

Dipankar Mukherjee Vs. Bindu Sarkar

Dipankar Mukherjee Vs. Bindu Sarkar

SooperKanoon Citation : sooperkanoon.com/876395

Court : Kolkata

Decided On : Jul-11-2005

Reported in : 2005(4)CHN198

Judge : S.K. Gupta, J.

Acts : Criminal Rules - Rule 46; ;Criminal Order; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 62 to 69, 125, 126, 126(2), 397, 401 and 482

Appeal No. : C.R.R. No. 663 of 2005

Appellant : Dipankar Mukherjee

Respondent : Bindu Sarkar

Advocate for Def. : Amar Kr. Bhounmik and ;Sandip Kundu, Advs.

Advocate for Pet/Ap. : Sekhar Basu and ;Debabrata Roy, Advs.

Disposition : Application allowed

Judgement :

S.K. Gupta, J.

1. This revisional application has been filed under Sections 397, 401 and 482 of the Cr. PC against the order dated 12.01.2005 passed by the Id. Additional Chief Judicial Magistrate, Sealdah in Case No. M-89 of 2004 wherein he allowed the

maintenance case, filed under Section 125 Cr. PC, ex parte, by directing the petitioner to pay Rs. 2,500/- per month to the opposite party towards her maintenance with effect from the date of the order.

2. Case of the petitioner is that he is a member of the Rajya Sabha since April, 1994. On 16.07.2004, the opposite party filed an application under Section 125 of the Cr. PC before the Id. Additional Chief Judicial Magistrate, Sealdah claiming maintenance @ Rs. 5,000/- per month for herself on the allegation that her marriage with the petitioner took place on 27.08.2003 as per Hindu rites at Kalighat Temple. She has stated in the petition that it was her second marriage. Her first marriage took place in the year 1981 with one Mahadeb Sarkar and out of the said wedlock a son and a daughter were born. She left her first matrimonial house along with children in the year 1993 and started living in her father's house at Madhyamgram. In the later part of the year 1996, the petitioner appointed her to look after his mother. Since then, she was living in the house of the petitioner at Manicktala Main Road. During this time, it has been alleged in the petition, the O.P. and the petitioner developed intimate relationship. As such, at the insistence of the petitioner, the opposite party filed suit for divorce against her first husband and obtained decree on 06.06.2003. The O.P. has further alleged in the said petition filed under Section 125 of the Cr. PC, that she conceived twice at the instance of the petitioner but she was compelled to undertake abortions in a private nursing home in the month of December, 2000 and August, 2001. After obtaining the decree of divorce, the opposite party and the petitioner got themselves married at Kalighat Kali Temple on 27.08.2003. Since then, they started living in the said Manicktala house as husband and wife. Thereafter the present petitioner started living at Delhi and got involved with another woman there. It has further been alleged that the petitioner neglected to maintain the opposite party and ousted her from the said Manicktala house with the help of antisocial elements. The O.P. has further alleged in the said petition that the petitioner is earning about Rs. 25,000/- per month and is getting other facilities as a member of the Parliament. On the other hand, the O.P. has claimed that she has no income of her own and she is unable to maintain herself. As such, she filed the petition under Section 125 Cr. PC against the petitioner praying for maintenance. On the basis of that, on 16.07.2004 the Id. Additional Chief Judicial Magistrate,

Sealdah directed issuance of notice upon the petitioner asking him to show cause by 03.09.2004 thereafter on 03.09.2004 the Id. Magistrate fixed 04.10.2004 for appearance and further order observing that the A/D card was returned after service. The petitioner has claimed that no notice/summon was ever served upon him. On 12.01.2005 the Id. Magistrate recorded statement of the O.P. and thereafter on the same day Id. Magistrate was pleased to pass ex parts order allowing the petition, filed by the O.P. under Section 125 of the Cr. PC, and directed the petitioner to pay Rs. 2,500/- per month in favour of the O.P. towards her maintenance.

