

(2018) 07 J&K CK 0102

In the Jammu And Kashmir High Court

Case No : Criminal Miscellaneous Case No.. 617 Of 2017

Tariq Mehmood Bhat @APPELLANT@Hash Smt. Zubaida Akhter And Anr.

Date of Decision : 27-07-2018

Acts Referred:

Code of Criminal Procedure 1973, — Section 488, 561A

Citation : (2018) 07 J&K CK 0102

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. The instant petition has been filed, seeking recall of ex-parte order dated 25th August, 2017 of this Court and affording the petitioner an opportunity of being heard.

2. The facts, as these emerge from the study of the file under consideration are that the respondents had filed the petition under Section 561-A

Cr.P.C., before this Court against judgment and order of 2nd Additional Sessions Judge, Jammu (Annexure-A) dated 18th August, 2015, by which the

criminal revision petition against the order of Judicial Magistrate 1st Class (Sub-Judge, Jammu) (Annexure-B) dated 07th August, 2014 was partly

allowed to the extent of interim maintenance granted under Section 488 Cr. P.C in favour of respondent No. 2 was upheld and the

same was set aside for respondent No. 1.

3. It is alleged that after the order of 2nd Additional Sessions Judge, Jammu, the respondent herein filed a petition under Section 561-A Cr.P.C.,

thereby seeking reversal of judgment of 2nd Additional Sessions Judge, Jammu and the same was disposed of vide judgment (Annexure-C) dated 25th

August, 2017 thereby setting aside the order of 2nd additional sessions judge

and held that wife was entitled to interim maintenance till Divorcee is proved during trial.

4. It is also alleged in the instant petition that the petitioner engaged Bharti, Advocate as his counsel and paid requisite fee, in return of which the counsel assured the petitioner, who is working in Police Department that he will be attending the case on regular basis, but unfortunately he could not appear, as the matter was listed in supplementary cause list. It is further alleged that the High Court in terms of judgment dated 28th August, 2017 has reversed the judgment of 2nd Additional Sessions Judge, Jammu without hearing the petitioner and hence the petitioner is seeking recall of the said order by invoking the provision of Section 561-A on the following among other grounds:-

- a. The order passed by this Court is ex-parte and the petitioner was not notified about the listing of the matter in supplementary cause list.
- b. The judgment has been reversed without giving any opportunity to present the case of the petitioner, by virtue of which injustice has been caused to the petitioner.
- c. The judgment being ex-parte constitutes manifest injustice and condemning the petitioner without hearing.
- d. Even the judgment on merit is required to be re-considered, as the reasoning assigned is based on the central provision of Cr. P.C u/s 125, which is para material the J&K Cr. P.C u/s 488.
- e. The judgment has been rendered per-incuriam without noting the distinction, thus, it is an error apparent on the face of record and deserves to be corrected, as the said judgment is binding upon all Subordinate Courts.
- f. The High Court is a Court of record and can correct its error while exercising power u/s 561-A.

5. I have considered the arguments. Perusal of impugned order would reveal that this court in 561-A Cr.P.C. No.05/2016 in case titled Smt. Zubaida

Akhtar and another vs. Tariq Mehmood Butt, has passed a detailed order.

6. Facts as are evident from order under challenge are that petitioner solemnized marriage with respondent No.1 as per Muslim rites and ceremonies;

that out of the said wedlock, one male child namely Mohd. Muzamil (respondent No.2) was born on 22.05.1998; that at the time of marriage, petitioner

was unemployed and soon after the marriage, respondent No.1 and petitioner herein were thrown out of the house by the parents of

petitioner and it was the parents of the respondent No.1 who provided protection and shelter to them; that respondents and petitioner resided

there for more than five years and subsequently the parents of the respondent No.1 arranged a rental accommodation in Mohalla Ustad, Jammu

and the expenses of all the three were being met by the parents of respondent no.1 including the education expenses of their child ; that in the year

1998, petitioner herein was recruited in Police Department and thereafter he started harassing wife and on one fine morning without telling

anything to respondent No.1, the petitioner herein left the rental accommodation at Mohalla Ustad, Jammu and later on it came to the knowledge of

petitioner No.1 that he had gone to Rajouri and had managed to get transferred there; petitioner told the wife that if she wants to continue with

him , she will have to transfer the title and ownership of land; that after refusing to transfer the land by wife , petitioner herein told them that he

has no need of them; and wife /respondent no.1 came to know that her husband is going to solemnize a second marriage and thereafter just to

harass respondent No.1 petitioner herein sent a legal notice on 22.05.2010.

7. It is further evident from the order impugned that petitioner filed two cases at Rajouri against wife, one for restitution of conjugal rights and another

for custody of minor son; respondent No.1 filed two civil transfer applications (CTA Nos.27/2013 & 28/2013) before this Court to transfer the case

from Rajouri to any Court of competent jurisdiction at Jammu, in which, this Court stayed the proceedings in the above two cases till disposal of the

CTAs; that after the proceedings in the above mentioned cases having been stayed by this Court, the petitioner herein sent

â??Divorce/Talaknamaâ?? dated 29.08.2013; respondent no.1 filed a suit for declaration declaring the said Talaknama as null and void, in which the

operation of the said document was stayed. But subsequently, the stay was vacated; then wife has filed an appeal in the Court of learned

Additional District Judge, Jammu, in which the stay has been granted; the respondents then filed a petition for grant of maintenance in the Court of

learned Judicial Magistrate Ist Class (Sub Judge) Jammu; that the learned Magistrate vide order dated 07.08.2014 granted interim maintenance of

Rs.3000/- p.m. to wife and Rs.2000/-p.m. to child ; that petitioner filed a revision petition against order dated 07.08.2014 before learned 2nd

Addl. Sessions Judge, Jammu and vide order dated 10.08.2015 learned 2nd Sessions Judge, partially allowed the revision petition; so far as

granting of the interim maintenance to wife was concerned that was set aside on the ground that the petitioner has divorced her .

However, revision petition pertaining to the grant of maintenance to child was concerned, that order was upheld.

8. This court, in Petition u/s 561-A Cr.P.C. No.05/2016, after hearing the counsel for wife, set aside the order of 2nd Additional Sessions Judge relying

on the 2014 JKJ (4) HC 3 case titled Manzoor Ahmed Dar v Tasleem Akhtar and 2017 (2) JKJ HC 510 case titled Ab. Qayoom v. Learned 1st

Additional Session Judge, Jammu & ors., wherein it is held that interim allowance /maintenance shall be allowable till plea of divorce is proved

during trial. It has also been held that if such plea is taken as it is and maintenance is declined then it would have disastrous consequences.

9. Once this court has exercised the jurisdiction vested under section 561-A Cr.P.C., then in another petition filed by aggrieved party u/s 561-A

Cr.P.C., this Court would not set aside the order, because impliedly it will amount to review of order, which is not the true spirits of power vested to

this court u/s 561-A Cr.P.C.

10. This court while exercising the power under section 561-A Cr.P.C., does not function as court of trial, appeal or revision. Inherent jurisdiction

has to be exercised sparingly, careful and with great caution. Exercise of power under Section 561-A Cr.P.C. is the exception and not rule.

Inherent jurisdiction of High Court under this section may be exercised:-

1. To give effect to an order under the Code.

2. To prevent abuse of the process of Court.

3. To otherwise secure the ends of justice.

11. From the perusal of order impugned, I do not find any incorrectness or error apparent on the face of it, which can attract any of provision of

Section 561-A Cr.P.C., as mentioned above.

12. In view of above, this petition is dismissed.