

**(2000) 07 CAL CK 0046****Calcutta High Court****Case No:** C.R.R. No. 168 of 1997

Subrata Deb

APPELLANT

Vs

Rina Deb

RESPONDENT

**Date of Decision:** July 10, 2000**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 125

**Citation:** 104 CWN 1184**Hon'ble Judges:** Debiprasad Sengupta, J**Bench:** Single Bench**Final Decision:** Allowed

### **Judgement**

Debiprasad Sengupta, J.

This revisional application is directed against an order dated 29.6.96 passed by the Learned Judicial Magistrate, 1st Court, Siliguri, in M. R Case No. 66/95 u/s 125 of the Code of Criminal Procedure thereby directing the present petitioner to pay an amount of Rs. 1,500/- per month as maintenance to the present opposite party. It appears that the opposite party herein filed a petition u/s 125 of the Code of Criminal Procedure claiming maintenance for herself at the rate of Rs. 1.500/- per month and Rs. 3,000/- as expenses for the proceedings. The case of the present opposite party/wife in her application u/s 125 of the Code of Criminal Procedure is that she got married on 26.7.93 and about three months after marriage her husband and other in-laws started torture and ill-treatment, as a result of which she had to leave her matrimonial home. It was further alleged that the husband asked the wife to bring a sum of Rs. 1.5 lakh from her father and when she refused to comply of the said demand, her husband and other in-laws started torturing her. It was specifically alleged in the petition u/s 125 Criminal Procedure Code that on 6.6.95 her husband and his relations poured kerosene oil on her body with an intention of setting fire on her. She somehow managed to escape from the house early in the morning of 7.6.95 and thereafter she lodged a case u/s 498A of the

Indian Penal Code with Matigara police station. Since 7.6.95 the wife had been living with her parents and the husband neglected and refused to provide her any maintenance.

2. The present petitioner being the husband appeared and contested the said proceeding u/s 125 Criminal Procedure Code by filing a showcause and denying all the allegations and averments made in the petition u/s 125 Criminal Procedure Code and contended that the opposite party/wife left her matrimonial home of her own volition and she is living separately without any just and sufficient cause and as such she is not entitled to get any maintenance from the petitioner. After taking evidence and on consideration of the materials placed before him the learned Magistrate by his order dated 29.6.96 allowed the said application u/s 125 Criminal Procedure Code and directed the present petitioner to pay an amount of Rs. 1.500/- towards the maintenance of the opposite party/wife. Challenging the said order of the learned Magistrate the petitioner came up before this court in revision. It appears that the learned Magistrate totally disbelieved the allegations of torture and ill-treatment as alleged by the opposite party/wife in her application u/s 125 Criminal Procedure Code. In her application u/s 125 Criminal Procedure Code it was the specific case of the opposite party that she was subjected to torture both physically and mentally at her matrimonial home by the husband and other in-laws. It is further stated by her that on 6.6.95 the situation became worse and on that date the husband of the opposite party and his relations with an intention to set fire poured kerosene oil on the body of the opposite party/wife but the opposite party some-how managed to escape. The learned Magistrate disbelieved this allegation relying on the Ext. D. which is a letter written by the opposite party to her husband. From Ext. D it appears that the said letter was written by the opposite party to her husband from her father's house. On the day of alleged incident, i.e., on 6.6.95 the opposite party/wife was very much at her parental house at Subhaspally where-from she wrote the said letter. So the learned Magistrate observed that the opposite party failed to substantiate her allegation of setting fire on her body by the husband and other in-laws on 6.6.95. The learned Magistrate also disbelieved that the present petitioner/husband claimed an amount of Rs. 1 lakh from the father of the opposite party/wife. The learned Magistrate was of the view that both the parties manufactured concocted story of their sweet will to establish their respective case which have get no basis at all. So the point of physical and mental torture by the present petitioner and his relations upon the opposite party/wife at her matrimonial home have no basis at all and as such the said point was decided accordingly.

3. Although the allegation of torture and ill-treatment which is totally disbelieved by the learned Magistrate he was of the view that since the opposite party is the legally married wife of the present petitioner, she is entitled to get maintenance. It was held by the learned Magistrate that the present petitioner neglected to maintain his legally married wife although he had sufficient monthly income and when the opposite party was in her parental house the present petitioner neglected to

maintain her. The learned Magistrate in his judgment observed that under compelling circumstances the wife/opposite party used to reside at her parental house and since the present petitioner being the husband neglected to maintain his wife, the wife/opposite party is entitled to get maintenance from her husband. Accordingly the learned Magistrate by the impugned order directed the present petitioner to pay an amount of Rs. 1.500/- per month towards the maintenance of the opposite party/wife.

