

HIGH COURT OF CHHATTISGARH, BILASPURCr.M.P.No.116 of 2020

Smt.Yogeshwari W/o. Bhagwat Shrivasa, Caste Shrivasa,
aged about 24 years, R/o. Tendubhata, Police Station
and Tahsil Janjgir, District Janjgir-Champa (CG)

----- Petitioner

Versus

Bhagwat Shrivasa S/o. Ram Prasad Shrivasa, aged about 25
years, Caste Shrivasa, R/o. Village Hardihari, Police
Station and Tehsil Nawagarh, District Janjgir-Champa
(CG)

----- Respondent

For Petitioner	:	Mr.Govind Dewangan, Advocate
For Respondent	:	Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

16/01/2020

1. The petitioner is the applicant before the Family Court, Janjgir. She moved an application under Section 125 of the CrPC. That application was dismissed for want of prosecution and non-appearance on 29.11.2019 as she could not appear before that Court when the case was called out for hearing. Questioning that order, this petition under Section 482 of the CrPC has been filed.
2. Mr.Govind Dewangan, learned counsel for the petitioner, would submit that learned Family Court is absolutely unjustified in rejecting the application in default and her application could have been decided on merit. The Family Court has no power and jurisdiction

to recall its order being Criminal Court, therefore, she has filed an application for setting aside/recalling the order dated 29.11.2019. On being asked, as to why the petitioner has not moved an application for recalling or for restoration, learned counsel submits that the Family Court in exercising the jurisdiction under Section 125 of the CrPC basically exercises jurisdiction under the provisions of the CrPC and against the dismissal of application filed under Section 125 of the CrPC in default for non-appearance, application for recalling would not be maintainable in view of Section 362 of the CrPC.

3. I have heard learned counsel for the petitioner, considered his submissions and went through the records with utmost circumspection.
4. Chapter IX of the CrPC contains special provision pertaining to maintenance of wives, children and parents in the CrPC. Chapter IX comprises three Sections namely Sections 125, 126 and 127 and it is self-contained code designed to further speedy remedy for the grant of maintenance to wives, children and parents. Section 125 enumerates the conditions under which the relief of maintenance can be granted and Section 126 is concerned with procedural aspect and Section 127 relates to alteration in the quantum of maintenance to suit the changed conditions and circumstances.

5. At this stage, it would be appropriate to notice Section 126 of the CrPC which provides as under:-

"126. Procedure.(1) Proceedings under section 125 may be taken against any person in any district-

(a) where he is, or

(b) where he or his wife, resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proceed 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 wilfully avoiding service, or wilfully 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 at to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under Section 125 shall have power to make such order as to costs as may be just."

6. Proviso to sub-section (2) of Section 126 of the CrPC deals with the situation when the husband is absent and the court is empowered to hear and determine matter ex parte and this order can be set aside on showing sufficient cause. There is no provision under this chapter indicating the procedure when the

applicant is absent. Section 126 of the CrPC is silent as to the order that can be passed when the applicant/wife is absent. There is no indication as to either dismissing the application for default or the consideration of the matter on merits ex-parte.

7. The Supreme Court in the matter of Smt. Savitri w/o Govind Singh Rawat v. Govind Singh Rawat¹ held that though there was no specific provision under the Cr.P.C. to allow grant of interim maintenance, however, such a power is implicit under Section 125 of the Cr.P.C. It was held that the jurisdiction of a Magistrate under Chapter IX of the Code is not strictly a criminal jurisdiction. While passing an order under that Chapter asking a person to pay maintenance to his wife, children or parents, as the case may be, the Magistrate is not imposing any punishment for a crime committed by him. Chapter IX of the Code contains a summary remedy for securing some reasonable sum by way of maintenance, subject to a decree, if any, which may be made in a civil Court in a given case provided the Personal Law applicable to the person concerned authorizes the enforcement of any such right to maintenance. The Code, however, provides a quick remedy to protect the applicant against starvation and to tide over immediate difficulties. It was held that it is the duty of the Court to interpret

1 AIR 1986 SC 984

the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very purpose of the legislation. Thus, in the absence of any express prohibition, it was appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct a person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application.

