

GAHC010092282023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./403/2023

SONU AMSI
S/O KUL BAHADUR MONGER
R/O VILL- UMBARMAN P.O. ULUKUNCHI, P.S. BAITHALANGSO
DIST. WEST KARBI ANGLONG, ASSAM

VERSUS

ROSILA KHOLAR
D/O LATE KOLONG MALANG
R/O VILL- UMSWAI
P.O. UMSWAI, PIN-782410
P.S. BAITHALANGSO
DIST. WEST KARBI ANGLONG, ASSAM

Advocate for the Petitioner : MR. R BORA, MR BHARGAV DAS, MR ARINDAM BARUAH

Advocate for the Respondent : MR R S RONGHANG (R-1), MR. P DEKA (R-1), MR B P BORAH (R-1), MR P J DUTTA (R-1)

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 10.05.2024

Date of Judgment & Order : 21.08.2024

JUDGMENT & ORDER (CAV)

Heard Mr. R. Bora, learned counsel for the petitioner. Also heard Mr. B. P. Borah, learned counsel for the respondent No. 1.

2. This is an application under Section 482 of Cr.P.C, 1973 for setting aside and quashing of the order dated 22.11.2022 passed by the learned Judicial Magistrate First Class, West Karbi Anglong at Hamren in M. R. Case No. 01/2022, whereby, the second party/petitioner was directed to pay Rs. 8,000/- (Eight thousand) as monthly allowances towards monthly maintenance.

3. In brief the case of the petitioner is that 1st party/respondent was in a relationship with the second party/petitioner from July 2016 till September 2020 and out of their relationship a child was born. The child is studying in nursery at Don Bosco Higher Secondary School, Umswai. It has been alleged that the 1st party/respondent was subjected to cruelty, physical and mental harassment by the petitioner and she had to undergo medical treatment for the same. Thereafter, she fled to Umswai and is presently living with her elder sister. As she has no source of income of her own, she is unable to bear her own

expanses as well as of her minor daughter and accordingly, she filed this petition under Section 125 of Cr.P.C seeking maintenance. It is further claimed by the 1st party/respondent that the petitioner/second party has sufficient land and property wherein he cultivates broom, bamboo etc., and also possesses a public transport vehicle, wherefrom he earns sufficient income. And as such, the first party/respondent prayed for monthly maintenance of Rs. 20,000/- (Rupees Twenty thousand) from the present petitioner/second party.

4. The case proceeded ex-parte against the present petitioner/second party as held by the learned Court below that he never appeared before the Court even after receiving notice and did not file his written statement. But the petitioner never received any notice from the learned Court below as the notice was issued to the address of West Karbi Anglong at Hamren though he is resident of Umbormon. In the said case, the first party/respondent adduced 3(three) witnesses including herself and after hearing the ex-parte argument from the first party/respondent, the learned Court below accordingly passed the judgment and order directing the present petitioner to pay maintenance at the rate of Rs. 8,000/- (Rupees Eight thousand) per month from the date of institution of M.R Case No. 01/2022.

5. On being highly aggrieved and dissatisfied by the impugned order dated 22.11.2022 passed by the learned Judicial Magistrate First Class, West Karbi Anglong at Hamren in M.R. Case No. 01/2022, the petitioner has preferred the present petition for setting aside and quashing of the impugned order passed by the learned Judicial Magistrate First Class.

6. It is submitted by Mr. R. Bora, learned counsel for the petitioner that the learned Judicial Magistrate First Class erred in law as well as in facts in passing the impugned order dated 22.11.2022 and as such, the same is liable to be set aside and quashed. The evidence adduced by the respondent in support of her claim even if taken into consideration on their face value, no case of maintenance is made out against the present petitioner and as such the impugned order dated 22.11.2022 passed by the learned Judicial Magistrate First Class, West Karbi Anglong is liable to be set aside and quashed.

7. As the case proceeded ex-parte in absence of the present petitioner, he had no opportunity to contest the case and thus, in his absence and without affording any reasonable opportunity, the learned Court below passed the order of maintenance which is liable to be set aside and quashed.

8. Mr. Bora, learned counsel for the petitioner further submitted that there was no specific evidence in regards to mental and physical torture though she exhibited some medical report at the time of her examination which was exhibited as Exhibit-VI. The learned trial Court below also observed that there is no specific mention about the amount of earning of the present petitioner to determine the exact amount of income of the petitioner but the learned trial Court directed to pay Rs. 8,000/- (Rupees Eight thousand) per month towards maintenance allowances in spite of the fact that there is no specific evidence regarding the earnings of the petitioner/second party. More so, the petitioner/second party is earning his livelihood by driving his vehicle on rental basis and the shop which was owned by the petitioner is already closed and hence, there are no source of income for the petitioner to pay maintenance as

granted by the learned Court below.

