

Revappa Vs. Gurusanthawwa

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Court : Karnataka

Decided On : Dec-15-1959

Reported in : AIR1960Kant198; AIR1960Mys198; 1960CriLJ1107

Judge : K.S. Hegde, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 68 to 74, 86, 438, 488, 488(6) and 537; Evidence Act - Sections 114

Appeal No. : Criminal Revn. Case No. 63 of 1959

Appellant : Revappa

Respondent : Gurusanthawwa

Judgement :

ORDER

(1) This is a reference made by the learned District Magistrate of Gulbarga under S. 438, Cr.P.C.

(2) Few facts need to be stated before considering the point of law involved. One Gurusantawwa, filed an application against her alleged husband Revappa under S. 488 of the Cr.P.C. Claiming maintenance from him, and the same was enquired into File No. 31/5 of 1957 on the file of the learned First Class Magistrate, Gulbarga, Revappa, the respondent in that application, resisted the claim in question. When the application came up for hearing on 19-2-1958, the petitioner

therein absented herself and consequently the application was dismissed for her default. After the dismissal of that applicaiton, she filed a second application on 3-5-1958.

It may be noted that in the first application, she had given the address of the respondent as 'resident of Nagergi, Taluk Gulbarga.' But in her second application, the address given is 'resident of Nagergi. Taluk Gulbarga and also residing at Roz Khurd, Gulbarga.' On the day when this application was filed, the learned Magistrate was absent. The same was taken on file by the Head Munshi who issued a notice to the respondent to his alleged residence at 'Roz Khurd Gulbarga'. Roz Khurd appears to be a locality in Goldberg town. The Head Munshi entrusted this notice to a process server of the Munsiff's Court. It may be noticed that the Magistrate concerned is a Munsiff-Magistrate and his court is a Munsiff-cum-Magistrate's Court. The process server reported that the respondent had refused to accept the notice.

On the date fixed for hearing i.e., on 5-11-1958, the learned Magistrate, declared the respondent ex parte and directed him to pay maintenance to the petitioner at the rate of Rs. 25/- per month. The respondent moved the learned Magistrate on 2-3-1959 to set aside the ex parte order, on the ground that he had not refused the notice as alleged by the process server. The learned Magistrate dismissed that application on the ground that the same having been made more than three months after the date of the ex parte order, it cannot be entertained in view of sub-section (6) of S. 488, Cr.P.C.

(3) According to the learned District Magistrate the order made by the first Class Magistrate, Gulbarga, on 5-11-1958 is illegal for two reasons viz. (1) the Head Munshi had no authority to issue summons to the respondent in that petition and (2) the summons in question should have been issued only through the Police. The learned government Pleader does not support the reference made by the District Magistrate. He has raised various objections to the reference. According to him the enquiring Magistrate has not committed any irregularities or illegalities; they are cured by S. 537, Cr.P.C. The provisions for the service of summonses by Criminal Courts are found in Ss. 68 to 74 of the Cr.P.C.

These provisions make it clear that every summons issued by a Court under the Criminal Procedure Code should be in writing, in duplicate and signed and sealed by the Presiding Officer of such Court, or by such Officer as the High Court may, from time to time, by rule direct, and such summons will have to be served by a police officer, or subject to such rules as the State Government may prescribe in this behalf, by an Officer of the Court issuing it, or other public servant. My attention has not been drawn to any rules framed either by the High Court or by the State Government in this behalf.

Hence the summons in question should have been signed by the Presiding Officer and the same should have been served by a Police Officer. But the learned Government Pleader says that the process contemplated by S. 488 of the Cr.P.C. is not the same as the summons for which provision is made under S. 68, Commissioner. P. C. No provision of law nor any decided authority was brought to my notice in support of this contention. Sub-section (6) of S. 488, Cr.P.C. provides as follows:

'All evidence under this chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons cases: 'Provided that if the Magistrate is satisfied that he is wilfully avoiding service or wilfully neglects to attend the court, the Magistrate may proceed to hear and determine the case ex parte. Any order so made may be set aside for good cause shown on application made within three months from the date thereof.'

I have not been able to appreciate the learned Government Pleader's distinction between the 'service' as mentioned in sub-section (6) of S. 488, Cr.P.C. and summons referred in S. 86 of the Cr.P.C. To my mind, they appear to be one and the same.

(4) Now, coming back to S. 68 of the Cr.P.C., it is seen that that section provides for all summonses to be issued by a court under the Cr.P.C. That being so, I am unable to accept the contention of the learned government Pleader that the notice contemplated in S. 488, Cr.P.C. is something different from the summons provided

in S. 68 of the Cr.P.C.

(5) It was next urged by the learned Government Pleader that the service of process by the process-server is validated by illustration (e) to S. 114 of the Evidence Act. I cannot visualise the possibility of the application of S. 114 of the Evidence Act to the facts of the present case. Illustration (e) to S. 114 of the Evidence Act, lays down a presumption that 'judicial and official acts have been regularly performed'. What all that provision says is that if it is proved that an official act has been performed, then in the absence of any other evidence it shall be presumed that it has been done regularly. In this case, there is no room for presumption as the facts are admitted.

(6) Lastly, it was contended by the learned Government Pleader that the errors or irregularities in the summons are cured by S. 537 of the Cr.P.C. From the facts found, there are good reasons to believe that the summons in question was procured to a wrong address by manipulation. It is also not unlikely that a false return was got up. The surrounding circumstances of the case strongly indicate that a fraud had been played on the court. I am of the opinion that the error or irregularities in the issue of the summons have in fact occasioned a failure of justice, in the sense that an adverse order against the first respondent in this court has been passed without giving him an opportunity to place his case before the Court.

(7) In the result, I accept the reference and quash the ex parte order passed by the learned Magistrate on 5-11-1958 directing payment of maintenance to the second respondent in this case. Her application will be enquired into afresh according to law.

(8) Reference accepted.