

(2014) 08 AHC CK 0172

In the Allahabad High Court

Case No : Criminal Revision Nos. 590, 591 and 672 of 1998

Inamul Haq

APPELLANT

Vs

Shahin Jahan

RESPONDENT

Date of Decision : 05-08-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 126(2), 127

Citation : (2014) 3 ACR 3234 : (2014) 87 ALLCC 65

Hon'ble Judges : Harsh Kumar, J

Bench : Single Bench

Advocate : Daya Shanker Misra and C.K. Mishra, Advocate for the Appellant;
D.S. Tiwari and B.C. Mishra, Advocate for the Respondent

Judgement

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Harsh Kumar, J.—These three Criminal Revisions being Criminal Revision No. 672 of 1998, 590 of 1998 and 591 of 1998, which have arisen from the proceedings under section 125 Cr.P.C. between the parties, before the Family Court, Moradabad, passed in case Nos. 314 of 1997 and 315 of 1997. The brief facts of the case are that the opposite party Smt. Shahin Jahan moved an application in the year 1994 under section 125 Cr.P.C. against the revisionist, which was allowed ex parte vide order dated 10.3.1997. The revisionist moved an application under section 126(2) Cr.P.C. for setting aside the ex parte order dated 10.3.1997 passed in maintenance petition Case No. 112 of 1997, (original number 896/9 of 1994) which was decided vide order dated 16.4.1998 and the application was allowed, setting aside the order dated 10.3.1997 subject to certain conditions.

2. Feeling aggrieved with the imposition of conditions in the impugned order dated 16.4.1998 allowing his application under section 126(2) Cr.P.C. the husband has preferred Criminal Revision No. 590 of 1998. The revisionist had also moved an application under section 127 Cr.P.C., numbered as Misc. case No. 315 of 1997 which was rejected vide separate order dated 16.4.1998 and

Criminal Revision No. 591 of 1998 has been preferred by husband against that order.

3. Since the revisionist failed to comply with the conditions imposed on him vide impugned order dated 16.4.1998 passed in Misc. Case No. 314 of 1997, at the time of setting aside ex parte order, the learned Court due to non compliance of conditions imposed, rejected the restoration vide order dated 20.4.1998 and feeling aggrieved the revisionist has filed Criminal Revision No. 672 of 1998.

4. Thus, against the three orders (i) dated 16.4.1998 allowing application under section 126(2) Cr.P.C. (ii) dated 16.4.1998 rejecting application under section 127 Cr.P.C. and (iii) dated 20.4.1998 rejecting the application under section 126(2) Cr.P.C. for noncompliance of conditions, the revisionist has preferred these revisions and all the three matters since relates to same proceeding between the same parties, they are being decided together by a common order.

5. Heard Sri D.S. Mishra, learned Counsel for the revisionist. None has appeared for the opposite party Smt. Shahin Jahan.

6. Learned Counsel for the revisionist argued that at the time of setting aside ex parte order dated 10.3.1997, the Family Court, Moradabad had no jurisdiction to impose any conditions in allowing application under section 126(2) Cr.P.C. and imposition of such harsh conditions is against the principles of natural justice, so the conditions are liable to be deleted and impugned order dated 16.4.1998 is liable to be modified; that since the revisionist has entered into second marriage and is getting sufficient salary so as to maintain herself, the ex parte order of maintenance passed under section 125 Cr.P.C. on 10.3.1997 is liable to be cancelled within the provision of section 127 Cr.P.C.; that the revisionist is Notary Advocate having a small income from profession; that since the conditions imposed at the time of allowing application under section 126(2) Cr.P.C. were unjust and unwarranted, so the order dated 20.4.1998 rejecting the restoration application due to non-compliance of conditions is also wrong, illegal and incorrect and is liable to be set aside.

7. Though State is necessary party to be impleaded in revisions in criminal matters but the revisionist has not impleaded State as opposite party and it is noteworthy that State was impleaded as opposite party in Criminal Revision No. 191 of 1995, Inamul Haq v. State of U.P. and Shahin Jahan earlier filed by revisionist. The learned AGA is present to assist the Court on behalf of opposite party State, which is necessary party and was heard.