3. According to the petitioner, he was not aware anything about this proceeding as well as about the impugned order as passed by the Id. Magistrate. Only on 26.02.2005 the petitioner was informed by his friends, who are residing at Kolkata that the opposite party obtained an ex parte Order Of maintainance from the Court of the Id. Magistrate. After receiving the said information, the petitioner engaged his Advocate and instructed him to obtain copies of the relevant orders. Said Id. Advocate obtained the certified copies of the orders, as passed by the Id. Magistrate on 28.02.2005 and handed over the same to the petitioner on 01.03.2005. On perusal of the orders passed by the Id. Magistrate, the petitioner for the first time came to know that an ex parts order was passed against the petitioner on the basis of an application filed by the opposite party as per provisions of Section 125 of the Cr. PC. By filing the present revisional application, the petitioner has claimed that the Id. Magistrate was not at all justified in passing the ex parts order against him. It has been claimed that no notice for filing show-cause against the petition under Section 125 of the Cr. PC was served upon the petitioner. Further contention of the petitioner is that the Id. Magistrate did not follow the procedure for service of notice as provided in the Criminal Procedure Code as well as in the Criminal Rules and Orders, as passed by this High Court. Moreover, while deciding the said petition exparte, the Id. Magistrate also did not indicate his reasons as to why the said petition should be heard ex parte. There is nothing in the order to show that the Id. Magistrate was satisfied that the petitioner was wilfully avoiding service of summons and, as such, he decided to proceed with the matter ex parte. The petitioner has claimed that the order, as passed by the Id. Magistrate, suffers from material illegality and it has certainly caused failure

of justice. He has prayed, that this Court, by exercising its revisional jurisdiction, should interfere into the said order and the same should be set aside.

4. The O.P. has contested the application and the Id. Advocate for the opposite party submitted that notice was duly served upon the petitioner and as in spite of service of the notice, the petitioner did not appear before the Court, so there was no other alternative for the Court then to dispose of the petition filed under Section 125 of the Cr. PC, ex parte. According to him, the Id. Magistrate was perfectly justified in passing the impugned order by directing the petitioner to pay Rs. 2,500/- per month to the opposite party towards her maintenance and as such he submits that the revisional application should be rejected.

5. Ld. Advocate for the petitioner mainly argued on the point that the notice was not at all served upon the petitioner and as the Id. Magistrate did not follow the procedure, as provided in the Cr. PC as well as in the Criminal Rules and Orders in sending the notice to the petitioner, so the ex parte order, which was passed on the basis of the said alleged service of notice, is totally illegal and cannot stand. In this respect he has drawn my attention to the provisions of Section 62 to 69 of the Cr. PC. It appears from Section 62 Cr. PC that it has been provided therein that the summons is to be served by a police officer or by an officer of the Court and it should be, as far as practicable, be served personally on the person so summoned, by delivering or tendering to him one of the duplicate of the summons and the said person on whom the summons has been served is to sign a receipt on the back of one of the duplicate summons. Section 67 of the Cr. PC provides that in case a summons is to be served beyond the local jurisdiction of the Court, then the said Court will send the summons in duplicate to a Magistrate within whose local jurisdiction the person summoned, resides. From those provisions it is very much clear that the legislature has clearly laid down the procedures which are to be followed in the case of issuing summons to a person from the Court. It is apparent from the orders of the Id. Magistrate that those procedures were not followed. It is the admitted position that the petitioner is a Member of the Parliament and he is at present staying at Delhi. Even the notice from the Court of the Id. Magistrate was allegedly sent to his Delhi address describing him as a Member of the Rajya Sabha. So, the fact remains that the petitioner was at the

