

Loganathan Vs. Dhanalakshmi and Another

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SooperKanoon Citation : sooperkanoon.com/787714

Court : Chennai

Decided On : Nov-27-1995

Reported in : 1996CriLJ1896

Judge : T.S. Arunachalam, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 126, 126(2) and 397

Appeal No. : Crl. R.C. No. 269 of 1992

Appellant : Loganathan

Respondent : Dhanalakshmi and Another

Advocate for Def. : K. Sakthivel, Adv.

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

Judgement :

ORDER

1. Petitioner Loganathan is the husband of first respondent Dhanalakshmi and father of second respondent minor Sasikala. First respondent preferred M.C. No. 30/89, under section 125 of the Code of Criminal Procedure before Judicial Magistrate No. IV, Dindigul, claiming a monthly award of maintenance for herself and her minor daughter from her husband, the petitioner herein.

2. In the said petition, she has stated that she entered into matrimony with the petitioner herein on 30-3-1979. Of the said marriage Sasikala was born, who at the time of filing of the application for maintenance was aged about 9 years. According to her, after the birth of Sasikala, her husband coerced her to obtain money from her parents. He then drove her out of his house, after snatching away her jewellery and cash. Three weeks thereafter, he thought it fit to take her back to house. After living together for sometime, he sent her back to her father's house in the guise of fixing up a suitable house on rent for their living together. She later learnt that the petitioner herein had married for a second time. When she questioned him, he replied that he did not like her and therefore, had taken a second wife and she could do whatever she wished. First respondent has further stated in her petition that her husband was earning Rs. 500/- every month from his bakery, apart from earning an annual income of Rs. 20,000/- from the lands owned by him. This application for maintenance was entertained on 8-8-1989. On 22-1-1990, the petitioner wherein filed a counter statement, wherein he has admitted marriage and paternity. According to him, his wife was interested in luxurious living and therefore chose to join her parents on her own volition. He also provided her with jewellery weighing 7 sovereigns. He despatched a lawyer's notice, in response to which she joined him for a shortwhile and again went back to her parent's house with minor Sasikala. He has further alleged that his wife was in intimacy with another person. He refuted the allegation that he had married Jamuna, while his marriage was in subsistence with the first respondent. He admitted, earning Rs. 500/- every month, from the bakery, but denied receipt of agricultural income, since he had no lands whatever.

3. After a chequered history, of several adjournments, it is clear that on 20-4-1992, the impugned order was passed by the Magistrate an ex-parte order, directing the petitioner herein to pay a lump sum of Rs. 500/- every month to both the respondents on or before 10th of every English calendar month. While passing the aforesaid ex-parte order, learned Magistrate has observed that the petitioner herein had not appeared before him from 'January' and in spite of several opportunities offered to him, he did not produce witnesses. So the Magistrate has stated that he felt that the petitioner herein was wilfully evading production of witnesses. A further observation has been made by the learned Magistrate that the

attitude of the petitioner herein was one of carelessness towards Court proceeding. Thereafter, the learned Magistrate has observed that without any reason, the petitioner herein and his counsel had absented themselves. From the evidence available, he was unable to find any discrepancy, sufficient enough to negative the maintenance claim. The petitioner had neither produced any witness nor examined himself. It is in that background that the impugned order was passed.

4. Mr. K. V. Sridharan, learned counsel appearing on behalf of the petitioner, contended that the Court below ought to have noticed that the petitioner had appeared before it on several occasions without fail and had also cross-examined the first respondent, who had entered into the witness box as P.W. 1. On the basis of the calendar extract appended along with the affidavit of the petitioner, petitioner's learned counsel contended that it would appear odd, that the learned Magistrate had chosen to 'feel' that the petitioner was careless and was wilfully evading production of witnesses on his side. Learned counsel representing the respondents submitted, that the petitioner has a remedy under the proviso to Section 126(2) of the Code of Criminal Procedure, to show good cause before the learned Magistrate within three months from the date of pronouncement of the impugned order and plead for setting aside of the ex parte order passed by him. When such remedy was available, he contended that a remedy in revision before this Court cannot be maintained. He then submitted that if the petitioner had not produced witnesses, as has been observed by the Learned Magistrate, he cannot not put forth a case as though he had not been given a fair chance, to let in evidence on his side. However, after perusing the calendar extract in my presence, he was able to visualize certain lacuna, which I will expatiate, a little later.

