

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.2138 of 2022

Anup Kumar Choudhury

....

Petitioner

Ms. Smita Das, Advocate and
Mr. Ramakrishna Naik, Advocate

-Versus-

Madhusmita Behera

....

Opposite Party

Mr. G.K. Behera, Advocate for OP

CORAM:

JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT:16.12.2022

1. Instant petition under Section 482 Cr.P.C. is at the behest of the petitioner challenging the correctness, legality and judicial propriety of the impugned order dated 20th July, 2022 passed in Criminal Revision No.09 of 2021 by the learned Additional Sessions Judge, Talcher and for a consequential direction to the learned S.D.J.M., Talcher for disposal of Criminal Misc. Case No.149 of 2018 filed under Section 126(2) Cr.P.C. against the ex-parte order of maintenance dated 2nd March, 2019.

2. As revealed from the record, the marriage between the petitioner and opposite party was solemnized in 2001, however, thereafter, due to dissension between them, both remained separate and in the meanwhile, the opposite party moved the court of learned S.D.J.M., Talcher for maintenance in terms of Section 125 Cr.P.C. which was disposed of ex-parte with a direction to pay an amount of Rs.20,000/- as monthly allowance with a cost of Rs.10,000/- payable to her by the petitioner. Thereafter, the petitioner said to have approached this Court in

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CRLMC No.1006 of 2019 challenging the ex-parte order of maintenance and it was disposed of on 16th May, 2019 granting the liberty to him to move the revisional court or invoke Section 126(2) Cr.P.C. Accordingly the petitioner, pursuant to the above direction, filed Criminal Revision No.10 of 2019 but the same was dismissed by order dated 18th March, 2020. Subsequent thereto, the petitioner moved an application under Section 126 (2) Cr.P.C. in Criminal Misc. Case No.236 of 2020 with a prayer to set aside the ex-parte order of maintenance which is awaiting disposal. In the meantime, the opposite party filed Criminal Misc. Case No.153 of 2019 and also Criminal Misc. Case No.17 of 2020 for realization of the arrear maintenance dues. As per the petitioner, Criminal Misc. Case No.153 of 2019 was dropped after a payment of Rs.2,10,000/- was made by him. In so far as Criminal Misc. Case No.78 of 2020 is concerned, it was for recovery of arrear monthly maintenance to the tune of Rs.1,80,000/- and again another was levied vide Criminal Misc. Case No.349 of 2020 for an amount of Rs.2,00,000/- and in response to the notice received, the petitioner prayed for stay of the execution since the proceeding under Section 126(2) Cr.P.C. to be pending awaiting disposal. However, the learned S.D.J.M., Talcher by order dated 18th September, 2021 rejected the request for stay which was challenged before the learned Additional District Judge, Talcher in Criminal Revision No.19 of 2021 but the same was also dismissed by order dated 20th July, 2022 (Annexure-4) which is currently under challenge.

3. Heard Ms. Das and Mr. Naik, learned counsel for the petitioner and Mr. Behera, learned counsel for the opposite party.

4. Learned counsel for the petitioner submitted that the application under Section 126(2) Cr.P.C. is pending disposal since

July, 2020 as against the order of maintenance which was allowed ex-parte in favour of the opposite party and the learned courts below fell into serious error by not staying the execution which was pleaded for. It is submitted that the impugned order under Annexure-4 confirmed the order of the court of the first instance but it suffers from legal infirmity as the order of maintenance was decided and disposed of without the participation of the petitioner which needs a recall for a fresh adjudication. While contending so, a decision of this Court in the case of **Bijaya @ Vijaya Shankar Singhdeo Vrs. Smt. Pournamasi Jema** reported in **2018 (II) OLR 659** has been relied upon. Two more decisions in **Vinita Mishra Vrs. Subhang Mishra** of the Chhattisgarh High Court in CRR Nos.523 of 2016 dated 17th June, 2016 and **G. Ramesh Vrs. Modukuri Nagamani @ Modkuri Getha Nagmani & Another** of the Telangana High Court decided on 30th August, 2017 in Criminal Revision Case No.1487 of 2017 have also been referred to contend that not only the maintenance amount is exorbitant and on the higher side besides the cost imposed but also the ex-parte order of maintenance is liable to be set aside hence the execution is required to be put on hold.

5. On the other hand, Mr. Behera, learned counsel for the opposite party submitted that the learned courts below rightly declined to interfere with the execution proceeding since arrear dues to be payable by and mounted against the petitioner and that apart, the maintenance has already been confirmed in Criminal Revision No.10 of 2019 by order dated 18th March, 2020 of the learned Additional Sessions Judge, Talcher. In view of the above, according to Mr. Behera, learned counsel for the opposite party, the revisional court rightly stayed its hand from the execution proceeding and dismissed Criminal Revision No.09 of

2021 by the impugned order under Annexure-1 and therefore, it need not be disturbed and interfered with.

