KERALA HIGH COURT

N.M. Velayudhan

Vs

P. Sukumari

(Kumari P Janaki Amma, J.)

21.12.1977

ORDER

Kumari P. Janaki Amma, J.

1. The petitioner is the respondent in M. C. 27 of 1970 of the District Magistrate's Court, Kottayam. That case was initiated by his wife, respondent herein for maintenance for herself and her two children. Maintenance was allowed at the rate of Rs. 30/- for the respondent and Rupees 15/- each for the two children. While the above petition was pending, the present petitioner filed H. M. A. No. 91/71 before the Sub Court, Kottayam for restitution of conjugal rights against the present respondent. That petition was allowed on 30-1-74. Thereafter the present petitioner filed C.M.P. 134/74 contending that the wife was not entitled to get maintenance from the husband and seeking cancellation of the order for maintenance already made. The petition was opposed by the present respondent. The Chief Judicial Magistrate dismissed his petition stating that the order for restitution of conjugal rights was not a ground for cancellation of the order for maintenance passed by that court. The petitioner took the matter in revision before the Court of Session, Kottayam. The learned Sessions Judge relying on the decisions in Fakruddin Shamsuddin v. Bai Jenab AIR 1944 Bom 11 : 45 Cri LJ 271 and Haji Hussain Sulaiman Hodekar v. Rukhya Bi 1962 Ker LJ 783 declined to interfere with the order of the Chief Judicial Magistrate. The revision petition before him was accordingly dismissed. The petitioner wants the above orders to be set aside by this Court invoking the inherent jurisdiction under Section 482, Cr. P.C.

2. A preliminary objection is raised that the petition itself is not maintainable. It is argued that the petition is couched in such a way as to appear that it is under Section 482 of the Code of Criminal Procedure whereas it is really an application for invoking the re-visional jurisdiction of the High Court and as the learned Sessions Judge has already dismissed an application for revision filed by the petitioner, a second revision petition is barred both under Section 397 (3) and under Section 399 (3) of the Code of Criminal Procedure, 1973. The contention, therefore, is that the present petition should be dismissed in limine.

3. The decisions of the High Courts are conflicting as to whether the inherent powers of the High Court can be invoked in cases where a revision petition to High Court is barred either under Section 397 (2) or under Section 397 (3) and Section 399 (3) of the Code of Criminal Procedure.

I need not refer to the above decisions in view of two recent decisions of the Supreme Court dealing with the point.

4. *In Amar Nath v. State of Haryana*[1] the appellant moved the High Court of Punjab and Haryana to quash an order of the Judicial Magistrate, 1st Class, Karnal issuing summons to an accused in a private complaint. The petition was under Sections 397 and 482 of the Code of Criminal Procedure. The High Court held that issue of summons was an interlocutory order and a revision petition was barred under Section 397 (2) of the Code. The High Court refused to invoke the inherent powers stating that by such exercise the very object of Section 397 (2) would be defeated. When the case came up before two Judges of the Supreme Court, the Supreme Court observed (at p. 1893): While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under Sub-section (2) of Section 397 of the 1973 Code the inherent powers contained in Section 482 would not be available to defeat the bar contained in Section 397 (2). Section 482 of the 1973 Code contains the inherent powers of the Court and does not confer any new powers but preserves the powers which the High Court already possessed. A harmonious construction of Sections 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred under Section 397 (2) and cannot be the subject of revision by the High Court, then to such a case the provisions of Section 482 would not apply. It is well settled that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject-matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers.

5. In the above case, however, the Supreme Court held that the order which was challenged was not of an interlocutory nature and, therefore, the High Court was directed to dispose of the revision on the merits. A decision whether the inherent powers should have been invoked was, therefore, unnecessary for the disposal of the case.

6. Another case where the question came up for decision before the Supreme Court is in *Madhu Limaye v. State of Maharashtra*[2] The following observations are noteworthy (at p. 168 of 1978 Cri LJ): The following principles may be noticed in relation to the exercise of the inherent power of the High Court which have been followed ordinarily and generally, almost invariably, barring a few exceptions : (1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party; (2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice; (3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code. On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include Sub-section (2) of Section 397 also, shall be deemed to limit or affect the inherent powers of the High Court. But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem 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 of 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 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.

7. The identical principle applies in the case of a petition filed for invoking the inherent powers of the High Court where there is express provision barring a second revision under Section 397 (3) and Section 399 (3) of the Code of Criminal Procedure.

8. It is common case here that there is an order for maintenance passed in favor of the respondent. That subsequently the civil court granted a decree for restitution of conjugal rights to the petitioner is also admitted. The impact of the decree on the order granting maintenance under Section 488 of the Code of Criminal Procedure, 1898 corresponding to Section 125 of the new Code of 1973 is the matter to be decided. It is not clear whether C. M. P. 134 of 1974 was filed before or after the coming into force of the new Code. But it does not make any difference since no change has been effected in the relevant provision and Section 489 (2) of the old Code corresponds to Section 127 (2) of the new Code both in language and in content. Section 127 (2) of the new Code reads: Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

9. The Kerala High Court had occasion to interpret the scope of Section 489 (2) in Haji *Hussain Sulaiman Hodekar v. Rukhya Bi*[3] Therein also, the husband obtained a decree for restitution of conjugal rights and sought cancellation of the order for maintenance awarded to the wife. This Court, following the decision in *Fakruddin Shamsuddin v. Bai Jenab*[4] held that where in the circumstances of a particular case the Magistrate is satisfied that the counter-petitioner did not wish to have his wife back and his object in getting the decree was merely to get the maintenance order cancelled, the court will be justified in refusing to cancel the order.