9. Further it is submitted by Mr. Bora, learned counsel for the petitioner that if the order passed by the learned Court below in M.R. Case No. 01/2022 is allowed to stand, it would cause serious prejudice to the petitioner and as such, the same is liable to be set aside.

10. Mr. Bora, learned counsel for the petitioner further submitted that the learned Court below did not consider the fact that the present petitioner was residing in another place and he never received any summon from the Court and there is no mention that item was delivered rather the process was returned due to insufficient address but without considering his aspects the case proceeded ex-parte against the petitioner.

11. In this context, Mr. B. P. Borah, learned counsel for the respondent submitted that the present petition is not maintainable under Section 482 of Cr.P.C and the remedy was also available for the petitioner to file petition under Section 126(2) of Cr.P.C to make an application for setting aside the ex-parte order of maintenance and as per the provision the application has to be made within 3(three) months from the date of order but even if the period of limitation is computed for making an application to have the ex-parte order of maintenance, the person, against whom the order is made, can, in a given case, satisfy the court that he had no knowledge of the maintenance proceeding and of the order passed therein. In an appropriate case, therefore, it would be, within the powers of the Magistrate, to condone, under Section 5 of the Limitation Act.

12. In support of his submission Mr. B. P. Borah, learned counsel for the respondent relied on the decision of the Coordinate Bench of this Court reported in **2006 (Suppl1) GLT 438 (Hasar Ali (MD.) vs. Mustt. Batasi Bibi)** and stressed on the paragraph No. 31 of the said judgment, which reads as under:

“31. In the light of what has been laid down in Kaushalya Rani (supra), it logically follows that the restriction of making an application within three months from the date of the order, as envisaged in Section 126 (2), is a special law laying down a period of limitation, which is distinguishable from the general law of limitation contained in the Limitation Act, 1963, and Section 5 will apply to an application made, under the proviso to Section 126 (2), to have an ex parte order of maintenance set aside. Considered thus, it is clear that even if the period of limitation is computed for making an application to have the ex parte order of maintenance, the person, against whom the order is made, can, in a given case, satisfy the court that he had no knowledge of the maintenance proceeding and of the order passed therein. In an appropriate case, therefore, it would be, within the powers of the Magistrate, to condone, under Section 5 of the Limitation Act, the delay in making an application to have an ex parte order of maintenance set aside even if the application is made, under Section 126 (2) of the Code, beyond the period of limitation prescribed therefore, i.e., three months from the date of making of the order of maintenance.”

13. In this context, Mr. R. Bora, learned counsel for the petitioner submitted that the petition under Section 482 of Cr.P.C is still maintainable even remedy may be available under Section 397 of Cr.P.C, if there is an abuse of process of law.

14. Mr. Bora, learned counsel for the petitioner also relied on the decision of

the Apex Court passed in ***Criminal Appeal No. 842/2016*** arising out ***S.L.P. (Crl) No. 3314/2009*** and mainly stressed on paragraph No. 5 of the said judgment, which reads as under:

"5. Mr. P.K. Goswami learned senior advocate for the appellants supported the view taken by this Court in the case [Dhariwal Tobacco Products Ltd. \(supra\)](#). He pointed out that in paragraph 6 of this judgment Justice S. B. Sinha took note of several earlier judgments of this Court including that in [R.P. Kapur v. State of Punjab](#)[4] and [Som Mittal v. Govt. of Karnataka](#)[5] for coming to the conclusion that "only because a revision petition is maintainable, the same by itself, ..., would not constitute a bar for entertaining an application under [Section 482](#) of the Code." Mr. Goswami also placed strong reliance upon judgment of Krishna Iyer, J. in a Division Bench in the case of [Raj Kapoor and Ors v. State and Ors](#)[6]. Relying upon judgment of a Bench of three Judges in the case of [Madhu Limaye v. The State of Maharashtra](#)[7] and quoting therefrom, Krishna Iyer, J. in his inimitable style made the law crystal clear in paragraph 10 which runs as follows:

"10. The first question is as to whether the inherent power of the High Court under [Section 482](#) stands repelled when the revisional power under [Section 397](#) overlaps. The opening words of [Section 482](#) contradict this contention because nothing of the Code, not even [Section 397](#), can affect the amplitude of the inherent power preserved in so many terms by the language of [Section 482](#). Even so, a general principle pervades this branch of law when a specific provision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code. In [Madhu Limaye v. The State of Maharashtra](#) this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that [Section 482](#) is pervasive it should not subvert legal interdicts written into the same Code, such, for instance, in [Section 397\(2\)](#). Apparent conflict may arise in some situations between the two provisions and a happy solution

"would be to say that the bar provided in sub-section (2) of [Section 397](#) operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in [Section 397\(2\)](#) can limit or affect the exercise of the

inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction”.

