
(15) Before parting with this order, we regret to mention that despite *Jagjit Rai Vohra's* case (supra) being available as a guiding factor to dispose of these writ petitions, learned counsel for the parties still by an agreed order ventured to have these cases referred to a Full Bench and employ this Court's time for no useful purpose. This time could well have been saved and employed otherwise usefully.

S.C.K.

Before S. S. Dewan and A. L. Bahri, JJ.

KAMLA DEVI AND ORS.,—*Petitioners.*

versus

MEHMA SINGH,—*Respondent.*

Criminal Revision No. 966 of 1987

January 5, 1989.

Criminal Procedure Code (II of 1974)—S. 125, Chapter IX—Maintenance allowance ordered—Application for recovery of the amount—Such application dismissed in default—Restoration of such application—Power of Court to restore—Grounds for restoration—Stated.

Held, that the Code of Criminal Procedure, 1974 provides a swift and speedy remedy to the petitioner claiming maintenance who are being neglected. It is only in the matter of implementation of such orders that a stringent provision is made for recovery of such amount as recovery of fine or by sending the person against whom order is made to imprisonment for a certain period till payment is made. This remedy cannot be throttled by procedural technicalities such as non-appearance of the petitioner on a particular day. Such non-appearance in a given case may be beyond the control of the petitioner. In other words, there may be sufficient and cogent reason for the petitioner not to put in appearance when the case was actually called. In such circumstances not to restore the application dismissed in default would result in miscarriage of justice. On a sufficient cause being shown, the Court would have inherent power in such like cases to restore such applications dismissed in default.

(Para 9).

Kamla Devi and others v. Mehma Singh (A. L. Bahri, J.)

(This case was referred to a Larger Bench by Hon'ble Mr. Justice Jai Singh Sekhon on October 11, 1988 for decision of an important question of law involved in this case. The question has since been decided by the Division Bench consisting of Hon'ble Mr. Justice S. S. Dewan and Hon'ble Mr. Justice A. L. Bahri and it has also been directed that the matter be placed before the Single Judge for decision of the Criminal Revision Petition according to law).

Petition under Section 401 of the Code of Criminal Procedure for revision of the order of the court of Shri M. S. Luna, Additional Sessions Judge, Patiala, dated 27th August, 1987, modifying that of the court of Shri Balbir Singh, Sub-Divisional Judicial Magistrate, Rajpura, dated 25th March, 1987, partly accepting this revision and maintaining the imprisonment for 12 months and ordering that he may be released earlier subject to payment of arrears i.e., Rs. 10,000 found due from him. It has also made clear that in default of each month, he is to undergo sentence for one month and his imprisonment can be reduced proportionate to the amount paid by him.

Gur Rattan Pal Singh, Advocate, for the petitioners.

Jagmohan Singh, Advocate, for the respondent.

JUDGMENT

A. L. Bahri, J.—

(1) Jai Singh Sekhon, J,—*vide* his order dated October 11, 1988 referred the following question of law to the larger Bench :—

“Whether the Judicial Magistrate can restore the execution application of an order passed under section 125 of the Code which was dismissed in default of non-appearance of the petitioner on sufficient cause being shown.”

(2) The facts of the case, in brief, are as under :—

(3) Smt. Kamla Devi filed an application under section 125 of the Code of Criminal Procedure for the grant of maintenance for herself as well as for her two minor children against her husband Mehma Singh. *Vide* order dated October 25, 1982, Judicial Magistrate 1st Class, Rajpura allowed maintenance at the rate of Rs. 100 per mensem to Smt. Kamla Devi and at the rate of Rs. 50 per mensem to each of the minor daughters Neelam and Guddi. The maintenance was payable with effect from the date of the institution of the application i.e., September 23, 1980. On the failure of Mehma Singh to pay the

