

C. Subramanyam Vs. C. Sumathi and anr.

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Court : Andhra Pradesh

Decided On : Oct-17-2003

Reported in : 2003(2)ALD(Cri)905; I(2004)DMC456

Judge : Bilal Nazki and ; K.C. Bhanu, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 126(3) and 482

Appeal No. : Criminal Revision Case No. 984 and Criminal Revision Petition No. 979 of 2001

Appellant : C. Subramanyam

Respondent : C. Sumathi and anr.

Advocate for Def. : C. Padmanabha Reddy, Adv. (Amicus Curiae);Public Prosecutor

Advocate for Pet/Ap. : Pottigari Sridhar Reddy, Adv.

Judgement :

Bilal Nazki, J

1. This is the reference made by a learned Single Judge of this Court on 12.2.2002 in respect of order dated 19.7.2001 passed by the learned Judicial First Class Magistrate, Pakala in Crl. M.P. No. 798 of 2001 in M.C. No. 5 of 2000.

2. The brief facts that are necessary for answering the present Reference are that the first respondent herein filed a petition seeking to set aside the order dated 4.10.2000 whereunder the maintenance petition filed by her in M.C. No. 5 of 2000 was dismissed for default. She filed the said maintenance petition against her husband. When the case came up for hearing on 4.10.2000 for her non-appearance, the Court dismissed the maintenance petition for default. She filed a petition seeking restoration of the maintenance petition on the ground of ill-health. Her husband contended that no medical certificate in support of the claim of ill-health was filed and the default order could not be set aside. After hearing both sides, the learned Magistrate allowed the petition placing reliance on the decision reported in the case of Smt. Prema Jain v. Sudhir Kumar Jain, 1980 Cr.L.J. 80. Against the said order, the husband filed Crl. R.C. No. 984 of 2001 which came up before the learned Single Judge.

3. The learned Judge, after considering the decisions of various High Courts and for the reasons mentioned in the reference order, is of the view that having regard to the fact that the trend of judicial decision appears to be that an application for maintenance dismissed for default, can be restored and the Magistrate can entertain an application for setting aside the default order and pass appropriate orders thereon. Since this view is contrary to the view of this Court in Abdul Waked v. Hafeez Begum and Ors., 1986 (2) APLJ 200, the learned Single Judge is of the opinion that the judicial discipline requires that the matter should be referred to the Bench consisting of two Judges to have an authoritative pronouncement in the matter. The Reference is accordingly posted before us.

4. We have heard the learned Counsels for both sides and also taken the assistance of Senior Advocate, Mr. C. Padmanabha Reddy as amicus curiae. The short point that falls for consideration before us is whether the Magistrate is having inherent powers to restore a petition for maintenance, which was dismissed for default.

5. According to the learned Single Judge that when the Magistrate has no power to dismiss the application filed under Section 125 for default and pass an illegal order, by dismissing the petition for default that is to say, he has no power to

rectify the mistake and the illegal order passed by him should be perpetuated would result in miscarriage of justice and the Court should rectify its own mistake as seen from the principle 'actus curiae neminem gravabit'. It is also observed that . the Apex Court was of the view that the proceedings under Section 488 of the Code of Criminal Procedure (old Code) are of civil nature vide Mst. Jagir Kaur and Anr. v. Jaswant Singh, : [1964]2SCR73 .

In Abdul Wahed's case, it is held as follows :

'The Trial Court is not empowered to pass an order dismissing the application for default and much less the application for setting aside the default order cannot be entertained. It is obvious that the Trial Court has no power to pass a default order. The revision has been filed before the Sessions Court against the order declining to set aside the ex parte order and restore the same on file. The Magistrate has no power to pass default order or set aside such ex parte order and the Sessions Court invoking the revisional jurisdiction cannot clothe such power with the Magistrate in the absence of provision to that effect in the Criminal Procedure Code. Though the revision petition before the Sessions Court is confined to the order declining to set aside the ex parte order the Sessions Court under the powers vested in revisional jurisdiction is justified in setting aside the original order dismissing the application for default. The Sessions Court has ample power under revisional jurisdiction to revise any illegal order passed by the Subordinate Court and need not be fettered by the subject-matter in the revision petition. Considering from this perspective the order of the Sessions Court is sustainable. Revision petition dismissed.'

