

Parson Kaur Vs. Bakshish Singh

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Court : Punjab and Haryana

Decided On : Oct-07-1969

Reported in : 1971CriLJ489

Judge : Gurdev Singh, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 488(6); [Code of Civil Procedure \(CPC\), 1908](#); [Limitation Act, 1963](#) - Sections 5

Appeal No. : Criminal Revn. No. 77-R of 1968

Appellant : Parson Kaur

Respondent : Bakshish Singh

Advocate for Def. : R.L. Sharma, Adv.

Advocate for Pet/Ap. : S.L. Ahluwalia, Adv.

Judgement :

ORDER

1. On an application made by Smt. Parsan Kaur, petitioner , against her husband, Bakhshish Singh, under Section 488, Criminal P.C., she and her minor son were granted maintenance at the rate of Rs. 200/- per mensem by an order of the Judicial Magistrate 1st Class, Ambala, dated the 1st October, 1966. The maintenance was, however, granted with effect from the date of the application,

i.e., 23rd of March, 1966, Subsequently the petitioner applied to the Magistrate for realisation of the arrears of maintenance amounting to Rs.1,800/-. On service of notice upon him the respondent Bakhshish Singh, approached the Magistrate on 22nd of July, 1967, for setting aside the ex parte order of maintenance in exercise of his powers under Section 488(6) of the Code of Criminal Procedure. This application was contested inter alia on the plea that he was not duly served in the original proceedings and it was about a month back that he had learnt that such an order had been passed against him. In contesting this prayer for setting aside the ex parte order, Smt. Parsan Kaur pleaded inter alia that the application under sub-section (6) of S. 488 of the Code of Criminal Procedure, having been made after more than 30 days (3 months?) from the date of the order prescribed under that provision, was barred by time and was thus liable to dismissal without going into its merits.

The learned Magistrate by his order dated the 21st of September, 1967, however, directed that a preliminary enquiry about the date of the knowledge of the ex parte decree passed against Bakhshish Singh, be made. Aggrieved by this order, Smt. Parsan Kaur invoked the revisional jurisdiction of the Court of Session at Ambala, reiterating her plea that her husband's application for setting aside the order of maintenance being beyond the period of limitation prescribed under sub-section (6) of s. 488 of the Code of Criminal Procedure, had to be dismissed. The learned Sessions Judge, on due consideration of the matter, held that the period of three months prescribed under sub-section (6) of s. 488 of the Code of Criminal Procedure, for setting aside an ex parte order of maintenance, had to be reckoned from the date of that order and the question of respondent's knowledge of such an order was not relevant. He has referred to case by his order dated the 3rd of April, 1968, recommending that the Magistrate's order dated the 21st September, 1967, directing a preliminary enquiry to be made of the date when the respondent came to know of the ex parte order of maintenance, be quashed.

2. In opposing this recommendation, Mr. R. L. Sharma, appearing for the respondent-husband, has urged that since the order of maintenance, that has been sought to be set aside, was passed in the respondent's absence and without proper service of the notice of the original application for maintenance on him the

period of three months prescribed under sub-section (6) of S. 488 of the code of Criminal Procedure, must be reckoned not from the date of their order but from the date on which the respondent became aware of it. in support of this contention, he has cited Raja Harish Chandra Raj Singh v. Deputy Land Acquisition Office, AIR 1961 SC 1500 and Zohra Bagum alias Aysha Begum v. Mohamed Ghouse Qadri Qadeeri, AIR 1966 Andh Pra 50. The Supreme court decision on which reliance is placed, relates to the question of limitation for an application under Section 18(2) of the Land Acquisition Act, 1894, or reference to the Court. Under one of the provisions to that section, the application for reference has to be made within six weeks from the date of the Collector's award. Their Lordships of the Supreme Court, however, ruled that the expression 'date of the award' used in proviso (b) to Section 18(2) of the Act must mean the date when the award is either communicated to the party or comes to his knowledge either actually or constructively, observing that it would be unreasonable to construe the words 'from the date of the Collector's award', used in this proviso in a literal or mechanical way. Relying upon this observation, Jaganmohan Reddy, J., while dealing with an application made under the proviso to sub-section (6) of S. 488 of the Code of Criminal Procedure, in AIR 1966 Andh Pra 50, has held that limitation for setting aside the ex parte order of maintenance made under 488 of the Code of Criminal Procedure, begins from the date of the knowledge of the order by the aggrieved party and not from the date on which that order was passed.