maintenance as ordered, Smt. Kamla Devi moved an application for execution of the order of maintenance on October 19, 1983. She claimed arrears of maintenance for the period September 23, 1980 to October 23, 1983. The said application for execution was dismissed in default by the Magistrate on May 19, 1984. Subsequently, the Judicial Magistrate restored the application dismissed in default,—*vide* his order dated August 4, 1984. In the meantime, Smt. Kamla Devi filed another application for execution for recovery of arrears of maintenance for the period March 1, 1984 to March 31, 1985. Both these applications were disposed of,—*vide* order dated March 25, 1987, Mehma Singh was ordered to undergo twelve months' imprisonment subject to the condition that he would be released if he would make the payment of the amount of arrears earlier. A finding was also recorded that a sum of Rs. 10,000 was in arrears. Mehma Singh took up the matter in revision before the Additional Sessions Judge, Patiala who,—*vide* his order dated August 27, 1987 set aside the order of the Judicial Magistrate restoring the application which was dismissed in default holding that the Judicial Magistrate had no jurisdiction to do so. Otherwise, the order passed on the second application, as noticed above, was maintained. Smt. Kamla Devi and her minor children filed the present criminal revision petition in this Court against the order of the Additional Sessions Judge.

(4) Chapter IX of the Code of Criminal Procedure contains provisions for the grant of order for maintenance of wives, children and parents. This chapter consists of four sections such as sections 125 to 128. Section 125 provides that a Magistrate of the first class may, on fulfilment of certain conditions, pass an order for the grant of maintenance to wives, children and parents. Sub-section (3) of section 125 further provides that on failure of the person to comply with the order of the maintenance, the Magistrate could, 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 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. Certain conditions are also mentioned therein where the Magistrate shall not pass such an order in execution. Section 126 of the Code of Criminal Procedure provides for territorial jurisdiction of the Court where such an application under section 125 of the Code can be instituted. Sub-section (2) of section 126 provides for evidence to be recorded in such proceedings in the presence of the person against whom an order for payment of maintenance is proposed to be made

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or where his personal attendance is dispensed with, in the presence of his pleader. It further provides that where such a person is avoiding appearance, an *ex parte* order can be passed. The Court was also given power to make such orders as to costs as may be deemed fit. Section 127 of the Code provides contingencies when order passed under section 125 of the Code of Criminal Procedure could be modified, varied or cancelled. Section 128 provides forum where order passed under section 125 of the Code can be enforced.

(5) In a way, the aforesaid provisions in Chapter IX of the Code of Criminal Procedure constitute a Code of Procedure by itself. However, questions cropped up as to whether these proceedings are criminal in nature or civil or that orders passed under section 125 of the Code of Criminal Procedure (section 488 of the old Code) are administrative orders, interim orders and could be reviewed by the Magistrate on fulfilment of the conditions as mentioned in these provisions and that the general provision that no criminal Court can review its order would not be attracted to these proceedings. The Calcutta High Court in *Hakimi Jan Bibi v. Mouze Ali*, (1), noticed an earlier decision in *Jamoti v. Gadalo Kamar*, (2), wherein it was held that where the application had been dismissed by a fully empowered Magistrate after hearing the evidence, the District Magistrate could not entertain the complaint *de novo*. The Calcutta High Court held that the above case did not lay down the proposition that where a petition for maintenance has been dismissed in default of the appearance of the applicant, it is not open to the applicant to present a fresh petition. The application to re-hear the petition already dismissed does not appear to have been made under any section of the Code giving the Magistrate any power to set aside his previous order and hear the case over again. The aforesaid observations of the Division Bench of the Calcutta High Court were noticed by Gurdev Singh J. in *Babu Ram v. Ramji Lal and others*, (3), in which it was held that if once a Magistrate passes an order dismissing for default an application under section 145 of the Code of Criminal Procedure, the proceedings could not be restored. These two decisions were further noticed and relied upon by Shamsheer Bahadur J. in *Bhagwan Singh v. Mst. Gurnam Kaur and another*, (4). It was observed that there was no provision in the Code of

(1) (1905)2 Cr. L.J. 213 (1CLJ. 214).

