

Court No. - 92

Case :- APPLICATION U/S 482 No. - 10290 of 2019

Applicant :- Rajkumar

Opposite Party :- State Of U.P. And 2 Others

Counsel for Applicant :- R.V. Pandey

Counsel for Opposite Party :- G.A.,Ashutosh Gupta,Ashutosh Sharma,Gyan Prakash Verma

Hon'ble Arun Kumar Singh Deshwal,J.

1. Rejoinder affidavit filed today is taken on record.
2. Heard learned counsel for the applicant, learned counsel for opposite party no.2 and Sri Sunil Kumar Kushwaha, learned AGA for the State.
3. The present application has been filed for the following relief:

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the present application and quashed the order and judgment dated 25.01.2019 in recall/restoration application no.164 of 2017 whereby has recall/restore ex-parte order dated 23.11.2017 passed by the learned trial court in Case No.336 of 2016 (Smt. Bindu Devi & Others Vs. Rajkumar), u/s 125 Cr.P.C., pending in the court of the Chief Judge, Family Court, Azamgarh."

4. Facts giving rise to the present case are that opposite parties, nos.2 and 3, are the wife and daughter of the applicant, respectively. The application for maintenance u/s 125 Cr.P.C. filed by opposite parties, nos.2 and 3, was dismissed for want of prosecution on 23.11.2017. Against that order, opposite parties, nos.2 and 3 filed a recall application, which was allowed by the court below by the impugned order dated 25.01.2019. This impugned order is under challenge in the present case.
5. Contention of learned counsel for the applicant is that the impugned order is erroneous as once an order has been passed in criminal proceeding dismissing the application u/s 125 Cr.P.C. for want of prosecution, then same cannot be recalled or modified in view of the bar of Section 362 Cr.P.C. In support of his contention, the counsel of the applicant relied upon the judgment of the Apex Court in the case of **State Rep. by D.S.P., S.B.C.I.D., Chennai Vs. K.V. Rajendran and Ors in Criminal Appeal No.1389 of 2008**. In this judgment, the Apex Court observed that the bar of section 362 Cr. P.C. also applies to the inherent power under section 482 Cr.P.C.

6. *Per contra*, learned counsel for opposite parties, nos.2 and 3 as well as learned AGA have

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submitted that Section-362 Cr.P.C. provides that save as otherwise provided by the Cr.P.C. or any other law, no court shall alter or review its judgement or final order disposing of the case. Therefore, it is clear that an exception has been provided in Section-362 Cr.P.C., itself and that exception has been mentioned in Section-127 Cr.P.C. which permits the court to alter or change any order passed u/s 125 Cr.P.C. Therefore, the court below is correct in recalling the order dated 23.11.2017 and restoring the case at its original number. In support of his contention, learned counsel for opposite party no.2 has relied upon the judgement of the Apex Court in the case of **Sanjeev Kapoor Vs. Chandana Kapoor & Others reported in AIR 2020 SC 1064**. In that judgement, the Apex Court observed that even after passing the order u/s 125 Cr.P.C., Magistrate or the court concerned will not become *functus officio* and it has jurisdiction to cancel or modify the order passed u/s 125 Cr.P.C.

7. After hearing the rival contention of learned counsel for the parties, and on the perusal of record, it appears that the application filed by the opposite parties, nos.2 and 3 against the applicant seeking maintenance u/s 125 Cr.P.C. was dismissed for want of prosecution on 23.11.2017 and on the recall application filed by the opposite parties, nos.2 and 3, the order dated 23.11.2017 was recalled and matter was restored to its original place by the impugned order dated 25.01.2019. In the impugned order, the court below has observed that in the proceeding of 125 Cr.P.C., if the case was dismissed for want of prosecution, the same can be recalled under Section-126(3) Cr.P.C. where the court has all power to make such order as the circumstances require.

8. So far as the bar u/s 362 Cr.P.C. is concerned, the bar has been imposed to recall or modify the final order by Section-362 Cr.P.C. after signing the same. It is clear from Section-362 Cr.P.C. that unless otherwise provided by the code or any other law, final judgement or order cannot be recalled or reviewed after signing the same. For ready reference, Section-362 Cr.P.C. is being quoted as under:

"362. Court not to alter judgment.—*Save as otherwise provided by this Code or by any other law for the time being in force, 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."*

9. From perusal of the above section, it is clear that if any provision is provided under Cr.P.C., which permits the recall or alter the judgement or final order, then the bar u/s 362 Cr.P.C. will not apply. It is provided u/s 126(3) Cr.P.C. that the court dealing with Section-125 Cr.P.C. shall have power to make such order as may be just and proper. After that, Section-127 Cr.P.C. provides that the court which has passed an order for maintenance u/s 125 Cr.P.C. including the order of interim maintenance has jurisdiction to make such alteration as required. Sections-125, 126 and

127 Cr.P.C. are being quoted as under:

"125. Order for maintenance of wives, children and parents.—(1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.—For the purposes of this Chapter,—

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, 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 for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] 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:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied

that there is just ground for so doing.

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

126. Procedure.—(1) Proceedings under Section 125 may be taken against any person in any district—

(a) where he is, or

(b) where he or his wife resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully 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 thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

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

127. Alteration in allowance.—(1) On proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.

(2) 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.

