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**Court :** Allahabad

**Decided On :** Feb-06-1974

**Reported in :** 1974CriLJ1234

**Judge :** Yashoda Nandan, J.

**Appellant :** Dhani Ram

**Respondent :** State and anr.

**Judgement :**

ORDER

**Yashoda Nandan, J.**

1. This is a revision by the husband in proceedings under Section 488 of the Code of Criminal Procedure (hereinafter referred to as the Code).

2. The material facts giving rise to this revision are that on the basis of an application filed by opposite party Srimati Parbati, the learned Sub-Divisional Magistrate, Khair, Aligarh passed an ex parte order directing the applicant to pay Rs. 100/- per month as maintenance allowance to her. This order the learned Magistrate apparently passed under the proviso to Section 488 (6) of the Code. On the 26th of March, 1970, an application was made by the applicant before the learned Magistrate praying that the ex parte order dated 16th October, 1969, be set aside, the case restored to its original number and decided after giving the

applicant an opportunity of contesting the claim put forward by opposite party No. 2. This application was dismissed by the learned Magistrate for default of appearance of the applicant on 8th June, 1970. On the same date the applicant filed a second application praying for the same relief. In the second application it was disclosed that the earlier one had been dismissed by the learned Magistrate for default of the applicant. The second application was also dismissed by the learned Magistrate on 18th July, 1970. It was held by the learned Magistrate that a perusal of the file revealed that every effort had been made to inform the applicant about the case but he had all along evaded the service of notice by registered letters. The learned Magistrate took into account the fact that publication of notice of the case against the applicant had also been made in two newspapers having circulation in Delhi as well as in district Aligarh. It was held by the learned Magistrate that he presumed that sufficient service was made of on the applicant in respect of the case and he consequently could not take the plea that he was not informed of the case. It was further held by the learned Magistrate that the application for restoration had been made after three months of the order and therefore it had become time-barred. In the result, the learned Sub-Divisional Magistrate dismissed the application.

The applicant went up in revision before the learned Sessions Judge, Aligarh. The learned Sessions Judge relied upon Section 488 (6) of the Code and held that the application dated 8th of June, 1970, not having been made within three months of the order dated 16th October, 1969, was barred by limitation. It was held by the learned Sessions Judge that the dismissal of the application dated 8th June, 1970, by the learned Magistrate was legally correct.

3. Learned Counsel appearing for the applicant has invited my attention to the fact that in the application made by the opposite party for award of maintenance allowance, it had clearly been averred by her that the applicant was a Government servant employed in the office mentioned in the application itself, at Delhi. He submitted that no attempt had been made to effect service on the applicant by taking recourse to the procedure prescribed by Section 72 of the Code or in any other manner provided by Chapter VI of the Code. It was submitted that under the Code, there is no provision for effecting service on a party or a witness in any

manner other than that provided by Chapter VI of the Code. It was submitted that the sending of a registered letter by post to the applicant at an address in Delhi, which was returned undelivered, was no service on the applicant in the eye of law. He went on to submit that even publication in the newspapers having circulation at Aligarh and Delhi could not be considered to be service of notice of the case on the applicant in accordance with the procedure prescribed by law. It was urged that since no attempt had been made to serve the applicant by the procedure provided by law, the learned Magistrate and the learned Sessions Judge were both unjustified in coming to the conclusion that the applicant had been sufficiently served and had evaded service within the meaning of the proviso to Sub-Section (6) of Section 488 of the Code. There is, in my opinion, force in this contention which must prevail. In a case which has to be decided in accordance with the procedure prescribed by the Code, there is no provision for effecting service on a party either by registered post or by publication in the newspapers. The procedure followed by the learned Magistrate is wholly unwarranted. He was, therefore, unjustified in assuming that the applicant had been sufficiently served and had designedly failed to appear before him.

4. The first ground on which the application made by the applicant was dismissed by the learned Sessions Judge consequently fails.

5. As for the ground of limitation, it is true that the Code itself provides that an ex parte order passed under Section 488 (6) of the Code can be set aside on an application made within three months from the date thereof. Literally read the proviso to Sub-Section (6) of Section 488 of the Code restricts the limitation, within which an application must be made, to three months from the date of the order itself. On a literal construction consequently the application did stand barred by limitation.

6. The proviso to Sub-Section (6) of Section 488 of the Code came up for interpretation before the High Court of Andhra Pradesh in *Zohra Begum v. Mohamed Ghouse Qadri Qadeeri* : AIR 1966 AP50 where it was held that the limitation for setting aside an ex parte order of maintenance begins from the date of the knowledge of the order to the aggrieved party and not from the date of the

passing of that order. In support of its conclusion, the Andhra Pradesh High Court relied upon a decision of the Supreme Court in Harish Chandra v. Deputy Land Acquisition Officer : [1962]1SCR676 . I agree with the interpretation of the proviso to Sub-Section (6) of Section 488 of the Code in : AIR 1966 AP50 (supra).

7. In the result, the revision is allowed. The order of the learned Sub-Divisional Magistrate dated the 18th of July, 1970 and that of the learned Sessions Judge dated 25th of November, 1970, are set aside. The learned Magistrate will treat the application presented on 8th of June, 1970 as being within time and decided it on merits.

8. The record of the case shall be sent down to the court concerned at an early date in order to enable it to expeditiously pass appropriate orders.

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