(2) (1877)1 CLR 89.

(3) 1964 PLR 196.

(4) 1966 Cr. L.J. 129.

Criminal Procedure which could justifiably empower the Magistrate to restore for hearing an application which was dismissed in default by a Magistrate. The contention that the Court in its inherent powers could also review its judgment and the Magistrate's action in restoring the petition when the petitioner reappeared on the day when it was dismissed in default was repelled observing that the power of restoration could not be spelled out from the general provisions. In *Nand Lal Misra v. Kanhaiya Lal Misra*, (5), the Supreme Court while interpreting section 488(6) of the old Code of Criminal Procedure observed that the provisions of Chapter XXX-VI (of the old Code) were a self-contained Code and a distinction was drawn that those proceedings were not criminal in the sense of a trial of an accused person on a charge. Such proceedings were of a civil nature. Delhi High Court in *Harbhajan Kaur v. Major Sant Singh*, (6), constructing the observations of the Supreme Court in *Nand Lal's case* (supra), observed that such maintenance proceedings were criminal proceedings designed by way of summary process to provide to deserted wives and neglected children adjudication of their civil right of maintenance upto a limited amount enforceable through criminal Courts to avoid the notorious delays of civil proceedings which may still be utilised for fuller relief under the general law in the ordinary civil Courts. The Orissa High Court in *Norbet Kispatta v. Mst. Tersa Kerketa*, (7), while commenting upon the provisions of section 488 of the old Code, observed that such proceedings are not civil proceedings so as to attract the provisions of Civil Procedure Code as such proceedings are wholly governed by the provisions of Criminal Procedure Code. Thus, the provisions of Orders VI, VII and VIII of the Code of Civil Procedure relating to pleadings in civil suits did not apply to a petition under section 488 of the old Code of Criminal Procedure. The matter was considered by the Karnataka High Court in *Smt. Malan v. Baburao Yashwant Jadhav*, 1981 (8), wherein it was observed that the strict rules of pleadings applicable to the pleadings in a civil suit cannot be applied to a petition under section 125 of the new Code of Criminal Procedure. The Allahabad High Court in *Bishamber Dass v. Smt. Anguri and another*, (9), did not allow amendment of application filed under section 125 of the Code of Criminal Procedure to

(5) AIR 1960 S.C. 882.

(6) AIR 1969 Delhi 298.

(7) 1971 CrL. L.J. 1496.

(8) 1981 CrL. L.J. 184.

(9) 1978 CrL. L.J. 385.

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include the plea that the petitioner (wife) was unable to maintain herself on the ground that there was no provision in the Criminal Procedure Code to do so. However, the case was remanded to the trial Court to lead evidence on the said point.

(6) A Division Bench of this Court consisting of S. S. Sandhwalia, the then C.J. and D. S. Tewatia, J. in *Chanan Singh v. Jangir Kaur*, (10), while noticing some of the decisions, as referred to above, held that the proceedings under Chapter IX specially contained in the Code of Criminal Procedure are criminal in nature. The niceties of construing formal civil pleadings would not be attracted to an application under section 125 of the Code. Even assuming that a written application may be necessary thereunder, the said section does not prescribe its contents or any formal mode of presentation, the same is not to be verified as a formal civil pleading. Consequently, neither the Code of Civil Procedure nor the principles thereunder could in any way be attracted nor the strict rules of civil law with evidence beyond pleadings should be ignored can come into play. The question before the Division Bench was as to whether the technicalities construing civil pleadings were actually attracted to an application for maintenance by a wife under section 125 of the Code of Criminal Procedure. The Division Bench answered the question in the negative.

(7) In *Savitri v. Govind Singh Rawat*, (11), the Supreme Court construed the scope of section 125 of the Code of Criminal Procedure on the question of making interim order. One of the principles laid down by the Supreme Court was as under :—

“Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment.

