

A. Simon Vs. Venkatammal

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Court : Chennai

Decided On : Jul-09-1990

Reported in : II(1991)DMC66

Judge : Padmini Jesudurai, J.

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

Appeal No. : Crl. Rev. Case No. 791 of 1986 and Crl. Rev. Petn. No. 782 of 1986

Appellant : A. Simon

Respondent : Venkatammal

Advocate for Def. : G. Sugumaran, Adv.

Advocate for Pet/Ap. : V. Gopinath, Adv.

Disposition : Petition dismissed

Judgement :

Padmini Jesudurai, J.

1. The petitioner, against whom an ex-parte order of maintenance has been passed in favour of his mother aged 70, has filed the present revision challenging the order of the learned Magistrate, both on the ground setting him ex-parte, as well as his liability to pay maintenance and the quantum.

2. The respondent is the widowed mother of the petitioner. She filed M.C. No. 33 of 1985 under Section 125, Cr. P.C. in the Court of the Judicial First Class Magistrate No. 1, vellore, claiming a monthly maintenance of Rs. 500 /-on the averment that she was widowed while young and with great difficulty she had brought up the Petitioner and her other sons, got them married in life and settled her properties on them. About six months prior to the filing of the petition she was driven-out of their house by the petitioner and another son Sekar, who was initially shown respondent in the petition. The respondent had no means to maintain herself and was too old to earn a living. The petitioner was a Government Servant drawing more than Rs. 700/- per month. He had failed to maintain the respondent.

3. The petition was taken on file on 18-5-1985, and on 2-1-1986 notice by Registered Post with Acknowledgement Due was ordered to the petitioner and to the son Sekar for the hearing on 17-1-1986. The petitioner was Served, while the notice to the son Sekar was returned unserved. On 17-1-1986 the petitioner did not appear in Court, and non-bailable warrant was issued to secure his attendance. Fresh notice to Sekar was ordered for the subsequent hearings but all the notices were returned unserved. On 23-4-86, the respondent filed a memo that since her son Sekar was paying her more than Rs. 100/- per month for maintenance, she was giving him up in the present proceedings. Since the non-bailable warrant against the petitioner continued to be pending, on 7.6.86, publication in a Local Tamil Daily was ordered and on 7-8-1986 the publications was made in the Tamil Daily 'Malai Murasu' for the hearing on 13-8-1986. On 13-8-1986, the petitioner did not appear and he was set ex-parte and evidence was taken. On 19-8-1986 the impugned order was passed.

4. Initially Thiru Gopinath, Learned counsel for the petitioner would urge that - though proviso (2) to Section 126 of the Criminal Procedure Code (the Code for Short) enables the petitioner to file an application before the Magistrate to 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 would challenge the correctness of the order, in so far as it related to setting him ex-parte. Reliance was placed upon a decision of a learned Judge of this Court in Muthusamy v. Kataiarasi and another 1989 L.W. CrI. 168 and also to a Judgment of a Full Bench

of the Kerala High Court in *Balan Nair v. Bavani Ammu* and another 1987 CrL. L.J. 399 Ker-FB wherein also, the Court held that a person against whom an ex-parte order under Section 125 Cr. P.C. has been made, could challenge the legality of setting him ex-parte, either by an application under Sec. 126 or in a revision under Section 397. Reference was also made to the analogous provision in the Civil Procedure Code and in particular to a judgment of a Full Bench of this Court in *Krishna Ayyar v. Kuppan Ayyangar* I.L.R. 30 Mad 54 wherein it was held that when a suit was decreed ex-parte, the appellate Court to which an appeal from the decree was preferred under Section 540 of the Code of Civil Procedure (Act 14 of 1882), has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the suit ex-parte and the appellate Court could remand the suit for rehearing.

5. I am in agreement with the views expressed in the above decisions. 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 an application under Section 126(2) proviso the Court is to find out, on the oral and documentary evidence adduced for the purpose, if 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.

