

The State Vs. Bhimrao and anr.

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Court : Karnataka

Decided On : Jan-04-1963

Reported in : AIR1963Mys239; 1963CriLJ293; (1963)1MysLJ148

Judge : T.K. Tukol, J.

Acts : [Code of Criminal Procedure \(CrPC\), 1898](#) - Sections 69, 70, 71, 488(6)

Appeal No. : Criminal Revn. Case No. 44 of 1962

Appellant : The State

Respondent : Bhimrao and anr.

Advocate for Def. : Md. Inayatullah, Adv. for Respondent No. 1 and ; K. Jagannatha Shetty, Adv. for Respondent No. 2

Advocate for Pet/Ap. : Radhakrishna, High Court Govt. Pleader

Judgement :

T. K. Tukol, J.

1. This is a reference made by the Sessions Judge, Bidar under Section 438 of the Code of Criminal Procedure, recommending that the order passed by the Munsiff-Magistrate, in Suit No. 261/5 of 1960 awarding a monthly maintenance of Rs. 30/- to the respondent be set aside on the ground that the ex parte order had been passed without proper service of summons.

2. It is quite clear from the different endorsements on the back of the summons issued to the petitioner who is the husband of the respondent, that on the first occasion when the Process Server went to the village, he had gone to Bagdal for election work while on the second occasion he had gone to attend a fair at Humanabad. The third summons bears the endorsement of the Process Server that the petitioner had gone to Gulbarga and that a copy had been therefore affixed to the house. We have now to see whether such service by affixing a copy of the summons to the house of the petitioner is valid service under the Code of Criminal Procedure. Section 69 (1) of the Code provides for summons being served personally by delivering to the persons one of the duplicates of the summons and getting his signature thereon at its back acknowledging the receipt of the same. Section 70 provides that where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of the family. In the present case, the record does not disclose that any attempt was made to serve the petitioner in the manner provided by Section 70. Section. 71 which provides for service by affixing a copy of the summons to some conspicuous place of the residence, reads as follows--

'If service in the manner mentioned in Sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or

homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.'

In the present case the records of the Court of the Magistrate do not disclose that the method of serving summons prescribed by Section 70 of the Code was ever attempted or was found to be impossible to be given effect to on account of the absence of any adult male member in the family. In that view, service of summons by affixing a copy will be bad in law because Section 71 can be resorted to only after the methods prescribed by Section 69 and 70 are found to be ineffective after the exercise of due diligence on the part of the Process Server. Mr. Jagannatha Shetty for the respondent submitted that it was for the petitioner to show that service of summons under Section 70 was possible and that the provisions of that Section had not been resorted to. The grievance of the petitioner is that he was not served with any summons. So if the Court comes to the conclusion after scrutinizing the records of the proceedings that the methods for service of summons followed by the process server had not complied with Section 70 before resorting to service by affixing a copy of summons to some conspicuous part of the house occupied by the person to be served, then service under Sec. 71 would be bad in law.

3. If there is no valid service, then the ex parte order awarding maintenance to the respondent will not be valid. It was pointed out that under the proviso to Sub-section (6) of Section 488 of the Code it was obligatory on the petitioner to have made an application within three months from the date of the ex parte order. The relevant portion of the proviso reads thus--

'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.'

It would be manifest from the wording of this proviso that before the Magistrate proceeds to hear a petition under Section 488 in the absence of the respondent, he must be satisfied that either the respondent was wilfully avoiding service or had wilfully neglected to attend the Court. In other words, the wording of the proviso is so cautious that even if the person is served and had neglected to attend it would not be still open to the Magistrate to proceed ex parte unless he is satisfied that there is wilful negligence in attending the Court. So the proviso requires a subjective satisfaction on the part of the Magistrate that either the respondent is avoiding the summons wilfully or that he is wilfully neglecting to attend the Court. It is only thereafter that the Magistrate can proceed to hear and determine the case ex parte. In the present case, neither the order passed by the Magistrate nor the order sheet discloses that the Magistrate was satisfied that the respondent was wilfully avoiding service or was wilfully neglecting to attend the Court. The period of three months is with reference to the date of 'any order so made'. The words 'order so made' must necessarily imply an order passed in conformity with the first part of the proviso. If the order itself is not in conformity with the first part of the proviso, the second part of the proviso prescribing a period of three months from the date of the order so made will not come into operation.

4. Considering from all points of view I have no hesitation in holding that the order passed by the Magistrate on 17-11-1961 is bad in law and has therefore to be set aside. The reference is accordingly allowed. The order passed by the Magistrate is set aside and the original suit No. 261/5 of 1960 is remitted back to the Court of the Munsiff-Magistrate, Bidar for disposal according to law. No order as to costs.