4. Sub-section (4) of Section 125 provides that no wife shall be entitled to receive any allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent. From the aforesaid provisions of Section 125(4) it becomes clear that if any wife lives separately from her husband without any just and sufficient cause she will not be entitled to get any maintenance from her husband. In the instant case it is the specific case of the opposite party/wife that she was subjected to torture and ill-treatment by her husband and inlaws, as a result of which she had to leave her matrimonial home. But such allegation of torture and ill-treatment has been totally disbelieved by the learned Magistrate. It is not the case of the opposite party that she wanted to live with her husband and inspite of her request her husband refused to take her to her matrimonial home. On the contrary it is the specific case of the opposite party /wife that as a result of torture and ill-treatment she was compelled to leave her matrimonial home. The learned Magistrate having totally disbelieved the allegations made by the opposite party, awarded maintenance in favour of the opposite party/wife thereby totally ignoring the provision of Section 125(4) Criminal Procedure Code.

5. Mr. Milan Mukherjee, the learned Advocate appearing for the opposite party submits that while the opposite party/wife was at her parental house she was totally ignored and neglected by the present petitioner and no amount of maintenance was paid by the petitioner/ husband during the said period. So the learned Magistrate was justified in directing the petitioner to pay maintenance to the opposite party/wife. Mr. Mukherjee relies on a judgment reported in AIR 1975 SC 83. In the said decision it was held by the Hon'ble Apex Court that in determining the amount of maintenance u/s 488(1) (of the Old Code) the Magistrate is competent to take into consideration the separate income and means of the wife. In the said decision the Hon'ble Apex Court discussed the circumstances which are to be considered by the learned Magistrate while fixing the amount of maintenance. In my opinion, this judgment has got no manner of application in the present case. Mr. Mukherjee next relies upon a judgment reported in 1981 SCC (Cri) 829. In the said judgment it was held by the Hon'ble Apex Court that where it is proved to the satisfaction of the court that a husband is impotent and is unable to discharge his marital obligations, this would amount to both legal and mental cruelty which would undoubtedly be a "just ground" as contemplated by the 2nd proviso to Section 125(3) for the wife's refusal to live with her husband and the wife would be entitled

to maintenance from her husband according to his means. In my opinion, this Judgment is also not applicable in the present case because it was held by the Supreme Court that impotency should be considered as a cruelty and that can be a "just ground" for the wife to live separately from her husband. In the present case facts and circumstances are quite different from that which has been referred to above. The next Judgment relied upon by Mr. Mukherjee Is reported in 1992 CLJ 1562. In the said decision it appears that the wife used to live separately from her husband on the ground that her life was not safe in her matrimonial home. The husband carrying on foot wear business and having substantial income of his own. It was held that the order directing payment of maintenance at the rate of Rs. 400/- per month was quite justified. This decision has also got no manner of application in the present case as in the present case the allegation of torture and ill-treatment made by the wife in her petition u/s 125 Criminal Procedure Code was totally disbelieved by the learned Magistrate. Mr. Mukherjee also relies upon a judgment reported in 1967 CLJ 1334: AIR 1967 Ker 216. In the said Judgment it was held by the learned Single Judge of Kerala High Court that if a wife is justified in living separately from her husband, it is no valid plea for the husband to say that she voluntarily left the house or that he is prepared to maintain her if she returns to him. It was held that if a husband does not maintain a wife who is justified in living separately from her husband, it is a case of refusal or neglect to maintain. This judgement is also not applicable in the present case as in the present case the wife/opposite party failed to prove that she was justified in living separately from her husband. In her petition u/s 125 Criminal Procedure Code she tried to make out a case of torture and ill-treatment by her husband and in-laws which she failed to prove by adducing evidence.

6. I have carefully gone through the impugned order passed by the learned Magistrate. I have also carefully gone through the judgments referred to above and all connected papers. In my considered opinion the learned Magistrate was very much wrong in awarding maintenance in favour of the opposite party /wife. Since the wife/opposite party failed to prove the allegation of torture and ill-treatment, which was totally disbelieved by the learned Magistrate. It cannot be said that the wife had just and sufficient ground to live separately from her husband. In view of the provisions of Section 125 (4) of the Code of Criminal Procedure the wife is not entitled to get any maintenance from her husband as she failed to prove that she had just and sufficient ground to live separately. In view of the discussions made above I allow this application and set aside the impugned order dated 29.6.96 passed by the learned Judicial Magistrate. 1st Court, Siliguri in Mr. Case No. 66/95 (T. R. Case No. 343/95).