6. The initial hurdle having soon removed, the learned counsel for the petitioner would next contend that the order setting the petitioner ex-parte is illegal on two grounds, the first being lack of proper service of summons as contemplated under the Code and the second being, want of a proper finding, that the petitioner had wilfully evaded service or had wilfully neglected to attend Court. On the first contention, the learned counsel would urge that Section 62 in Chapter VI of the Code relating to service of summons, prescribes the manner in which summons have to be served. According to the learned counsel, every summons had to be

served by a police officer or subject to any rules made by the State Government, to be served by an officer of the Court issuing the summons or other public servant and service, either by Registered Post or by a Paper publication, was not a mode prescribed in Chapter VI or any other provision in the Code. Reliance was placed upon a decision of a learned Judge of the Calcutta High Court in Hemandmath Chowdry v. S.M. Anchana Chowdry A.I.R, 1971 Cal 817 wherein, in a proceeding under Section 125 of the .Code, the first summons had been returned by the process server unserved and the Court had directed fresh summons by personal service on proper identification and the process server, without serving summons in the manner as directed by the Court, had served it by affixture at the office and the learned Judge held that (his was not proper service of summons and was in violation of Sections 70 and 71 of the Code of Criminal Procedure 1898 (the present provisions being Sees. 64 & 65).

7. The learned counsel also placed reliance upon a judgment of the learned Judge of the Allahabad High Court in Dhani Ram v. State and another, 1974 CrL. L.J. 1234 wherein, in a maintenance proceedings, the notice sent by Court by Registered Post to the respondent was returned undelivered and thereafter, there was a paper publication and the respondent was set ex-parte, the learned Judge set aside the ex-parte order observing, that this was not service in the eye of the law and there was no provision for effecting service on a party, either by Registered Post or by publication in the Newspaper.

8. With great respect to the learned Judge, who decided the above cases, I am unable to agree with the views expressed by them in their judgments. Chapter IX of the Code captioned 'Order for maintenance of Wives, Children and Parents' is a self-contained Chapter and does not contain the mode by which service to the respondent has to be made. Both the learned Judges have assumed that Chapter VI relating to issue of summons, has been statutorily made applicable to Chapter IX as well. A reading of the relevant part of Section 126 extracted hereunder would show that this is not so.

'126(2) 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.'

9. All that is required of the learned Magistrate is to see that evidence is taken in the presence of the respondent and if his personal attendance is dispensed with, in the presence of his pleader, the exception being, when the Magistrate is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court, in which contingency, the respondent could be set ex-parte.

10. In Chapter IX, there is no requirement that the respondent should be served with summons as contemplated in Chapter VI. All that Section 126 would imply is that the Magistrate should put the respondent on notice about the proceedings, so that it would be possible for him to fulfil the mandatory requirement of taking of evidence in the presence of the respondent. This is in contradistinction to the language used in Section 113 in Chapter VIII of the Code dealing with taking bonds for keeping peace and good behaviour. Section 134 in Chapter X-B dealing with public nuisances and Section 145(1) in Chapter X-D all these provisions specifically stating that in these proceedings, summons or order as the case may be, be served on the person, in the manner provided for service of summons. It is significant that in Section 126, there is no such requirement regarding service to the respondent. Chapter IX is akin to these Chapters in the sense that though they are proceedings under the Criminal Procedure Code they are not criminal trials.

11. Chapter VI of the Code is captioned 'Processes to compel appearance'. Under Section 126, Cr. P.C., the Magistrate is not required to compel appearance of the respondent. On the contrary, if the Magistrate is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court, he has to set the

respondent ex-parte. This is so because of the nature of the proceedings under Chapter IX, which the Supreme Court in *Nandlal Misra v. Kanhary Lal Misra* : 1960 CriLJ1246 has stated are civil in nature and the relief given is also essentially civil in nature. Unlike proceedings under Section 125 of the Code, an accused or a witness, as the case may be, has to be compelled to attend Court, by resorting to the processes made available to the Court under Chapter VI such as summons, warrant proclamation and attachment. Since a respondent in proceedings under Section 125 need not be compelled to attend Court, Chapter VI dealing with the processes to compel appearance cannot apply to Chapter IX. This further made clear by the language in Section 126 'wilfully avoiding service', and not 'wilfully avoiding service of summons'. Even Section 126(2) which makes summons procedure applicable to these proceedings, restricts it to mere recording of evidence and does not make summons procedure applicable to commencement of proceedings, by issue of processes.

12. The Full Bench of the Kerala High Court in the decision already referred to above in *Balan Nair v. Bavani Amma and others* 1987 Cri. L.J. 399 has held that service in regard to Chapter IX, is not to be effected strictly in terms of the provisions of Part A of Chapter VI, though the broad principles of the latter Chapter could be invoked and service by Registered Post or through a public servant could be made. The Magistrate guided by the broad principles contained in Part A of Chapter VI. will have to devise ways for service of process. When that has been done, such service cannot be challenged on the ground that service, has not been admitted in terms of the provisions of Part A of Chapter VI of the Code. I am in full agreement with view expressed by the Full Bench.

