

Bhagwant Singh v. Surjit Kaur (S. S. Sandhawalia, C.J.)

assumed there that the Division Bench decision of the Punjab High Court in *Sohan Singh's* case, A.I.R. 1956 Punjab 215 had taken the view that the Court had full power to grant refund of Court-fees even when the fees had been collected in accordance with the provisions of law and the Full Bench apparently negated such a view."

In this view of the matter, the application for the refund of the Court-fee is allowed.

5. Consequently, it is directed that the certificate for the refund of the Court-fee paid on the cross-objections be issued in accordance with law.

N.K.S.

Before S. S. Sandhawalia, C.J. and S. P. Goyal, J

BHAGWANT SINGH,—Petitioner.

versus

SURJIT KAUR,—Respondent.

Criminal Revision No. 1284 of 1978.

December 2, 1980.

Code of Criminal Procedure (II of 1974)—Sections 125 and 127 (2)—Order for maintenance passed—Subsequent decree of Civil Court specifically on the point of maintenance—Order of maintenance—Whether liable to be varied or cancelled in terms of the Civil Court decree—Provisions of section 127 (2)—Whether mandatory.

Held, that where the decree of a Civil Court is directly on the issue of the liability or the quantum of maintenance, then it is obviously a judgment of a Court of competent jurisdiction directly on the point. Once that is so, it calls for notice that the language of the statute is in terms mandatory. The Legislature has designedly used the words "shall cancel the order or, as the case may be, very the same accordingly." The opening part of section 127 (2) of the Code of Criminal Procedure 1973 undoubtedly vests a certain dis-

cretion in the Magistrate. He must be satisfied or atleast it should appear to him that the decision of the competent Civil Court has necessitated a cancellation or variance of the earlier order. However, once he comes to that conclusion, then the language of the provision implies that he has no discretion but to cancel or to vary the order in accordance with the Civil Court decree. Apart from the specific language in section 127(2) of the Code, it appears on the larger principle also as well settled that where the Civil rights of the parties are involved, the plenary jurisdiction is with the Civil Courts and normally their decrees must override or have a precedence over a parallel or equivalent jurisdiction. Thus, on the language of section 127(2) of the Code as also on principle, it would be obligatory for a Magistrate to follow the judgment of a competent Civil Court specifically on the point of maintenance and, consequently, to cancel or vary the earlier order of the criminal court under section 125 of the Code accordingly. (Paras 8, 9 and 12).

Case referred by Hon'ble the Chief Justice Mr. S. S. Sandhawalia, dated 11th September, 1980, to a Division Bench for decision of a meaningful question involved in the case and for its final disposal. The Division Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia and Hon'ble Mr. Justice S. P. Goyal, finally decided the case on 2nd December, 1980.

Petition under section 401 Cr. P. C. for revision of the order of the Court of Shri A. S. Sodhi, Additional Chief Judicial Magistrate, Sangrur, dated the 13th October, 1978, dismissing the petition of the husband-petitioner for cancellation of the maintenance allowance.

Surjit Singh, Advocate, for the Petitioner.

Tirath Singh, Advocate with Ashok Jindal, Advocate, for the Respondent.

JUDGMENT

S. S. Sandhawalia, C.J.

(1) Whether it is obligatory for a Magistrate under section 127(2) of the Code of Criminal Procedure, 1973, to cancel or vary an earlier order of maintenance under section 125 of the said Code strictly in accordance with the judgment of a competent civil Court specifically on the issue of maintenance, is the meaningful question which has necessitated this reference to the Division Bench.

Bhagwant Singh v. Surjit Kaur (S. S. Sandhawalia, C.J.)

