C. Subramanyam Vs C. Sumathi and Another

Court: Andhra Pradesh High Court

Date of Decision: Oct. 17, 2003

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 125, 126(3), 482

Citation: (2003) 2 ALD(Cri) 905 : (2004) 1 ALT(Cri) 341 : (2003) 3 APLJ 420 : (2004) 1 DMC 456 : (2004) 3 RCR(Criminal) 547

Hon'ble Judges: K.C. Bhanu, J; Bilal Nazki, J

Bench: Division Bench

Advocate: Pottigari Sridhar Reddy, for the Appellant; C. Padmanabha Reddy, Public Prosecutor, for the Respondent

Judgement

Bilal Nazki, J

1. This is the reference made by a learned Single Judge of this Court on 12.2.2002 in respect of order dated 19.7.2001 passed by the learned

Judicial First Class Magistrate, Pakala in Crl. M.P. No. 798 of 2001 in M.C. No. 5 of 2000.

2. The brief facts that are necessary for answering the present Reference are that the first respondent herein filed a petition seeking to set aside the

order dated 4.10.2000 whereunder the maintenance petition filed by her in M.C. No. 5 of 2000 was dismissed for default. She filed the said

maintenance petition against her husband. When the case came up for hearing on 4.10.2000 for her non-appearance, the Court dismissed the

maintenance petition for default. She filed a petition seeking restoration of the maintenance petition on the ground of ill-health. Her husband

contended that no medical certificate in support of the claim of ill-health was filed and the default order could not be set aside. After hearing both

sides, the learned Magistrate allowed the petition placing reliance on the decision reported in the case of Smt. Prema Jain v. Sudhir Kumar Jain,

1980 Cr.L.J. 80. Against the said order, the husband filed Crl. R.C. No. 984 of 2001 which came up before the learned Single Judge.

3. The learned Judge, after considering the decisions of various High Courts and for the reasons mentioned in the reference order, is of the view

that having regard to the fact that the trend of judicial decision appears to be that an application for maintenance dismissed for default, can be

restored and the Magistrate can entertain an application for setting aside the default order and pass appropriate orders thereon. Since this view is

contrary to the view of this Court in Abdul Waked v. Hafeez Begum and Ors., 1986 (2) APLJ 200, the learned Single Judge is of the opinion that

the judicial discipline requires that the matter should be referred to the Bench consisting of two Judges to have an authoritative pronouncement in

the matter. The Reference is accordingly posted before us.

4. We have heard the learned Counsels for both sides and also taken the assistance of Senior Advocate, Mr. C. Padmanabha Reddy as amicus

curiae. The short point that falls for consideration before us is whether the Magistrate is having inherent powers to restore a petition for

maintenance, which was dismissed for default.

5. According to the learned Single Judge that when the Magistrate has no power to dismiss the application filed u/s 125 for default and pass an

illegal order, by dismissing the petition for default that is to say, he has no power to rectify the mistake and the illegal order passed by him should

be perpetuated would result in miscarriage of justice and the Court should rectify its own mistake as seen from the principle ""actus curiae neminem

gravabit"". It is also observed that . the Apex Court was of the view that the proceedings u/s 488 of the Code of Criminal Procedure (old Code)

are of civil nature vide Jagir Kaur and Another Vs. Jaswant Singh, .

In Abdul Wahed"s case, it is held as follows :

The Trial Court is not empowered to pass an order dismissing the application for default and much less the application for setting aside the default

order cannot be entertained. It is obvious that the Trial Court has no power to pass a default order. The revision has been filed before the Sessions

Court against the order declining to set aside the ex parte order and restore the same on file. The Magistrate has no power to pass default order or

set aside such ex parte order and the Sessions Court invoking the revisional jurisdiction cannot clothe such power with the Magistrate in the

absence of provision to that effect in the Criminal Procedure Code. Though the revision petition before the Sessions Court is confined to the order

declining to set aside the ex parte order the Sessions Court under the powers vested in revisional jurisdiction is justified in setting aside the original

order dismissing the application for default. The Sessions Court has ample power under revisional jurisdiction to revise any illegal order passed by

the Subordinate Court and need not be fettered by the subject-matter in the revision petition. Considering from this perspective the order of the

Sessions Court is sustainable. Revision petition dismissed.