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,—

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to [maintenance or interim maintenance, as the case may be,] after her divorce, cancel

the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a [monthly allowance for the maintenance and interim maintenance or any of them has been ordered] to be paid under Section 125, the civil court shall take into account the sum which has been paid to, or recovered by, such person [as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of] the said order."

10. From perusal of Sections-125 Cr.P.C., 126 Cr.P.C. and 127 Cr.P.C., it is clear that Section-125 Cr.P.C. is social justice legislation which orders for the maintenance of wives, children and parents and the legislature has provided in Sections-125(5) Cr.P.C., 126 Cr.P.C. as well as Section-127 Cr.P.C., certain conditions on fulfilling of which, order passed u/s 125 Cr.P.C. can be recalled or modified.

11. In Section-125 Cr.P.C. using of expression "*as the Magistrate from time to time direct*", the use of expression from time to time has purpose and meaning. It clearly contemplates that the order passed u/s 125(1) Cr.P.C., the Magistrate may have to exercise jurisdiction from time to time. The above legislative scheme indicates that Magistrate does not become *functus officio* after passing of the order u/s 125 Cr.P.C.

12. The Apex Court in the case of **Badshah Vs. Sou. Urmila Badshah Godse and another** reported in **(2014) 1 SCC 188** has considered the interpretation of Section-125 Cr.P.C. In paragraph nos.13.3 to 18 of the judgement of **Badshah (supra)**, following guidelines have been laid down:

"13.3.Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125 Cr.P.C. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution of India. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society.

14. Of late, in this very direction, it is emphasised that the courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate.

There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:

"It is, therefore, respectfully submitted that 'social context judging' is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice.

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Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."

15. *The provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour.*

16. *The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, the court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.*

17. *Cardozo acknowledges in his classic "... no system of jus scriptum has been able to escape the need of it." and he elaborates:*

"It is true that codes and statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. ... There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a Judge's troubles in ascribing meaning to a statute. ... Says Gray in his lectures:

"The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the Judges have to do is, not to determine that the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.""

18. *The court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision — libre recherché scientifique i.e. "free scientific research". We are of the opinion that there is a non-rebuttable presumption that the legislature while making a provision like Section 125 Cr.P.C., to fulfil its constitutional duty in good faith, had always intended to give relief to the woman becoming "wife" under such circumstances. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard.*

Journey from Shah Bano to Shabana Bano guaranteeing maintenance rights to Muslim women is a classical example.

13. *Considering the legislative purposes behind Section- 125 Cr.P.C., which is quasi-criminal in*

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nature, the Apex Court considered in the case of **Sanjeev Kapoor (supra)** the issue of applicability of Section-362 Cr.P.C. in the proceeding of Section-125 Cr.P.C. and observed that bar of Section-362 Cr.P.C. does not apply to the order passed u/s 125 Cr.P.C. Paragraphs nos.25, 26 and 27 of the judgement mentioned above are being quoted as under:

"25. The above legislative scheme indicates that the Magistrate does not become functus officio after passing an order under Section 125 Cr.P.C., as and when the occasion arises the Magistrate exercises the jurisdiction from time to time. By Section 125(5) Cr.P.C., the Magistrate is expressly empowered to cancel an order passed under Section 125(1) Cr.P.C. on fulfilment of certain conditions.

26. Section 127 Cr.P.C. also discloses the legislative intendment where the Magistrate is empowered to alter an order passed under Section 125 Cr.P.C. Sub-section (2) of Section 127 Cr.P.C. also empowers the Magistrate to cancel or vary an order under Section 125 Cr.P.C. The legislative scheme as delineated by Sections 125 and 127 Cr.P.C. as noted above clearly enumerated the circumstances and incidents provided in the Code of Criminal Procedure where the court passing a judgment or final order disposing of the case can alter or review the same. The embargo as contained in Section 362 is, thus, clearly relaxed in the proceedings under Section 125 Cr.P.C. as indicated above.

27. The submissions which have been pressed by the learned counsel for the appellant were founded only on embargo of Section 362 and when embargo of Section 362 is expressly relaxed in the proceedings under Section 125 Cr.P.C., we are not persuaded to accept the submission of the counsel for the appellant that the Family Court was not entitled to set aside and cancel its order dated 6-5-2017 in the facts and circumstances of the present case."

14. From the above legal position, it is clear that the order passed u/s 125 Cr.P.C. may be final or interim, can be recalled or altered u/s 127 Cr.P.C. Therefore, it falls in the category of exceptional cases mentioned in Section-362 Cr.P.C. Hence, a bar of Section 362 Cr.P.C. is not applicable in such cases.

15. The Judgment relied upon by the applicant's counsel does not apply in the present case.

16. In view of the above, this Court does not find any illegality in the impugned order passed by the Principal Judge, Family Court, Azamgarh.

17. Accordingly, the present application is **rejected**.

18. Considering the fact that application u/s 125 Cr.P.C. has been pending since 2016, therefore, Principal Judge, Family Court, Azamgarh, is directed to conclude the proceeding u/s 125 Cr.P.C., expeditiously, preferably within a period of one year, without giving any unnecessary adjournment to any of the parties.

Order Date :- 14.5.2024
S.Chaurasia