(2) The facts disclose a long history of matrimonial discord betwixt the petitioner-husband and the respondent-wife. They were married more than 25 years ago and even way back in 1960, a petition under section 10 of the Hindu Marriage Act claiming a decree of judicial separation was filed by the petitioner-husband, which was, however, dismissed on September 27, 1963. Later, in the year 1965, the respondent-wife preferred an application for maintenance under section 488 of the Old Code of Criminal Procedure, which was allowed and a monthly maintenance allowance of Rs. 50 was ordered on the 25th of June, 1965. Feeling dissatisfied later with the quantum of maintenance, the respondent-wife moved an application for enhancement thereof, but she did not meet with any success in the Court of the Magistrate who dismissed the same on the 16th of September, 1975. A revision petition was, however, carried against the same, which was allowed by the learned Additional Sessions Judge, Sangrur, who by his order, dated 6th of August, 1976, enhanced the maintenance allowance to Rs. 65 per mensem.

(3) Apparently, not satisfied with the aforesaid maintenance, the respondent-wife filed a regular civil suit in the year 1973 against the petitioner-husband for the recovery of Rs. 12,000 as maintenance allowance in the lump sum at the rate of Rs. 100 per mensem with an added prayer to have the said amount as a charge on the landed estate of the petitioner-husband. Two specific issues in the following terms were framed in the said suit, which were decided against the respondent-wife and, as a necessary consequence, the suit was dismissed by the learned Subordinate Judge by his judgment, dated the 30th of April, 1974 :—

- (1) Whether the plaintiff was turned out by the defendant from his house and the defendant has refused to maintain her ? If so, to what effect ?
- (2) If issue No. 1 is proved, to what amount the plaintiff is entitled to recover from the defendant as monthly maintenance allowance ?

An appeal against this judgment and decree was carried. The findings of the trial Court on issues Nos. 1 and 2 were specifically

affirmed by the learned Additional District Judge on merits in his considered judgment, dated the 15th of November, 1976, dismissing the appeal.

(4) Armed with the judgments of the civil Courts, the petitioner-husband moved an application under section 127(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the New Code), seeking cancellation of the maintenance order on their basis. On 6th February, 1978, Shri G. S. Mann, Judicial Magistrate 1st Class, Sangrur, accepted the petitioner-husband's prayer and cancelled the order of maintenance in favour of the respondent-wife in accordance with the civil Court decree. A revision petition was then carried against the said judgment by the respondent-wife, which came up before the learned Sessions Judge, Sangrur, who,— *vide* his order, dated 16th of August, 1978, accepted the same, set aside the order of the learned Magistrate and remanded the matter for fresh decision. The case then went back to the Additional Chief Judicial Magistrate who, by the impugned judgment, dated 13th October, 1978, has taken the view that, despite the decree of the civil Court directly on the question of maintenance, he still has the discretion in the matter to follow it or not and, in the ultimate result, dismissed the application of the husband-petitioner. Aggrieved by the above, the husband preferred this criminal revision petition which first came up before me sitting singly.

(5) Noticing some divergence of Judicial opinion on the point, the matter was referred for decision by a larger Bench and that is how the same is before us.

(6) Inevitably, the controversy herein must first revolve around the specific statutory provisions. Sub-section (2) of section 127 of the New Code is in the following terms :—

“Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.”

Basing himself primarily on the language of the aforesaid provision, Mr. Surjit Singh, learned counsel for the petitioner had contended,

Bhagwant Singh v. Surjit Kaur (S. S. Sandhawalia, C.J.)

that the Legislature has intentionally used mandatory terms therein. Once it is so found by the Magistrate that the decree of the Civil Court is one by a Court of competent jurisdiction, then, according to the learned counsel, there is no option with the Magistrate but to cancel or vary the earlier order in compliance therewith.

(7) In construing the statutory provisions and appraising the arguments of the learned counsel for the parties, I may notice at the very outset that, as a matter of sound judicial restraint, I would not wish to proceed beyond the specific question which arises for determination here and to opine on the question in abstract. The direct issue herein is whether a decree of the civil Court of competent jurisdiction, specifically on the liability and the quantum of maintenance, would be normally binding on the Magistrate so as to entail a necessary variance or cancellation of the earlier order of maintenance. At present, I do not feel called upon to answer the larger issue whether all civil Court decrees, which may be relevant or have an impact on the issue of maintenance, would wholly rule out the discretion of the Magistrate to follow them or not.

