

Equivalent citations: 2005 CriLJ 2330

Bench: R Singh

Kehari Singh Son Of Shri Ambika Prasad Singh vs The State Of U.P. And Smt. Rekha Singh D/O Shri Birendra Singh on 11/3/2005

## JUDGMENT

Ravindra Singh, J.

1. Heard Sri M.C. Chaturvedi, learned counsel for the petitioner, learned A.G.A. and Sri H.M. Srivastava learned counsel for the respondent No. 2.

2. This writ petition has been filed against the order dated 12.3.2001 passed by the learned Judicial Magistrate, Kalpi, district Jalaun in Criminal Case No. 00 of 2000, whereby the application filed by the respondent No. 2 was allowed and recalled the order dated 22.8.200, passed by learned Judicial Magistrate, Kalpi, dismissing the applications filed by respondent No. 2 under Section 125 Cr.P.C. in her non-appearance and the case was restored to its original number at the cost of Rs. 100/- and order dated 22.6.2001, passed by learned III Addl. Sessions Judge, Jalaun at Orar in Criminal Revision No.105 of 2001, whereby the revision filed by the petitioner against the abovementioned order dated 12.3.2001 was dismissed.

3. The facts, in brief, of this case are that the respondent No. 2 Smt. Rekha Singh filed an application dated 28.11.1997 claiming the maintenance allowance from her husband, the petitioner Kehari Singh under Section 125 Cr.P.C, in the court of learned Judicial Magistrate, Orai, District Jalaun. The respondent No. 2 did not appear in the court of learned Judicial Magistrate, Orai on 22.8.2000 and no application on her behalf was moved. To exempt her personal appearance, the petitioner also did not appear in the court but on his behalf an application for exempting his personal appearance was moved. So the case was dismissed on account of non-appearance of respondent No. 2. Thereafter, respondent No. 2 filed an application dated 15.9.2000 in the court concerned praying therein to recall the order dated 22.8.2000 and to restore her case to its original number. The petitioner filed an objection against the abovementioned application dated 15.09.2000 after hearing both the parties, the order dated 22.08.2000 was recalled by the learned Magistrate on 12.03.2001 and the case was restored to its original number at the cost of Rs. 100/-. This order dated 12.03.2001 was challenged by the petitioner by way of filing Criminal Revision No. 105 of 2001, the same was dismissed by learned III Addl. Sessions Judge, Jalaun at Orai on 22.06.2001.

4. It is contended by the learned counsel for the petitioner that the impugned order dated 12.03.2001 passed by learned Judicial Magistrate, Kalpi recalling the order dated 22.8.2000 and restoring the case and the order dated 22.06.2001 passed by learned III Addl. Sessions Judge, Jalaun at Orai are illegal which, have been passed without applying the judicial mind because (i) there is no provision in Criminal Procedure Code to recall the order by which the complaint was dismissed in non-appearance (ii) the said order being revisable, so it was open for to the respondent No. 2, to approach the revisional authority to get the said order annulled or set aside (iii) it was open for the respondent No. 2 to file her second complaint.

5. In support of his contention, the learned counsel for the petitioner has relied upon case of Shyamta v. Dangra and Anr., reported in Allahabad Criminal Cases, 1980 (17), 14 and the case of Krishna Rao Palne v. Premila Bai and Ors., reported in 1976 Cr. L.J. 1819, where it was held that in the Criminal Procedure Code, there is no provision, of review its judgment or order and only clerical or arithmetical errors can be corrected, But Section 126(2) Cr.P.C. provides that a person against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or, willfully neglecting to attend the court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereafter subject to such terms including

terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

6. Learned counsel for the petitioner has also relied upon the case of Smt. Harbhajan Kaur v. Major Sant Singh, report in A.I.R. 1969 Delhi, 298, in which it was held that proceedings under Section 488 Old Cr.P.C. (125 of Nov. Cr.P.C.), are the criminal proceedings and not civil proceedings and governed by the provisions of the Code. In the Criminal Procedure Code, there is no provision for restoration of the criminal proceedings.

7. The contention made by the learned counsel for the petitioner are controverted by the learned A.G.A. and learned counsel for the respondent by submitting that there is no provision in the Criminal Procedure Code to dismiss the complaint in the non-appearance of the complainant. The provisions under Sections 125 to 127 Cr.P.C. pertaining to maintenance have the trappings of civil proceedings and the projection of right to recover the maintenance is apparently of civil in nature are transplanted in Criminal Procedure Code for providing speedy and eminent relief and immediate sustenance of life to the handicapped segment of the society. So ex-parte order dismissing the application under Section 125 Cr.P.C. may be recalled and the same may be restored to its original number.

8. In support of his submissions, the learned counsel for the respondents cited the case of Abdul Wahed v. Hafeeza Begum and Ors., reported in 1987 Cr.L.J. 726, in which by the learned Single Judge of Andhra Pradesh High Court has taken the following view:

"Section 126 Cr.P.C., is silent as to the order that can be passed when the applicant is absent. There is no indication as to either dismissing the application for default or the consideration of the matter on merits ex parte. The learned counsel for the petitioner contends that the provisions under Chap. XIV are in the nature of Civil Proceedings and the power to dismiss the application for default and set aside the ex parte order are implicit. It is true that the provisions under Section 125 to 127 Cr.P.C. pertaining to maintenance have the trappings of Civil Proceedings and the projection of right to recover maintenance apparently of civil nature are transplanted in Criminal Procedure Code for providing speedy and imminent relief and immediate sustenance of life to the handicapped segment of the society. The proviso while providing the procedure for determining the matter ex parte and also setting aside the ex parte order in the event of the respondent being absent is conspicuously silent regarding in the event of applicant not diligent in prosecuting; the matter. In so far as the dual situations of either being the plaintiff or the defendant being absent suitable provisions have been made under O.IX C.P.C. and also setting aside the ex parte orders if sufficient cause is shown and the pattern embodies in C.P.C. is evolved in so far as setting aside the ex parte order when the respondent is absent, but the analogous provision in C.P.C. in respect of orders that can be passed in the event of absence of the applicant has not been incorporated. The endeavor to read implicit power cannot be encouraged as there is no specific or implied provision to that effect and further the provision in the event of the absence of respondent and the absence of similar provision in the absence of the applicant can be inferred as eluding such power in the event of the absence of the applicant: We cannot escape the conclusion that there is lacuna regarding this aspect."

9. The next case cited by the learned counsel for the respondents is of Shabihul Hasan Jafari v. Zarfin Fatma and Anr., reported in 2000 Cr.L.J.,3051 in which Hon'ble Single Judge of this High Court has taken the view that due to absence of a person who initiated the maintenance proceedings either under the Muslim Woman (Protection of Rights on Divorce) Act 1986 or Criminal Procedure Code can be dismissed and subsequently the said order of dismissal can be recalled or set aside and the can can be restored to its original position for effective adjudication on merits.

10. Next case cited by the learned counsel for the respondents is of Sk. Alaujddin Alias Alai Khan v. Khadiza Bibi alias Mst. Khodeja Khatun, (1991) Cr.L.J. 2035 in which the Calcutta High Court has taken the view, following the decision of Hon'ble Supreme Court in case of Mst. Jagir Kaur v. Jaswant Singh, (AIR 1963 SC 1521) that the proceedings under Section 125 Cr. P. C. being civil in nature, the Magistrate can invoke inherent power to recall his earlier order and finally dispose of the proceedings. The next case cited by the

learned counsel for the respondents is Smt. Kamla Devi v. Mehma Singh, reported in 1989 Cr.L.J. 1866 (:Punjab & Hry) in which Punjab and Haryana High Court has taken the following view:

"There is no specific provision in Chapter IX of the Cr. P. C. dealing with application for grant of maintenance to wives, children and parents to dismiss such applications for non-appearance of the petitioner. Since such applications are not to be equated with criminal complaints which necessarily are to be dismissed for non-appearance of the complainant in view of Section 256 of the Cr. P. C, it is only in the exercise of inherent power of the Court that for non-appearance of the petitioner, application under Section 125 of the Code is dismissed. If that is so there is no reason why there should not be inherent power with the (Court to restore such applications dismissed in default on showing sufficient cause by the petitioner for his non-appearance."

11. From the perusal of the record and after considering the facts and circumstances of the case and submissions made by the counsel for the petitioner and learned A.G.A. and learned counsel for the respondents, the question for determination is whether the maintenance proceedings arising under Section 125 Cr. P. C. having once been dismissed for default of the respondent No. 2 can be restored for adjudication on merits.

12. The provisions of Section 126(2) of Criminal Procedure Code provides that an order for payment proposed to be made on an application of the person against whom an order for payment of maintenance is proposed, the ex parte order passed against him may be set aside by learned Magistrate but there is no specific provision if the application is dismissed in non-appearance, of applicant complainant to recall the ex parte order and to restore the case to its original number. The intention of the Legislature was to provide eminent relief to most needy person as wife, children and the parents as mentioned in Section 125 Cr. P. C., such persons are not able to maintain themselves and are facing many problems and they are not earning persons. In such circumstances, they are not in proper position to pursue their cases in the court by affording the necessary expenses. So in such miserable conditions and due to some unavoidable circumstances they may not be able to attend the court proceedings on every date fixed there to pursue their cases. In such situation, if it is held that the court lacks the jurisdiction to restore the case in absence of such provision, the very object and purpose of Legislature would be frustrated. The paramount rule of interpretation which overrides the others is that the Statute is to be expounded according to the intent of think that made it. Therefore, if there is any lacuna in the Statute, then also to oblige the Magistrate judicially in order to give effect to the will of the Legislature Therefore, the learned Magistrate is empowered to restore the proceedings initiated under Section 125 Cr. P. C. which were dismissed in non-appearance of the complainant/applicant.

13. The application filed under Section 125 Cr. P.C. claiming maintenance allowance cannot be termed as a complaint. The word "Complaint" is defined in Section 2(d) of the Cr. P. C. as 'Complaint means any allegation made orally or in writing to a magistrate, with a view to his taking action under this code that some person, whether known or unknown has committed an offence, but does not include police report.

14. In view of the discussions made above, I am of the opinion that due to non-appearance of the respondent No. 2, the maintenance proceedings can be restored by recalling or setting aside the order of the dismissal for effective adjudication on merits. Therefore, the impugned order dated 12.3.2001 passed by learned Judicial Magistrate, Kalpi, district Jalaun in Criminal Case No. 300 of 2000 and order dated 22.6.2001, passed by the learned III Addl. Sessions Judge, Jalaun at Orai in Criminal Revision No. 105 of 2001 do not suffer from any illegality or irregularity. Both the impugned orders are perfect which do not require any interference by this Hon'ble Court. Therefore, the prayer for quashing the above mentioned impugned orders is refused.

15. Accordingly, the writ petition is dismissed.