

(1979) 02 CAL CK 0020

Calcutta High Court

Case No: Criminal Revision Case No. 1488 of 1978

Sirajul Mondal

APPELLANT

Vs

Samejanechha Bibi
and Others

RESPONDENT

Date of Decision: Feb. 20, 1979

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 125, 127, 127(3)(b), 399(2), 399(3)

Citation: 83 CWN 351

Hon'ble Judges: Jyotirmoyee Nag, J

Bench: Single Bench

Advocate: Mrinmoy Bagchi, for the Appellant; Alok Kumar Biswas and Smt. Sukiran Biswas,
for the Respondent

Judgement

Jyotirmoyee Nag, J.

This Rule is directed against the judgment passed by the learned Sessions Judge, Murshidabad, in Criminal Motion No. 43 of 1978 allowing the application of the opposite party wife after setting aside the judgment and order passed by the learned Magistrate who, however, had refused maintenance to the wife on the ground that she is a divorcee and she had been paid her Den Mohur and so she is not entitled to any maintenance. The learned Judge found that the wife is entitled to maintenance although she was a divorcee and he sent back the case to the learned Magistrate to assess the quantum of maintenance on the basis of the evidence on record. The husband petitioner has come up in revision against the judgment of the learned Sessions Judge. Mr. Mrinmoy Bagchi appearing for the petitioner has contended that the learned Judge erred in finding that the wife was entitled to maintenance and went wrong particularly in assessing the evidence as though he was dealing with an appeal and, therefore, the judgment is liable to be set aside. The whole case of the husband depended upon Ext. A alleged to be a "Nadabinama" wherein it was stipulated not between the parties but between the father of the wife

opposite party and the petitioner that her Den Mohur had been satisfied by payment of Rs. 779/-and all that the husband had got during the marriage, such as, ring and other presents given to him, were returned on condition that the wife would not claim any further maintenance from the husband. The learned Judge upon a consideration of the evidence found that Ext. A the said "Nadabinama" was not executed by the opposite party wife and in fact he found that it was a fictitious document as there was much suspicion about it on a consideration of the oral evidence adduced by both the parties.

2. On behalf of the opposite party it is submitted by Mr. Biswas that this revisional application is not maintainable in view of section 399 (2) of the Code of Criminal Procedure. His contention is that no second revision lies. I am afraid, I am unable to agree with this contention of the learned Advocate for the opposite party inasmuch as it is quite clear from section 399 (3) Cr. P. C. that no second revision lies at the instance of the same party who moved the Sessions Judge in revision and I am supported by a finding of a Division Bench decision of the Orissa High Court reported in [Ramachandra Puja Panda Samant Vs. Jambeswar Patra and Another](#), . Mr. Bagchi has contended that in view of sub-section (3) (b) of section 127 of the Criminal Procedure Code the wife is not entitled to any maintenance as her Den Mohur had been paid after the divorce given by her husband, relying upon the evidence of the witnesses for the petitioner and the "Nadabinama" Ext. A. As I have already stated before, this Ext. A has been characterised as a spurious document by the learned Judge and I have no reason to differ from this finding. Mr. Biswas appearing for the opposite party wife has, however, contended that even if the Den Mohur has been paid the learned Magistrate has to award maintenance to the wife even if she is a divorcee, he may, however, take into consideration the amount of Den Mohur paid by the husband according to the customary law to the wife at the time of the divorce but that would go for reduction of the amount to be paid as maintenance and in an appropriate case also for cancellation of the maintenance order provided the amount paid by way of Den Mohur is sufficient to maintain the wife so long as she remains unmarried. That is a matter that is to be considered by the learned Magistrate when he awards the maintenance to the wife. In this connection the learned Advocate for the opposite party has relied upon a Supreme Court decision reported in [Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another](#), In that case His Lordship Iyer, J. was pleased to hold that every divorcee otherwise eligible is entitled to the benefit of maintenance allowance and the dissolution of the marriage is no difference to this right under the current Code. In the normal course an order for maintenance must follow the quantum having been determined by the learned Magistrate at the trial level. But the only factor that has to be taken into consideration is whether the husband has neglected to pay to the wife maintenance after the divorce and if the Magistrate finds that the husband has neglected to maintain the divorcee even he has means to do so then the Magistrate cannot ignore the right of the wife to get the maintenance. Even mutual consent to live

separately would be no bar to getting such maintenance inasmuch as the fact that the husband has divorced the wife presupposed separate residence of the parties. Lastly, it has been held that section 127 Cr. P. C. cannot rescue the respondent from his obligation. Payment of mehar money as a customary discharge is within the cognizance of that provision. The Court has to take into consideration the amount of mehar money that is paid to the wife. Is it sufficient to maintain her according to her standard? As the scheme of the provisions in Chapter IX has a social purpose, ill used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets and hence section 127 has to be considered in the light of the social objective to be achieved. The payment of illusory amounts by way of Customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute. The purpose of the payment "under any customary or personal law" must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole scheme of section 127 (3) (b) is manifestly to recognise the substitute maintenance arrangement by lump sum payment organised by the custom of the community or the personal law of the parties. There must be a rational relation between the sum so paid and its potential as provision for maintenance to interpret otherwise is to stultify the project. Law is dynamic and its meaning cannot be pedantic but purposeful. The proposition, therefore, is that no husband can claim u/s 127 (3) (b) absolution from his obligation u/s 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance. Accordingly, I uphold the findings of the learned Sessions Judge and I direct that the learned Magistrate when fixing the quantum of maintenance will take into consideration the above observations of the Supreme Court and act according to law. The Rule is accordingly discharged.