

Damodaran Vs. Lakshmi

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Court : Chennai

Decided On : Oct-10-1996

Reported in : 1997CriLJ2092; I(1997)DMC207

Judge : M. Karpagavinayagam, J.

Appeal No. : Crl.R.C. No. 14 and Crl.M.P. No. 79 of 1993

Appellant : Damodaran

Respondent : Lakshmi

Advocate for Def. : V.K. Muthusami, Adv.

Advocate for Pet/Ap. : A.K. Sridharan, Adv.

Judgement :

ORDER

1. The petitioner, Damodaran, is the husband. The respondent, Lakshmi, is the wife. On 4-1-1988, the respondent-wife filed a petition for maintenance under Section 125, Cr.P.C.

2. In M.C. No. 3/88, despite service of the summons, the petitioner husband did not appear. So, on 26-5-1989, Judicial Magistrate No. II, Erode passed an order awarding maintenance of Rs. 500/- per month.

3. On 5-8-1991, i.e. after a lapse of two years and three months, the petitioner husband filed a petition in C.M.P. No. 3270 of 1991 to set aside the ex parte order of maintenance under Section 126(2), Cr.P.C. It is alleged in the petition that the husband-petitioner came to know about the ex parte order dated 26-5-1989 only on 3-5-1991.

4. This application was contested by the respondent-wife stating that the summons was sent to the husband and the same was returned on 8-1-1988 itself as refused and the refusal endorsement is marked as Ex. P. 1 and that the petition was not maintainable, in law and on merits.

5. On hearing both the parties, learned Judicial Magistrate. No. II, Erode allowed the petition filed by the petitioner-husband on the ground that the respondent-wife did not adduce any material to show that the husband knew about the ex parte order even prior to 3-5-1991. Being aggrieved over the order in C.M.P. No. 3270 of 1991 dated 10-3-1992, the wife filed a revision in CrI.R.P. No. 32 of 1992 on the file of the District Sessions Judge, Erode.

6. The Sessions Court, on hearing both the parties and perused the petition and the counter, allowed the revision holding that the refusal to receive the summons must be considered as service of the summons and therefore, the application filed under Section 126(2) to set aside the ex parte order after two years and three months, was not maintainable and therefore the wife-respondent was entitled to maintenance and thereby the ex parte order passed on 26-5-1989 was restored.

7. Challenging the order passed by the Sessions Court, the present action has been resorted to by the petitioner-husband by filing a revision in this Court.

8. Mr. A. K. Sridharan, learned Counsel for the petitioner and Mr. V. K. Muthusami, Counsel for the respondent argued. I also perused the records and the orders of both the Courts. Section 126(2), Cr.P.C. provides thus :-

'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 present 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 to 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.

So, under this section, 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, the Magistrate may proceed to hear and determine the case ex parte. Ex. P1, as referred in the orders of both the Courts below, would make it clear that the summons was returned as referred as early as 8-1-1988, and then the ex parte order was passed by the Magistrate on 26-5-1989 after recording evidence of PW 1. Therefore, the order was passed ex parte on the ground that the husband wilfully avoided service by refusing to receive the same. As such, there is no illegality in the said order.

9. However, the husband-the petitioner filed the petition to set aside the ex parte order under Section 126(2) on 5-8-1991 stating that he came to know about the passing of the ex parte order only on 3-5-1991. The section says that any ex parte order may be set aside for good cause shown on an application made within three months from the date thereof. But, admittedly, the petition to set aside the ex parte order was not filed within three months from the date thereof, i.e., the date of the order, namely, 26-5-1989. The only ground that has been urged before the lower Court in the above petition is that he came to know about the ex parte order only on 3-5-1991 and as such, according to him, the petition filed on 5-8-1991 was within three months from the date of 3-5-1991. The Section provides that the husband has to show good cause for his non-appearance on the specified date. He has also to establish in this case that he has not wilfully avoided the service, especially when the wife produced the document Ex.P. 1 to show that the summons was refused to be received, by the husband. Ex. P. 1 is the postal

endorsement. As per the records, it is clear that the petitioner-husband filed only a verify petition (sic) in C.M.P. No. 3270 of 1991 by stating that he had knowledge of the ex parte order only on 3-5-1991. Even assuming, it to be so, it is clear that the petition was presented on 5-8-1991, that is, after three months and two days from the alleged date of the knowledge. So, in either way, the petition under Section 126(2) cannot be maintained before the lower Court. Moreover, the Magistrate allowed the petition to set aside the ex parte order on the ground that the wife was not able to prove that the husband knew about the order, even prior to 3-5-1991. This is quite wrong. Previously, the very same Magistrate passed an ex parte order awarding maintenance only on accepting the evidence and Ex. P. 1 and held there was a wilful avoidance of service of the summons on the part of the husband. That was the ground on which the ex parte order was passed. When such being the case, the Magistrate cannot say that the wife was not able to prove that the husband knew about the ex parte order prior to 3-5-1991.

10. Any how, as correctly held by the Sessions Judge, the petitioner-husband in his verified petition in C.M.P. No. 3270 of 1991 filed before the Judicial Magistrate, No. II, has not shown any good cause so as to enable the Magistrate to set aside the ex parte order. Further more, it is also to be noted that despite the fact that he came to know about the ex parte order on 3-5-1991, the husband did not care to rush to the Court to file the necessary petition immediately. Even according to him, the husband filed the said petition only on 5-8-1991, after three months.

11. I do not find any material to show that he has not wilfully avoided the service, especially when Ex.P. 1 was filed by the wife. It is also apparent that no affidavit was filed in the said petition giving any acceptable explanation for his non-appearance. Even in his verified petition, as referred earlier, he has not shown any good cause to establish that his failure to approach the Court in time was bona fide. Further more, as pointed out by the Sessions Court, the petitioner did not give the details in the petition as to when and how the information was received about the ex parte order. So, in all aspects, I feel that the order of the Sessions Court in Crl.R.P. No. 32 of 1991 restoring the ex parte order dated 26-5-1989 is justified and valid in law.

12. In the result, the revision, which has no merits, is liable to be dismissed and the same is accordingly dismissed. No costs. Consequently, Crl.M.P. 79 of 1993 is also dismissed.

13. Petition dismissed.

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