

ORISSA HIGH COURT : CUTTACK

**RPFAM NO. 33 OF 2008**

From an order dated 15.09.2008 passed by Shri S.K. Pattnaik, Judge, Family Court, Rourkela in Criminal Proceeding No.25 of 2008.

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Ranjeet Kishan ..... Petitioner

-Versus-

Sumitra Kishan and another ..... Opp. Parties

For Petitioner : M/s. A.K. Nanda,  
G.N.Rana, G.N. Sahu &  
B.K. Das.

For Opp. Parties : M/s. A. Tripathy &  
A.K. Behu7ra.  
(for O.P.No.1 )

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Decided on 19.05. 2010.  
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**P R E S E N T :**

**THE HONOURABLE SHRI JUSTICE M. M. DAS**  
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**M.M. Das, J.** This petition has been filed under section 19(4) of the Family Court's Act, 1984 by the husband-petitioner challenging the order dated 15.09.2008 passed in Criminal Proceeding No.25 of 2008 by the Judge, Family Court, Rourkela. The opposite parties filed an application under section 125, Cr.P.C. for grant of maintenance from the petitioner on the ground that the opposite party no.1 and the petitioner are co-villagers and developed an acquaintance with each other. In course of time, the petitioner

proposed to marry her and to create confidence in the mind of the opposite party no.1 applied vermilion on her forehead and later declared that they are husband and wife. On such deceit, the opposite party no.1 cohabitated with the petitioner and when she conceived, the petitioner attempted to force her to abort the pregnancy for which dissension arose between them. The petitioner thereafter neglected the opposite party no.1 for which she convened a village meeting. But as the same did not yield any result, she reported the matter before the I.I.C., Lahunipara Police Station on which the police did not take any action. Accordingly, she was compelled to file a private complaint, being I.C.C. Case No.7 of 2000, under sections 376/493/417, I.P.C. The said case ultimately ended in conviction on 07.04.2003 sentencing the petitioner to undergo R.I. for five years and to pay a fine of Rs.10,000/-,in default, to suffer R.I. for two years more. In due course the opposite party no.1 gave birth to opposite party no.2. As she had no means to maintain herself and the child, for which she filed the application under section 125, Cr.P.C. for grant of maintenance of Rs.1,000/- per month for herself and Rs.500/- per month for her child to be paid by the petitioner.

2. The petitioner filed his show cause denying the entire episode and disowned the parenthood of the opposite party no.2. The learned Judge, Family Court, Rourkela registering the said

proceeding under section 125, Cr.P.C. as Criminal Proceeding No.10/2004 and after recording the evidence of both the parties passed a judgment on 18.04.2006 taking note of the fact that the petitioner has filed an appeal against his conviction in the criminal case, which is pending and after analysing the evidence adduced, as a matter of fact, found the so-called marriage between the parties ought to be disbelieved and, therefore, the opposite party no.1 cannot be held to be entitled to get maintenance from the petitioner. The Judge, Family Court, however, held that the opposite party no.2 was born through the petitioner and the child being an illegitimate child is entitled to maintenance. In conclusion, the learned court below quantifying the maintenance to be paid directed that the petitioner shall pay Rs.250/- per month for maintenance of the opposite party no. 2 within 10<sup>th</sup> of each succeeding month to be effective from the date of the application, i.e., 17.03.2004. The arrear maintenance shall be paid within a month from the date of the order failing which the opposite party no.1 (petitioner no.1 before the court below) is at liberty to realize the same through the process of law. The maintenance amount for the opposite party no.2 shall be paid through the opposite party no.1.

