
Asit Baran Mukherjee Vs Fuleswari Mukherjee

C.R.R. No. 447 of 2002

Court: Calcutta High Court

Date of Decision: Sept. 5, 2002

Acts Referred:

Constitution of India, 1950 – Article 227#Criminal Procedure Code, 1973 (CrPC) – Section 125, 397(2)

Citation: (2002) 4 CHN 746 : (2003) 2 RCR(Criminal) 656

Hon'ble Judges: Malay Kumar Basu, J

Bench: Single Bench

Advocate: Subhrajit Basu, for the Appellant;Laxminath Bhattacharjee, for the Respondent

Final Decision: Dismissed

Judgement

Malay Kumar Basu, J.

This revisional application is directed against the order dated 27th November, 2001 passed by the learned

Additional Sessions Judge, 2nd Court, Alipore in Criminal Motion No. 267 of 2001 of his court. By this order the learned Additional Sessions

Judge affirmed the order under revision passed by the learned Judicial Magistrate, 2nd Court, Diamond Harbour in Misc. Case No. 225 of 1992

u/s 125 of Cr. P. C. The wife, Smt. Fuleswari Mukherjee filed that application u/s 125 of Cr. P. C. claiming maintenance from the husband on the

ground that the latter neglected to maintain her and she having no independent source of income was passing her days with great hardship along

with a child at the house of her father.

2. During trial of the case the petitioner-wife examined herself and her witnesses but the opposite party-husband did not adduce any evidence,

although at the time of the argument he was present and advanced his argument. After considering the materials on record and hearing the

arguments of both sides, the learned Magistrate allowed the petition of the wife and awarded, a sum of Rs. 1000/- in all (Rs. 500/- for the wife

herself and Rs. 500/- for the child) payable by the husband every month by way of maintenance.

3. Being aggrieved by that order the husband, Sri Asit Baran Mukherjee, preferred a revisional application before the Court of Sessions and the

learned Additional Sessions Judge, 2nd Court, Alipore passed the said impugned order upholding the order under challenge of the learned

Magistrate and also affirming the amount of maintenance which he awarded.

4. Being again aggrieved thereby, the husband has preferred the present application before this court under Article 227 of the Constitution of India

challenging the said order as erroneous, improper and unjust.

5. At the very outset, the learned advocate appearing on behalf of the opposite party-wife before me has challenged the legal maintainability of this

revisional application on the ground that the finding of fact by both the courts below being concurrent, there cannot be any scope for the petitioner

to prefer any such second revisional application challenging the said concurrent findings of fact. This contention of Mr. Bhattacharjee can hardly be

furnished aside. u/s 397(2) of Cr. P. C. a second revision is not permissible particularly when both the courts below have pronounced the same

findings of fact and the aggrieved petitioner has come to this court for the second time. A petition under Article 227 of the Constitution of India has

a limited compass. Article 227 of the Constitution should not be taken as a universal panacea to be applied in cases where the revisional

application u/s 397 Cr. P. C. is not tenable under the law. The conditions for applying this particular provision of the Constitution touching the

power of general superintendence of this court over the performance of the inferior courts are settled by the Apex Court in a large variety of cases

and the principles which have been enunciated are that the provisions of this Article can be attracted where there are errors apparent on the face of

the record or where there are violation of principles of natural justice or there are errors which are so gross and flagrant that intervention of the

court is called for or the impugned order suffers from perversity or the order is founded on a misreading of the evidence or on the basis of no

material at all. In these limited number of situations the provisions of Article 227 of the Constitution of India can be attracted and it cannot be used

as a substitute for Section 397 or Section 482 of the Criminal Procedure Code.

6. In the present case, as it will be clear enough, there is no such error apparent, on the face of the record or perversity in the matter of drawing of

the conclusions by the court below or it is also not the case that the findings of the courts below were due to misreading of the evidence on record

or they are founded on no material at all. That being the position, it will not be permissible for this court to scan the evidence just like an ordinary

appellate or criminal court and to ascertain whether the courts below were justified in drawing the conclusions from the evidence. Therefore, I find

sufficient substance in the contention advanced by the learned advocate for the opposite party that this application under Article 227 of the

Constitution of India is not legally maintainable at all, the provisions of that Article being not attracted to such a situation.

