

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

Crl. Misc. No.M-8273 of 2015

Date of decision : 07.08.2018

Harbilas

.....Petitioner(s)

Versus

Balbir Kaur

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. B.S. Jaswal, Advocate for the petitioner.

Mr. Anter Preet Singh, Advocate for the respondent.

ANITA CHAUDHRY, J.

The petitioner has assailed the order passed by the Executing Court (Annexure P-3) and the order passed subsequently by the Additional Sessions Judge (Annexure P-5).

It would be necessary to just refer to few facts. A petition under Section 125 Cr.P.C. was filed by the wife, which was allowed. The husband failed to pay and therefore, the wife filed an application under Section 128 Cr.P.C. for enforcement of the maintenance order dated 04.10.2011. On 22.02.2014 the execution proceedings were dismissed in default for want of prosecution and the Civil Judge noted in its order that the decree holder had failed to place on record the certified copies even though a period of two months had passed. Subsequently, the wife filed an application seeking restoration of the application and gave an explanation that they had applied for certified copies and it took time, therefore, they could not file it and that application was allowed and the execution petition was restored to its original number and the case was again adjourned for filing the documents.

Aggrieved by that order, the husband filed a revision challenging the order of restoration on the plea that the Magistrate had no jurisdiction to restore the execution petition which was dismissed and he had no power to review or recall his own order and it was mandatory for Magistrate to issue notice to him.

The Additional Sessions Judge dismissed the revision noticing the fact that the judgment debtor was not present on the day when the execution was dismissed for non-prosecution and no prejudice had been caused as he was aware of the proceedings and he could join the proceedings.

I have heard counsel of both the sides.

Counsel for the petitioner refers to ***Hari Singh Mann Vs. Harbhajan Singh Bajwa 2000(4) RCR (Criminal) 650, Sunita Jain Vs. Pawan Kumar Jain and ors. 2008(1) RCR (Crl.) 954, Ranvir Singh Vs. State of Haryana and another 2009(4) RCR (Crl.) 305 and Mostt. Simrikhia Vs. Smt. Dolley Mukherjee 1990(2) (SC) 337*** and urges that the proceedings under the Criminal Procedure Code govern the procedure defined therein and no Court has the power to review its own order as it ceases to have control over the same.

The submission on behalf of the respondent is that the husband was not paying the maintenance and for that an execution petition had been filed and earlier the judgment debtor was appearing but he did not appear on the date when the petition was dismissed for non-prosecution. It was urged that the execution could not have been dismissed for non-prosecution as the their counsel was present in the Court and his presence recorded in the order and at best, it could be dismissed for want of compliance of the order and thereafter an application was filed for restoration and the Supreme Court has

held that the proceedings under Section 125 Cr.P.C. are of civil nature and when the case had been dismissed in default, it can be restored. Reliance was placed upon *Vijay Kumar Prasad Vs. State of Bihar and ors. 2004(2) RCR (Criminal) 470 and Jasbir Singh Vs. Kiran in CRM-M-4806-2011, D.O D. 11.10.2012 (P&H).*

The proceedings under Section 125 Cr.P.C. are quasi civil in nature. Hon'ble Supreme Court in the matter of *Vijay Kumar Parshad Vs. State of Bihar and others 2004(2) RCR (Crl.) 470 SC* has held that proceedings under Section 125 of Cr.P.C. are of civil nature. In view of the law laid down in the said authority, the Court has inherent power to restore the proceedings, although there is no provision in the Code of Criminal Procedure for recalling or reviewing the order.

The petitioner was aware of the proceedings and he intentionally failed to appear and was watching the proceedings.

In the case of *State of Uttar Pradesh vs. Bhagwant Kishore Joshi, AIR 1964 SC 221*, the Hon'ble Supreme Court has considered the provisions under Chapter IX and opined that there is no bar on the Court to recall its order dismissing an application under Section 125 Cr.P.C., while dealing with the permissibility of a preliminary enquiry prior to registration of FIR and observed as under:-

“In the absence of any prohibition in the Code, express or implied, I am of the opinion that it is open to a police officer to make preliminary enquiries before registering an offence and make a full scale investigation into it.”

The Bombay High Court in the matter of *Sau. Mandakini B. Pagire vs. Bhausahab Genu Pagire and another, 2009 Crl. L.J., 80* came to the same conclusion. Referring to Section 362 of Cr.P.C., the Court held that the recalling of dismissal order cannot be treated as an alteration or change in

the judgment or final order. Once it is found that the Criminal Court has inherent power to grant interim allowance to the wife under Section 125 Cr.P.C. then it follows that exercise of such inherent powers can be done for setting right the wrong. The principle “*ubi-jus-ibiremedium*” is attracted in such a case.

In *Kehari Singh versus State of U.P. and another, 2005 Crl. L.J., 2330*, it was held that people in such miserable conditions due to unavoidable conditions may not be able to attend the Court proceedings on every date fixed there to pursue their cases. In such situations, if it is held that the Court lacks the jurisdiction to restore the cases in absence of such provisions, the very object and purpose of the legislation would be frustrated. The paramount rule of interpretation of provisions, which overrides the others is that the Statute is to be expounded according to the intent of the authority that made it. Therefore, even if there is any lacuna in the Statute, then also it is the obligation on the part of the Magistrate to give effect to the will of the Legislature by a judicial order. Thus, the learned Magistrate is empowered to restore the proceedings initiated under Section 125 Cr.P.C., which were dismissed for non-appearance of the complainant/applicant.

In view of the above, I do not find any illegality or perversity in the orders.

The petition is dismissed.

07.08.2018

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**(ANITA CHAUDHRY)
JUDGE**

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No