It was further held as under :—

“That in the absence of any express prohibition, it is appropriate to construe the provision in Chapter IX as conferring an implied power on the magistrate to direct the person against whom an application is made under section 125 of

(10) 1983 All India Criminal Law Reporter 51.

(11) 1985 Marriage Law Journal, 561.

the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. It is quite common that applications made under section 125 of the Code also take several months for being disposed of finally. In order to enjoy the fruits of the proceedings under section 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the Court. Every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective.

It was further held that :

“Having regard to the nature of the jurisdiction exercised by a magistrate under section 125 of the Code, the said provision should be interpreted as conferring power by necessary implication on the magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to therein pending final disposal of the application.”

The observations of the Supreme Court in *Shri Bhagwan Dutt v. Smt. Kamla Devi and another*, (12) were noticed in *Savitri's case* (supra) which are as under :—

“These provisions (sections 488, 489 and 490 of the old Code of Criminal Procedure) are intended to fulfil a social purpose. Their object is to compel a man to perform the moral obligation which he owes to society in respect of his wife and children. By providing a simple, speedy but limited relief, they seek to ensure that the neglected wife and children are not left beggared and destituted on the scrap-help of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. Thus, section 488 is not intended to provide for a full and final determination of the status and personal rights of the parties. The jurisdiction conferred by the section on the Magistrate is more in the nature of a preventive rather than a remedial jurisdiction; it is certainly not punitive.

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As pointed out in *Thompson's case* 6NWP 205 the scope of the Chapter XXXVI is limited and the Magistrate cannot except as thereunder provided usurp the jurisdiction in matrimonial disputes possessed by the civil Courts. Sub-section (2) of section 489 expressly makes orders passed under Chapter XXXVI of the Code subject to any final adjudication that may be made by a civil Court between the parties regarding their status and civil rights."

A direct question as to whether an application filed under section 125 of the Code of Criminal Procedure dismissed in default could be restored was under consideration of the Delhi High Court in *Smt. Prema Jain v. Sudhir Kumar Jain*, (13). It was held that such an order of dismissal did not amount to final order and the Magistrate had the jurisdiction to restore the said application which was dismissed in default. The provisions of section 362 of the Code of Criminal Procedure were not attracted as the order dismissed in default was not a final order. It was further held that the application filed under section 125 of the Code of Criminal Procedure could neither be considered as complaint nor a police report under section 173 of the Code of Criminal Procedure. A clear cut distinction was drawn with respect to the application filed under section 125 of the Code and criminal complaint and it was observed as under :—

"It is not possible to equate maintenance proceedings contemplated by Chapter IX of the New Code with other proceedings under the Code, say, for instance, those covered by Chapters XIX and XX, for a variety of reasons. Failure to maintain a wife or a child has not been made by the statute liable to punishment; the respondent is not to be treated as an offender, the petition under section 125 of the New Code is not a complaint and no preliminary inquiry is to be held before the issue of a process in pursuance thereof. Unlike a criminal trial, here the Court can proceed against the respondent *ex-parte* due to his non-appearance and can pass a final order behind his back. The provision for maintenance has been incorporated in the Code of Criminal Procedure only with the aim of making available to helpless persons a swift and speedy remedy otherwise it would seem here to be quite

out of place. In the case of an accused person there is a presumption of innocence unless there is proof to the contrary and the slant in the matter of interpretation is, therefore, against the prosecution. On the other hand, the provision in section 125 being a benevolent one, it has to be construed in favour of the persons who seek shelter thereunder. A petition under section 125 and a complaint to have someone sentenced for a crime are not expected, therefore, to be meted out the same treatment.”