3. The petitioner's counsel Mr. Sunder Lal, submits that the Supreme Court case on which Jaganmohan Reddy, J. has relied, is clearly distinguishable and does not justify the view taken in Zohra Begum's case, AIR 1966 Andh Pra 50. This contention, in my opinion, has considerable force. In holding that under proviso (b) to sub-section (2) of S. 18 of the Land Acquisition Act, the period prescribed for making an application for reference to the Court has to be completed from the date of the knowledge of Collector's award, this is what Gajendragadkar, J. (as he then was) delivering the judgment of the court observed:-

'In dealing with this question it is relevant to bear in mind the legal charge of the award made by the Collector under Section 12. In a sense it is a decision of the Collector reached by him after holding an enquiry as prescribed by the Act. It is a

decision, inter alia, in respect of the amount of compensation which should be paid to the person interested in the property acquired; but legally the award cannot be treated as a decision; it is in law an offer or tender of the compensation determined by the Collector to the owner of the property under acquisition. If the owner accepts the offer no further proceedings is required to be taken the amount is paid and compensation proceedings are concluded. If, however, the owner does not accept the offer, Section 18 gives him the statutory right of having the question determined by court, and it is the amount of compensation which the Court may determine that would bind both the owner and the Collector. * * * * * It is because of this nature of the award that the award can be appropriately described as a tender or offer made by the Collector on behalf of the Government to the owner of the property for his acceptance.* * * * *.

Therefore, if the award made by the Collector is in law no more than an offer made on behalf of the Government to the owner of the property then the making of the award as properly understood must involve the communication of the offer to the party concerned. That is the normal requirement under the contract law and its applicability to cases of award made under the act cannot be reasonably excluded. Thus considered the date of the award cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office ; it must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. If that be the true position then the literal and mechanical construction of the words ' the date of the award' occurring in the relevant section would not be appropriate.'

4. From these observations, it is abundantly clear that the construction placed by their Lordships of the Supreme Court on the expression 'the date of the award' is based upon the peculiar nature of the award made by the Collector under the Land Acquisition Act and, in my opinion, these observations cannot be taken as a charter for laying down that in every case where a period of limitation according to the statute has to commence from the date of the order, it should be taken as implied that where the parties are not present when the order is passed or the order is not communicate to them by the Court or the authority passing it, the date of its knowledge would be the terminus a quo of that period of limitation.

5. The relevant proviso to sub-section (6) of S. 488 of the Code of Criminal Procedure under which the respondent approached the Magistrate for setting aside the ex parte order of maintenance passed against him as far back as 1st of October, 1966, reads thus:-

'Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court the Magistrate may proceed to hear and determine the case ex parte. Any orders so made may be set aside for good cause shown, on application made within three months from the date thereof.'

The concluding words of this proviso are clear and admit of no ambiguity. It is well-settled canon of interpretation that where the language of a statute is clear, the duty of the Court is to give effect to it irrespective of the hardship that it may entail to individuals. Since the application to which this proviso refers, is for setting aside an ex parte order, it is obvious that the order in question is not passed in the presence of the party concerned but in his absence. The legislature while enacting this proviso was aware of the fact that the person, against whom an ex parte order of maintenance is passed, would not be aware of it for sometime and even during three months, prescribed for an application to set it aside, he may not obtain the knowledge of that order. If in that situation the legislature merely provided that the application for setting aside an ex parte order, is to be made within three months from the date of the order and did not proceed further to add 'or from the date of the knowledge of such an order' it is obvious that the legislature did not intentionally and deliberately.

In fact it appears to me that it was for valid reason that the date of knowledge was not prescribed as terminus a quo for computing the period of three months within which an application to set aside such an ex parte order is required to be made. An order of maintenance under Section 488 of the Code of Criminal Procedure, is passed on applications of wives and minor children who are not being maintained and who are in indigent circumstances. Considering the nature of the proceedings and the relief sought in these summary proceedings, the legislature set its face against permitting the husband, or other person against whom the order is made, from deliberately avoiding to appear at the proceedings and thereafter evade the

service of the ex parte order. I had an occasion to deal with the precise question, which is now agitated before me, earlier in *Hari Singh v. Mst. Dhanno*, (1962) 64 Pun LR 59 = 1962 (2) Cri LJ 581, where I expressed the opinion that the period of three months has to be reckoned from the date of the ex parte order sought to be set aside under the proviso to sub-section (6) of S. 488 of the Code of Criminal Procedure, and not from any other date, irrespective of the date on which the respondent obtains the knowledge of the order. In coming to this conclusion I then observed as follows:-

