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Sanjay Das Vs. Rinku Das

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Court : Kolkata

Decided On : Mar-23-2007

Reported in : 2007(3)CHN567

Judge : Biswanath Somadder, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 125 and 126

Appeal No. : C.R.R. No. 3167 of 2004

Appellant : Sanjay Das

Respondent : Rinku Das

Advocate for Def. : Usof Ali Dewan, Adv.

Advocate for Pet/Ap. : Lapita Banerjee and ;Rekha Bose, Advs.

Judgement :

Biswanath Somadder, J.

1. Affidavit of service filed in Court today, be kept on record.

2. This is an application directed against several orders passed on 1st December, 2004 by the learned Judicial Magistrate, 1st Class, 2nd Court, Sealdah, South 24-Parganas in M. Case No. 99 of 2004. These orders were passed in respect of an application under Section 125 of the Code of Criminal Procedure, 1973, filed by

the wife, being the opposite party herein.

3. It is the contention of the learned Advocate appearing on behalf of the petitioner that the ex parte order of maintenance passed by the learned Judicial Magistrate on 1st December, 2004, could not have been passed in the facts of the instant case. She submits that on the day, i.e. 1st December, 2004, the learned Advocate representing the husband, had taken out an application before the said learned Judicial Magistrate, requesting the learned Magistrate to grant two months time for filing opposition to the application under Section 125 of the Code of Criminal Procedure, due to illness of the said learned Advocate, who specially stated in paragraph 3 of her application that she was suffering from malaria since the third week of November, 2004, and as such, she was unable to draft the opposition to the application under Section 125 of the Code of Criminal Procedure. The learned Advocate appearing on behalf of the petitioner further submits that the learned Magistrate ought to have adhered to the procedure laid down under Section 126 of the Criminal Procedure Code wherein there is a proviso which says 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, he may proceed to hear and determine the case ex parte. The learned Advocate submits that her client never wilfully avoided service nor did he wilfully neglect to attend the Court. The learned Magistrate ought to have taken such facts into consideration and especially the fact that the learned Advocate who was representing her client, being the husband, was seriously ill and as such had prayed for some time to file opposition to the application under Section 125 of the Code of Criminal Procedure. She submits that in the facts of the instant case, the learned Magistrate ought not to have determined the case ex parte.

4. Learned Advocate appearing on behalf of the opposite party submits that the wife has till date, not received any payment of maintenance in terms of the order so passed by the learned Magistrate. He submits that the ex parte order of maintenance passed by the learned Magistrate, ought not to be set aside by the Court.

5. I have considered the submission made by the learned Advocates appearing on behalf of the respective parties. It appears that on 1st December, 2004, the learned Advocate representing the husband did take out an application stating that she was suffering from malaria since the third week of November, 2004 and due to her serious illness, she was unable to draft the opposition to the application under Section 125 of the Code of Criminal Procedure, 1973. In such circumstances, she had prayed for two months time to file the opposition in the matter. The learned Magistrate while proceeding to pass his order, later on that day itself, ought to have taken into consideration that this was not a case of wilful avoidance of service or wilful neglect to attend the Court by the person against whom an order for payment of maintenance was proposed to be made. The learned Magistrate proceeded to pass the ex parte order without taking into consideration that for the purpose of passing such an ex parte order, on an application under Section 125 of the Code of Criminal Procedure, 1973, he has to be satisfied that the person against whom an order for payment of maintenance was proposed to be made, was wilfully avoiding service, or wilfully neglecting to attend the Court. This is not being the case, the learned Magistrate ought not to have passed the said ex parte order directing payment of maintenance on 1st December, 2004.

6. In the circumstances, the said ex parte order being Order No. 6 dated 1st December, 2004, is hereby set aside. The learned Magistrate is directed to hear out the application under Section 125 of the Code of Criminal Procedure filed by the opposite party within a period of three months from the date of communication of this order, after granting an opportunity to the petitioner herein, to use an opposition in the said matter.

7. I make it clear that no unnecessary adjournment will be granted to either of the parties by the learned Magistrate while hearing out the application under Section 125 of the Code of Criminal Procedure, 1973. I also make it clear that I have not gone into the merits of the case and the learned Judicial Magistrate shall dispose of the said application in accordance with provisions of law and after taking into consideration all evidence that may be produced by the parties, at the time of hearing.

8. The application stands disposed of in terms of the directions given hereinabove.

9. Criminal section is directed to supply urgent certified copy of this order, if applied for, to the respective parties.

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