

Al Ashraf Kably and Another Vs. Al Farrok Kably and Another

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Court : Mumbai

Decided On : Feb-04-2013

Judge : The Honourable Mrs. Justice Roshan Dalvi

Appeal No. : Criminal Writ Petition No.3889 of 2012

Appellant : Al Ashraf Kably and Another

Respondent : Al Farrok Kably and Another

Judgement :

Oral Order:

1. Rule. Made returnable forthwith.

2. The Petitioners are the two sons of Respondent No.1. They have challenged the order of the Judge, Family Court, Mumbai passed on 13th September, 2012 granting maintenance of Rs.15,000/- p.m. to Respondent No.1 under Section 125 of the Cr PC. They are foreign nationals. The Petitioner No.1 is settled in the USA at least since 2009 and carries an American passport. The Petitioner No.2 is settled in Canada and carries a Canadian passport since July, 2012. He is at present on deputation in Jordan.

3. The application was made by Respondent No.1 u/s.125 (1) (d) of the Cr PC which runs thus:

125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain.

(a) ..

(b) ..

(c) ..

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.

4. The procedure for making an application U/s.125 is set out in Section 126 (1) of Cr P C which runs thus:

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

(a) where he is, or

(b) ..

(c) .

5. Though that was not the case of the Petitioners herein in the trial court, it is argued on behalf of the Petitioners that consequently the proceedings can be taken U/s.125 of the Cr PC only against the person who is in that district.

6. The applicability of the Family Court's Act as also the Cr PC u/s.1 of the Family Court's Act as also Cr P C extend to the whole of India except the State of Jammu and Kashmir. These legislations do not extend beyond that area. The process of the Court under Cr PC cannot, therefore, be issued beyond India. Therefore, the statute has made provisions for filing an application for maintenance by the parents U/s.125 (1) (d) against any person who is within the district where he is

U/s.126 (1) (a).

7. In the case of **Vijay Kumar Prasad Vs. State of Bihar, 2004 DGLS (soft) 445** the term is in Section 126 (1) (a) is considered by the Supreme Court. In paragraph 12 of the judgment it is observed that the father who applies for maintenance must file his application not where the party resides, but where the party against whom the application is made is. Under (b) and (c) of 126 (1) a leeway is given to a deserted wife or even deserted children of a person to initiate proceedings where they reside. It is held in paragraph 13 of the judgment that such leeway to file an application where the applicant resides is not given to the parents. This aspect is held thus:

13. .. The benefit given to the wife and the children to initiate proceeding at the place where they reside is not given to the parents. A bare reading of the Section makes it clear that the parents cannot be placed on the same pedestal as that of the wife or the children for the purpose of Section 126 of the Code.

14. . Unlike clauses (b) and (c) of Section 126(1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives.

8. The word is is held to be not the same as the expression reside or the expression last resided. It is held to be wider than the word resides and entails the physical presence of the Respondent at a particular time. That is held not to be fleeting presence and not also a continued residence. Consequently if the Respondents are in India, the application would be maintainable. The Respondents, however, unfortunately are in America and Jordan / Canada. That was the position at the time of the filing of the Petition also.

9. Consequently the Court's territorial jurisdiction is not seen. In the impugned order that aspect has not been considered as that was not contended. The learned judge has assumed that there is territorial jurisdiction which it is seen that learned Judge did not have.

10. Consequently the order suffers from the want of lack of territorial jurisdiction of the Court. It may be mentioned that the order of the Court cannot be enforced outside the territory of India as the Cr PC or the Family Court's Act do not extend beyond India. Consequently such an order cannot be enforced outside the limits of India.

11. For that reason the impugned order is required to be set aside. The application of Respondent No.1 filed in the Family Court, Mumbai stands dismissed for want of territorial jurisdiction of that Court.

12. Rule is granted to the above extent.

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