

Criminal Revision

PRESENT:

THE HON'BLE MR JUSTICE KALIDAS MUKHERJEE

Judgment on 02.09.2010

CRR NO. 599 OF 2009

Swapan Giri

Vs.

Jharna Pradhan & Anr.

Points:

**Maintenance-** Magistrate considering evidence granted maintenance for the child under section 125 Cr. P. C. whether revisional court can interfere with the order.-Code of Criminal Procedure, 1973 S.401

Facts:

The O.P. No. 1 filed an application under Section 125 Cr.P.C. contending, inter alia, that the petitioner herein was a co-villager and love affairs developed between them. There was cohabitation between them. The O.P. conceived as a result of such cohabitation. When the O.P. disclosed the fact of her pregnancy, the petitioner refused to marry her and the O.P. gave birth to a child. The O.P. has no income of her own and the petitioner herein is liable to pay maintenance for the child. The learned Magistrate allowed the application under section 125 Cr. P.C. Learned Magistrate relied on exhibit – 1, that is, the birth certificate of the child and exhibit – 2, that is, the papers relating to the treatment of the O.P. and directed the OP to pay maintenance for the child @ Rs.500/- per month.

Held:

It cannot be said that the learned Magistrate granted such maintenance without any evidence on record. The learned Magistrate rightly relied upon

exhibit 1 and exhibit 2 in granting maintenance in favour of the child from the stand point of Section 125 Cr.P.C. Court find that no illegality or material irregularity was committed by the learned Magistrate in passing the impugned order. The application, therefore, stands dismissed. Para 16  
Cases cited:

*(2008)1 C.Cr.LR. (cal) 499 [Nani Gopal Kar Vs. The State of West Bengal and Anr.] & AIR 1993 SC 2295 [Goutam Kundu Vs. State of West Bengal and another].; AIR 1985 SC 765 [Sumitra Devi Vs. Bhikan Choudhary] paragraph 4, AIR 1987 SC 1049 [Smt. Dukhtar Jahan Vs. Mohammed Farooq]. Dwarika Prasad Stapathy Vs. Bidyut Prava Dixit and another, (1999) 7 SCC 675; Md. Mahasin Sk. Vs. Sayeda Khatun Bibi 2005(1) CLJ (Cal) 372*

For the Petitioner : Mr. Bhudeb Chatterjee

Mr. Hare Krishna Halder

For the O.P.No. 1 : Mr. Mahammad Mahmud

KALIDAS MUKHERJEE, J.:

1. This is an application under Section 401 read with Section 482 of the Code of Criminal Procedure assailing the order dated 24.11.2008 passed in M.R. Case No. 64 of 1999 by the learned Additional Chief Judicial Magistrate, Jhargram whereby and whereunder the learned Magistrate allowed the application under section 125 Cr. P.C. and directed the OP to pay maintenance for the child @ Rs.500/- per month.
2. The O.P. No. 1 filed an application under Section 125 Cr.P.C. before the learned Magistrate contending, inter alia, that the petitioner herein was a

co-villager and love affairs developed between them. The petitioner herein took the O.P. to his house on several occasions and proposed to marry her. There was cohabitation between them. The O.P. conceived as a result of such cohabitation. When the O.P. disclosed the fact of her pregnancy, the petitioner refused to marry her and on 23rd Agrahan the O.P. gave birth to a child. The O.P. filed a criminal case against the petitioner which was sent to the P.S. bearing G.R. No. 558 of 1998. The O.P. has no income of her own and the petitioner herein is liable to pay maintenance for the child. The petitioner has landed properties and business earning about Rs.8,000/- per month.

3. The petitioner herein filed written objection against the prayer for maintenance under Section 125 Cr.P.C. contending, inter alia, that he did not know the O.P. herein and there was no love affairs or cohabitation with the petitioner. It has been contended that he is not the father of the child. The father of the petitioner herein died and as his mother was sick, the marriage of petitioner took place during his early age. The G.R. case No. 558 of 1998 was filed falsely by the O.P. against this petitioner. The O.P. is aged about 40 years and the petitioner is a minor. The petitioner is a member of the C.P.M. Party and there was rivalry with the local Congress Party. The members of the rival political group has set up the O.P. herein to harass the petitioner. It has been contended that the O.P. herein used to mix with so many male persons at different times.

4. The learned Counsel for the petitioner submits that the O.P. herein filed a case under Section 376 of the Indian Penal Code against the petitioner alleging love affairs followed by cohabitation and the birth of a child. It is contended that in granting the prayer for maintenance the learned Magistrate relied on exhibit – 1, that is, the birth certificate of the child and

exhibit – 2, that is, the papers relating to the treatment of the O.P. It is contended that the petitioner herein is already married. It is submitted that there is no paper to show that the petitioner is a biological father of the child and in such position the learned Magistrate was not justified in granting maintenance against the petitioner. It is submitted that the matter may be sent back to the learned Court below for consideration on all the issues involved in the matter. It is submitted that the petitioner herein had no access to the O.P. No. 1 herein. The learned Counsel has referred to the decisions reported in *(2008)1 C.Cr.LR. (cal) 499 [Nani Gopal Kar Vs. The State of West Bengal and Anr.] & AIR 1993 SC 2295 [Goutam Kundu Vs. State of West Bengal and another]*.