8. In the matter of **Smt. Prema Jain v. Sudhir Kumar Jain**² the High Court of Delhi after considering the various authorities has held that magistrate hearing an application under Section 125 of the CrPC had power to set aside dismissal of application and can restore the maintenance application. It was held as under:-

"25. The order in the present case was administrative in nature rather than a judicial one, and the Magistrate cannot be held to be incapable of reviewing or reversing the same. This view finds strength in the provisions following Section 125 in the same Chapter which entitle the Court to alter, to review or even to cancel its judicial orders."

9. In the matter of **Shabihul Hasan Jafari v. Zarin Fatma and another**³ the Allahabad High Court has held that application for maintenance filed under Section 6 of Muslim Women (Protection of Rights on Divorce) Rules,

2 1980 Cr.L.J. 80

3 2000 Cr.L.J. 3051

1986, dismissed for default can be restored for adjudication on merits even in absence of express provision in the Code, and observed as under:-

"8. In view of discussion made above, I am of the opinion that due to petitioner's absence a maintenance proceeding either under the Act or the Code can be dismissed and subsequently on the prayer being made, the said order of dismissal can be recalled or set aside and the case can be restored to its original position for effective adjudication on merits. Resultantly, the present miscellaneous case fails and is dismissed."

10. In the matter of Lavinder Pal Singh v. Mohinder Kaaur & Others⁴, the Punjab and Haryana High Court considering the provisions incorporated in Section 126 of the CrPC has held that magistrate has power to set aside the ex parte order made under Section 125 of the CrPC and has also jurisdiction to restore the maintenance proceeding, and observed as under:-

"11. A conjoint and meaningful reading of these provisions would reveal that the proceedings under section 125 Cr.P.C are not the crime related complaints, but are of primary civil nature for the benefit of destitute wives, children and parents, who are unable to maintain themselves. Meaning thereby, this Chapter has entirely a different procedure to deal with the situation, which is not at all applicable for disposal of other crime related complaints. In this manner, the procedure under section 125 Cr.P.C cannot legally be equated with the procedure of crime related complaints. If the submission of learned counsel that the Magistrate has no power to restore the maintenance petition, is accepted, then, to my mind, it would frustrate the very intent and purpose of

the Legislature in providing expeditious remedy of maintenance allowance to the destitute wives, children and parents of the person concerned, which is not legally permissible. If the Magistrate has the power to order and then to set aside, the ex-parte order under section 125 Cr.PC, in that eventuality, it cannot possibly be said that he has no jurisdiction to restore the maintenance petition, as (contrary) urged on behalf of the petitioner. This matter is no more res integra and is well settled."

11. The Supreme Court in the matter of **State of Uttar Pradesh v. Bhagwant Kishore Joshi**⁵ while dealing with the permissibility of a preliminary enquiry prior to registration of FIR held:

"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 making a full scale investigation into it."

12. The Bombay High Court in the matter of **Sau. Mandakini B. Pagire v. Bhausaheb Genu Pigire**⁶ referring to Section 362 of the CrPC 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 of the CrPC, then it follows that exercise of such inherent powers can be done for settling right the wrong. The principle "*ubi-jus-ibi-remedium*" is

5 AIR 1964 SC 221

6 2009 Cr.L.J. 70

attracted in such a case.

13. This Court also in the matter of Adheshwari Watti & another v. Kamlesh Watti⁷ held that application for restoration of maintenance petition is maintainable as application under Section 125 of the CrPC is not strictly a proceedings under the Code of Criminal Procedure and such a provision has been enacted for hapless and helpless section of society.

14. In view of the aforesaid legal position, I am of the considered opinion that learned Family Court is empowered to restore the proceedings initiated under Section 125 of the CrPC, which was dismissed for non-appearance of the complainant/applicant.

15. Accordingly, the present CrMP stands disposed of reserving liberty in favour of the petitioner to move an application before the Family Court, Janjgir for restoration of such maintenance application. If such an application is filed, the Family Court shall consider and decide the same in accordance with law.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-