IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of case

Crl. Misc. Appl. No. 28 of 2001, decided on 26.04.02
Crl. Misc. appl. No. 68 of 2002
Khem Singh Vs. State & Others

A.F.R. (Approved for reporting)
~~**Not approved or reporting**~~

Date 26.04.02 Initials of Judge

Note: -Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

(Court No.- Hon.C.J.'s Court Old Block)

Criminal Misc. Application No.28 of 2001
(Old No.4472 of 1999)

Khem Singh — Applicant.

Versus

State and others — Opposite parties.

With

Criminal Misc. Application No. 68 of 2002

Khem Singh — Applicant

Versus

State of Uttaranchal and others — Opposite parties.

Hon'ble Irshad Hussain, J.

Application under Section 482 of the Code of Criminal Procedure (for short 'Code') was initially filed by the applicant-husband with a prayer that the proceedings of Petition No.755 of 1999, Smt, Shakuntala Devi Versus Khem Singh, under Section 125 of the Code pending in the Court of Judicial Magistrate, Hardwar be quashed.

Since the proceedings in the above petition were not stayed at the instance of the applicant-husband, the same were finally decided on merit vide judgment and order dated 19.01.2000 (Annexure A_4 in Application No.68 of 2002). In view of this the applicant-husband

filed Criminal Misc. Application No.68 of 2002, with a prayer to have the said judgment and order quashed.

Facts giving rise to the above application are that the applicant-husband had file a suit for dissolution of his marriage with respondent no.3 Smt. Shakuntala Devi and the same was numbered as O.S.No.27 of 1997 pending in the Court of District Judge, Chamoli. During the pendency of this suit, respondent-wife had filed petition under Section 125 of the Code claiming maintenance for herself and minor son. This petition was pending in the Court of learned Chief Judicial Magistrates, Chamoli wherein the written statement had been filed by the applicant-husband and he intended to contest the petition. Statement of the respondent-wife was recorded on 7.6.1999, but later on respondent-wife filed an application on 17.6.1999 to have her petition rejected as not pressed on account of mental and physical torture she had been subjected to on account of her coming to Chamoli from Hardwar to do Pairvi in the said petition. She had averred that she was residing in Hardwar and it was not possible for her to visit Chamoli to attend the proceedings in the said petition. Pursuant to the said application, the learned Chief Judicial Magistrate, Chamoli by order dated 17.6.1999, allowed the said application and petition under Section 125 of the Code of the respondent-wife was dismissed and the record was consigned to record room.

The respondent-wife filed another petition under section 125 of the Code on 2.7.1999 in the Court of learned Judicial Magistrate, Hardwar and the same was registered as Petition No.755 of 1999, Smt. Shakuntala Devi and others Versus Khem Singh. Registration of this petition gave and occasion to the applicant-husband to file the

earlier mentioned application under section 482 of the Code for quashing these proceedings.

In this subsequently instituted petition, the applicant-husband has filed objections on 4.10.1999 and also filed an affidavit on 5.11.1999 challenging the jurisdiction of the Judicial Magistrate, Hardwar to entertain and hear the said petition on the ground that Smt. Shakuntala reside in her parent's village Kaushalpur, Patwari Tehsil Oonkhimath, District Rudraprayag and as such she could not have filed the petition in the Court of Judicial Magistrate, Hardwar. At the time of the disposal of the application for interim maintenancve preferred by the wife, the learned Judicial Magistrate, Hardwar did not accept the contention, of the applicant-husbabnd that the said Court has no territorial jurisdiction to entertain and decide the petition on the ground that identitical question is involved in the petition filed by the applicant-husband before the Hon'ble High Court and went on to decide the said petition, on merit and awarded interim maintenance allowance of Rs.200.00 per month to the wife and maintenance allowance of Rs.400.00 per month to the minor son of the parties per order dated 6.11.1999 (Annexure A3 of the Criminal Misc. Writ Petition No.68 of 2002). The petition was thereafter came to be decided exparte on merit against the applicant-husband by the learned Judicial Magistrate, Hardwar per judgement and order dated 19.1.2000 because the applicant-husband has not later on put in appearance in the case to contest the same. By the said judgment the order (Annexure 4 of the said application), monthly maintenance allowance of Rs.500.00 and Rs.400.00 was granted to the wife and the minor son respectively. As mentioned above the Criminal Misc. Application

No.68 of 2002 was filed to have the proceeding and judgment dated 19.1.2000 quashed.