3. As the amount as directed was not paid by the petitioner, the opposite parties filed the Criminal Proceeding

No.25 of 2008 before the Judge, Family Court, Rourkela under section 128, Cr.P.C. for enforcement of the order of maintenance. The petitioner took a stand that the application filed under section 128, Cr.P.C. by the opposite parties on 14.05.2008 having been filed more than one year after the date when the maintenance became due, the application is not maintainable. The opposite party no.1 took a stand that she being a poor, rustic, illiterate and distress woman was not aware of the legal provision as to limitation for which she could not file a petition within the time stipulated on behalf of her minor son aged only three years. The learned court below recorded that the judgment directing payment of maintenance was allowed on 18.04.2006, thus the claim for arrears should have been made by 17.04.2007 and the application under section 128, Cr.P.C. has been filed on 14.05.2008, i.e., beyond one year and one month after the due date. However, he held that the case is clearly an exception from a normal case as in the instant case the opposite party no.2 is a minor child of only three years and therefore, he being a minor is under a legal disability as per section 6 of the Indian Limitation Act, 1963, which provides that during legal disability limitation does not start to run in respect of any suit or petition for execution of a decree until such disability ceases. Section-8 of the Limitation Act gives further chance of three years of limitation

after seizure of legal disability. The Court below, therefore, applying the said provisions to the facts of the present case held that the opposite party no.2 is a minor and under a legal disability as per section 6 of the Limitation Act. Limitation for filing a petition under section 128, Cr.P.C. for execution of the order of the maintenance shall not start until his legal disability ceases, i.e, until he attains the age of 18 years. Observing thus, the Court below repelled the objection raised by the petitioner with regard to non-maintainability of the application filed under section 128, Cr.P.C. on the ground of limitation and allowed the application of the opposite parties directing the petitioner to pay all the arrear maintenance dues, which was to be paid to the opposite party no.2 within fifteen days from the date of the said order in one instalment failing which the opposite party no.1 is at liberty to apply on behalf of her minor son to enforce such payment through the process of court.

4. Mr. Nanda, learned counsel for the petitioner drawing the attention of this Court to the proviso of section 125(3), Cr.P.C. vehemently urged that the learned court below has committed an illegality in directing payment of the arrear maintenance on an application filed by the opposite parties beyond the period prescribed and further the learned court below could not have applied the provision of sections-6 and 8 of the

Limitation Act to the facts of the present case. He, therefore, submitted that the order impugned is ex facie illegal and is liable to be set aside. He relied upon the decisions of this Court in the case of **Hagiri Dei and another v. Budhiram Behera, 1982 CRL. L. J. 491 and Bimala Dei v. Karna Mulia, 1986 CRL. L. J. 521** in support of his contention. Further in support of his contention with regard to the interpretation of section 6 of the Limitation Act, he relied upon the decision in the case of **Kumari Subasini Panda & others v. State of Orissa & others, 57 (1984) C.L.T. 262.**

5. Mr. Tripathy, learned counsel appearing for the opposite parties, on the contrary, submitted that there is no error committed by the learned court below in directing payment of the entire arrear maintenance to the opposite party no. 2 as has been held by this Court in the case of **Jasolal Agrawalla alias Jaasolal Jain v. Smt. Pushpabati Agrawalla, 2006 (Supplementary) Volume-I, OLR 223.** He further submitted that as has been held by this Court, it must be borne in mind that section 125, Cr.P.C. is a measure of social legislation and it has to be construed without rhyme or reason for the welfare and benefit of the wife, as has been held by the Supreme Court in the case of **Shantha @ Usha Devi and another v. B.G. Shiva Nanjappa, 2005 AIR SCW 2613.** For proper appreciation of the

rival contentions raised by the parties, it would be appropriate to refer to sections 125 (3) and 128, Cr.P.C., which read as follows:

**“125. Order for maintenance of wives, children and parents.-**

(1)   xx                   xx           xx

(2)   xxx               xxx       xxx

(3)   If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.”

“128. **Enforcement of order of maintenance.**—A copy of the order of [maintenance or interim maintenance and expenses of proceeding, as the case may be,] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses or proceeding, as the case may be,] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identify of the parties and the non-payment of the [allowance, or as the case may be, expenses, due]”.