The matter was again considered by the Delhi High Court in *Suhird Kamra v. Smt. Neeta and another*, (14). The case of *Smt. Prema Jain* (supra) as well as of the Supreme Court in *Smt. Savitri's case* (supra) were noticed alongwith other cases and it was observed as under :—

“Keeping in view the fact that proceedings under Chapter 9 are in nature of civil proceedings and enacted for providing urgent and effective reliefs it cannot be said that the magistrate has no power to restore, on sufficient cause shown, a petition under section 125 of the Code which had been dismissed in default. It is a matter of common knowledge that petitions under section 125 are disposed of not in terms of months but sometimes in years and the Court is empowered to fix maintenance from the date of the petition. A great deal of misery will be caused to destitute women and helpless children or even parents who cannot maintain themselves if the provisions are to be read to mean that a petition dismissed in default cannot be restored. This could never be the intention of the Legislature. There could be no other interpretation lest it be said that there is so much law yet there is no room for justice. It has therefore to be held that a criminal Court while considering a petition under section 125 of the Code has power to restore the same on its file on sufficient cause being shown if the petition had earlier been dismissed in default of appearance of the petitioner.”

(8) There is no specific provision in Chapter IX of the Code of Criminal Procedure 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 Code of Criminal Procedure, 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.

(9) The nature of the proceedings in Chapter IX of the Code is inherently concerning civil rights i.e., grant of maintenance to wives, children and the parents. All these orders passed under different provisions of Chapter IX, as briefly noticed above, are interim in nature and can be modified, varied or cancelled on the grounds mentioned therein. Furthermore, such orders are subject to final orders, if any, passed by the civil Courts regarding grant of maintenance. The Code of Criminal Procedure provides a swift and speedy remedy to the petitioner claiming maintenance who are being neglected. It is only in the matter of implementation of such orders that a stringent provision is made for recovery of such amount as recovery of fine or by sending the person against whom order is made to imprisonment for a certain period till payment is made. This remedy cannot be throttled by procedural technicalities such as non-appearance of the petitioner on a particular day. Such non-appearance in a given case may be beyond the control of the petitioner. In other words, there may be sufficient and cogent reason for the petitioner not to put in appearance when the case was actually called. In such circumstances not to restore the application dismissed in default would result in miscarriage of justice. On a sufficient cause being shown, the Court would have inherent power in such like cases to restore such applications dismissed in default.

(10) As observed by the Supreme Court in *Nand Lal Misra's case* (supra), proceedings under Chapter IX of the Code of Criminal Procedure are not of criminal nature but are primarily of a civil nature. Although technicalities of procedure as provided in different provisions of the Code of Civil Procedure may not *in fact* apply to the proceedings initiated under section 125 of the Code of Criminal Procedure, however, such of the provisions of the Code of Civil Procedure which help in advancing the cause of justice can legitimately be adopted in the proceedings initiated under section 125 of the Code of Criminal Procedure. The provision

of restoration of application dismissed in default is such which enhances the cause of administration of justice and such power is inherent with the Court while deciding an application under section 125 of the Code of Criminal Procedure in view of the analogy of the decision of the Supreme Court in *Savitri's case* (supra).

(11) In *Babu Ram's case* (supra), this Court was considering the scope of proceedings under section 145 of the Code of Criminal Procedure which relates to apprehension of breach of peace in connection with the possession of land or property and as such are basically different from proceedings under section 125 of the Code of Criminal Procedure. The view expressed in *Bhagwan Dutt's case* (supra) is overruled. Technical rules of procedure, as laid down in the Code of Civil Procedure, cannot be applied to the proceedings under section 125 of the Code of Criminal Procedure. To that extent, the view expressed in *Chanan Singh's Case* (supra) and other cases referred to above is correct. However, the view expressed in *Chanan Singh's case* (supra) by Division Bench of this Court that proceedings under section 125 of the Code of Criminal Procedure are criminal cannot be accepted in view of the decision of the Supreme Court in *Nand Lal Misra's case* referred to above.

(12) We respectfully agree with the view expressed by the Delhi High Court in *Suhird Kamra's case* (supra) and *Smt. Prema Jain's case* (supra). The question referred is, therefore, answered in the affirmative.

(13) The matter is directed to be placed before the Single Judge for decision of the criminal revision petition according to law.

R.N.R.