6. A perusal of the above decision shows that the Trial Court is not empowered to pass an order dismissing an application for maintenance for default, much less an application for setting aside the default order cannot be entertained. To the same effect is the decision reported in the case of Shyamta v. Smt. Dangra and Anr., 1980 All.L.J., 135, wherein it is held as follows :

'A Criminal Court cannot even review its judgment or order. It can only correct clerical or arithmetical errors. Section 488(6) contemplates only one situation in which restoration of an order passed under Section 488, Cr.P.C. can be done. It is

only when an ex parte order has been passed against a husband, this remedy is not available to a wife who files a petition for maintenance. The learned Sessions Judge was wrong in holding that the Magistrate could have restored her application in the exercise of inherent powers. As held in the case of Krishna Rao Paine v. Pramila Bai, (1976 CrL.J. 1819) (All), Magistrate has no power under Section 561A to order restoration. The inherent powers are possessed only by the High Court. The proceedings may be of a quasi-judicial nature but that does not mean that the Magistrate dealing with them gets all the powers of a Civil Court. In Hakimi Jan Bibi v. Monze AH, (1905 (2) CrL.J. 213) a Division Bench of the Calcutta High Court had held that the law does not empower a Magistrate to rehear an application for maintenance under Section 488, Cr.P.C. dismissed for non-appearance. I respectfully subscribe to this view. A wife whose application for maintenance has been dismissed for default can file a second application and on this ground also the question of restoration of previous application does not arise'

7. From the above decisions, it is clear that the Criminal Court has not conferred with the power to review its own judgment, but it can only correct clerical or arithmetical errors therein. To the same analogy, it is pertinent to quote the observations of the Apex Court in A.S. Gauraya v. S.N. Thakur, : 1986 CriLJ1074 , which reads as follows:

'In B.D. Sethi v. V.P. Dewan, : 7(1971)DLT162 , a Division Bench of the Delhi High Court held that a Magistrate could revive a dismissed complaint since the order dismissing the complaint was not a judgment or a final order. In para 9, the Court observes as follows:

'9. As long as the order of the Magistrate does not amount to a judgment or a final order there is nothing in the Criminal Procedure Code prohibiting the Magistrate from entertaining a fresh application asking for the same relief on the same facts or from reconsidering that order. During the course of the proceedings, a Magistrate has to pass various interlocutory orders and it will not be correct to say that he has no jurisdiction to reconsider them....'. We would like to point that this approach is wrong. What the Court has to see is not whether the Code of Criminal Procedure contains any provision prohibiting a Magistrate from entertaining an

application to restore a dismissed complaint, but the task should be to find out whether the said Code contains any provision enabling a Magistrate to exercise an inherent jurisdiction which he otherwise does not have. It was relying upon this decision that the Delhi High Court in this case directed the Magistrate to recall the order of dismissal of the complaint. The Delhi High Court referred to various decisions dealing with Section 367 (old Code) of the Criminal Procedure Code as to what should be the contents of a judgment. In our view, the entire discussion is misplaced. So far as the accused is concerned, dismissal of a complaint for non-appearance of the complainant or his discharge or acquittal on the same ground is a final order and in the absence of any specific provision in the Code, a Magistrate cannot exercise any inherent jurisdiction.

For our purpose, this matter is now concluded by a judgment of this Court in the case of Bindeshwari Prasad Singh v. Kali Singh, : 1978 CriLJ187 . We may usefully quote the following passage at page 126 (of SCR) : (at p. 2433 of AIR):

'..... Even if the Magistrate had any jurisdiction to recall this order, it could have been done by another judicial order after giving reasons that he was satisfied that a case was made out for recalling the order. We, however, need not dilate on this point because there is absolutely no provision in the Criminal Procedure Code of 1898 (which applies to this case) empowering a Magistrate to review or recall an order passed by him. Criminal Procedure Code does contain a provision for inherent powers, namely, Section 561-A which, however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of Civil Procedure Code, the Subordinate Criminal Courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the respondent was to move the Sessions Judge or the High Court in revision. In fact, after having passed the order dated 23.11.1968, the Sub-Divisional Magistrate became functus officio and had no power to review or recall that order on any ground whatsoever. In these circumstances, therefore, the order even if there be one, recalling order dismissing the complaint was entirely without jurisdiction. This being the position, all subsequent proceedings following upon recalling the said order would fall to the ground including order dated 3.5.1972, summoning the accused which must also

be treated to be nullity and destitute of any legal effect. The High Court has not at all considered this important aspect of the matter which alone was sufficient to put an end to these proceedings. It was suggested by Mr. D. Goburdhan that the application given by him for recalling the order of dismissal of the complaint would amount to a fresh complaint. We are, however, unable to agree with this contention because there was no fresh complaint and it is now well settled that a second complaint can lie only on fresh facts or even on the previous facts only if a special case is made out. This has been held by this Court in *Pramatha Nath Taluqdar v. Sdaroj Ranjan Sarkar*, : AIR 1962 SC876 . For these reasons, therefore, the appeal is allowed. The order of the High Court maintaining the order of the Magistrate dated 3.5.1972 is set aside and the order of the Magistrate dated 3.5.1972 summoning the appellant is hereby quashed'.