5. The learned Counsel appearing for the O.P. No. 1 submits that the case filed

by the O.P. against the petitioner under Section 376 I.P.C. is pending and there was love affairs between the petitioner and the O.P. and the petitioner had access to the O.P. and, as a result of the cohabitation, the child was born. It is contended that circumstantial evidence is there and the child is entitled to get maintenance under the provisions of Section 125 Cr.P.C. It is contended that in this proceeding the point of paternity of the child cannot be raised. It is submitted that Section 125 Cr.P.C. has been enacted for the welfare and protection of the child. The learned Counsel has referred to and cited the decisions reported in *AIR 1985 SC 765 [Sumitra Devi Vs. Bhikan Choudhary] paragraph 4, AIR 1987 SC 1049 [Smt. Dukhtar Jahan Vs. Mohammed Farooq]*.

6. P.W. 1 has stated that Swapan Giri used to come to their house as well as she used to visit his house and in this way they were acquainted with each other. It is in her evidence that Swapan Giri promised to marry her. She

has stated that Swapan Giri is the father of the child and in the birth certificate as well as the card issued from the hospital there is the name of Swapan Giri as the father of child. It is in her evidence that although Swapan Giri promised to marry her, but, ultimately he did not marry and she informed the Panchayat of the village of the matter. It is in her evidence that she was working as maid servant in the house of Swapan Giri prior to the birth of the child and thereafter love affairs developed between them and she became pregnant. She has stated that she was treated as Bhangagara BPHC during her pregnancy. She has stated that Swapan did not provide any maintenance towards the child; Swapan has a business of vegetables and he earns Rs.1,000/- per month from the aforesaid business. In the cross-examination she has stated that Swapan has 5/6 bighas of landed property excepting the business of vegetables. She has denied the suggestion that because of her immoral life style she became pregnant.

7. P.W. 2 has stated that his daughter Jharna had love affairs with Swapan and she became pregnant. He has stated that he told Swapan giri, but, he refused to marry Jharna; a case was filed with the P.S. against Swapan Giri and that case is pending; Jharna gave birth to a child; the birth certificate was there. He has stated that Swapan earns Rs.2,500/- to Rs.3000/- per month. Swapan Giri has been examined as O.P.W. 1. He stated that he did not know Jharna and there was no love affairs; he did not live with the petitioner and there was no cohabitation. It is in his cross-examination that Jharna is his co-villager and the case was filed to harass him. He has stated that he does not know whether Jharna Pradhan filed a rape case against him and whether the said case pending. The learned Magistrate upon consideration of the evidence adduced by the

parties and relying on exhibit 1 and exhibit 2 granted maintenance to the tune of Rs.500/- in favour of the child.

8. In the case of *Nani Gopal Kar Vs. The State of West Bengal & another (Supra)*, there was promise to marry the victim girl followed by cohabitation, but, ultimately the accused did not agree to marry the victim girl and a criminal case was filed under Section 376 I.P.C. A child was born. A case under Section 125 Cr.P.C. was filed wherein the learned Magistrate granted interim maintenance @ Rs.500/- per month for the child relying on the report of the Senior Scientific Officer of the Central Forensic Science Laboratory which revealed that the O.P. of the petition was the biological father of the baby. No interference was made with the order passed by the learned Magistrate.

9. In the decision reported in *Goutam Kundu Vs. State of West Bengal and another (Supra)* it has been held in paragraph 22, 26 and 27 as follows:

*“22. It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.”*

*“26. From the above discussion it emerges:-*

*(1) that courts in India cannot order blood test as a matter of course;*

*(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.*

*(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption*

*arising under Section 112 of the Evidence Act.*

*(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.*

*(5) No one can be compelled to give sample of blood for analysis.”*

*“27. Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Addl. Chief Judicial Magistrate, Alipore in rejecting the application for blood test. We find the purpose of the application is nothing more than to avoid payment of maintenance, without making any ground whatever to have recourse to the test.*

*Accordingly the Special Leave Petition will stand dismissed.”*

10. In the case of *Smt. Dukhtar Jahan Vs. Mohammed Farooq (Supra)* it has been held in paragraph 16 as follows:-

*“16. The proper Course for the High Court, even if entitled to interfere with the concurrent findings of the Courts below in exercise of its powers under S. 482, Cr.P.C., should have been to sustain the order of maintenance and direct the respondent to seek an appropriate declaration in the Civil Court, after a full-fledged trial, that the child was not born to him and as such he is not legally liable to maintain it. Proceedings under S. 125, Cr.P.C., it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner. The High Court was, therefore, clearly in error in quashing the order of maintenance in favour of*

