

Gayathri Vs. Ramesh

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Court : Karnataka

Decided On : Apr-08-1993

Reported in : II(1993)DMC197; ILR1993KAR1857; 1993(2)KarLJ447

Judge : M. Ramakrishna and ;B.N. Krishnan, JJ.

Acts : [Family Courts Act, 1984](#) - Sections 7, 7(2) and 10(2); [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 126, 126(2) and 274

Appeal No. : M.F.A. No. 249 of 1992

Appellant : Gayathri

Respondent : Ramesh

Advocate for Pet/Ap. : Hemalatha Mahishi, Adv.

Judgement :

Krishnan, J.

1. The appellant herein was the petitioner before the Prl.Judge, Family Court, Bangalore in C.Mis.No. 446 of 1990 and being aggrieved by the dismissal of the petition filed by her under Section 125 Cr.P.C., has preferred this Appeal. The petitioner has pleaded that she was married to the respondent on 13.4.1977 and till August 1980 they were living without much problem and in that month he married another girl by name Jayalaxmi and subsequently used to visit her.

Respondent has not been paying anything to her towards her maintenance. He has sufficient means as he is working as a mechanic in B.T.S., Bangalore and gets salary of Rs. 2,500/- per month. Therefore, she has sought for recovery of separate maintenance of Rs. 500/- per month. The respondent remained absent after service of notice in the trial Court and thereafter he was placed *exparte* and the case was posted for *exparte* evidence by way of affidavit and the petitioner filed an affidavit swearing to the several circumstances pleaded by her in support of the petition and after consideration of the said affidavit, the learned Judge came to the conclusion that no case had been made out for grant of maintenance and accordingly dismissed the petition. It is being aggrieved by this order of dismissal of petition that the petitioner has preferred the present Appeal.

2. After having heard the learned Advocate for the appellant, we are satisfied that the order of the learned Magistrate should be set aside solely on the ground that the procedure adopted is in direct contravention of Section 126 of the Criminal Procedure Code (for short 'the Code') and in that view of the matter it would not open to this Court to consider the case, put forward by the appellant, on merits. Though the learned Advocate for the appellant also wanted the order passed by the Family Court to be set aside, his case was not that there is any lacuna in the procedure adopted by the learned Judge, but that the conclusions arrived at by the learned Judge are not supportable and the said conclusion on facts should be reversed and an order granting maintenance should be passed.

3. Sections 125 to 128 of the Code occur in Chapter IX thereof. Section 126(2) of the Code which refers to the way in which the evidence to be recorded in proceeding under Section 125, reads as hereunder:

'All evidence in 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, and 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'.

The learned Advocate for the appellant contended that Section 126 of the Code would come into the picture only if a Magistrate were to exercise the jurisdiction and it is jurisdiction of the Family Court under Section 7 of the Family Courts Act (for short 'the Act') that has been invoked for grant of maintenance and therefore there is no scope for this Court to find out whether the proceedings taken by the learned Judge of the Family Court are in accordance with Section 126 of the Code. There is more than one fallacy in this argument advanced on behalf of the appellant. Undoubtedly the Family Court exercises jurisdiction to grant maintenance by virtue of Section 7 of the Act. It is by virtue of Section 7(2)(a) of the Act that the Family Court gets jurisdiction to exercise powers of Magistrate in this regard. That Section reads as hereunder:

'(2) Subject to the other provisions of this Act, a Family Court shall have and exercise the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973;'

It is undisputed that the petition has been filed by the appellant for recovery of maintenance under Section 125 of the Code. Section 10(2) of the Act which refers to the procedure to be followed in a proceeding under Chapter IX of the Code before a Family Court reads as hereunder:

'Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court'.

When Section 126(2) of the Code prescribes the procedure to be followed regarding recording of evidence in a proceeding initiated under Section 125 thereof and when Section 10(2) of the Act enjoins that the provisions of the Code shall apply to the proceedings under Chapter IX of the Code before the Family

Court, it is clear that though the proceeding is initiated before the Family Court and not a Magistrate, in a proceeding under Section 125 of the Code, the Family Court is bound to follow the procedure prescribed in Section 126 of the Code, so far as recording of evidence is concerned. The learned Advocate for the appellant contended that Section 20 of the Act has the over riding effect and therefore Section 126 of the Code is not expected to be followed by the Family Court in a proceeding under Section 125 of the Code, it may be noticed that by virtue of Section 10(2) of the Act, the provisions of the Code are practically incorporated into the Act so far as the proceedings under Chapter IX of the Act before the Family Court are concerned. If that be so, only by virtue of this very provision of the Act, Section 126 of the Code has to be complied with by the Family Court and there is no question of inconsistency between the provisions of the Act and the Code or the over-riding effect of the provisions of the Act in preference to Section 126 of the Code.

4. It was contended by the learned Advocate for the appellant that Section 126(2) of the Code requires the presence of the party or his Advocate and it rules out a case of an expert order. This argument has to be mentioned only to be rejected, because it takes note of only Sub-section (2) of Section 126 of the Code without taking note of its Proviso. The Proviso which has been extracted earlier makes it clear that it applies to a case where the case is proceeded to be heard and determined *ex parte* and what precautions are to be taken by the Court before proceeding to hear and determine the case *expert*. Therefore, it is clear that the Family Court while dealing with the petition preferred under Section 125 of the Code is bound to follow the procedure prescribed in Section 126 thereof.

5. In a proceeding under Section 125 of the Code the evidence shall be recorded in the manner prescribed for summons case. There is no provision in the Code enabling a Magistrate to take affidavit evidence in a summons case. Therefore the procedure of taking an affidavit in a summons case is completely unknown to the provisions of the Code and evidence has to be recorded as prescribed by Section 274 of the Code which relates to record in summons cases and inquiries. If the party against whom the order for payment of maintenance is proposed to be made is absent, the Court cannot straight-away place the said person *expert* and

proceed as in a civil matter. It must be come to a conclusion that, that person is wilfully avoiding service or was wilfully neglecting to attend the Court and then only he could proceed and determine the case expert as per proviso to Sub-section (2) of Section 126 of the Code. The learned Judge of the Family Court has not recorded any finding that the respondent was wilfully neglecting to attend the Court. Therefore, we have come to the conclusion that the procedure adopted by the learned Judge of the Family Court in merely placing the respondent expert and calling upon the petitioner to file an affidavit is highly illegal and therefore the order has to be set aside solely on that ground and in that view of the matter there is no necessity to enter into any kind of discussion in relation to the merits of the case put forward by the appellant. Therefore, it is clear that the order passed by the Family Court should be set aside and the matter should be remitted back to it with a direction to follow the procedure prescribed by Section 126 of the Code and thereafter proceed to dispose of the case according to law.

6. In the result, the order of the Family Court is set aside and the case is remitted back to it with a direction to dispose of the case according to law in the light of the observations made above. The Appeal is allowed only to the extent indicated above.