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**(2009) 12 CAL CK 0005**

**Calcutta High Court**

**Case No:** C.R.R. No. 3667 of 2009

Smt. Sumita Ganguly

APPELLANT

Vs

Sri Debasish Ganguly

RESPONDENT

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**Date of Decision:** Dec. 2, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Hindu Marriage Act, 1955 - Section 24, 9

**Citation:** (2011) 6 RCR(Criminal) 634

**Hon'ble Judges:** Ashim Kumar Roy, J

**Bench:** Single Bench

**Advocate:** Amitava Ghosh, for the Appellant;

**Final Decision:** Dismissed

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**Judgement**

Ashim Kumar Roy, J.

In connection with a proceeding u/s 125 of the Code of Criminal Procedure, the husband/opposite party was directed to pay a sum of Rs. 1,000/- per month to each of the petitioner/wife and to her minor child as their monthly interim maintenance.

2. Simultaneously, in connection with a Matrimonial Suit instituted by the husband/opposite party u/s 9 of the Hindu Marriage Act for restitution of conjugal rights, the Civil Court invoking section 24 of the Hindu Marriage Act directed the husband/opposite party pay a sum of Rs. 4,000/- per month to the wife/petitioner as her maintenance pendente lite and a sum of Rs. 2,000/- per month to her minor child as the cost of maintenance. Since the husband/ opposite party had been in default in payment of maintenance pendente lite to the wife/opposite party as well as the cost of maintenance to her minor child for some months, accordingly the Civil Court took steps for enforcement of the said order, when the husband, i.e., the opposite party herein moved a civil revision before this Hon"ble Court.

3. It may be noted in the meantime the husband/petitioner withdrew the said suit for restitution of conjugal rights.

4. In the said civil revision it was vehemently urged by the husband/petitioner that the order of payment of arrear maintenance pendente lite and the cost of maintenance cannot be enforced since the original Matrimonial Suit in connection with which such order was passed is no more subsisting as the same was withdrawn.

5. This Hon'ble High Court by its order dated December 11, 2008 disposed of the said civil revision observing that since by virtue of the order passed by the Civil Court in connection with the Matrimonial Suit, the husband/opposite party was directed payment of maintenance @ Rs. 4,000/- and Rs. 2,000/- per month respectively for the wife and the child, thus the husband need not pay any additional amount in terms of the order passed by the Criminal Court in connection with the proceeding u/s 125 of the Code of Criminal Procedure. In the said order this Court further directed the husband/opposite party to pay the entire arrear amount within one month from that day.

6. It is an admitted position that the husband/opposite party in terms of the aforesaid order of this Hon'ble High Court has already paid the entire arrear amount accumulated due to the non-payment of maintenance pendente lite to the wife/petitioner and the cost of maintenance to her minor child.

7. After making payment of arrear amount as aforesaid, on March 30, 2009, the husband/petitioner moved an application before the Learned Court below where proceeding u/s 125 of the Code of Criminal Procedure was pending for appropriate order seeking exemption from payment of interim maintenance in terms of Criminal Court's order, since pursuant to the order of this Court passed in the aforesaid civil revision, he had already paid the entire arrear amount and no additional amount of maintenance in terms of Criminal Court's order is needed to be paid. The Learned Additional Chief Judicial Magistrate, Serampore, Hooghly allowed the said application and the order of interim maintenance was recalled, hence this criminal revision.

8. Mr. Amitava Ghosh, the learned advocate appearing on behalf of the petitioner is present in Court. In spite of repeated calls none appears on behalf of the husband/opposite party. Affidavit of service showing that the envelop containing the notice and the copy of this application sent to him, has been returned unserved with the postal endorsement "Refused" filed in Court be kept with the records.

9. Heard Mr. Ghosh. Perused the impugned order as well as the other materials on record.

10. This is an admitted position that in terms of the order passed by this Court in a civil revision the petitioner has already paid all the arrear dues arising out of non-payment of maintenance pendente lite to the wife/petitioner as well as the cost of maintenance to her child. It is also an admitted position the Matrimonial Suit in connection with which the

opposite party/husband was directed to pay maintenance pendente lite to the wife/opposite party and cost of maintenance to her child is no more subsisting as the Matrimonial Suit has been withdrawn by him. There is no dispute that this Court in civil revision took judicial notice that the Matrimonial Suit has been withdrawn and held that the husband/opposite party need not have to pay an additional maintenance in terms of the order of the Criminal Court.

11. Now, having regards to the facts that High Court in a civil revision observed that the husband is not required to pay any additional amount of maintenance in terms of criminal Court's order as in connection with a Matrimonial Suit, a Civil Court directed him to pay higher amount of maintenance, the only question thus arises for decision in this criminal revision, is this, even after such Matrimonial Suit being withdrawn by the husband and when he is not paying any maintenance in terms of the civil Court's order, whether his liability to pay interim maintenance to his wife and the child in terms of the criminal Court's order passed in connection with a proceeding u/s 125 of the Code stands obliterated or not.