6. Admittedly an application under Section 125 Cr.P.C. was filed by the opposite party demanding monthly maintenance of Rs.30,000/- with litigation cost of Rs.25,000/- on the ground that the petitioner despite having sufficient means refused to maintain her when she was unable to maintain herself. The learned S.D.J.M., Talcher while disposing of Criminal Misc. Case No.149 of 2018 ex-parte, ordered the petitioner to pay Rs.20,000/- as monthly maintenance along with litigation cost of Rs.10,000/- and also to pay the arrear maintenance in three equal installments as the application was allowed with effect from 29th June, 2018. In the meantime, as earlier mentioned, the execution proceedings were initiated in Criminal Misc. Case Nos.153 of 2019, 78 of 2020 and 349 of 2020 and in the month of January, 2021, an application under Section 126(2) Cr.P.C. was filed by the petitioner. It is contended by learned counsel for the petitioner that the notice against the petitioner was not sufficient which is revealed from the order dated 13th February, 2019 of learned S.D.J.M., Talcher since it returned unserved with a postal endorsement 'long absent of addressee'. In any case, as per the petitioner, later to the filing of the execution in Criminal Misc. Case No.153 of 2019, he was arrested and the said proceeding was dropped on payment of an amount of Rs.2,10,000/- on 2nd January, 2020. Long thereafter, as it is made to appear, the petitioner approached the court of first instance by filing the application under Section 126(2) Cr.P.C. and during the interregnum, two more execution proceedings in Criminal Misc. Case Nos.78 and 249 of 2020 were filled for recovery of arrear maintenance. The present challenge relates to the impugned order under Annexure-4 whereby the revisional court declined to stay CRLMC No.2138 of 2022

the execution proceeding in Criminal Misc. Case No.78 of 2020 which is related to recovery of dues for an amount of Rs.1,80,000/-notwithstanding pending disposal of the application under Section 126(2) Cr.P.C.

7. The order of maintenance under Annexure-1 was challenged in CRLMC No. 1006 of 2019 which was disposed of granting liberty to the petitioner to file an application under Section 126(2) Cr.P.C. or to challenge the order of maintenance by way of a revision. As it is made to understand, pursuant to the above order dated 16th May, 2019 of this Court, the petitioner filed a Criminal Revision No.10 of 2019 which was disposed of on 18th March, 2020 upholding the order of maintenance of Rs.20,000/- and also the litigation expenses of Rs.10,000/- payable to opposite party. After the dismissal of the revision by the learned Sessions court, the petitioner filed the application under Section 126(2) Cr.P.C. for recall of the order of maintenance which has already been upheld in Criminal Revision No.10 of 2019. The said application in Criminal Misc. Case No.236 of 2020 for recall of the ex-parte order of maintenance is still subjudice for decision before the court of learned S.D.J.M., Talcher. The order of the Sessions court in Criminal Revision No.10 of 2019 was not challenged by the petitioner, who instead approached the learned S.D.J.M., Talcher under Section 126(2) Cr.P.C. In the considered view of the Court, the petitioner was required to avail one of the remedies allowed by order dated 16th May, 2019 in CRLMC No.1006 of 2019 but he instead challenged the order of maintenance in Criminal Revision No.10 of 2019 and after being unsuccessful, approached the court of first instance by filing the application under Section 126(2) Cr.P.C. According to the Court, the order of maintenance cannot be recalled by the leaned S.D.J.M., Talcher after the same having been confirmed in CRLMC No.2138 of 2022

Criminal Revision No.10 of 2019. The petitioner ought to have moved the learned S.D.J.M., Talcher for recall of the ex-parte order and in case of its rejection, should have challenged the same in revision but followed a course of action availing both the remedies leading to a situation where the maintenance order stood confirmed by the revisional court.

8. The Court finds that though the petitioner assailed the order of maintenance in Criminal Revision No.10 of 2019 but the order therein dated 18th March, 2020 was not challenged by him rather the learned Additional Sessions Judge, Talcher proceeded to confirm the maintenance on the premise that no rebuttal evidence was on record. When the petitioner had been set ex-parte, he had no occasion to participate in Criminal Misc. Case No.149 of 2018 and under the above circumstances, it was quite unusual for the learned Sessions court to expect rebuttal evidence to be on record from his side against the claim of maintenance. But the irony is, the petitioner did not challenge the said order in Criminal Revision No.10 of 2019.

9. There is no denial to the fact that the petitioner is liable to pay maintenance to the opposite party as at no point of time the latter's marital status was questioned or disputed. The challenge is only to the execution proceeding and also against the ex-parte order of maintenance on the ground that the same is not sustainable since the service of notice on him was not sufficient. It is admitted by the petitioner that in one of the exaction proceedings of 2019, he was arrested and had to pay an amount of Rs.2,10,000/- on 2nd January, 2020, later to which, it was dropped. The learned S.D.J.M., Talcher, in the facts and circumstances of the case, could not said to have been at fault by not staying the execution proceeding despite application under

Section 126(2) Cr.P.C. filed by the petitioner for the reason that the order of maintenance dated 2nd March, 2019 was already confirmed in Criminal Revision No.10 of 2019. The only course of action which was left for the petitioner was to challenge the order dated 18th March, 2020 passed in Criminal Revision No.10 of 2019. As a necessary corollary, the impugned order dated 20th July, 2022 passed in Criminal Revision No.09 of 2021 by the learned Additional Sessions Judge, Talcher has to be upheld leaving the petitioner to avail appropriate remedy as per law.

10. Accordingly, it is ordered.

11. In the result, the CRLMC stands dismissed.

(R.K. Pattanaik)
Judge

U.K. Sahoo