6. A perusal of the above decision shows that the Trial Court is not empowered to pass an order dismissing an application for maintenance for

default, much less an application for setting aside the default order cannot be entertained. To the same effect is the decision reported in the case of

Shyamta v. Smt. Dangra and Anr., 1980 All.L.J., 135, wherein it is held as follows :

A Criminal Court cannot even review its judgment or order. It can only correct clerical or arithmetical errors. Section 488(6) contemplates only

one situation in which restoration of an order passed u/s 488, Cr.P.C. can be done. It is only when an ex parte order has been passed against a

husband, this remedy is not available to a wife who files a petition for maintenance. The learned Sessions Judge was wrong in holding that the

Magistrate could have restored her application in the exercise of inherent powers. As held in the case of Krishna Rao Paine v. Pramila Bai (1976

Cri. L.J. 1819) (All) Magistrate has no power u/s 561A to order restoration. The inherent powers are possessed only by the High Court. The

proceedings may be of a quasi-judicial nature but that does not mean that the Magistrate dealing with them gets all the powers of a Civil Court. In

Hakimi Jan Bibi v. Monze AH, (1905 (2) Cri. LJ 213) a Division Bench of the Calcutta High Court had held that the law does not empower a

Magistrate to rehear an application for maintenance u/s 488, Cr.P.C. dismissed for non-appearance. I respectfully subscribe to this view. A wife

whose application for maintenance has been dismissed for default can file a second application and on this ground also the question of restoration

of previous application does not arise

7. From the above decisions, it is clear that the Criminal Court has not conferred with the power to review its own judgment, but it can only

correct clerical or arithmetical errors therein. To the same analogy, it is pertinent to quote the observations of the Apex Court in Maj. Genl. A.S.

Gauraya and Another Vs. S.N. Thakur and Another, , which reads as follows:

In B.D. Sethi and Others Vs. V.P. Dewan, , a Division Bench of the Delhi High Court held that a Magistrate could revive a dismissed complaint

since the order dismissing the complaint was not a judgment or a final order. In para 9, the Court observes as follows:

''9. As long as the order of the Magistrate does not amount to a judgment or a final order there is nothing in the Criminal Procedure Code

prohibiting the Magistrate from entertaining a fresh application asking for the same relief on the same facts or from reconsidering that order. During

the course of the proceedings, a Magistrate has to pass various interlocutory orders and it will not be correct to say that he has no jurisdiction to

reconsider them....''.

We would like to point that this approach is wrong. What the Court has to see is not whether the Code of Criminal Procedure contains any

provision prohibiting a Magistrate from entertaining an application to restore a dismissed complaint, but the task should be to find out whether the

said Code contains any provision enabling a Magistrate to exercise an inherent jurisdiction which he otherwise does not have. It was relying upon

this decision that the Delhi High Court in this case directed the Magistrate to recall the order of dismissal of the complaint. The Delhi High Court

referred to various decisions dealing with Section 367 (old Code) of the Criminal Procedure Code as to what should be the contents of a

judgment. In our view, the entire discussion is misplaced. So far as the accused is concerned, dismissal of a complaint for non-appearance of the

complainant or his discharge or acquittal on the same ground is a final order and in the absence of any specific provision in the Code, a Magistrate

cannot exercise any inherent jurisdiction.

For our purpose, this matter is now concluded by a judgment of this Court in the case of Bindeshwari Prasad Singh Vs. Kali Singh, . We may

usefully quote the following passage at page of AIR126 SCR. 2433

"..... Even if the Magistrate had any jurisdiction to recall this order, it could have been done by another judicial order after giving reasons that he

was satisfied that a case was made out for recalling the order. We, however, need not dilate on this point because there is absolutely no provision

in the Criminal Procedure Code of 1898 (which applies to this case) empowering a Magistrate to review or recall an order passed by him.

Criminal Procedure Code does contain a provision for inherent powers, namely, Section 561-A which, however, confers these powers on the

High Court and the High Court alone. Unlike Section 151 of Civil Procedure Code, the Subordinate Criminal Courts have no inherent powers. In

these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to recall the order dismissing the complaint. The remedy of the

respondent was to move the Sessions Judge or the High Court in revision. In fact, after having passed the order dated 23.11.1968, the Sub-

Divisional Magistrate became functus officio and had no power to review or recall that order on any ground whatsoever. In these circumstances,

therefore, the order even if there be one, recalling order dismissing the complaint was entirely without jurisdiction. This being the position, all

subsequent proceedings following upon recalling the said order would fall to the ground including order dated 3.5.1972, summoning the accused

which must also be treated to be nullity and destitute of any legal effect. The High Court has not at all considered this important aspect of the

matter which alone was sufficient to put an end to these proceedings. It was suggested by Mr. D. Goburdhan that the application given by him for

recalling the order of dismissal of the complaint would amount to a fresh complaint. We are, however, unable to agree with this contention because

there was no fresh complaint and it is now well settled that a second complaint can lie only on fresh facts or even on the previous facts only if a

special case is made out. This has been held by this Court in Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar, . For these reasons, therefore, the

appeal is allowed. The order of the High Court maintaining the order of the Magistrate dated 3.5.1972 is set aside and the order of the Magistrate

dated 3.5.1972 summoning the appellant is hereby quashed''.

8. Though the above decision is not directly on the point, but it clearly provides that the subordinate Criminal Courts have no inherent powers in

recalling the order. A contra view is taken by a Division Bench of Punjab and Haryana High Court in Kamla Devi v. Mehma Singh 1989 Crl. L.J.

