
(1986) 06 GAU CK 0011
In the Gauhati High Court
Case No : Criminal Revision No. 195 of 1986

Shri Uro Ram Haloi

APPELLANT

Vs

Smti. Maloti HaloI

RESPONDENT

Date of Decision : 12-06-1986

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 126(2), 397, 397(2)
Limitation Act, 1963 — Section 5

Citation : (1986) 2 GLR 48

Hon'ble Judges : K.N. Saikia, J

Bench : Single Bench

Advocate : B. Kalita and B.C. Pathak, for the Appellant;

Judgement

K.N. Saikia, J.—Heard the learned Counsel for the Petitioner, Mr. B. Kalita. The Petitioner impugns the judgment and order dated 10.3.86 of the Additional Sessions Judge, Kamrup, Gauhati rejecting his revision petition against the order dated 29-5.85 passed by the Magistrate, First Class, Gauhati in C.M. No. 24(K-3) of 1985 u/s 125 of the Code of Criminal Procedure as not maintainable in view of the provision in the proviso to Sub-section (2) of Section 126 Code of Criminal Procedure.

2. The Petitioner is a Signaller under the Indian Army in 25 Infantry Divisional Signal Regiment. The first party-opposite party, who is his wife, applied for maintenance for herself and her child. Several notices were issued to the Petitioner. One such notice issued in his home address was returned as "refused to release". The learned Magistrate after examining the Postal Peon accepted the service of the notice as valid and thereafter allowed the petition for maintenance exparte on 29.5.85 granting Rs. 300/- per month to the first party-opposite party and Rs. 100/- to her son, with effect from the date of filing the application. From that order the Petitioner moved a revision petition before the Additional Sessions Judge, Gauhati who rejected the petition. Hence this petition.

3. Mr. B. Kalita, the learned Counsel for the Petitioner, submits that in rejecting the revision petition the learned Judge did not exercise jurisdiction vested in him according to law; inasmuch as over and above the remedy as provided in the proviso to Sub-section (2) of Section 126 Code of Criminal Procedure, the Petitioner had the right of revision and he has been denied that right by holding that the revision petition was not maintainable.

4. Under Sub-section (3) of Section 397 Code of Criminal Procedure if an application u/s 397 has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. Considered as a second revision petition, this application will be barred under that provision as the Sessions Judge was also moved by the Petitioner. Mr. Kalita, however, submits that this is an application u/s 482 Code of Criminal Procedure and/or under Article 227 of the Constitution of India. It is true that under very exceptional circumstances when the Petitioner is moved a revision petition before the Sessions Judge he may come to the High Court u/s 482 and if the Court is satisfied that non-interference will result in great miscarriage of justice the High Court may interfere in exercise of its inherent power u/s 482 Code of Criminal Procedure. However, in the background of the facts and circumstances of the case, it is not considered to be a fit case where such interference would be justified except *ex debito Justitiae*.

5. The question involved in this petition is, whether a revision petition to set aside an *ex parte* maintenance order, is maintainable or not. To my mind in the instant case ends of justice will be met if the Petitioner is left to move an application for setting aside the *ex parte* maintenance order before the Magistrate under the proviso to Sub-section (2) of Section 126 Code of Criminal Procedure, which says:

(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 willfully avoiding service, or willfully 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.

6. The learned Judge rejected the revision petition relying, on *State of Mysore Vs. Ghousuddin and Another*, wherein it was held by a learned Single Judge of the Mysore High Court that the latter part of the proviso to Sub-section (6) or Section 488 of the old Code of Criminal Procedure made it incumbent on the husband in that case to have applied to the Magistrate, that too within three

mouths from the date of the order setting out sufficient cause or ground for his remaining absent and for requesting for setting aside of the order; and that when the law specifically laid down a particular procedure to be adopted it has to be complied with before an aggrieved person proceeds to invoke the revisional jurisdiction of the higher courts. As the husband failed to apply under that provision within three months the Sessions Judge could not have, in law, entertained the revision petition filed by the husband, which, according to the learned Judge, was not maintainable. In *Arunkumar Surajmal Jain Vs. Chandanbai Rupchandsa Jain and Others*, relying on *Ghousuddin (supra)* and *Pranab Kumar Mitra Vs. The State of West Bengal and Another*, it was bold that as in that case the applicant was pursuing his other remedy u/s 126 (2) of the Code for setting aside the ex parte order, the revision application before the High Court was untenable. In *Pranab Kumar (supra.)* with respect to revisional jurisdiction of the High Court it was observed:

In the absence of statutory provisions, in terms applying to an application in revision, as there are those in Section 431 in respect of criminal appeals, the High Court has the power to pass such orders as to it may seem fit and proper, in exercise of its revisional jurisdiction vested in it by Section 439 of the Code. Indeed, it is a discretionary power which has to be exercised, in aid of justice. Whether, or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon the facts and circumstances of that case. The revisional powers of the High Court vested in it by Section 439 of the Code, read with Section 435, do not create any right in the litigant, but only conserve the power of the High Court to see that justice is done in accordance with the recognised rule of criminal jurisprudence.