relevant time, residing outside the jurisdiction of the Court of the Id. Magistrate, Sealdah. So, service of summons upon the petitioner should be made as per provisions of Section 67 Cr. PC wherein it has been provided that when a summons is to be served upon a person residing at any place outside the local jurisdiction of the Magistrate, it shall ordinarily send summons in duplicate to a Magistrate within whose local jurisdiction the person summoned resides. So far as the present case is concerned, no such step has been taken by the Id. Magistrate in causing service upon the petitioner. That apart it appears from Rule 46 of the Criminal Rules and Orders Volume 1 which has been framed by this Court, it has been provided therein the manner in which the service is to be made in case of a Member of the Parliament. It appears that similar procedure, as provided in the Cr. PC, has been made in chapter 3 of the Criminal Rules and Orders in respect of service of process upon a particular person. There is no doubt that there is no reflection of compliance of those provisions in the orders as passed by the Id. Magistrate. Ld. Advocate for the opposite party drew my attention that notice was sent through registered post upon the petitioner and he received it. But the petitioner, as I have already pointed out, has denied that the said notice was received by him. Whether the acknowledgement card which has been filed before the Magistrate bears the signature of the petitioner or not, cannot be decided at this stage. Fact remains that notice was directed to be served upon the petitioner through the postal department. But it appears from the various provisions of the Cr. PC as well as rule made under Criminal Rules and Orders, that there is no provision for serving summons/notice through the postal department upon an opposite party. Service through the postal department, in respect of this type of case, has been totally non-existent in the Cr. PC as well as in the Criminal Rules and Orders. Be that as it may, it is very much clear that the Id. Magistrate did not follow the steps which have been provided in the statute for service of notice upon the petitioner. Ld. Advocate for the petitioner argued that service of notice, is the pre-condition for the Magistrate to pass any order in a maintenance case against the husband and since the said service has not been properly done, so any order, as passed by the Id. Magistrate, is beyond jurisdiction and suffers from material illegality. In this respect, he has drawn my attention to the decision reported in : AIR1971 Cal244 , Hemendra Nath Chowdhury v. Archana Chowdhury, wherein it

has been held that an ex parte order of maintenance passed in absence of proper service of summons on the party that was saddled with the maintenance was bad for non-conformance with procedure and is liable to be set aside. Id. Advocate for the opposite party argued that since a proceeding under Section 125 Cr. PC has been introduced in the statute book in order to do social justice, so said proceeding cannot be vitiated only on the ground of not serving the notice/summons properly on the party concerned, as provided in the statute. According to him, notice was duly sent by registered post with A/D to the petitioner and he received the same and thereafter did not to attend the Court. He argued that the Id. Magistrate was justified in holding that the said service was proper so far as the petitioner was concerned. But I regret, I cannot agree with this argument in view of the decision, as cited above. Moreover, it is the settled principle that when the statute provides for performing a particular act in a particular way, then the said act must be performed in that particular way. There is no scope for the Id. Magistrate to follow a separate procedure as per his whims. So, from the above discussion, I have got no hesitation to hold that the opposite party has failed to prove that notice was properly served upon the petitioner so far as the proceeding under Section 125 of the Cr. PC is concerned particularly when the petitioner clearly denied that notice was served upon him.

6. That apart, it is the admitted position that Id. Magistrate proceeded to hear the maintenance case filed by the opposite party against the petitioner ex parte. In Section 126 of the Cr. PC the procedure has been laid down therein as to when and in which manner the Magistrate is entitled to proceed with the maintenance case ex parte. It has been clearly laid down in the proviso under Sub-section (2) of Section 126 of the Cr. PC 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. So, it appears that before proceeding with the matter ex parte, the Magistrate is duty bound to record his satisfaction that the person concerned, against whom an order of maintenance was proposed to be made, was wilfully avoiding service or wilfully neglecting to attend the Court. But so far as the orders as passed by the Id. Magistrate, the certified copy of which has been filed in this revisional application, it appears that

no such satisfaction has been recorded by the Id. Magistrate before proceeding with the matter ex parte. Simply he passed an order to the effect 'The O.P. has taken no step and he is found absent on calls. Fix 14.12.2004 for ex parte hearing.' This order shows that no reasoning whatsoever has been given by the Id. Magistrate for his decision to hear the matter ex parte. He has not stated anything in his order that he was satisfied that the person concerned was wilfully neglecting to attend the Court. As such, it is very much clear that the provisions of Section 126 Cr. PC has not been followed by the Id. Magistrate. In this respect, the Id. Advocate for the petitioner cited a decision reported in 1993 Criminal Law Journal 1892, *Satrughna Adak v. Sonali Adak*, wherein it has been clearly laid down 'An ex parte order is possible only after satisfying these essential requirements of Section 126(2) Cr. PC. If the Magistrate is not satisfied about the prerequisite conditions 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, there is no scope for passing an ex parte order.' So far as the present case is concerned, I have already pointed out that the Id. Magistrate did not record such satisfaction while proceeding to dispose of the maintenance application ex parte against the present petitioner. As such, I have got no hesitation to hold that the ex parte order, as passed by the Id. Magistrate suffers from material illegality and consequently it is desirable that it should be set aside.