4A. I have carefully considered the inherent merits of the rival contentions. It is quite true that a salutary remedy stands contemplated under section 125 of the Code of Criminal Procedure, to prevent vagrancy of neglected wives and children. In that context, the learned Magistrate did owe a duty, to have disposed of M.C. No. 30/89 on his file, with expedition. It is rather and (sic), that when a summary remedy is contemplated in the Code of Criminal Procedure, with an avowed object

of providing quick remedy to neglected wives and children, the learned Magistrate had taken nearly 28 months, to pass an ex parte order. This long delay necessarily impelled me to have a look into the diary extract maintained by the learned Magistrate. The maintenance petition was received in Court on 8-8-1989 and posted for hearing on 19-9-1989. It is not known if summons was issued then to the petitioner herein, but the fact remains that on 19-9-1989, he was not present before Court. Summons was ordered on that returnable on 25-10-1989. On that date, petitioner was present and a copy of the maintenance application was furnished to him. From then on for six hearings till 10-5-1990, both petitioner and respondents were present. On 20-6-1990, an application for condoning the absence of the petitioner was filed and accepted. Again, the same pattern of adjournments followed and on one occasion or two the petitioner herein was absent and his absence was condoned on petitions. On 8-2-1991, first respondent examined herself as P.W. 1. On the same day, it is clear from the record, that petitioner herein, had her cross examined. The calendar extract shows that hearing stood adjourned to 15-2-1991 for production of other witnesses, of the first respondent. On 15-2-1991, first respondent did not produce her witnesses. Similar was the case on 8-3-1991. On 11-4-1991, there was no Magistrate. Hence, for examination of first respondent's witnesses the case was adjourned to 20-5-1991. On 20-5-1991, neither witnesses were present nor the petitioner herein was present. There was also no Judicial Officer appointed. Hence, for examination of witnesses on behalf of the first respondent, proceedings stood adjourned to 14-6-1991. On that day also respondents' witnesses were not available. So also there was no Presiding Officer. On 24-7-1991, both parties were present, but witnesses for the respondent were not present. An application was preferred for adjournment, was allowed. The matter stood posted to 2-8-1991, for examination of witnesses on behalf of the respondents herein.

5. Though all the while time was afforded to the wife to reproduce her witnesses, on 2-8-1991, the docket entry reads that both parties were present, but the husband stated that he has no witnesses and therefore the matter was adjourned to 22-8-1991, for production of witness by the husband. The records do not show that the wife had closed her case and the turn had fallen upon the husband to let in evidence. On 22-8-1991, both parties were present, but since the Magistrate

was on training, proceeding were adjourned to 26-9-1991. On 26-9-1991, both parties were present. The endorsement shows that the husband had not taken steps to produce witnesses. Therefore, he was directed to pay Rs. 25/- as costs to his wife. For Production of witnesses by the husband enquiry stood adjourned to 24-10-1991. On 24-10-1991, both parties were present. In spite of it the matter was adjourned to 28-11-1991. Similarly, on 28-11-1991, proceedings were adjourned to 23-1-1992. Abruptly, on 27-2-1992, the endorsement made by the Magistrate reads that the wife was present but husband was absent, The husband was wantonly prolonging production of witnesses and hence the enquiry stood closed. For Judgment, the matter was adjourned to 2-3-1992. On 2-3-1992 even the wife was absent. Learned Magistrate directed notice to her and listed the miscellaneous case for orders on 5-3-1992. On 5-3-1992, orders were not pronounced, since the Stenographer was on leave. On 10-3-1992, without any reason, it was adjourned to 13-3-1992. On 13-3-1992, the endorsement reads that the Stenographer was on leave. Ultimately, on 20-4-1992, the impugned order was passed.

6. On the face of this calender extract, it is rather odd that the enquiring Magistrate had chosen to observe that the petitioner herein had not appeared before him from January, obviously January 1992. The calendar extract does not show that the husband did not produce witnesses to be examined on his side. As a matter of fact, if the petitioner herein was available in Court, as the diary extract clearly portrays, the Magistrate must have put him into the witness box to examine himself, unless he did not want to depose. That is not the case. It is not possible to comprehend, as to why the learned Magistrate had thought it fit to abruptly terminate the proceedings, when he was prepared to adjourn the matter for over a month and a half from 5-3-92, for some reason or the other, as the endorsements faced by him will show. Application of mind contemplated before an order could be passed under section 126(2) of the Code of Criminal Procedure, is conspicuously absent. Mere recording by the Magistrate that he felt that the husband was prolonging without production of witnesses and towards that end wilfully absenting himself would not suffice, for that must be based on the foundation of material available before him. Now that I have extracted the entire material available before the Magistrate on 20-4-1992, it is not possible to uphold the impugned order, since

it is obvious that a reasonable opportunity had not been afforded to the petitioner herein to put forth his case. In the period of more than two years, when the enquiry was pending, except on rare occasions, the petitioner had not only appeared before the learned Magistrate, but had also participated in the proceeding. It cannot also be overlooked that in the counter statement, the petitioner has taken a stand that his wife was living with another person, thereby assailing her character. If that allegation will amount living on adultery or not is a matter to be scrutinized by the learned Magistrate, on the basis of evidence to be brought on record. As a matter of fact, on the nature of defence taken by the petitioner, the learned Magistrate ought to have directed the petitioner herein to get into the witness box first in point of time, so that the wife could have an opportunity to challenge such evidence. That procedure, which has been principled by decisions, has not attracted the attention of the learned Magistrate.