10. One of the grounds taken in the present petition is that the decision in *Haji Hussain Sulaiman Hodekar v. Rukhya Bi*[5] requires reconsideration as it does not lay down the correct law. I do not, however, see much weight in the contention. Though the word "shall" in Section 127 (2) apparently suggests that it is obligatory on the part of the Magistrate to vary or cancel the order for maintenance consequent on the civil court passing a decree for restitution of conjugal rights, the opening words of the section viz., "where it appears to the Magistrate" admit of no other interpretation than that the Magisrate should take into account all the attendant circumstances and exercise his judicial discretion before he varies or cancels an order of maintenance already in force. The subjective satisfaction of the Magistrate that the decree for restitution of conjugal rights was obtained by the husband, bona fide, out of a genuine wish to have the company of his wife restored to him should precede the variation or cancellation of the order for maintenance already passed. A husband who had been neglecting to maintain his wife, when faced with an order for maintenance in favour of the wife may rush to the Civil Court and succeed in obtaining a decree for restitution of conjugal rights, He may not have in all such cases a geniune intention

to execute the decree. Instances are there where the the purpose in getting a decree for restitution of conjugal rights is not to secure the company of the wife but to evade payment of maintenance to her. It may be noted that Order XXI, Rule 32 of Civil Procedure Code contains the form of a decree for restitution of conjugal rights and how a decree is executed. In M. P. Shreevastava v. Mrs. Veena , the wife in a decree for restitution of conjugal rights obeyed the decree and expressed her preparedness to live with the husband; but the husband obstructed and did not permit her to live with him. The court, thereupon, entered satisfaction of the decree at the instance of the judgment-debtor, wife. The decision was confirmed in Letters Patent Appeal, (See M, P. Shreevastava v. Veena). In cases of the kind it is gross injustice to deny maintenance to the wife on the basis of the decree for restitution of conjugal rights. It is, therefore, improper to deny the Magistrate an opportunity to take into consideration the circumstances of each case and decide whether the order of maintenance should be varied or cancelled. If he finds that the object of the husband in obtaining a decree for restitution of conjugal rights is to get the maintenance order cancelled, the Magistrate may refuse to act upon the decree. But if he finds that the husband really wants to execute the decree and the wife unreasonably refuses to obey, the Court should cancel the order for maintenance. In other words, the decree of the Civil Court granting restitution of conjugal rights does not ipso facto nullify the order for maintenance. The party who obtains a decree for restitution of conjugal rights should be prepared to comply with the conditions in the decree.

11. The question as to whether it is obligatory on the part of the criminal court to cancel an order for maintenance when the husband produces a copy of the decree for restitution of conjugal rights has been the subject matter of decision by other High Courts as well in cases which arose under the Code of Criminal Procedure, 1898 and the interpretation put to the section is in conformity with the decision in *Haji Hussain Sulaiman Hodekar v. Rukhya Bi 1962 Ker LJ 783(Supra),* See the decisions by the Madras High Court in *Pavakkal v. Athappa Goundan*[6] by the Calcutta High Court in Kunti Bala Dassi v. Nabin Chandra Das , by the Allahabad High Court in *Nur Muhammad v. Ayesha Bibi*[7] by the Rangoon High Court in *Ma Pwa Shein v. Maung Po Kwe*[8] by the Rajasthan High Court in *Jhanwar-lal v. State*[9] *and Geeta Kumari v. Shiva Charan* [10]All the above decisions lay down that while it is improper to compel a husband to maintain a wife who consistently refuses to obey the order of the Civil Court directing her to live with the husband, the court is competent to consider whether the decree for restitution of conjugal rights was obtained by the husband bona fide. Where the husband has taken steps to execute the decree for restitution of conjugal rights and the wife unreasonably refuses to obey the decree, it is up to the Magistrate to cancel the order for maintenance. The following observations of Beaumont C. J. in *Fakruddin Shamsuddin v. Bai Jenab*[11] explain the law, The Magistrate's discretion under that section must no doubt be exercised judicially, but, in my opinion, it is a real discretion. I think the present applicant is going too far in suggesting that the Magistrate is bound to cancel the order because a civil court has made an order for restitution of conjugal rights. I think the Magistrate is entitled, and indeed bound, to satisfy himself that the applicant is bona fide prepared to give effect to the order of the Civil Court; that he is prepared to offer the wife a home which she ought to accept. The mere fact that the civil Court is satisfied on that point does not justify the Magistrate in surrendering his own discretion; he must be satisfied. Unless he is satisfied, the risk is run of a party having obtained a mere paper decree of a civil Court without any intention of giving effect to it. We think, therefore, the order of the lower Court was right, and on the material before the Magistrate he was entitled to decline to revoke the order, there, being no evidence before him as to what home the husband was prepared to offer the wife. The

position is no better in the present case. On the face of the order of the Magistrate and the order in revision by the Sessions Judge, there appears to be no other material before Court than the decree for restitution of conjugal rights, The courts below have, therefore, exercised their discretion rightly in refusing to cancel the order for maintenance. This is not a fit case where the inherent jurisdiction of this Court should be invoked for setting aside the order passed by the courts below.
The petition is accordingly dismissed.

Cases Referred.

11977 Cri LJ 1891 (SC)
21977 Ker LT Short Notes 29 : 1978 Cri LJ 165 (SC)
31962 Ker LJ 783
4AIR 1944 Bom 11 : 45 Cri LJ 271
51962 Ker LJ 783
6AIR 1925 Mad 1218 : (1926) 27 Cri LJ 30
7(1905) ILR 27 All 483
8(1939) 40 Cri LJ 827 (Rang)
91969 Cri LJ 306 (Raj)
101975 Cri LJ 137 (Raj)
11AIR 1944 Bom 11 : 45 Cri LJ 271