The submission of the learned counsel for the applicant was that the Judicial Magistrate, Hardwar has no territorial jurisdiction to decide the petition and that the learned Magistrate acted illegally in deciding the petition as such despite the specific objection to this effect having been taken by the applicant-husband in his objection dated 4.10.1999 (Annexure I to the said application). Learned counsel, in support of his argument, drew attention to the provision of Section 126 of the Code wherein the place where the proceedings under section 125 may be taken had been defined and enumerated. The provisions of this section provide that 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

From the above it is evident that the petition may be taken in the district where the wife resides. The provision does not stipulate that the place of residence should be the permanent place of residence of the person initiating the proceedings under Section 125 of the Code. It is of significance that the respondent-wife has from the very beginning claimed that since she had been deserted by the husband and she has been residing with her uncle in Hardwar. This is evident from the statement made by her on 7.6.1999 in the earlier instituted proceedings under section 125 of the Code (Annexure 4 of the

original Application No.28 of 2001). Not only this the respondent-wife had by her application dated 17.6.1999 (Annexure V) prayed for dismissal of the petition because it was not possible for her to come to Chamoli from Hardwar to prosecute the proceedings in the said petition and this was the reason that her prayer was accepted and the maintenance petition was dismissed as not pressed per order dated 17.6.1999 by learned Chief Judicial Magistrate, Chamoli (Annexure VI). If that had been the situation, there can be no doubt that the respondent-wife was, in fact, residing in Hardwar and by virtue of her residing there at that time, she could have very well preferred petition for maintenance under section 125 of the Code in a component Court of Magistrate in District Hardwar. She had done so and her petition No.755 of 1999 was, thus, filed and registered according to law. In short, there is no merit in the arguments of the learned counsel for the applicant-husband that the Court of the Judicial Magistrate, Hardwar has had no jurisdiction to entertain and hear the petition of the respondent-wife.

Another submission made on behalf of the applicant-husband was that the earlier petition under Section 125 of the Code having been dismissed on the prayer of the respondent-wife, the second Petition No.755 of 1999 in the Court of Judicial Magistrate, Hardwar was not legally maintainable. As mentioned earlier, the earlier petition pending before the learned Chief Judicial Magistrate, Chamoli was got dismissed at the request of the respondent-wife and since the same was dismissed without adjudication of the respective rights and liabilities of the parties, there was no bar for the respondent-wife to have preferred the petition for maintenance again in a competent

Court. In fact, the earlier application was dismissed without going into the merits. There is nothing in law which may debar the respondent from filing a second petition for proper and adequate relief of maintenance from the applicant-husband. In short this submission of the learned counsel also carry no conviction and is as such rejected.

Lastly it was argued that the impugned judgment and order dated 19.1.2000 (Annexure A_4) being not based on proper and fair appraisal of the material on record and also in contravention of the mandate of Section 354 of the Code, the same deserves to be quashed. A bare perusal of the impugned judgment rebut the contention of the learned counsel. The reason is that the judgment not only contains the respective contentions of the parties but also the points for determination, the decision thereon and the reasons for the decision as contemplated by Clause (b) Sub-Section (1)) of Section 354 to the Code. As mentioned earlier, the applicant-husband after putting in appearance and filing written statement in the said proceedings, did not contest the proceedings and, therefore the learned Magistrate was legally obliged to record the statement of respondent-wife as P.W.1 and decide the petition on merit. It has been found by the learned Magistrate that the respondent-wife was unable to maintain herself and her minor son and further that she had been turned out of the house by the applicant-husband, who did not provide her and the son any maintenance allowance.

It is not disputed that the applicant-husband is an employed young man and has capacity to pay the maintenance allowance as granted to the respondent-wife and minor son and thus, there is no

merits in the argument that the judgment and order dated 19.1.2000 is not based on evidence and its appraisal on the points for determination.

On behalf of the respondent-wife, learned counsel has challenged the maintainability of the petition of the applicant-husband on the ground that the same is highly belated. The impugned judgment and order was passed on 19.1.2000, whereas the Criminal Misc. Application No.68 of 2002 was filed on 18.2.2002. The applicant-husband Khem Singh made an averment in Paragraph 19 of the affidavit dated 18.2.2002 that the certified copy of the impugned judgment was received by him on 28.9.2000 and despite this, the present Criminal Misc. Application came to be filed after about 16 months, no doubt after an inordinate delay. Any petition to set aside the exparte judgment and order, in fact, could not have been filed before the concerned Magistrate. In this connection it need to be pointed out that proviso to Sub-Section (2) of Section 126 of the Code provides a limitation of three months to have the exparte order set aside for good cause to be shown by the defaulting party. Even here no good cause has been shown for the inordinate delay by the applicant-husband who clearly appears to be applying delaying tactics to deprive the deserted respondent-wife and minor son from seeking legal relief of proper allowance to maintain themselves. Apart from this, the amount of maintenance awarded by the learned Magistrate is not on the higher side and the applicant-husband being employed in service has had capacity to pay the same. In this count also, no interference under the inherent powers is warranted against the

impugned judgment and order and the above application being without merit are liable to be dismissed.

Both the Criminal Misc. Applications are dismissed.

Nainital
26.04.2002 (Irshad Hussain)