7. Id. Advocate for the opposite party submits that there is provision in the Cr. PC itself for the petitioner to file application for setting aside the ex parte order before the Id. Magistrate. But the petitioner did not invoke that jurisdiction and came directly to this Court which is not permissible. As such, this revisional application, as filed in this Court, is not maintainable. But I have already pointed out that the petitioner has been able to prove that the Id. Magistrate did not follow the procedures, as laid down in the statute regarding the service of summons while proceeding to hear the matter ex parte. So the very jurisdiction of the Id. Magistrate in passing the impugned order has been challenged in this revisional application. It is the well-settled principle that a Revisional Court should not hesitate to interfere into any order, passed by the subordinate Court, if it appears that the order, so passed by the Court below suffers from material illegality and is without jurisdiction. So far as the present case is concerned, I have already

pointed out that the impugned order of the Id. Magistrate suffers from material illegality and it was certainly without jurisdiction since he did not follow the procedure as laid down in the statute, before proceeding to hear the matter ex parte. Consequently, I hold that this Court has got ample power to interfere into the said order by exercising its revisional jurisdiction.

8. Therefore, from my above discussion, I am of opinion that the Id. Magistrate was not at all justified in passing the ex parte order against the petitioner as he did not follow the procedures established by the statute and so in my considered opinion, it is a fit case where the ex parte order, as passed by the Id. Court below should be set aside and the matter should be sent back to the Id. Magistrate for disposing of the same afresh after hearing both the sides. Since the present petitioner has now become aware of the filing of the petition under Section 125 of the Cr. PC against him by the opposite party, so appropriate direction should be given to him to enter appearance before the Court below and to file a show-cause within a specified time. As the petition has been filed under Section 125 of the Cr. PC, so I think it will be proper for this Court to give necessary direction upon the Id. Magistrate to dispose of the said application expeditiously.

9. In the result, the revisional application is allowed on contest but without any cost. The impugned order dated 12.01.2005 passed by the Id. Additional Chief Judicial Magistrate, Sealdah in Case No. M-89/2004 whereby he allowed the said misc. case exparte against the petitioner and directing him to pay Rs. 2,5007- in favour of the O.P., is set aside. The Id. Magistrate is directed to dispose of the said maintenance case afresh after hearing both the parties by offering opportunities to them to adduce evidence in support of their respective contention. Since, the petitioner has now got the knowledge about the institution of the maintenance case, so he is directed to submit his show-cause petition against the petition under Section 125 of the Cr. PC by 30.07.2005 before the Id. Magistrate. No further notice/summons is required to be served upon the petitioner in respect of the petition filed under Section 125 of the Cr. PC. The Id. Magistrate is directed to fix the case as pending before him, on 30.07.2005 for filing show-cause by the present petitioner, against the maintenance petition and thereafter the Id. Magistrate is directed to dispose of the maintenance application as expeditiously

as possible preferably within three months from the filing of the show-cause, by allowing both the parties to adduce evidence in support of their respective contention. The Id. Magistrate is directed not to allow any unnecessary adjournment to either of the side. I make it very clear that while disposing of this revisional application, the merit of the petition filed under Section 125 of the Cr. PC has not been taken into consideration by this Court and the matter is left open for the Id. Magistrate to decide in accordance with law without being influenced in any way by the observations, as made in this revisional application.

10. Department is directed to send a copy of this order immediately by special messenger to the Id. Magistrate for his information and taking necessary action.

11. Xerox certified copy, if applied, may be handed over to the parties on urgent basis.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com