8. Learned AGA defended the impugned order and submitted that the material on record shows that revisionist is an Advocate and taking undue advantage of being lawyer by profession has been adopting delaying tactics in order to harass the opposite party Smt. Shahin Jahan by making misuse of his position; that the material on record shows that the maintenance petition was filed way back in the year 1994 and after lapse of twenty years, the matter is still pending due to mala fides and delaying tactics of revisionist; that the revisions have been filed with

wrong and baseless allegations in order to harm and harass the opposite party and are liable to be dismissed.

9. Upon hearing the arguments and perusal of material on record, I find that as per allegations made is maintenance petition filed in 1994, before C.J.M., Moradabad, the marriage between the parties took place on 13.4.1992 and since June, 1992, the applicant Shahin Jahan is living in her maika, where she was left by the revisionist during pregnancy and son out of wedlock was born to her in maika on 24.2.1993. It was also alleged that since after nikah, her husband and in-laws continued to make demand of dowry and treated her with cruelty for non-fulfillment thereof and after beating, during pregnancy she was dropped at her maika on 17.6.1992 and opposite party Inamul Haq is earning Rs. 5000/- per month from legal profession and Rs. 20,000/- from export business and has performed second nikah with Smt. Sabia in September, 1992.

10. On formation of Family Court, Moradabad the maintenance petition No. 896/9 of 1994 was transferred from the Court of Judicial Magistrate to Family Court and its No. 896/9 of 1994 was changed to Misc. Criminal Case No. 112 of 1997.

11. Perusal of record also shows that in maintenance petition Criminal Case No. 896/9 of 1994 filed by Smt. Shahin Jahan upon her application interim maintenance was granted by the Magistrate on 12.12.1994 with effect from the date of filing of maintenance application. Feeling aggrieved with the order of interim maintenance the revisionist Inamul Haq filed Criminal Revision No. 191 of 1995 Inamul Haq v. State of U.P. and Smt. Shahin Jahan, before this Court and vide order dated 7.2.1995 parsed by this Court, the revisionist was directed to pay Rs. 300/- per month to Smt. Shahin Jahan from the date of impugned order i.e. 12.12.1994 and the Magistrate was directed to dispose of the maintenance case expeditiously. That after filing of W.S. Revisionist disappeared at the stage of evidence and case was ordered to proceed ex parte, which order was subsequently recalled, upon application of revisionist and again after evidence of claimant on the date fixed for opposite party evidence, the revisionist again disappeared and his opportunity of evidence was closed. Again on application of opposite party on 25.2.1997, he was allowed another opportunity fixing 6.3.1997 but he again disappeared.

12. It is also pertinent to mention that in absence of revisionist the maintenance petition was decided ex parte vide order dated 10.3.1997 and application under section 126(2) Cr.P.C. was moved by revisionist beyond prescribed period of three months (after about six months) with the allegations that he could not be aware of the proceedings of the case. The Principal Judge, Family Court, Moradabad found that not only sufficient but more than required opportunities for evidence were given to the revisionist but he deliberately absented himself and though there is no sufficient reason for his absence but under the philosophy of law and view that the real controversy between parties must be decided effectively, upon consideration of the case of both the parties and their evidences, it allowed the application in the interest of justice, by impugned order

dated 16.4.1998.

13. In Criminal Revision No. 590 of 1998, which has been filed against order dated 16.4.1998 allowing application under section 126(2) Cr.P.C., the only argument of learned Counsel for the revisionist is that the Principal Judge, Family Court acted wrongly and illegally in passing conditional order and in any case it imposed such harsh and difficult conditions which were impracticable and unjust and may not have been fulfilled and on this ground the conditional order of allowing application is liable to be set aside. He argued that imposition of such impracticable conditions resulted in rejection of his application under section 126(2) Cr.P.C., and the imposition of conditions is against the Principles of natural justice--

14. Before proceeding further it appears necessary to reproduce the conditions imposed by the lower Court in impugned order, which are as under:--

"In the light of facts narrated above the application to set aside order dated 10.3.1997 is liable to be allowed on following terms and conditions.

(1) The applicant Inamul Haq will pay Rs. 1000/- as costs towards harassment of his wife Smt. Shahin Jahan.

(2) The applicant will not be allowed to produce his evidence more than two times. This opportunity will be exhausted maximum up to 15.5.1998.