1866 wherein it is held that :

There is no provision in Chapter 9 of Code of Criminal Procedure dealing with the application for grant of maintenance of wives, children and the

parents, but to dismiss such application for non-appearance of the petitioner. Since such applications are not to be equated with criminal complaint

which necessarily ought to be dismissed for non-appearance of the complainant in view of Section 256 of Code of Criminal Procedure, it is only in

the exercise of inherent power of the Court that for non-appearance of the petitioner, the application u/s 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. To the same effect, the decision reported in the case of SK. Alauddin @ Alai Khan Vs. Khadiza Bibi @ Mst. Khodeja Khatun and Others,

wherein a learned Single Judge of the Calcutta High Court has held as follows :

Following the decision of the Supreme Court reported in 1963 SC 1521 I hold that instant proceedings before me u/s 125, Cr. P.C. is a

proceeding of a civil nature in which the Magistrate can invoke the inherent powers to recall his earlier order finally disposing the proceeding of this

nature provided sufficient grounds are shown.

10. In another decision reported in the case of Smt. Prema Jain v. Sudhir Kumar Jain (supra), a learned Single Judge of the Delhi High Court has

held that as below :

The order in the present case was of administrative nature, rather than the judicial one and the Magistrate cannot be held to be incapable of

reviewing or reversing the same. This view finds strength in the provision following Section 125, in the same chapter which entitles the Court to

alter or review or to cancel its judicial orders.

11. Firstly, we deal with the maxim of equity, namely ""actus curiae neminem gravabit"" which means an act of Court shall prejudice no man. This

maxim is founded upon justice and a Good Sense, which serves safe and certain guidelines for the administration of law.

12. After disposal of the main petition on 4.10.2000, there was no lis pending in the Court of Judicial First Class Magistrate, Pakala. Crl. M.P.

No. 798 of 2001 was preferred u/s 126(3) of the Code of Criminal Procedure praying for restoration of M.C. No. 5 of 2000 which was

dismissed for default.

Section 126(3) reads as follows :

The Court in dealing with applications u/s 125 shall have power to make such order as to costs as may be just.

This provision relates to imposition of costs to the successful parties in order to compensate for the costs incurred. So, this provision does not

confer any power to the Magistrate to recall the order dated 4.10,2000. The maintenance proceedings stood terminated by that date and the case

was disposed of. There is no provision in the Code to restore the application u/s 125, Cr.P.C. which was dismissed for default. In the absence of

specific provision, the maxim has no application as there is no Us pending in the Trial Court. Section 362 of the Cr.P.C. mandates that 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.

This section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a

specfic statutory provision becomes functus officio and disentitled to entertain a prayer with the same relief unless formal order of final disposal is

set aside by the Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment a final order

disposing of the case is signed. In the new Section 362 of the Code of Criminal Procedure which was drafted keeping in view of the

recommendations of 41st Report of the Law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of

review not only to the judgment, but also to the final order other than the judgment. This provision applies to any order or judgment disposing of

the case under Criminal Procedure Law. Though the proceedings u/s 125 are in the nature of civil proceedings, that does not mean Section 151 of

CPC would apply. Therefore, any order passed u/s 125 of Code of Criminal Procedure is subject to Section 362 of Cr.P.C. Though the order

passed by the learned Judicial Magistrate of First Class is illegal, but he cannot rectify it under the guise of review. It can be corrected only by

invoking revisional jurisdiction by the concerned Court as contemplated under the Code. Therefore, in our view, entertainment of the

Miscellaneous Petition after disposal of the main case and restoration of the main case by the learned Judicial First Class Magistrate, Pakala are

unwarranted and not referable to any statutory provision. In support of our view, a decision reported in the case of Superintendent and

Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh and Others, may be quoted, wherein it has clearly been laid down that once a

judgment has been pronounced by a High Court either in exercise of its appellate or revisional jurisdiction, no review or revision can be entertained

against that judgment, as there is no provision in the Code of Criminal Procedure which would enable the High Court to review the same or to

exercise revisional jurisdiction. In the same way, the subordinate Criminal Courts have no inherent power to invoke u/s 482 of Cr.P.C. which vests

such power only with High Courts. There is no provision in the Cr.P.C. which would enable the learned Magistrate to review or recall the order

dated 4.10.2000.

13. In view of the above discussion, we hold that, firstly a Magistrate has no power to dismiss a petition u/s 125, Cr.P.C. for default, and

secondly, for any reason, if it is dismissed, the said Court will become functus officio and it has no power to set aside the default order, the earlier

order is illegal notwithstanding. In such a case, the affected party has to take recourse to the revisional jurisdiction as contemplated under the Code

of Criminal Procedure.

The Reference is answered accordingly. We appreciate the assistance given by Mr. C. Padmanabha Reddy.