'The word 'thereof', which has been underlined above, leaves no manner of doubt that the period of three months has to be reckoned from the date of the ex parte order which is sought to be set aside and not from any other date. This is irrespective of the date on which the petitioner obtains the knowledge of the order. If the legislature intended that the period of three months for making an application for setting aside an ex parte order should be reckoned from the date of knowledge, it could not have failed to state so. On a reference to the various provisions of the Indian Limitation Act, we find that wherever the legislature considered that the date of knowledge should be the *terminum a quo* it has specifically said so. If the argument of the learned counsel is accepted, it would amount to incorporating in the relevant provision the words 'or from the date on which he comes to know of this order'. where the language is clear and unambiguous, it has to be given effect to irrespective of the hardship it may entail on the parties concerned. This is the view which has also been taken by the Madras High Court in *A. S. Govindan v. Jayammal*, AIR 1950 Mad 153, which has been cited by the respondent's counsel'.

6. I still find myself in respectful agreement with the view taken by Somasundram, J. AIR 1950 Mad 153. The contrary view expressed in AIR 1966 Andh Pra 50, has already been discussed above, and speaking with respect, in taking that view the peculiar nature of the Collector's award with which their Lordships of the Supreme Court were dealing in AIR 1961 SC 1500, has been ignored. I find that a contrary view has been taken by T. K. Tukol, J. in *State v. Bhimrao*, AIR 1963 Mys 239. In holding that where a person is not validly served in proceeding under Section 488 of the Code of Criminal Procedure, an application, for setting aside an ex parte order awarding maintenance, made after the expiry of three months of the date of

the ex parte order, (was maintainable?) the learned Judge observed:-

'If there is no valid service, then the ex parte order awarding maintenance to the respondent will not be valid * * * * *. The period of three months is with reference to the date of 'any order so made'. The words 'order so made' must necessarily imply an order passed in conformity with the first part of the proviso. If the order itself is not in conformity with the first part of the proviso, the second part of the proviso prescribing a period of three months from the date of the order so made will not come into operation.'

7. I regret, I do not find it possible to subscribe to this view. The application for setting aside an ex parte order under the proviso to sub-section (6) of S. 488 of the Code of Criminal Procedure, will succeed if sufficient cause is shown. The non-service, or service not effected in accordance with law may furnish a ground for setting aside the ex parte order but these matters do not, in any way, affect the period of limitation prescribed under that proviso for an application to set aside an ex parte order. The commencement of limitation would not depend upon the merits of the ex parte order.

8. As I had an occasion to point out in (1962) 64 Pun LR 59 = (1962 (2) Cri LJ 581) (supra), on reference to the various articles of the Indian Limitation Act and similar provision contained in several statutes laying down the period of limitation for an application, appeal, et., the legislature has, wherever it considered necessary, made the date of knowledge of the order sought to be challenged, set aside, revised or appealed against, as the date of commencement of the prescribed period of limitation and in other cases it has contented itself by merely making the date of the order the terminus a quo for computing the period of limitation. It will suffice here to refer to Arts. 122, 123 and 131 of the schedule to the Indian [Limitation Act, 1963](#), Article 122 provides :

Article Description of Application. Period of limitation Time from which period begins to run.

122 To restore a suit or appeal or application Thirty days. The date of dismissal.

for review or revision dismissed

for default of appearance or for want

of prosecution or failure to pay

costs of service of process or to furnish

security for costs.

9. There is ample authority for proposition that the period of 30 days provided under this article has to commence from the date of the dismissal and not from the date of the knowledge of the party whose appeal, application or revision is dismissed. Reference in this connection may be made to Mohan Lal v. Jai Lal. (1949) 1 Pepsu LR 212 and Kanai Lal Shaw v. Bhattu Shaw, AIR 1961 Cal 474.