In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the court’s jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the court’s process. Can we state that in this third category the inherent power can be exercised? In the words of Untwalia, J.: (SCC p. 556, para 10)

“The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with [Section 482](#) of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.

“ I am, therefore clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cessation need not take up this court’s time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not been produced, despite its presence in the records in the court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified.”

15. Mr. B. P. Borah, learned counsel for the respondent further submitted that the maintenance allowances which is granted by the learned Court below is also not sufficient for maintenance for herself and for her daughter who is school going child and that apart she has no sources of income of her own. Further, he

submitted that even if it is considered that the petitioner/second party has the only source of income from his driving and that too also as a skill labour, he earns Rs. 600/- (Rupees six hundred) per day and in that event also the petitioner being able bodied person has the capacity to pay monthly maintenance to the respondent and her child to the tune of Rs. 8000/- (Rupees Eight thousand) per month.

16. Mr. B. P. Borah, learned counsel for the respondent accordingly submitted that there is no reason to make any interference in the judgment and order passed by the learned trial Court below. The learned trial Court below had passed the reasonable and justified order of maintenance.

17. After hearing the submissions made by the learned counsels for both sides, I have perused the case record and judgment and order passed by the learned trial Court below.

18. It is seen that the judgment and order was passed by the learned trial Court below on 22.11.2022 and from the order sheet as submitted by the learned counsel for the respondent, it reveals that since the date of order of the judgment, the present petitioner did not pay anything and for which, DW has to be issued against the present petitioner and as DW returned unexecuted, the learned trial Court below vide the order dated 05.01.2024 had to issue warrant of arrest against the present petitioner and only after the issuance of the DW, the petitioner appeared before this Court with a petition for setting aside the ex-parte judgment and order passed by the learned trial Court below.

19. It is seen that the relationship between the petitioner and the respondent is not disputed nor the paternity of the child is challenged by the present petitioner. However, it is a fact that the present petitioner did not get any

opportunity to cross-examine the PWs to rebut the case of the respondent as the case proceeded ex-parte against him. More so, he did not file any application under Section 126 (2) of Cr.P.C for vacating the ex-parte order passed against him and only after the issuance of DW, he appeared before this Court with a petition for setting aside the ex-parte order and the judgment passed by the learned trial Court below.

20. It is the case of the respondent that she was subjected to mental and physical harassment by the present petitioner and for which, she also had to undergo medical treatment and had to leave the house of the petitioner as she could not bear the mental and physical harassment subjected to her.

21. To substantiate her plea she also produced the medical report/medical documents and the same was exhibited as Exhibit No. VI while adducing her evidence as PW-1. She also adduced the evidence of 2(two) other PWs in support of her case who also adduced in her favour and PW-2 also testified that the respondent/first party was subjected to mental and physical harassment by the present petitioner for which she had to undergo for medical treatment. The PW-3 also corroborated the testimony of PW-1 and PW-2 and adduced their evidence in support of case of the respondent. The respondent also produced the original birth certificate and also the school fees expanses borne by her as exhibit Nos. 1, 2, 3, 4 & 5 to substantiate her plea that she had to spend a good amount of money for educational expenses and other expenses for her child.

22. It is a fact that the respondent could not produced any documentary evidence to prove the income of the present petitioner regarding the possession of the land and property and other cultivation etc., but there is no dispute that the petitioner is able bodied person and he also admitted in his petition that he earns his livelihood by driving his own vehicle and thus, even if it is considered

that the petitioner has no other sufficient source of income but he is able bodied person and earns his livelihood even working as daily wage earner.

23. Mr. P. B. Borah, learned counsel for the respondent rightly submitted that a skill labour also earns Rs. 600/- (Rupees six hundred) per day and even if the same is considered as his income, the petitioner is able to provide maintenance at the rate of Rs. 8,000/- (Rupees Eight thousand) per month to the petitioner which is reasonable assess by the learned trial Court below towards maintenance for the respondent as well as for her child. More so, it is admitted fact that the respondent has no source of income of her own to maintain herself along with her daughter and the petitioner being the husband and the father of the child of the respondent cannot abstain himself from paying the maintenance to the respondent and her child and it is his bounden duty to provide maintenance to his wife and the child.

24. Considering all the facts and circumstances of the case, I do not find any mistake or illegality committed by the learned trial Court below by passing the ex-parte order as well as assessing the maintenance allowances which is found to be reasonable and justified. Thus, there is no reason to make any interference in the impugned order dated 22.11.2022 passed by the learned Judicial Magistrate First Class, West Karbi Anglong at Hamren in M. R. Case No. 01/2022. In the result, I find no merit in this criminal petition and accordingly, the same stands dismissed.

25. With above observations, this criminal petition stands disposed of.

JUDGE

Comparing Assistant