

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CRIMINAL PROCEDURE

CrI. M.C. No. 377/2010 & CrI. M.A. 1296/2010

Reserved on:18th May, 2011

Decided on: 8th July, 2011

JAGMOHAN ARORA

..... Petitioner

Through: Ms. Purnima Maheshwari, Advocate

versus

SAROJ ARORA

..... Respondents

Through: Mr.D.K. Kaushik, Adv. for Respondent

Mr. Manoj Ohri, OPP for the State with Mr. V. Maindola, SI PS Bhajanpura.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. The issue that arises for consideration in the present petition is whether the learned Metropolitan Magistrate has the jurisdiction to recall/review its order of dismissal of the complaint under Section 125 Cr.P.C. in default of appearance and non-prosecution.

2. The facts in a nutshell are that a complaint under Section 125 Cr.P.C. seeking maintenance was filed by the Respondent who is the wife of the Petitioner. The learned Metropolitan Magistrate vide its order dated 5th February, 2008 directed the Petitioner to pay a monthly maintenance of Rs. 1000/- to the Respondent which the Petitioner duly paid till 30th March, 2009 when the complaint case No.218/2007 was dismissed for non-prosecution as the Complainant/Respondent failed to appear. The Respondent thereafter filed an application for restoration of the petition accompanied by the affidavit of the learned counsel. On the said application, the learned Metropolitan Magistrate recalled its order. Vide the impugned order dated 17th December, 2009 restored the complaint to its original position subject to a cost of Rs.300/-.

3. Learned counsel for the Petitioner contends that the impugned order dated 17th December, 2009 recalling the order dated 30th March, 2009 dismissing the complaint for non-prosecution is contrary to the law laid-down by the Hon'ble Supreme Court in Adalat Prasad vs. Roolal Jindal & Ors., (2004) 7 SCC 338. It is urged that even though proceedings under Section 125 Cr.P.C. relate to the right of the wife/child/parent to claim maintenance is essentially a civil right but the procedure to be followed for adjudication of the said right is as per the Code of Criminal Procedure, 1973. Moreover, the non-compliance of an order passed under Section 125 Cr.P.C. entails penal action i.e. imprisonment. There is no provision in the Code of Criminal Procedure empowering a Magistrate to review/recall its order. While dealing with the proceedings under Section 125 Cr.P.C., the Magistrate is bound by the procedure prescribed under the Cr.P.C. In case of dismissal of a complaint by the Magistrate, the remedy lies by approaching the superior court by way of a petition under Section 482 Cr.P.C. or in revisional jurisdiction. The procedure prescribed is a summary procedure as prescribed for summons cases and the same is circumscribed by the Code of Criminal Procedure, 1973. An order of dismissal of the complaint under Section 125 Cr.P.C. is in the form of termination of the complaint and thus is in the nature of termination of a complaint case. The law laid-down by the hon'ble Supreme Court in Adalat Prasad(supra) is reiterated in Subramaniam Sethuraman vs. State of Maharashtra & Anr., 2004 CrI. L.J. 4609; N.K. Sharma vs. Abhimanyu, 2005 CrI. L.J. 4529; Everest Advertising Pvt. Ltd. Vs. State, GNCTD, 2007 CrI.L.J. 2442; Dinesh

Dalmia vs. CBI, 2008 CrL. L.J. 337 and Dharmeshbhai Vasudevbbhai & Ors., 2009 CrL. L.J. 2969.

4. Learned counsel for the Respondent on the other hand contends that the provisions under Section 125 Cr.P.C. relate to a different realm of jurisdiction. Section 127 Cr.P.C. itself permits alteration of an order passed under Section 125 Cr.P.C. thus giving the power of review/recall to the learned Metropolitan Magistrate. He relies upon the decisions in Iqbal Bano vs. State of U.P. & Anr. AIR 2007 SC 2215; Smt. Prema Jain vs. Sudhir Kumar Jain, 1980 CrL. L.J. 80; Suhird Kamra vs. Smt. Neeta & Anr., 1988 (14) DRJ 283. According to him, the bar prescribed under Section 362 Cr. P.C. does not extend to a case of dismissal for non-prosecution as no judgment or final order on merits is passed.

5. I have heard learned counsel for the parties at length. In Adalat Prasad(supra) and other decisions relied upon by the learned counsel for the Petitioner, the Hon'ble Supreme Court was dealing with orders recalling the issuance of process for offences under the penal Statutes. Their Lordship's held that in the absence of any power of review or inherent power with subordinate courts, the remedy lies in invoking Section 482 Cr.P.C. In a case where the dismissal of the complaint would amount to discharging the accused, a revision against the same would lie and in a case where the dismissal of the complaint amounts to acquittal of the accused an appeal or a leave to appeal against the acquittal would be the remedy open to the Complainant. Learned counsel for the Petitioner has strenuously relied upon Adalat Prasad (supra) to contend that the Magistrate has no power to recall an erroneous order and the same is without jurisdiction. It may be noted that in Adalat Prasad, their Lordships were dealing with complaint under Sections 120A, 120B, 405, 406, 415, 420, 463, 465 and 468 of IPC.

6. Section 127 Cr.P.C. provides that on proof of a change in the circumstances of any person receiving a monthly allowance for the maintenance or interim maintenance or order under Section 125 Cr.P.C. the Magistrate may make such alterations as he thinks fit in the allowance of the maintenance or interim maintenance. Under sub-Section 2 of Section 127 Cr.P.C., the Magistrate has been conferred with the jurisdiction that in consequence of any decision of a competent civil court any order passed under Section 125 should be cancelled or varied.

