

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 258 of 2020

Sri Bapi Das

Vs

State of West Bengal & Anr.

For the Petitioner : Mr. Souri Ghosal.

For the State : None.

For the Opposite Party : Mr. Koustav Bagchi,
Mr. D. Ghosh,
Ms. P. Kar.

Heard on : 13.03.2023

Judgment on : 25.04.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated 15/11/2018 passed in Miscellaneous Case No. 1116 of 2017 pending before the Learned Judicial Magistrate, 3rd Court, Barrackpore, North 24 Parganas granting interim maintenance.
2. The petitioner's case is that the marriage between the petitioner and the Opposite Party No. 2 was solemnised as per Hindu rites and customs on 01.07.2014.
3. The present petitioner is employed with the Indian Army and was posted at Hissar Cantonment, Haryana at the time of his marriage.
4. After marriage, and after a brief stay at Saptapally, Deshbandhu Road, Habra, North 24 Parganas, the petitioner along with the Opposite Party No. 2, shifted to the Service Quarter of the petitioner at Hissar Cantonment, Haryana, where they started living as husband and wife.
5. On 25.03.2015 the petitioner took his wife, the Opposite Party No. 2, to her parent's house, where the Opposite Party No. 2 and her parents requested the petitioner to leave his wife for few days and accordingly the petitioner, on good faith, left his wife at her parental house.
6. On 28.03.2015, the petitioner personally went to the parental house of the Opposite Party No. 2 to bring her back, as he had to join his duties at Hissar, Haryana on 10.04.2015 but she refused to go back.

7. Several attempts were made by the petitioner and by his parents to bring the Opposite Party No. 2 back to the present petitioner but all such attempts went in vain.
8. On 27.05.2015, the petitioner filed an application under Section 9 of the Hindu Marriage Act for restitution of conjugal rights, which was registered as Matrimonial Suit no. 106 of 2015. The said Matrimonial Suit No. 106 of 2015 was decreed *Ex Parte* in favour of the petitioner by the Learned Additional District Judge, Fast Track, 5th Court at Barasat on 27.05.2016.
9. That after getting such Decree the petitioner made repeated attempts to bring the Opposite Party No. 2 back with him but as earlier all such attempts have failed to yield any positive results.
10. The Opposite Party No. 2 has filed two applications, one under Section 125 of Code of Criminal Procedure, being Miscellaneous Case No. 105 of 2015 and another under Section 12 of Protection of Women from Domestic Violence Act. But both the cases were dismissed for default.
11. The Opposite Party has also filed a complaint before the Learned Additional Chief Judicial Magistrate at Barrackpore, which was later registered as Noapara Police Station Case No. 183 of 2015 corresponding to G.R. Case No. 3549 of 2015 (under Sections 498A/406 etc. of Indian Penal Code) and the same is pending.
12. The Opposite Party No. 2 has also filed a complaint under Sections 307/406/420/440/506 of the Indian Penal Code, which has been

registered as Noapara Police Station Case No. 233 of 2015 and the same too is pending.

13. Since all such attempts to bring the Opposite Party back to the petitioner have failed for a period of 2 years approximately, the present petitioner has filed Matrimonial Suit No. 196 of 2017 for a Decree of Divorce on the grounds of desertion.
14. In the said Matrimonial Suit bearing No. 196 of 2017, the Opposite Party appeared and filed an application under Section 24 of the Hindu Marriage Act and while allowing the said application bearing Miscellaneous (Matrimonial) Case No. 1725 of 2017, Learned Additional District Judge, 5th Court at Barasat was pleased to direct the present petitioner to pay a sum of Rs. 8,000/- per month for the Opposite Party No. 2 and Rs. 3,000/- per month for their minor son.
15. The Opposite party, inspite of refusing the said Money Order has illegally and with Mala fide intention filed another application under Section 125 of the Code of Criminal Procedure for maintenance, for herself as well as for the minor son, which has been registered as Miscellaneous Case No. 1116 of 2017 and the same is pending before Judicial Magistrate, 2nd Court at Barrackpore.
16. The Learned Judicial Magistrate, 2nd Court at Barrackpore took up the application challenging the maintainability as well as the application for Interim maintenance together and by an Order dated 15.11.2018 was pleased to reject the maintainability application of the present petitioner

and allowed the application for interim maintenance of the Opposite Party No. 2 and while allowing the said application directed the present petitioner to pay a sum of Rs. 8,000/- per month to the Opposite Party No.2 and Rs. 3,000/- per month to the minor son.

17. In the Matrimonial Suit No. 196 of 2017, several attempts were made to reconcile the dispute of the parties herein and accordingly the present petitioner wanted to take the Opposite Party No. 2 to the place of his posting, i.e. Bhopal.
18. The Opposite Party again refused to go with the present petitioner.
19. **Mr. Souri Ghosal, learned counsel for the petitioner** has submitted that the Opposite Party No. 2 is deliberately harassing the present petitioner by taking advantage of the present legal system.
20. Since the Opposite Party has willfully deserted her husband, she is not eligible to get any interim maintenance as per the provisions of Section 125 (4) of the Code of Criminal Procedure).
21. That unless Miscellaneous Case No. 1116 of 2017 pending before Learned Judicial Magistrate, 2nd Court at Barrackpore, North 24 Parganas is quashed, the petitioner shall suffer irreparable loss and injury.
22. Opposite Party No. 2 has filed the Miscellaneous Case No. 1116 of 2017 pending before Learned Judicial Magistrate, 2nd Court at Barrackpore, North 24 Parganas by suppressing the material facts.