*the child.”*

11. In the case of *Sumitra Devi Vs. Bhikan Choudhary (Supra)* it has been held in paragraph 4 as follows:-

*“4. Now that the matter is going back to the original Court we think it appropriate to bring it to the notice of the learned Magistrate that under S. 125 of the Code of Criminal Procedure even an illegitimate minor child is entitled to maintenance. Even if the fact of marriage is discarded, the minor child being found to be an illegitimate daughter of the respondent would be entitled to maintenance. Our saying so may not be construed as a conclusion against the factum of marriage or as a suggestion that the child is not legitimate. We have no intention to say either way.”*

12. In the instant case the learned Magistrate discussed the evidence adduced by the parties and relying on exhibit 1 and exhibit 2 granted maintenance in favour of the child to the tune of Rs.500/- per month. The learned Counsel for the petitioner herein submits that he is not pressing for holding the DNA test.

13. The main point for consideration is whether the petitioner herein had any access to the O.P. herein at the material point of time. It is the case of the O.P. herein that there was love affairs between them which was followed by cohabitation and, as a result, the child was born. It is in the evidence of P.W. 1, that is, the petitioner under Section 125 Cr.P.C. that she used to act as a maid-servant in the house of Swapan Giri prior to the birth of the child and thereafter love affairs developed between them. She has further stated that thereafter she became pregnant by Swapan Giri because of such love affairs and cohabitation. On this point of being a maid servant in the house of Swapan Giri there was no cross-examination. It has been

contended in the written objection filed by the petitioner herein under Section 125 Cr.P.C. that the O.P. herein earned her livelihood by mixing with different male persons. It was also suggested during cross-examination of P.W. 1 that she became pregnant due to her immoral life style. The O.P.W. 1 only denied the case of the petitioner under Section 125 Cr.P.C. but, nothing was stated by him that the lady used to mix with so many male persons and thus became pregnant by some others or that she became pregnant for her immoral life style as suggested during cross-examination of P.W. 1. Under such circumstances, it has been proved by the O.P. herein that the petitioner herein had access to her and because of cohabitation the child was born.

14. Under Section 125(1) Cr.P.C. illegitimate child is also entitled to get maintenance. The proceeding under Section 125 Cr.P.C. is a summary procedure. In the decision reported in *Dwarika Prasad Stapathy Vs. Bidyut Prava Dixit and another reported in (1999) 7 SCC 675* it has been held that the proceeding under Section 125 Cr.P.C. is a summary remedy and the order under Section 125 Cr.P.C. does not finally determine the status, rights and obligations of the parties and the Section only provides for maintenance of indigent wives, children and parents. It has been held by the Apex Court in the said decision in paragraph 9 as follows:-

*“9. It is to be remembered that the order passed in an application under Section 125 Cr.P.C. does not finally determine the rights and obligations of the parties and the said section is enacted with a view to provide a summary remedy for providing maintenance to a wife, children and*

*parents. For the purpose of getting his rights determined, the appellant has also filed a civil suit, which is pending before the trial court. In such a situation, this Court in S.*

*Sethurathinam Pillai Vs. Barbara observed that maintenance under Section 488 Cr.P.C. 1898 (similar to Section 125 Cr.P.C.) cannot be denied where there was some evidence on which conclusion for grant of maintenance could be reached. It was held that order passed under Section 488 is a summary order which does not finally determine the rights and obligations of the parties; the decision of the criminal court that there was a valid marriage between the parties will not operate as decisive in any civil proceeding between the parties.”*

15. From the evidence it is clear that the petitioner here had access to the O.P.

herein at the relevant point of time. The facts of the case of *Md. Mahasin Sk. Vs. Sayeda Khatun Bibi reported in 2005(1) CLJ (Cal) 372* are similar to those of the instant one. In that case there was claim for maintenance for the illegitimate son and the opposite party worked as maid servant in the house of the petitioner. It was held that the petitioner alone had the access to have sexual intercourse with the opposite party.

16. It cannot be said that the learned Magistrate granted such maintenance without any evidence on record. The learned Magistrate rightly relied upon exhibit 1 and exhibit 2 in granting maintenance in favour of the child from the stand point of Section 125 Cr.P.C. I find that no illegality or material irregularity was committed by the learned Magistrate in passing the impugned order. The application, therefore, stands dismissed.

17. Let a copy of this order along with the L.C.R. be sent to the learned Court

below immediately.

18. Urgent Photostat certified copy, if applied for, be handed over to the parties

as early as possible.

(Kalidas Mukherjee, J. )