But so far as O.P. No. 3, the child born from O.P. No. 2, is concerned, his status becomes that of illegitimate child, though petitioner has made out a case that in a case under Section 498-A, O.P. No. 2 had not mentioned about birth of a son. But in the instant case, it appears that birth of a son has not been vehemently denied. So far as Section 125, Cr. P.C. is concerned, a son whether legitimate or illegitimate will be entitled to maintenance and O.P. No. 3 who is said to be born from O.P. No. 2 by having sex relationship with the petitioner is entitled to maintenance @ Rs. 150/- per Month as allowed by the learned Court below. Revision Partly Allowed.”*

I have considered the judgments relied upon by the learned Advocate appearing for the parties regarding the applicability of the provisions relating to maintenance in respect of the cases where there has been dissolution of marriages. In the instant case what weighed with the learned trial Court was the decree passed by the learned Civil Court wherein the marriage was annulled from the date of the judgment. The records of the civil case do not reflect that any permanent alimony was granted to the petitioner. Section 25 of the Hindu Marriage Act which deals with permanent alimony and maintenance is required to be considered. The relevant provision being Sub-section 1 of Section 25 of the Hindu Marriage Act is set out as follows:

“S.25. Permanent alimony and maintenance: (1) *Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant [, the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.”*

The Hon'ble Supreme Court in Rameshchandra Rampratapji Daga –Vs. – Rameshwari Rameshchandra Daga (2005) 2 SCC 33 in paragraph 18 of the said judgment was pleased to observe as follows:

“18. *When the legislature has used such wide expression as “at the time of passing of any decree”, it encompasses within the expression all kinds of decrees such as restitution of conjugal rights under Section 9, judicial separation under Section 10, declaring marriage as null and void under Section 11, annulment of marriage as voidable under Section 12 and divorce under Section 13.”*

Therefore annulment of marriage *ipso facto* cannot be a ground for setting aside an order of maintenance until and unless it satisfies that a permanent alimony was received by a wife and also the conditions under Section 125 of Code of Criminal Procedure for which a wife is not entitled to get maintenance is satisfied. The reasons so assigned by the learned Chief Judicial Magistrate, North 24 Parganas in its order dated 10.01.2019 in Misc. Case No. 143 of 2016 arising out of M. Case No. 48 of 2009 under Section 127 of the Code of Criminal Procedure do not satisfy any of the conditions.

As such the order dated 10.01.2019 passed by the learned Chief Judicial Magistrate, North 24 Parganas in Misc. Case no. 143 of 2016 under Section 127 of the Code of Criminal Procedure is hereby set aside.

The learned Chief Judicial Magistrate is directed to pass a fresh order after adhering to the grounds referred to above.

Accordingly, CRR 1096 of 2019 is allowed.

Pending application, if any, is consequently disposed of.

Interim order, if any, is hereby made absolute.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)