7. Before disposing of this revision, I am bound, to answer the contention raised by respondents counsel that the petitioner ought to have chosen the remedy available to him under proviso to Section 126(2) of the Code of Criminal Procedure, without approaching this Court for exercise of revisional powers. This Court had occasion to consider this very question in *Muthusamy v. Kalaarasi*, 1989 Mad LW (Crl) 168. The observations made therein read as hereunder :-

'It is true that the petitioner could have as well filed a petition in the trial Court itself to have the ex parte order set aside. It is quite so. Such an application could have been filed. The law permits three month's time for the petitioner to have the ex parte order set aside by the trial Magistrate. However, the revision has been filed in this Court within such period of limitation of three months and obviously this revision has not been filed to evade the limitation bar contained in Section 126(2), CrI.P.C. It has not been brought to my notice that a revision is barred against an ex parte order.'

8. A similar view is taken by another learned single judge of this Court in *A. Simon v. Venkattamal*, 1991 Mad LW (Crl) 113. Learned Judge stated as follows :-

'This revision was filed against an ex parte order of maintenance in favour of the petitioner's aged mother, viz. respondent herein. It was contended for the

petitioner that though proviso (2) of Section 126 of the Criminal Procedure Code enables the petitioner to file an application before the Magistrate and have the ex parte order set aside, it was open to the petitioner to forego that remedy and file a revision under section 397, Cr.P.C., wherein also, he could challenge the correctness of the order, in so far as it related to setting him ex parte.

Held :- The existence of a remedy under proviso (2) Section 126 Criminal Procedure Code to have the ex parte order set aside by showing good cause, does not preclude the respondent from challenging in a revision under section 397 of the Code, the legality of the order setting him ex parte. The scope of scrutiny in the two proceedings however, would be different. While in an application under Section 126(2) proviso the Court is to find out, on the oral and documentary evidence adduced for the purpose, whether the respondent has shown good cause for his inability to receive service or his failure to attend Court, in a revision under section 397, the Court's scrutiny is limited to the regularity of the proceeding and the correctness, legality and propriety of the order and the respondent cannot offer to show good cause, which he could do only under section 126.'

9. A Full Bench of the Kerala High Court in Balan Nair v. Bhavani Amma, 1987 Cri LJ 399, stated that,

'A person against whom an ex parte order has been passed has the right to file an application under section 126 before the Magistrate to set aside the ex parte order, provided the application is filed within a period of three months from the date of the order. Even if there is delay in filing the application, it is open to him to invoke Section 5 of the Limitation Act. At the same time, remedy of the person, who suffers an ex parte order is not confined to filing an application to set aside the ex parte order before the Magistrate concerned. It is open to him to challenge the order by way of revision before the revisional Court in terms of Section 397, of the Code. Of course, the scrutiny by the a revisional Court will be of a more limited nature than the scrutiny Magistrate himself has to make in an application to set aside the ex parte order.'

10. The law laid down in the aforesaid three cases will provide the answer for the contention urged by respondent's learned counsel. I have no hesitation

whatever in setting aside the impugned order and remitting the matter back to the enquiring Magistrate to continue further proceedings from the stage where it ended on 24-7-1991. Both parties shall be afforded opportunities to let in evidence. Learned enquiring Magistrate shall dispose of this, miscellaneous case within three months from the date of receipt of a copy of this order along with the case records. Petitioner and the respondents will have to co-operate with the learned Magistrate to facilitate disposal of the miscellaneous case within the time span now fixed.

11. I have already stated about the object with which Section 125 of the Code of Criminal Procedure was introduced. If that object will have to be preserved, the respondents must be in a position to receive interim maintenance, since the proceedings have been pending in one forum or another from August, 1992, till November, 1995. If interim maintenance is not ordered, then the sanctity of this purposeful provision will certainly be reduced to a dead letter. Though while admitting this criminal revision case, interim stay was ordered on condition that the petitioner should pay Rs. 250/- per month to the respondents, after hearing counsel on either side extensively. I am of the opinion that the petitioner is bound to pay Rs. 150/- each to respondents 1 and 2 every month a interim maintenance from the date of petition till its disposal. If the petitioner had not paid any amount towards maintenance to the respondents in pursuance of the conditional order passed by this Court while entertaining of the main revision, execution can be sought for on the foundation of the interim award of maintenance made by me today. On termination of the proceeding before the Magistrate, the order of the Magistrate will step in. Learned Magistrate should fix the quantum separately for each respondent.

12. This Criminal revision case is allowed in the manner indicated above.

13. Revision allowed.