8. Though the above decision is not directly on the point, but it clearly provides that the subordinate Criminal Courts have no inherent powers in recalling the order. A contra view is taken by a Division Bench of Punjab and Haryana High Court in *Kamla Devi v. Mehma Singh*, 1989 CrL. L.J. 1866, wherein it is held that :

'There is no provision in Chapter 9 of Code of Criminal Procedure dealing with the application for grant of maintenance of wives, children and the parents, but to dismiss such application for non-appearance of the petitioner. Since such applications are not to be equated with criminal complaint which necessarily ought to be dismissed for non-appearance of the complainant in view of Section 256 of Code of Criminal Procedure, it is only in the exercise of inherent power of the Court that for non-appearance of the petitioner, the 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.'

9. To the same effect, the decision reported in the case of *S.K. Alauddin v. Khadiza Bibi*, 1991 CrL. L.J. 2035, wherein a learned Single Judge of the Calcutta High Court has held as follows :

'Following the decision of the Supreme Court reported in 1963 SC 1521, I hold that instant proceedings before me under Section 125, Cr. P.C. is a proceeding of a

civil nature in which the Magistrate can invoke the inherent powers to recall his earlier order finally disposing the proceeding of this nature provided sufficient grounds are shown.'

10. In another decision reported in the case of Smt. Prema Jain v. Sudhir Kumar Jain (supra), a learned Single Judge of the Delhi High Court has held that as below :

'The order in the present case was of administrative nature, rather than the judicial one and the Magistrate cannot be held to be incapable of reviewing or reversing the same. This view finds strength in the provision following Section 125, in the same chapter which entitles the Court to alter or review or to cancel its judicial orders.'

11. Firstly, we deal with the maxim of equity, namely 'actus curiae neminem gravabit' which means an act of Court shall prejudice no man. This maxim is founded upon justice and a Good Sense, which serves safe and certain guidelines for the administration of law.

12. After disposal of the main petition on 4.10.2000, there was no lis pending in the Court of Judicial First Class Magistrate, Pakala. CrI. M.P. No. 798 of 2001 was preferred under Section 126(3) of the Code of Criminal Procedure praying for restoration of M.C. No. 5 of 2000 which was dismissed for default.

Section 126(3) reads as follows :

'The Court in dealing with applications under Section 125 shall have power to make such order as to costs as may be just.'

This provision relates to imposition of costs to the successful parties in order to compensate for the costs incurred. So, this provision does not confer any power to the Magistrate to recall the order dated 4.10,2000. The maintenance proceedings stood terminated by that date and the case was disposed of. There is no provision in the Code to restore the application under Section 125, Cr.P.C. which was dismissed for default. In the absence of specific provision, the maxim has no application as there is no Us pending in the Trial Court. Section 362 of the Cr.P.C.

mandates that no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error. This section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a prayer with the same relief unless formal order of final disposal is set aside by the Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment a final order disposing of the case is signed. In the new Section 362 of the Code of Criminal Procedure which was drafted keeping in view of the recommendations of 41st Report of the Law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment, but also to the final order other than the judgment. This provision applies to any order or judgment disposing of the case under Criminal Procedure Law. Though the proceedings under Section 125 are in the nature of civil proceedings, that does not mean Section 151 of CPC would apply. Therefore, any order passed under Section 125 of Code of Criminal Procedure is subject to Section 362 of Cr.P.C. Though the order passed by the learned Judicial Magistrate of First Class is illegal, but he cannot rectify it under the guise of review. It can be corrected only by invoking revisional jurisdiction by the concerned Court as contemplated under the Code. Therefore, in our view, entertainment of the Miscellaneous Petition after disposal of the main case and restoration of the main case by the learned Judicial First Class Magistrate, Pakala are unwarranted and not referable to any statutory provision. In support of our view, a decision reported in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v. Mohan Singh, : 1975 CriLJ812 , may be quoted, wherein it has clearly been laid down that once a judgment has been pronounced by a High Court either in exercise of its appellate or revisional jurisdiction, no review or revision can be entertained against that judgment, as there is no provision in the Code of Criminal Procedure which would enable the High Court to review the same or to exercise revisional jurisdiction. In the same way, the subordinate Criminal Courts have no inherent power to invoke under Section 482 of Cr.P.C. which vests such power only with High Courts. There is no provision in the Cr.P.C. which would enable the learned Magistrate to review or recall the order dated 4.10.2000.

13. In view of the above discussion, we hold that, firstly a Magistrate has no power to dismiss a petition under Section 125, Cr.P.C. for default, and secondly, for any reason, if it is dismissed, the said Court will become functus officio and it has no power to set aside the default order, the earlier order is illegal notwithstanding. In such a case, the affected party has to take recourse to the revisional jurisdiction as contemplated under the Code of Criminal Procedure.

The Reference is answered accordingly. We appreciate the assistance given by Mr. C. Padmanabha Reddy.

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