(3) The applicant Inamul Haq will pay the amount of interim maintenance from the date of its order 12.12.1994 upto 12.4.1998 @ Rs. 300/- p.m. as per order of Hon"ble High Court dated. 7.2.1995 in CrI. Rev. No. 191/95. The entire amount due be paid after deductions and adjustment of amount already paid on or before 20.4.1998.

(4) Interim maintenance amount be paid regularly due after 12.4.1998 in advance.

(5) The amount of interim maintenance and amount of costs Rs. 1000/- be paid to Smt. Shahin Jahan on or before 20.4.1998.

After compliance of above conditions within time provided i.e. on or before 20.4.1998 the application for setting aside order dated 10.3.1997 shall stand allowed otherwise it will stand rejected."

15. In order to decide the legality of imposition of terms and conditions in an order under section 126(2) Cr.P.C., it is necessary to look into the provisions of section 126(2) Cr.P.C.

The proviso to section 126(2) Cr.P.C. states that:--

"Provided 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."

16. The above proviso shows that the ex parte order may be set aside upon good cause being shown and in setting aside ex parte order, including the terms of imposition of costs, some other terms may also be imposed, which the Magistrate thinks just and proper.

17. In view of above provisions, I find that the Court at the time of setting aside ex parte order had every right to impose conditions or pass conditional order, however the condition so imposed are required to be just and proper.

18. It is pertinent to mention that the revisionist is an Advocate and Notary Public, doing legal profession in Court premises, where the maintenance petition was pending and so repeated absence of the revisionist in maintenance proceedings and allegation of getting of knowledge of ex parte order dated 10.3.1997, sometime in September, 1997 as well as moving of application beyond prescribed period etc., do not sound bona fide, proper and correct. Considering the facts that the learned lower Court has not found sufficient reason for setting aside the ex parte order of maintenance dated 10.3.1997 yet it has allowed application in the interest of justice in order to decide the matter finally on merits, the imposition of costs of Rs. 1000/- which is contended to be a bit high in 1998, may not be considered to be excessive in view of the facts, circumstances and conduct of revisionist of repeated disappearance and the condition No. 1 may not be considered to be unjust or improper. In any case after lapse of more than 16 years from the date of impugned order, it would not be just and proper to reduce the amount of fine to any extent. As far as condition Nos. 2, 3 and 4 are concerned, they are not actually conditions imposed by the Lower Court in impugned order but are the requirements in the light of order dated 7.2.1995 passed by this Court in Crl. Revision No. 191 of 1995. The condition No. 2 granting only two opportunities of evidence to be exhausted within 15.5.1998 has been imposed considering past conduct of revisionist, with an attempt in compliance with the direction of expeditious disposal given by a Bench of this Court in Criminal Revision No. 191 of 1995 as mentioned above, and conditions Nos. 3 and 4 are actually reproduction of the above, order dated 7.2.1995 passed by this Court in Criminal Revision No. 191 of 1995 earlier filed by revisionist Inamul Haq v. State of U.P. and Smt. Shahin jahan.

19. So far as condition No. 5 is concerned, I find that the learned Lower Court has granted only four days time for payment of costs of Rs. 1000/- imposed under condition No. 1. I find that granting only four days time for payment of costs may not be considered just, appropriately and sufficient. Providing such a short time for compliance and payment of costs amounts to denial of allowing the application and the condition for payment of costs within only four days time may not be considered just or proper, in the eye of law.

20. I agree with Learned Counsel for the revisionist that reasonable time was not

given and after lapse of only four days, due to non-compliance of the conditions imposed the restoration application was ordered to be rejected on 20.4.1998 which order dated 20.4.1998 is also wrong and incorrect.

21. Considering the totality of facts and circumstances, I find that in the interest of justice by taking a lenient view (to which the revisionist does not deserve on account of his conduct noted by Court below), I find that condition Nos. 2 and 5 may be modified and relaxed in the manner and in place of two, one more and total three opportunities may be given to the revisionist for adducing and concluding his evidence within a maximum period of two months and 15 days time may be given for making payment of costs and complying with the conditions mentioned in the impugned order dated 16.4.1998.