Sections 6 and 8 of the Limitation Act read as follows:

“6. **Legal disability.**—(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.

(2) Where such person is, at the time from which the prescribed period is to be reckoned, affected by two such disabilities, or where, before the disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from time so specified.

(3) Where the disability continues up to the death of that person, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time so specified.



(4) Where the legal representative referred to in sub-section (3) is, at the date of the death of the person whom he represents, affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

(5) Where a person under disability dies after the disability ceases but within the period allowed to him under this section, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died.

Explanation-For the purposes of this section, 'minor' includes a child in the womb."

7.                   xx                   xx                   xx

8. **Special exceptions.**-Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application"

6.           In the case of Hagiri Dei (Supra), this Court, while dealing with section 125 (3), Proviso-1, Cr.P.C. and considering the question of limitation for recovery of arrears of maintenance categorically held that the first proviso to Sub-section 3) of Section 125, Cr.P.C. is clear and unambiguous. Acquiescence of the opposite party cannot confer jurisdiction on the Magistrate to enlarge the same. In certain circumstances, an application can be made for a period beyond one year, i.e., where a pending application has been closed for statistical purposes and fresh application is filed for the period covered by the earlier

application and the period subsequent thereto. This Court further held that the proviso has been enacted to prevent person in whose favour an order for maintenance has been made from being negligent and allowing the arrears to pile up, so that their recovery becomes a hardship so far as the person from whom recovery is to be made, is concerned. Holding thus in the facts of the said case, this Court ruled that a court does not enforce more than one year arrear and the application filed beyond the period of limitation was clearly not maintainable.

7. In the case of *Bimala Dei* (supra), it was held as follows:-

“.....The proviso to sub-sec.(3) of S.125 of the Code in clear and categorical terms puts an embargo on the power of the Magistrate to issue any warrant for recovery of the amount due unless the application is made to the Court within a period of one year from the date on which it became due. Therefore, the Magistrate has a duty to find out the date on which the amount became due.....”

In interpreting Sections - 6, 7 and 8 of the Limitation Act, 1963 in the case of *Kumari Subasini Panda and others* (supra), this Court laid down as follows:-

“.....Section 6 is an enabling section which confers a personal privilege on the person under disability. Section 7 is proviso to section 6 and should go together. Section 6 of the Indian Limitation Act does not in terms extend the period of limitation prescribed for any legal action but merely enables a person under disability at his choice to have limitation reckoned against him either from the date of accrual of the cause of action or from the date of cessation of the disability. In case the person

under disability chooses the prescribed period of limitation to be reckoned from the date of accrual of the cause of action, the whole period prescribed begins to run from the date of the cause of action. In the latter case, section 8 of the Indian Limitation Act steps in to cut short the period of three years from the date of cessation of the disability where the prescribed period exceeds three years. Section 7 of the Limitation Act prescribes that where several person are entitled to institute a suit or make an application and their legal relationship is such that one or some of them who is or are free from disability can give full discharge of the whole debt or claim without the concurrence of others who are under disability, time runs against all from the date of the cause of action irrespective of the disability of some of them and the persons under disability, time runs against all from the date of the cause of action irrespective of the disability of some of them and the persons under disability would not be entitled to the benefit under section 6 of the Limitation Act.....”