10. Article 123 of the Indian Limitation Act prescribes a period of thirty days for an application to set aside a decree passed ex parte etc. It is expressly stated in column 3 of that article that the point of time from which the period of 30 days begins to run will be 'the date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree'. It is thus, obvious that in this article the legislature, being conscious of the fact that an ex parte decree is passed in the absence of a party - and the absence of the party may be due to non-service - has expressly provided that the date of knowledge should be the date of the commencement of the period of 30 days for making an application to set aside the ex parte decree. This is in direct contrast with the proviso to sub-section (6) of S. 488, Criminal P. C. wherein any reference to the date of knowledge of the order is omitted and such an omission cannot be considered as accidental but deliberate. Again reference may be made to Art. 131 which prescribes a period of 90 days for invoking the revisional jurisdiction of the Court under the Codes of the Civil and Criminal Procedure. The date of commencement is prescribed as 'the date of the decree or order or sentence

sought to be revised'. Even in this provision there is deliberate omission of any reference to the date of the knowledge of the order by the person against whom the impugned order is passed.

11. It is thus quite obvious that if the proviso to sub-section (6) of S. 488 of the Code of Criminal Procedure, is construed as implying that the period of limitation for setting aside an ex parte order would commence from the date of the knowledge of the aggrieved party, that would be tantamount to adding in that proviso the words 'or from the date on which the person against whom the ex parte order is passed, becomes aware of it.' Such a construction is not permissible so as to extend the scope of a clear and unambiguous provision.

12. It has been urged on behalf of the respondent that this strict interpretation with regard to the commencement of the period of limitation under the proviso to sub-section (6) of S. 488 of the Code of Criminal Procedure, may result in a good deal of hardship to the person against whom the order is passed and thus defeat the ends of justice. As has been observed earlier, where the language of a statute is clear and admits of no ambiguity, the question of hardship is not relevant in interpreting it. In any case, I find that there is ample provision in law to mitigate hardship. Section 5 of the Indian Limitation Act, as it now stands in the Indian Limitation Act, 1963, provides:-

'Any appeal or any application, other than an application under any of the provisions of Order 22 of the Code of Civil Procedure 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.'

13. From this it is obvious that even in an application made under the proviso to sub-section (6) of S. 488 of the Code of Criminal Procedure a party can seek extension of time by making out a case for it. prior to the amendment of the Limitation Act in 1963, the position with regard to the applicability of Section 5 of the Limitation Act may have been different, but now that provision can be availed of even in proceedings under sub-section (6) of S. 499 of the Code of Criminal Procedure. Consequently, the respondent could seek extension of time by

showing that there was sufficient cause for his not coming to the Court within the prescribed period of 30 days (3 months?) from the date of the ex parte order. For that purpose, he is entitled to an opportunity to satisfy the Court that there is sufficient ground for condoning the delay in coming to the Court to have the ex parte order set aside.

14. The decision of Jindra Lal, J. in *Hardyal Singh v. Swaran Kaur*, Criminal Revn. No. 634 of 1966, D/- 15-5-1967 (Punjab) is no authority for the proposition that the period of three months prescribed under proviso to sub-section (6) of Section 488 of the Code of Criminal Procedure is to be reckoned from the date on which the person against whom the ex parte order of maintenance is passed learns about that order. The learned Judge had ruled in that case that the provisions of Section 5 of the Limitation Act could be availed of by the party against whom the ex parte order is passed when he remained the case observing as follows:-

'I therefore, allow this petition and remit the case to the learned Sessions Judge (for decision?) whether the allegation of the petitioner that he came to know of the order four days before the filing of the application, as alleged by him is correct or not. If he comes to the conclusion that the allegations of the petitioner are correct then he will be clearly entitled to the benefit of S. 5 of the Limitation Act, especially as it appears that he was never served with a notice of the application under S. 488 of the Criminal P. C.'

15. Since I have held that Section 5 of the Indian Limitation Act applies to an application for setting aside an ex parte order made under the proviso to sub-section (6) of S. 488 of the Code of Criminal Procedure, the impugned order of the learned Sessions Judge directing a preliminary enquiry into the date of the knowledge cannot be sustained. The recommendation of the learned Sessions Judge is accordingly accepted and the impugned order of the learned Magistrate is quashed. The case is remitted to the Magistrate for disposal of the respondent's application in the light of the observations made above. As I have held that the period fixed for filing the application can be extended under S. 5 of the Indian Limitation Act, it will be open to the respondent to make a proper application for the extension of time supported by an affidavit. The Magistrate shall then proceed to

deal with the matter in accordance with law. The counsel for the parties are directed to cause appearance of their clients before the Magistrate on the 27th of October, 1969.

16. Order accordingly.

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