7. Be that as it may, even if it is assumed for a moment that the application is maintainable under the law, even then on a perusal of the evidence on

record, I am of the view that the learned courts below did not commit any error, either of fact or of law, in drawing their conclusions from the

evidence lying before them. The petitioner-wife was examined as P.W. 1 in the court of the learned Magistrate and in her evidence she has

deposed that the opposite party-husband drove her away in the month of Magh, 1397 B. S. when she was pregnant for eight months and she was

never taken back by her husband so that she had been compelled to live in the house of her father with the child that was born out of that wedlock.

It is conspicuous to note that in her cross-examination the opposite party husband has taken from her mouth that she did not like to go to the house

of the opposite party again even if he was willing to take her back, because she was afraid, he would kill her then. This statement of the wife has

not been subjected to any further cross-examine or challenge and has been allowed to remain uncontroverted. This means that this is admitted by

the opposite party. If that be so, then it is clear that the plea of the opposite party-husband that he did not neglect to maintain his wife but it was the

wife who left his house of her own accord and was solely responsible for such separate living and in that matter he had no hand is not

substantiated. On the other hand, from such statement remaining unchallenged it is proved that it was in fear of being tortured by the husband that

the wife was reluctant to go to her husband's house. It is a settled position that in such an exigency it will be taken that the husband was

responsible for the wife's living separately from him and this will be interpreted as neglect on the part of the husband in the matter of her

maintenance.

8. So far as the other ingredients of Section 125 of Cr. P. C. are concerned, the evidence appears to be quite satisfactory and the learned courts

below appear to be perfectly justified in coming to the finding that the wife had been able to establish her allegations to the entire satisfaction of

them.

9. It has been vehemently argued by Mr. Basu, the learned advocate appearing on behalf of the petitioners, that the courts below failed to refer or

adjudicate on the question of income of the husband. But on a careful perusal of the judgments of both the courts below, I am unable to accept this

contention. From the judgment of the learned Magistrate it is found that at pages 7 and 8 of the said judgment, the learned Magistrate has dealt

with this point elaborately and after assigning the reasons he has come to his finding that the wife was entitled to get such an amount by way of

maintenance. It has been observed by him that from the evidence it appeared that the opposite party had landed properties, a two storied building

and he used to earn Rs. 5000/- per month from the ""business of cycle garage"". He has further observed that in this regard, apart from the evidence

of P. Ws. 1 and 2, the evidence of P.W. 4 went a long way in showing the income of the husband as alleged by the wife. Thus, the Id. Magistrate

relied upon the evidence of P.W. 4 when he states in his cross-examination that he inspected the papers regarding the landed properties of the

husband and also the licence of the cycle garage standing in his name showing that he used to run a business of cycle garage and against this the

opposite party-husband did not adduce any evidence, either oral or documentary, to show otherwise. In my opinion, this discussion on the

question of income of the husband is well-founded on the evidence and with this I may add that the statement of the P.W. 1 that the opposite

party-husband has a business in cycle garage having not been disputed or challenged by the husband in her cross-examination afford formed her

consideration. Thus, regarding the question of income of the husband as alleged by the wife, I find sufficient evidence on record adduced by the

wife-petitioner whereas the husband-opposite party having the burden of proof to show how much he earns from such business in cycle-garage

does not discharge such onus by adducing either oral or documentary evidence. Once it is established that he has a business in cycle garage, it is

his onus to show how much he earns from such business, but his total silence in this regard leads the court to draw an inference in tune with the

allegation levelled by the wife that he earns about Rs. 5000/- per month from such business. This is in addition to the landed properties which the

husband appears to be in possession of as per the evidence on records. The learned Additional Sessions Judge also has opined in his judgment

that the analysis made by the learned Magistrate on the question of income of the husband appears to be quite acceptable to him and he placed

reliance on the decision arrived at by the learned Magistrate in this regard and he ultimately upheld his findings. Therefore, I do not find any dearth

of evidence on this point or any lapse on the part of the learned courts below to consider such evidence and dwell upon the same in order to come

to their finding.

10. Having regard to the foregoing discussions, I am inclined to hold that there is no merit in the contentions advanced on behalf of the husband-

petitioner and accordingly, the revisional application be dismissed and the impugned order be affirmed.

11. Let urgent xerox certified copy of this order, if applied for, be given to the learned advocates for both the parties within seven days from the

date of putting in the requisites.