23. The Learned Magistrate has failed to appreciate the provisions of Section 125 (4) of the Code of Criminal Procedure in its proper perspective.
24. The Learned Magistrate failed to appreciate that Miscellaneous Case No. 1116 of 2017 pending before Learned Judicial Magistrate, 2nd Court at Barrackpore is sheer abuse of the process of Law.
25. The Learned Magistrate has passed the Order impugned in a rather mechanical manner.
26. **Mr. Koustav Bagchi, Learned Counsel for the Opposite Party** has submitted that the order under revision is in accordance with law and as such the revision is liable to be dismissed.
27. Heard both sides, perused the material on record. Considered. The following facts are before this Court:-
 - 1) That in spite of a decree of restitution of conjugal rights, the Opposite Party/Wife has refused to live with the petitioner/Husband.
 - 2) The Opposite Party/Wife has filed a case under Section 125 Cr.P.C. and also under Section 12 of the Domestic Violence Act.
 - 3) A case under Section 498A/406 IPC, by the wife/opposite party.
 - 4) Another case under Sections 307/406/420/440/506 IPC, by the wife/opposite party.
 - 5) Matrimonial Suit for divorce on grounds of desertion, by husband/petitioner.

- 6) In an application under Section 24 of the Hindu Marriage Act (Misc 1725/17 in MAT Suit No. 196 of 2017) by the wife, the Learned Additional District Judge vide an order dated 19.06.2018 granted maintenance amounting to Rs. 8000 to the wife and Rs 3000 to the minor son per month.
- 7) **Vide an order dated 15.11.2018 in Misc Case 1116 of 2017 (under revision) the Learned Magistrate also granted a sum of Rs 8000/- and Rs. 3000/-per month as maintenance in the proceedings under Section 125 Cr.P.C. without taking into consideration the fact that the wife and son had already been granted similar amount of maintenance in the matrimonial suit in an order under Section 24 of the Hindu Marriage Act, though the said order was brought to the notice of the court.**

28. The Magistrate vide **order dated 15.11.2018** held :-

*“.....The Ld. Advocate for the opposite party, at the time of hearing, submitted that the petitioner has her own source of income and **that apart she is receiving money regularly from the opposite party as per the direction of the Ld. Court u/s 24 of the Hindu Marriage Act.** As such he emphasized on rejection of the petition under consideration.*

At this stage this Court intends to note that there is no evidence at the disposal of the Court to ascertain any fact finally. What has to be done at this stage is to take tentative decision based on counter affidavits of the parties. Now coming back to the case in hand, the petitioner in her petition under consideration has claimed that she has no source of income.....”

Sd/-
Judicial Magistrate
3rd Court, Barrackpore, North 24 Parganas

29. The said decision of the Magistrate is clearly against the guidelines laid down by the Supreme Court in **Rajnesh Vs. Neha and Anr., Criminal Appeal No. 730 of 2020, on 04.11.2020**, wherein the Court held:-

“Directions on overlapping jurisdictions

It is well settled that a wife can make a claim for maintenance under different statutes. For instance, there is no bar to seek maintenance both under the D.V. Act and Section 125 of the Cr.P.C., or under H.M.A. It would, however, be inequitable to direct the husband to pay maintenance under each of the proceedings, independent of the relief granted in a previous proceeding. If maintenance is awarded to the wife in a previously instituted proceeding, she is under a legal obligation to disclose the same in a subsequent proceeding for maintenance, which may be filed under another enactment. While deciding the quantum of maintenance in the subsequent proceeding, the civil court/family court shall take into account the maintenance awarded in any previously instituted proceeding, and determine the maintenance payable to the claimant.

*To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, we direct that in a subsequent maintenance proceeding, the applicant shall disclose the previous maintenance proceeding, and the orders passed therein, so that **the Court would take into consideration the maintenance already awarded in the previous proceeding, and grant an adjustment or set-off of the said amount.** If the order passed in the previous proceeding requires any modification or variation, the party would be required to move the concerned court in the previous proceeding.”*

30. In the present case, the order under revision granting interim maintenance, dated 15.11.2018 in Miscellaneous Case No. 1116 of 2017 pending before the learned Judicial Magistrate, 3rd Court, Barrackpore, North 24 Parganas thus being not in accordance with law is liable to be set aside.
31. **CRR 258 of 2020 is allowed.**
32. The order of interim maintenance dated 15/11/2018 passed in Miscellaneous Case No. 1116 of 2017 pending before Learned Judicial Magistrate, 3rd Court, Barrackpore, North 24 Parganas is thus set aside.
33. The Learned Magistrate will proceed to dispose of the case finally following the guidelines of the Supreme Court in ***Rajnish Vs Neha (Supra)*** and permit the parties to file their respective affidavits of assets and liabilities and make all endeavour to dispose of the case expeditiously. The learned Magistrate will also consider as to whether the opposite party/wife has willfully deserted the petitioner without just and sufficient reason, while deciding the case finally.
34. There will be no order as to costs.
35. All connected Applications stand disposed of.
36. Interim order if any stands vacated.
37. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

38. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)