13. It follows that. Chapter VI is not applicable to proceedings under Chapter IX. The Magistrate could issue process to the respondent either by issue of summons or by issue of notice, sent by Court, by Registered Post or by hand delivery by a Court Officer or any other public servant or in any other manner. If the Magistrate is satisfied that the respondent is avoiding service, he is to set the respondent ex-parte. Then again if he is satisfied that the respondent after service of process, is wilfully neglecting to attend the Court, the Magistrate could set him ex-parte at any stage of the proceedings. Once service is effected on the respondent in some

mode or other, the same cannot be questioned on the grounds that service is illegal, as not being in conformity with Chapter VI.

14. Coming to the facts of the instant case, on 18.11.1985 the case had been taken on the file and posted to 5-12-1985. Notice to the petitioner and Sekar had been ordered by Registered Post with Acknowledgement Due. The service was not effected ; then again the case had. been adjourned to 2-1-1986, on which date a similar order had been passed and the Court had issued notice by Registered Post with Acknowledgement Due fo the petitioner, who had received the same and signed in the Acknowledgment, which is also available in the Court records. Notice on Sekar however had been returned unserved. The docket shows that the petitioner had been served and on 17.1,1986, since the petitioner in spite of receiving notice had failed to appear in Court, warrant had been issued for his appearance. Between 17-1-1986 and 17-6-1986, the case had undergone several adjournements with endorsements in so far as it related to the petitioner, that the non-bailable warrant was pending. On 17-6-1986 paperpublication had been ordered for the petitioner, since meantime Sekar had been given up. 'On 7-8-1986 paper publication had been made and on 13-8-1986, the petitioner was set ex-parte and evidence had been taken. It is therefore, clear that notice had been sent by Court by Registered Post with Acknowledgement Due and the petitioner has received the notice and signed in the Acknowledgement. It is not the case of the petitioner that he never received the notice or that the Acknowledgement is forged. Service by Court by Registered Post with Acknowledgement Due is proper service, since the petitioner had been put on notice about the proceedings pending against him. I am unable to accept the contention of the learned counsel for the petitioner to the contrary.

15. Regarding the second submission that the learned Magistrate had not given a finding before setting him ex-parte, that the petitioner had wilfully neglected to attend Court, it is seen that the order of the learned Magistrate does not contain a finding that the petitioner has wilfully neglected to attend Court. In the impugned order, the learned Magistrate has stated that several notices had been sent to the petitioner and he had failed to appear and thereafter, paper publication had been made and despite that also, the petitioner had not appeared and that holding that

the petitioner had wilfully failed to attend Court, he was setting the petitioner ex-parte, and evidence was being taken. Thus the necessary finding is found in the order itself. The learned counsel for the petitioner would still urge that the petitioner was a Head Constable attached to the Railways and there was no basis for the learned Magistrate to hold that the petitioner had wilfully neglected to attend Court, since the term 'wilfully' cannotes 'wantonly' and failure to attend Court on a single day would not. make the failure to attend wilful. Reference was made to the decision of this Court in Madras State Wakf Board v. Tajmahal Hussian : AIR1968 Mad332 and in the TNK Govindarajulu Chetti v. State 1951 Madras Weekly Notes Crl. 72 wherein the term 'wilful' under the Wakf Act 1954 and under the General Sales Tax Act (Madras Act 11 of 1938) had been interpreted as intentional and deliberate. The relevant provisions on both the above Acts are penal provisions, while Section 126 Cr. P.C. is not. The petitioner is a police constable, quite conversent with legal matters. He had been served with notice even for the hearing on 17-1-1986. The petitioner had been set ex-parte seven months thereafter, on 13-8-1986. If the petitioner had been prevented from attending Court on 17-1-1986 due to any cause beyond his control, he should have taken immediate steps, either to get an, adjournment or to appear in Court any time during the seven months. In view of the clear finding of the learned Magistrate that the failure to attend Court was wilful, there is no merit in the second contention. Further the question whether the failure to attend Court was wilful or not, can be canvassed only in an application under Section 126(2) Proviso and not in a revision under Section 397.

16. Regarding the quantum, the learned Magistrate has awarded Rs. 200/' per month. It is in evidence, that the respondent had settled all her properties on her sons. Though she had claimed Rs. 200/- per month for her medical expenses arid Rs. 300/- for her maintenance, the learned Magistrate had ordered only Rs 200/- obviously because her son Sekar was paying her about Rs. 100/-. The quantum also does not call for any reduction.

17. In the result, the revision is dismissed.