7. Several questions may arise u/s 126(2) Code of Criminal Procedure, namely, whether the proceedings have been taken in the presence of the person against whom an order of payment of maintenance is proposed to be made: whether his personal attendance was dispensed with and evidence was recorded in presence of his pleader; whether evidence was recorded in the manner prescribed in summons cases; whether the Magistrate was satisfied that the person against whom an order for Maintenance was proposed to be made was willfully avoiding service, or willfully neglecting to attend the Court; and whether the Magistrate recorded the reasons for being satisfied; whether the summons was served, if the Magistrate proceeded to hear and determine the case ex parte. An ex parte order may be set aside for good cause shown on an application made within three months from the date thereof. An ex parte maintenance order may be vulnerable on one or more of the above questions. If an ex parte order is not allowed to be challenged in revision without first making an application for setting aside the order of the Magistrate, the Magistrate's order will acquire a stamp of finality and may, depending on the facts and circumstances of a case, result in injustice. A maintenance proceeding in substance is one of civil nature. Applying the analogy of Order 9, Rule 13 read with Order 43, Rule 1(d) of the Code of Civil Procedure, the revisional jurisdiction of the higher courts may not be barred.

Besides, an application before the Magistrate under the proviso to Section 126(2) Code of Criminal Procedure., may be held to be barred by limitation and may be dismissed for default or rejected contrary to law. In all such cases the revisional jurisdiction of the higher courts would not be barred.

8. In view of the above position in law the Petitioner may move an application under the proviso to Section 126(2) Code of Criminal Procedure before the learned Magistrate and if and when an application is made, the learned Magistrate may entertain the application on condonation of delay considering the facts and circumstances of the case including that the Petitioner is an Army man and required to serve at different States in India and that he has moved a revision petition before the learned Sessions Judge and also moved a petition u/s 482 Code of Criminal Procedure /Article 227 of the Constitution before this Court.

9. In SLP (Cr) No. 1286"80 their Lordships of the Supreme Court ordered on 7.5.80 directing the Magistrate to dispose of the application filed by the Petitioner thereof for setting aside the ex parte order of maintenance after hearing both sides and after allowing the Petitioner to file a proper affidavit in support of that application. In Mohd. Nain Siddique v. Smt. Sultan Khaton (1982) 2 SCC 369 the Supreme Court being satisfied that the husband was not served with notice when the matter was decided against him ex parte by the learned trial Magistrate, set aside the ex parte order of the Magistrate as well as the High Courts order passed in revision and remanded the matter back to the trial Magistrate for being disposed of afresh in accordance with law, and also directed that there would be no fresh service on the husband who waived service and assured his appearance before the Magistrate. The instant direction is in line of the above direction of the Supreme Court.

10. The instant direction in respect of condonation of delay is based on the settled law that the limitation under the proviso to Sub-section (2) of Section 126 Code of Criminal Procedure, which corresponds to the proviso to Sub-section (6) of Section 488 of the old Code, begins to run from the date of knowledge of the order and that Section 5 of the Limitation Act is applicable to such an application to set aside an ex parte maintenance order, This was the ratio in Zohra Begum alias Aysha Begum Vs. Mohamed Ghouse Qadri Qadeeri and Another, ; Meenakshi Ammal Vs. Somasundara Nadar, ; Hemendra Nath Chowdhury Vs. Sm. Archana Chowdhury, ; Parson Kaur Vs. Bakshish Singh, ; Joginder Singh Surmukh Singh Vs. Smt. Balkaran Kaur, ; Dhani Ram Vs. State and Another, ; Mangu Ram Vs. Municipal Corporation of Delhi, ; Bina Ganguli Vs. Rash Behari Ganguli,

11. If and when the Petitioner moves an application as directed, it will be for the learned Magistrate to decide the application according to law on the basis of the materials placed before him by, and after bearing, the parties, keeping in mind the observations made hereinabove.

12. In the result, with the above directions and observations this petition is

disposed of.