8. In the case of Jasolal Agrawalla (supra), which is relied upon by the opposite party, the facts reveal that the order of maintenance passed by the learned Magistrate, inter alia, directing to pay the same with effect from 1<sup>st</sup> September, 1981 was challenged by the husband in a Criminal Revision before the learned Additional Sessions Judge and the Revisional Court confirmed the said order by dismissing the said revision. Thereupon, the husband invoking the inherent jurisdiction of this Court under section 482, Cr.P.C. filed a Criminal Misc. Case and this Court disposed of the said Criminal Misc. Case by order dated 30.09.1993 quashing the orders of both the courts below

and remitting the matter back to the learned Magistrate for fresh disposal in accordance with law. Thereafter, the learned Magistrate passed an order on 26.03.1996 holding that the opposite party-wife was entitled to maintenance and granted payment of maintenance to her @ Rs.300/- per month from the date of filing of the petition, i.e., 21.08.1980. The husband again assailed the said order before this Court in a Criminal Revision and this Court on 12.08.1998 disposed of the same holding that the petition filed by the opposite party-wife under section 125, Cr.P.C. was maintainable and she was entitled to monthly maintenance. While holding thus, this Court also held that the wife was not entitled to maintenance till the date on which the decree for dissolution of marriage was passed, i.e., 21.08.1981 and consequently, modified the order of the maintenance passed by the learned Magistrate as to the date from which the wife is entitled to the monthly maintenance. After disposal of the said Criminal Revision, the opposite party-wife filed two petitions before the learned Magistrate under section 125 (3) Cr.P.C. on 01.03.1998 and 23.03.2000 for realization of maintenance granted in her favour. The case did not end there and the husband filed a Special Leave Petition before the Supreme Court which was disposed of by the Hon'ble Supreme Court on 17.09.1999. The objection filed under section 125 (3) Cr.P.C. was

resisted by the husband on the ground of limitation. The learned Magistrate after hearing the parties, by order passed on 25.04.2000, held that the petitions were not barred by limitation as the matter was subjudice and had not attained finality and that the husband was liable to pay the arrear maintenance to the wife as ordered. The said order was challenged by the husband in a Criminal Revision before the learned Additional Sessions Judge, which was dismissed. Again the husband persisted to challenge the said order in an application under section 482, Cr.P.C. circumventing the bar under section 397(3), Cr.P.C. This Court referring to the decisions in the case of Hagiri Dei (supra) and Bimal Dei (supra) and considering the long drawn litigation between the parties came to the conclusion that the order granting maintenance became final only after disposal of the criminal revision by this Court on 12.08.1998. In such circumstances this Court relying upon the observation of the Supreme Court made in the case of the Shantha @ Usha Devi and another (supra), wherein it was held that it is unreasonable to insist on filing of successive applications when the liability to pay the maintenance as per the order passed under section 125(1) Cr.P.C., though a continuing liability has not attained finality, dismissed the said Criminal Misc. Case filed under section 482, Cr.P.C. and directed the learned Magistrate to pass

appropriate orders under section 125, Cr.P.C. in case the arrear maintenance amount is not paid within three months from the date of the said judgment.

9. In view of the peculiar facts of the above case, I am of the view that the ratio of the said decision is not applicable to the facts of the present case. Thus, it is imperative to conclude that as has been laid down by this Court in the case of Hagiri Dei (supra) and Bimala Dei (supra), the impugned order cannot be sustained since the learned court below has apparently erred in law in placing reliance on sections 6 and 8 of the Limitation Act, which were not applicable to the facts of the present case, where the opp. Party no. 2 is still a minor and his legal disability has not come to an end. Thus, the impugned order directing payment of the entire arrear maintenance to the petitioner no.2 within fifteen (15) days is quashed and the order is modified to the extent that the petitioner shall pay the maintenance as awarded for 12 months preceding the date of application filed under section 128, Cr.P.C., i.e., for the months of June, 2007 to May, 2008 amounting to Rs.3,000/- (Rupees three thousand) within a period of three weeks from today to the opposite party no.2 through his mother guardian-opposite party no.1 failing which appropriate steps will be taken by the learned Judge, Family Court for enforcement of the same and in accordance with law. It

is made clear that the petitioner shall continue to pay the current maintenance regularly.

10. The RPFAM is accordingly disposed of.

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***M.M. Das, J.***

*Orissa High Court, Cuttack.*  
*May 19th , 2010/Himansu.*