

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.1943 of 2022

Sachindra Kumar Samal

....

Petitioner

Mr. Devashis Panda, Advocate

-Versus-

Madhusmita Samal @ Swain &
Another

.... Opposite Parties

Ms.Anima Ku. Dei, Advocate for OPs

CORAM:

JUSTICE R.K. PATTANAIK

DATE OF JUDGMENT:11.11.2022

1. The petitioner has approached this Court assailing the correctness of the impugned order under Annexure-1 dated 7th June, 2022 passed in CRP No.117 of 2019 by the learned Judge, Family Court, Cuttack on the ground that restoration of the application under Section 125 Cr.P.C. dismissed for non-prosecution could not have been entertained since the court cannot recall or review its order in view of Section 362 Cr.P.C.

2. As claimed by the petitioner, opposite party No.1 wife filed an application under Section 125 Cr.P.C. in the Family Court registered as CRP No.89 of 2015, however, since no steps were taken repeatedly, it was dismissed for default, whereafter, restoration thereof was applied through CRP No.117 of 2019 in terms of Section 126 Cr.P.C. followed by a request to condone the delay in terms of Section 5 of the Limitation Act later to which the petitioner was summoned and on his appearance, he filed an objection by claiming that a proceeding under Section 125 Cr.P.C. cannot be restored to file and the court as is not vested with any inherent power has become *functus officio* after passing of the

final order, hence, it cannot recall or review the dismissal order in view of the bar envisaged in Section 362 Cr.P.C. However, the learned Judge, Family Court, Cuttack entertained the application for restoration and proceeded to hold that the question of limitation to be decided at a later stage on receiving evidence since it is a mixed question of fact and law. It is the said decision of the Family Court vide order 7th June, 2022 is under challenge at the behest of the petitioner.

3. Heard Mr. Devashis Panda, learned counsel for the petitioner and Ms. Anima Ku. Dei, learned counsel for the opposite parties.

4. Mr. Panda, learned counsel for the petitioner cited a decision in the case of **Md. Yusuf T. Attarwala Vrs. Jumana Yusuf T. Attarwala and Another MANU/WB/0128/1987: I (1988) DMC 442** to contend that the Family Court did not have the power to restore the proceeding or entertain an application in that regard since it had become *functus officio* after the final order of dismissal. Ms. Dei, learned counsel for the opposite parties however would submit that an action for maintenance is basically in the nature of civil proceeding and in case of its dismissal for default, the same can be restored to file and while contending so, Ms. Dei refers to a decision in the case of **Kehari Singh Vrs. The State of U.P. and Smt. Rekha Singh (2005) CriLJ 2330**.

5. The seminal question is whether the learned Family Court could have received and entertained the application for restoration of the proceeding under Section 125 Cr.P.C?

6. Admittedly, opposite party No.1 did not turn up, as a result of which, the proceeding under Section 125 Cr.P.C. was dismissed for default, whereafter, restoration was moved by her and it was received and entertained by the Family Court which has been challenged on the ground that there is no any provision in the Cr. CRLMC No.1943 of 2022

P.C. to restore the proceeding once dismissed for non-prosecution. In **Md. Yusuf T. Attarwala** (supra), the Calcutta High Court expressed a view that there is no jurisdiction to restore a proceeding under Section 125 Cr.P.C. when it is dismissed for default. However, the Allahabad High Court in **Kehari Singh** (supra) was of the view that an application under Section 125 Cr.P.C. claiming maintenance cannot be termed as a complaint as the definition of word 'complaint' as occurring in Section 2(d) Cr.P.C. cannot be borrowed. While referring to a decision of Andhra Pradesh High Court in **Abdul Wahed Vrs. Hafeeza Begum and Others 1987 CriLJ 726**, the Allahabad High Court in said decision concluded that the maintenance proceeding can be restored to file by recalling or setting aside the order of dismissal for effective adjudication and its disposal on merit. In **Kehari Singh** (supra), other citations in **Shabihul Hasan Jafari Vrs. Zarin Fatma (2000) CriLJ 3051** and **Sk. Alauddin@ Alai Khan Vrs. Khadiza Bibi @ Mst. Khodeja Khattun and Others (1991) CriLJ 2035** with similar view expressed with the conclusion that the power of recall is implicit with the court dealing with such applications for maintenance have been quoted with approval.

7. When a proceeding of maintenance is dismissed on account of default and if it is claimed that the court lacks jurisdiction to restore it in absence of any provision, how it could have been dismissed for non-prosecution, again for having no provision in the Cr.P.C. According to the Court since such is action is predominantly civil in nature, the power to restore a proceeding under Section 125 Cr. P.C. is inherent. An application for maintenance is not a complaint as defined in Section 2(d) Cr.P.C. so to hold that in the event of its dismissal for default, the bar contained in Section 362 Cr. P.C. would be attracted. In the decision of **Kehari Singh** (supra), it is observed that if there is any

lacuna in the statute, then a court is obliged to pass a judicial order to give effect to the intent and purport of the law and therefore, a proceeding under Section 125 Cr.P.C. even though dismissed for non-appearance can still be restored. With due respect, this Court is in disagreement with the decision of the Calcutta High Court in **Md. Yusuf T. Attarwala** (supra). Even though the proceeding is before the Family Court which is essentially dealing with the claim of maintenance is having authority to recall and restore a proceeding under Section 125 Cr.P.C. disposed of and dismissed due to non-appearance of the applicant. It is reiterated that the power to restore in such proceedings in absence of provision in Section 126 Cr.P.C. is implicit as has been held in **Kehari Singh** (supra) supported by other decisions with similar view. So, the Court is not persuaded to accept the contention of Mr. Panda, learned counsel for the petitioner on the point of maintainability vis-à-vis restoration of the proceeding. As a corollary, the learned Family Court cannot be said to have committed any error or illegality in entertaining the restoration application moved by opposite party No.1 and rightly received the same and proceeded further.

8. Accordingly, it is ordered.

9. In the result, CRLMC stands dismissed. In the circumstances, however, there is no order as to cost.

(R.K. Pattanaik)
Judge

U.K. Sahoo