(8) Within this narrow field, it appears to me that the petitioner is plainly on the strong ground. Where, the decree of civil Court, as in the present case, is directly on the issue of the liability or the quantum of maintenance, then it is obviously a judgment of a Court of competent jurisdiction directly on the point. Once that is so, it calls for notice that the language of statute is in terms mandatory. The Legislature has designedly used the words "shall cancel the order or, as the case may be, vary the same accordingly." The opening part of section 127(2) of the New Code undoubtedly vests a certain discretion in the Magistrate. He must be satisfied or at least it should appear to him that the decision of the competent civil Court, has necessitated a cancellation or variance of the earlier order. However, once he comes to that conclusion, then the language of the provision implies that he has no discretion but to cancel or vary the order in accordance with the civil court decree. Though we are well aware of the rule that, in a peculiar context, the words 'shall' and 'may' may be used as interchangeable terms, nothing has been brought to our notice by the learned counsel for the respondent, which may compel one to

construe the word 'shall' as 'may' in this provision. It is well settled that strong grounds are needed to read a mandatory provision as a directory one or *vice versa*, i.e., to read a directory provision as an obligatory one.

(9) Now, apart from the specific language in section 127 (2) of the New Code, it appears on the larger principle also as well settled that where civil rights of the parties are involved, the plenary jurisdiction is with the civil Courts and normally their decrees must override or have a precedence over a parallel or equivalent jurisdiction. This principle does not need any great elaboration now in view of the binding precedents on the point. In *Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and others* (1), whilst construing the analogous provisions of section 125 of the New Code, Krishna Iyer, J., speaking for the Bench, observed as follows :—

“Broadly stated and as an abstract proposition, it is valid to assert, as Sri Desai did, that a final determination of a civil right by a civil Court must prevail against a like decision by a criminal Court.”

Again in *Mt. Bashiran and others v. Nathu* (2), it was observed as under :—

“Now the object of S. 488 is to prevent vagrancy by compelling the husband or the father to support his wife or children who are unable to support themselves. It is, therefore, well established that the powers of the criminal courts under this chapter are limited in scope and the orders passed thereunder are subject to any final adjudication which may be made by a civil court as respects the civil rights of the parties.”

To the same effect are the weighty observations of Chief Justice I. D. Dua, who whilst construing the analogous provisions of section

(1) AIR 1978 S.C. 1807.

(2) AIR 1968 Rajasthan 255.

Bhagwant Singh v. Surjit Kaur (S. S. Sandhawalia, C.J.)

488 of the Old Code in *Ashish v. D. C. Tewari* (3), observed as under :—

“The somewhat summary method of enforcement of orders under this section also highlights the sense of urgency which inspired the enactment of this statutory provision. Such orders are, it is unnecessary to point out, subject to the final determination of the rights of the parties by Civil Court, and are also tentatively liable to be varied with change of circumstances.”

Apart from the larger principle of the pre-eminence of the decision of a Civil Court of competent jurisdiction, the judgment that directly covers the issue is *State of Mysore v. Nagappa and another* (4). It has only to be borne in mind that section 127(2) of the New Code is *in pari materia* with section 489(2) of the Old Code. Construing the latter provision, Khan, J., observed as under :—

“Under section 489(2) of the Code of Criminal Procedure, the Magistrate can vary or alter the order of maintenance if the circumstances so required. When it is brought to his notice that a decree for maintenance has been passed by the Civil Court it is the duty of the Court to consider whether that decision of the Civil Court leads to the consequence that the order passed by the Criminal Court under section 488 should be cancelled or varied.”