22. In view of discussions made above, I find that the Lower Court acted wrongly and improperly in providing too little time of four days for compliance as a condition for setting aside the ex parte order against the revisionist. The conditions Nos. 1, 3 and 4 are neither unjust nor improper nor required to be deleted or changed to any extent. However maintaining condition Nos. 1, 3 and 4, the conditions Nos. 2 and 5 are liable to be modified and relaxed in the manner that the revisionist shall be entitled to have maximum three opportunities for adducing his evidences without any adjournment within a maximum period of two months and for the payment of costs 15 days time is being provided for making payment to the opposite party Shahin Jahan or to deposit the same in her favour before Family Court, Moradabad within 15 days from today, failing which, the impugned order shall become ineffective and the application under section 126(2) Cr.P.C. shall stand rejected.

23. In the Criminal Revision No. 591 of 1998 which has been filed against order dated 16.4.1998 passed in Misc. Case No. 315 of 1997 rejecting the application of revisionist under section 127 Cr.P.C. as infructuous, the learned Counsel for the revisionist argued that the opposite party Smt. Shahin Jahan has made second marriage with Mohd. Ismaile, who has filed Civil Suit No. 535 of 19% before Civil Judge (Junior Division) Rampur, against her for mandatory injunction to perform marital obligations and she is getting handsome salary and has purchased properties and is not, unable to maintain herself; that the son of parties Ahmad Abu has attained majority on 24.2.2012 as his date of birth is 24.2.1994 as per School Transfer Certificate; that after attaining majority by him the revisionist is not liable for payment of maintenance for him and in the circumstances, the impugned order of maintenance dated 10.3.1997 is liable to be cancelled and learned Lower Court acted wrongly in rejecting the application.

24. Upon hearing learned Counsel and perusal of record, I find that the application of revisionist under section 126(2) Cr.P.C. for setting aside the ex parte order dated 10.3.1997 has been allowed vide order dated 16.4.1998. The Learned Lower Court has rejected, the application on account of becoming infructuous, due to setting aside of ex parte order dated 10.3.1997. I find that since the ex parte order dated 10.3.1997 has been set aside, the order passed

by Lower Court rejecting the application as infructuous is fully justified and requires no interference. Since order dated 10.3.1997 which is sought to be cancelled or modified under the provisions of section 127 Cr.P.C. has been set aside as above and does not exist there can be no modification therein. In any case, these points can be raised by him on merits in the maintenance petition during his evidence, which may be dealt with by the Court in accordance with law.

25. In view of discussions made above, I do not find any illegality, irregularity or incorrectness in the impugned order dated 16.4.1998 passed in Misc. Case No. 315 of 1997 rejecting application under section 127 Cr.P.C. as infructuous and revision is also liable to be dismissed.

26. In Criminal Revision No. 672 of 1998 which has been filed against order dated 20.4.1998 rejecting the application for restoration under section 126(2) Cr.P.C. for non-compliance of the conditions, I find that in view of the discussions made above in disposal of Criminal Revision No. 590 of 1998, the impugned order dated 20.4.1998 is wrong, illegal and incorrect and is liable to be set aside and the revision is liable to be allowed.

27. In view of discussions made above (i) Criminal Revision Nos. 591 of 1998 is dismissed, (ii) Criminal Revision No. 672 of 1998 is allowed setting aside order dated 20.4.1998 and (iii) Criminal Revision No. 590 of 1998 is partly allowed. The impugned order dated 16.4.1998 passed in Misc. Case No. 314 of 1997 allowing the application under section 126(2) Cr.P.C. and setting aside the ex parte order dated 10.3.1997 passed in Misc. Case No. 112 of 1997 is upheld and confirmed with modification in condition No. 2 and 5 of the impugned order relaxing them to the extent that the revisionist Sri Inamul Haq shall be having not more than three opportunities to adduce and conclude his entire evidences without adjournment within a maximum period of two months and two more opportunities for final arguments and the cost imposed under condition No. 1 shall be paid to opposite party Shahin Jahan or deposited in her favour in the Family Court, Moradabad within 15 days from today. The maintenance petition originally pertaining to the year 1994 is critically old and the Court below is directed to decide it as expeditiously as possible on day to day basis or by fixing very short dates, without giving any undue adjournment or advantage to either party and shall decide it in accordance with law within 10.11.2014 after affording reasonable opportunities to the parties.

Let a copy of this order be sent to Family Court, Moradabad by Fax as well as by ordinary process for proceeding in accordance with law and reporting the compliance to this Court positively by 15.11.2014.