Thus, the Code permits varying i.e. recalling of its earlier decision by the learned Metropolitan Magistrate in certain contingencies. Thus, the scheme of Chapter IX of the Code shows that the Magistrate does not become *functus officio* after passing an order under Section 125 Cr.P.C.

7. A perusal of Chapter IX shows that Section 125 provides for orders that a Criminal Court can pass for maintenance of the wife, children and parents in case a person having sufficient means neglects or refuses to pay maintenance. Section 126 provides for the procedure to be followed. Section 127 vests the Court with the power to alter the allowances in case of change of circumstances. Thus, impliedly any order passed under Section 125 Cr.P.C. is not a final order and can be amended, altered or recalled by the trial Court with the change of circumstance. There is also no bar that after dismissal for non-prosecution of an application under Section 125 Cr.P.C., an applicant cannot file a second application. The only loss would be that the applicant would be entitled for maintenance from the date of subsequent application filed. Thus, the scheme of Code itself shows that there is no bar for the Magistrate to amend or recall his order. The proceedings under Section 125 Cr.P.C. are essentially civil in nature, though the criminal process is applied for the purpose of summary and speedy disposal of such matters in the interest of the society. Thus, the proceedings under Section 125 Cr.P.C. which determine the civil rights of the parties in an expeditious manner under the Cr.P.C. cannot be equated with the proceedings of a complaint case as the latter are for the purpose of fact finding of complicity in the commission of a criminal offence. This being the position, to my mind, the decision rendered in the case of *Adalat Prasad (supra)* would have no application to a case under Section 125 Cr.P.C.

8. This Court in *Prema Jain (supra)* held that the order dismissing an application for maintenance in default of appearance is in the nature of an administrative order rather than a judicial one and the Magistrate has power to set aside and restore the application. The issue whether the order of dismissal for non-prosecution is administrative in nature was repelled by the Division Bench of Guwahati High Court in *Murti Dhar Singh & Ors. Vs. Vijendra Singh Jafa, 2002(3) GLT 453*. Though an order for dismissal of the complaint for default is not an order on merit and does not adjudicates the *lis* between the parties finally, however,

such an order is also not an administrative order. It is a judicial order terminating the application and thus a final order to that extent.

9. In *Smt. Savitri w/o Govind Singh Rawat v. Govind Singh Rawat*, AIR 1986 SC 984, the Hon'ble Supreme Court held that though there was no specific provision under the Cr.P.C. to allow grant of interim maintenance, however, such a power is implicit under Section 125 of the Cr.P.C. It was held that the jurisdiction of a Magistrate under Chapter IX of the Code is not strictly a criminal jurisdiction. While passing an order under that Chapter asking a person to pay maintenance to his wife, children or parents, as the case may be, the Magistrate is not imposing any punishment for a crime committed by him. Chapter IX of the Code contains a summary remedy for securing some reasonable sum by way of maintenance, subject to a decree, if any, which may be made in a civil Court in a given case provided the Personal Law applicable to the person concerned authorizes the enforcement of any such right to maintenance. The Code, however, provides a quick remedy to protect the applicant against starvation and to tide over immediate difficulties. It was held that it is the duty of the Court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very purpose of the legislation. Thus, in the absence of any express prohibition, it was appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct a person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application.

10. In view of the absence of any express prohibition under Chapter IX in my opinion there is no bar on the Court to recall its order dismissing an application under Section 125 Cr.P.C. His Lordships' J.R. Mudholkar, J. in *State of Uttar Pradesh v. Bhagwant Kishore Joshi*, AIR 1964 SC 221 : while dealing with the permissibility of a preliminary enquiry prior to registration of FIR held:

“In the absence of any prohibition in the Code, express or implied, I am of the opinion that it is open to a police officer to make preliminary enquiries before registering an offence and making a full scale investigation into it.”

11. The Bombay High Court in *Sau. Mandakini B. Pagire v. Bhausahab Genu Pagire and another*, 2009 CrL. L.J. 70, came to the same conclusion. Referring of

Section 362 of Cr.P.C., the Court held that the recalling of dismissal order cannot be treated as an alteration or change in the judgment or final order. Once it is found that the Criminal Court has inherent power to grant interim allowance to the wife under Section 125 Cr.P.C. then it follows that exercise of such inherent powers can be done for settling right the wrong. The principle “ubi-jus-ibi-remedium” is attracted in such a case.

12. In *Kehari Singh v. State of U.P. and another*, 2005 CrL. L.J. 2330, it was held that people in such miserable conditions due to unavoidable conditions may not be able to attend the Court proceedings on every date fixed there to pursue their cases. In such situations, if it is held that the Court lacks the jurisdiction to restore the cases in absence of such provisions, the very object and purpose of the legislation would be frustrated. The paramount rule of interpretation, which overrides the others is that the Statute is to be expounded according to the intent of the think that made it. Therefore, even if there is any lacuna in the Statute, then also it is the obligation on the Magistrate to give effect to the will of the Legislature by a judicial order. Thus, the learned Magistrate is empowered to restore the proceedings initiated under Section 125 Cr.P.C., which were dismissed for non appearance of the complainant/applicant.

13. In view of the aforesaid discussion, the present petition and the application are dismissed.

Sd/-

(MUKTA GUPTA)

JUDGE