(10) Now, in fairness to the learned counsel for the respondent, it must be noticed that he attempted to place reliance on *Smt. Shiela Rani v. Durga Parshad* (5). I am, however, of the view that that judgment is of no aid to his case. The question that fell for consideration there was entirely different, namely, that the maintenance amount in favour of a wife was attachable or not in pursuance of a decree for restitution of conjugal rights obtained against her by the husband. It is plain that the aforesaid question has little or no relevance for what falls for determination in the present case. Shamsheer Bahadur, J., only made a passing observation in the context of construing a judgment of the Calcutta High

(3) A.I.R. 1970 Delhi 98.

(4) AIR 1968 Mysore 12.

(5) A.I.R. 1965 Panjab 79.

Court but expressly left the matter wholly open by observing that in that case the respondent-husband had not applied under section 489(2) of the Old Code of Criminal Procedure and, therefore, the executing Court had no warrant to declare that the maintenance had become attachable on passing of the decree for restitution of conjugal rights. It must be necessarily held that this judgment is entirely wide of the mark and on an altogether different point.

(11) The learned counsel has then cited *Pavakkal v. Athappa Goundon*, (6), *Fakruddin Shamsuddin Saiyed v. Bai Jenab* (7), *Mt. Durchatia v. Ayodhya Prasad* (8); *Kunti Bala Dassi v. Nabin Chandra Das* (9) and *Jhanwarlal v. State of Rajasthan and another* (10). It is unnecessary to advert to these cases in detail because they are plainly distinguishable. In most of, if not in all, these cases the argument for cancellation or variation of the original order of maintenance was sought to be based on a decree of restitution of conjugal rights obtained by the husband. As I said earlier, it is not apt to delve into the abstract question of the effect and impact of all the civil decrees on the earlier order of maintenance under section 125 of the New Code. The cases aforesaid arise on their individual set of facts and their correctness or otherwise can only be examined when these issues arise directly for decision. Herein, the sole question is whether the decree of civil Court, specifically on the question of maintenance, would be binding under section 127(2) of the New Code, which was not even remotely the question in the cases relied on by the learned counsel for the respondent.

(12) To conclude on the legal issue, I would hold, on the language of section 127(2) of the New Code as also on principle and precedent, that it would be obligatory for a Magistrate to follow the judgment of a competent civil court, specifically, on the point of maintenance and, consequently, to cancel or

(6) A.I.R. 1925 Madras 1218.

(7) A.I.R. 1944 Bombay 11.

(8) A.I.R. 1953 Vindya Pradesh 28.

(9) A.I.R. 1955 Calcutta 108.

(10) A.I.R. 1969 Rajasthan 29.

Puran Singh v. State of Punjab (S. S. Sandhawalia, C.J.)

vary the earlier order of the criminal Court under section 125 of the New Code, accordingly. The answer to the question posed at the outset is rendered in the affirmative.

(13) Applying the same, it would be plain that the petitioner-husband is entitled to succeed. The learned Additional Chief Judicial Magistrate, Sangrur, in the order under revision, seems to have taken the view that even though the decree was that of a Court of competent jurisdiction and it covered the matter completely, yet he still had the discretion to follow the same or not. He seems to have chosen to go beyond the concurrent judgments of the civil Courts on the point and, in fact, launched on conjectures as to what would have been the result if certain evidence was brought to their notice. In essence, he seems to have again sat on judgment over and above the judgments rendered by the civil Courts themselves. That, in my view, he was not entitled to do. The order under revision has, therefore, to be set aside and in accordance with the judgments and decrees of the civil Courts, the earlier grant of maintenance under section 125 of the New Code, has to be necessarily cancelled. The revision petition is allowed.

S. P. Goyal, J.—I agree.

N. K. S.

Before S. S. Sandhawalia, C.J. and S. P. Goyal, J.

PURAN SINGH,—Petitioner.

versus

STATE OF PUNJAB,—Respondent.

Civil Writ Petition No. 3102 of 1978

December 8, 1980.

Constitution of India 1950—Article 311—Adverse confidential report against a public servant—Departmental enquiry ordered subsequently on the same material that led to the adverse report—Holding of such an enquiry—Whether permissible—Adverse report—Whether gets wiped out by such enquiry—Nature and purpose of a