

Neelesh Vs. Uma

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Court : Karnataka Gulbarga

Decided On : Sep-27-2012

Judge : D.V. Shylendra Kumar

Appeal No. : R.P.F.C. No. 530 of 2012

Appellant : Neelesh

Respondent : Uma

Judgement :

(Prayer: This RPFC Is Filed U/S. 19(4) of The Fc Act, 1984 Against The Judgment Dated 27.03.2012 Passed In Crl. Misc. No.555/2011 On The File Of The Judge, Family Court At Bijapur. Dismissing The Petition Filed U/S. 126(2) Of Cr.P.C.)

1. This revision petition is taken up for disposal, though listed on the application in I.A.2/2012 for early hearing, after hearing the learned counsel appearing for the petitioner and the respondent respectively.

2. Revision petition under Section 19(4) of the Family Courts Act, 1984 (for short 'the Act') is directed against the order dated 27.03.2012 passed in Crl. Misc. No.555/2011 on the file of the Judge, Family Court, Bijapur.

3. Under the impugned order, the learned Judge of the Family Court has dismissed the application filed by the revision petitioner under Section 126(2) of Cr.P.C., seeking for setting aside the earlier order passed by the very Court on

03.10.2011 in Crl. Misc. No.196/2011 awarding a maintenance in favour of the respondent to a sum of Rs.10,000/- per month on an application under Section 125 of Cr.P.C.

4. The application under Section 126(2) of Cr.P.C. had been filed on two grounds, mainly, that the revision petitioner has not been served in the proceedings initiated by the respondent-wife under Section 125 of Cr.P.C.; that the revision petitioner was staying at Bombay, whereas, the notice had been sent to his home address at Kolhapur and had been returned un-served and thereafter, the Court had permitted the claimant-the wife to effect service through substituted service. The publication which was effected had been carried in 'SAKAL' news daily having publication at Kolhapur; that the service is a no service in the eye of law, as the provision of Code of Civil Procedure does not enable a person being placed ex parte on such premise; that he had not been served and therefore the order is not tenable.

5. The other ground was that the revision petitioner was out of employment and was not earning any worth while income and therefore unable to pay the maintenance and that it was on the higher side.

6. The learned Judge of the Family Court who examined this matter in some detail, opined that in proceedings for maintenance under the provisions which are provided for under Section 125 of Cr.P.C., when service is permitted through post etc., and in the absence of service of registered acknowledgement, any other mode of service can be adopted and therefore opined that the order sought to be revised did not suffer from any illegality; that in a related proceeding between the parties, the very address, to which notice had been sent by R.P.A.D. had been given and therefore opined that there are no bonafidies on the part of the revision petitioner in coming up with an application seeking for modification or setting aside the order only on the ground of non-service etc., Accordingly, dismissed the application filed under Section 126(2) of Cr.P.C. with cost.

7. It is aggrieved by this order, the present revision petition under Section 19(4) of the Act.

8. Mr. Ameet Kumar Deshpande, learned counsel appearing for the petitioner-husband has urged that the learned Judge of the Family Court has committed an illegality in holding that furnishing of address is sufficient service in nature; that the mere fact of sending notice to the address as had been indicated by the revision petitioner is not sufficient to hold that service is effected; that issue of notice to respondent in a petition under Section 125 of Cr.P.C. through registered post acknowledgment due, is also bad in law. The service of notice by way of substituted service as provided for under Order 5 Rule 20(A) of C.P.C. is no service in the eye of law in proceedings under the Cr.P.C. and therefore there was no scope for placing the petitioner *ex parte* in the proceedings, in the absence of the petitioner in the petition under Section 125 of Cr.P.C. that the learned Judge of the Family Court had failed to appreciate this legal position and therefore the matter warrants interference.

9. On the other hand, Mr. Prakash Yeli, learned counsel appearing for the respondent-wife has with reference to para Nos.17 to 20 of the order of the Family Court which is challenged in this revision petition submits that the learned Judge of the Family Court has examined the matter in a fair way and was not only satisfied that the notice can be issued through R.P.A.D., but also can be said that a person served, if does not respond can be placed *ex parte* and at any rate no case had been made out by the revision petitioner with an application under Section 126(2) of Cr.P.C. and even otherwise, the application under Section 126(2) of Cr.P.C. lacks bonafides, as the revision petitioner had played a game of watch and wait.

10. A proceeding under Section 125 of Cr.P.C. though is a provision contained in the Code of Criminal Procedure, is nevertheless, a proceeding in the nature of civil proceeding for fixing a maintenance amount in respect of spouse i.e, wife and children who are unable to support themselves and on finding that the husband has neglected to provide maintenance etc., the provision though, is found in the Code of Criminal Procedure is essentially a proceeding in civil nature and adopted the procedure under the CPC for the purpose of service of notice cannot be described as an illegality or running at cross purposes with the purpose and object of provisions of Section 125 Cr.P.C. Therefore, I am not inclined to hold that the order providing for maintenance as originally ordered suffered from any illegality,

which warranted correction in a subsequent application under Section 126(2) of Cr.P.C. In fact, the provisions of proviso to Sub-Section (2) of Section 126 of Cr.P.C. which reads as under: "(2) All evidence to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with in the presence of his pleader, an 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 as to payment of costs to the opposite party as the Magistrate may think just and proper."

enables the Magistrate trying an application under Section 125 of Cr.P.C. to hear and determine the case ex parte if the Magistrate was satisfied that the person is wilfully avoiding service or wilfully neglecting to attend the Court, but in the instance case, a finding of this nature is found having recorded by the Magistrate. It is therefore, I am not inclined to interfere with the order of this nature.

11. Insofar as the quantum of maintenance is concerned, it is not disputed that the revision petitioner is highly qualified and was holding a managerial post in the position of Assistant Manger in IL and FS Cluster Development Initiative Ltd., Mumbai. Though, Mr. Deshpande submits that as of now, the revision petitioner is out of employment and therefore will be unable to pay this kind of maintenance, the fact remains that the person has such potential to earn an income which can definitely take care of providing for a maintenance of Rs.10,000/- as awarded by the Family Court in favour of the respondent- wife.

12. Having regard to the purpose and object of provisions of Section 125 of Cr.P.C., I do not find need or scope to interfere with the order of the Family Court under the revisional jurisdiction of this Court under Section 19(4) of the Act. Accordingly, revision petition is dismissed, levying cost of Rs.5,000/- on the

petitioner.

13. The cost along with arrears of maintenance and the current monthly maintenance is directed to be deposited before the Family Court within six weeks from today.

14. The amount in deposit before this Court is directed to be transferred to the Family Court and the Family Court is directed to release the same in favour of the respondent-wife.

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