12. Indisputably, a maintenance proceeding u/s 24 of the Hindu Marriage Act arising out of a Matrimonial Suit and a maintenance proceeding u/s 125 of the Code are completely distinct and different and they are worked for different purposes before the respective Court of competent jurisdiction. Both the proceedings are based on independent cause of action. One does not overlap the other. Where in a case of marriage between the parties has been solemnized according to the Hindu Marriage Act in appropriate case in terms of section 24 of the Hindu Marriage Act either of the spouse is entitled to maintenance pendente lite from the other. In other words, according to Hindu Marriage Act, the husband as well as the wife both are entitled to maintenance pendente lite from the other. Whereas, the right to maintenance according to section 125 of the Code of Criminal Procedure is restricted to a wife, including a divorced wife still her remarriage, if not such right has been curtailed by operation of the special Act as well as to the minor children both the legitimate and illegitimate and the parents. In appropriate cases according to the said provisions the wife including divorced wife is entitled to maintenance from her husband, both legitimate and illegitimate child from their father and the parents both from their son and daughter. No husband is entitled to any maintenance u/s 125 of the Code from his wife as is entitled under the Hindu Marriage Act. The order granting maintenance pendente lite to the wife u/s 24 of the Hindu Marriage Act in connection with a Matrimonial Suit u/s 9 of the Hindu Marriage Act is not a final determination as to the entitlement of the maintenance of the wife and has no overriding effect against an order of interim maintenance passed in a proceeding u/s 125 of the Code of Criminal Procedure. The mere fact the wife is receiving maintenance pendente lite by virtue of an order of Civil Court that does not debar her to maintain a proceeding u/s 125 of the Code of Criminal Procedure before the appropriate Criminal Court. The Magistrate is also not precluded from passing an order of maintenance in a proceeding u/s 125 of the Code of Criminal Procedure, despite there being an order of maintenance pendente lite passed in a

Matrimonial Suit. As such where maintenance pendente lite has been granted u/s 24 of the Hindu Marriage Act that does not warrant cancellation of an order of interim maintenance passed u/s 125 of the Code of Criminal Procedure. In such case of course the amount of maintenance passed in the two cases to be adjusted against each other and the husband is only obliged to pay the higher amount of maintenance and not on both count.

13. In the case at hand, the conduct of the husband/opposite party is absolutely mala fide. It is also apparent that there has been a clear attempt on his part to frustrate the due process of law. When a Criminal Court awarded an interim maintenance @ Rs. 1,000/- per month for each of the wife and the minor child in connection with a proceeding u/s 125 of the Code of Criminal Procedure, where the case of the wife was that she was driven out from her matrimonial home by the husband, the husband filed a matrimonial suit u/s 9 of the Hindu Marriage Act for restitution of conjugal rights. However, at the very moment when the Civil Court in connection with the said matrimonial proceeding passed an order u/s 24 of the Hindu Marriage Act awarding maintenance pendente lite @ Rs. 4,000/-½ per month to the wife and cost of maintenance to the minor children @ Rs. 2,000/- per month which is much higher than that of the quantum of maintenance awarded in connection with the proceeding u/s 125 of the Code of Criminal Procedure, the husband immediately withdrew the said matrimonial suit obviously for the purpose to avoid payment of more amount. The husband/opposite party has not stopped there and taking advantage of the aforesaid order of this Court passed in connection with a civil revision, where this Court taking judicial notice of the fact that the matrimonial suit is no more subsisting observed that there is no need to payment of additional amount of maintenance in terms of the order passed by the Criminal Court, the husband/opposite party to avoid his moral obligations which he owes to society in respect of his wife and children show they are not left beggared and destitute on the scrap heap of society and thereby driven to a life of vagrancy and immorality and crime for their subsistence and moved an application before the Criminal Court seeking exemptions from payment of the interim maintenance. When the said application was filed it was an admitted position that husband was not paying any maintenance pendente lite to the wife or cost of maintenance to his child as the matrimonial suit in connection with which such order was passed was no more subsisting and the order was not in force, still he moved the application for recalling the order of interim maintenance on the strength of the observation of this Court that no additional amount in terms of criminal Court's order is needed to be paid. The learned Court below has completely failed to appreciate the matter in its true perspective and the order impugned is absolutely not in accordance with law.

14. Therefore, the order impugned stands set aside and the order earlier passed by the learned Magistrate where the husband/opposite party was directed to pay maintenance @ Rs. 1,000/- per month each to the wife/opposite party and to her minor daughter stands revived and restored.

15. The husband/opposite party is directed to pay the interim maintenance for the wife/petitioner and her minor daughter @ Rs. 1,000/- per month for each of them within seven days from the date of communication of this order. He is further directed to liquidate the entire arrear amount arising out of non-payment of interim maintenance to the petitioner/wife and to her minor daughter from the date of his withdrawal of the Mat. Suit No.93 of 2007 pending before the learned Additional District Judge, Fast Track, 6th Court, Barrackpore. It is further directed that such arrear amount must be liquidated in two monthly equal instalments and be paid along with the current maintenance. In the event the husband/opposite party fails to pay the arrear maintenance as well as the current maintenance in the manner as aforesaid the petitioner/wife shall have the liberty to approach the learned Court below for enforcement of the order of maintenance. It is directed if any such application is filed by the wife/petitioner the learned Magistrate shall take steps at once in accordance with law for recovery of the maintenance.

16. The Office is directed to communicate this order at once to the learned Court below as well as to the husband/opposite party herein through the local Police Station within three days from this date.

Criminal section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.