

Abdus Sovan Vs. Rokia Bibi

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Court : Kolkata

Decided On : Mar-24-2005

Reported in : I(2006)DMC181

Judge : Arun Kumar Bhattacharya, J.

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

Appeal No. : CRR 1554 of 2001

Appellant : Abdus Sovan

Respondent : Rokia Bibi

Advocate for Def. : Saidur Rahman, Adv.

Advocate for Pet/Ap. : Bratindra Narayan Ray, Adv.

Disposition : Application dismissed

Judgement :

Arun Kumar Bhattacharya, J.

1. The hearing stems from an application filed by the petitioner praying for setting aside the order dated 9.1.2001 passed by the learned Additional Sessions Judge, 3rd Court, Murshidabad in Criminal Motion No. 258 of 2000 affirming the order dated 1.4.2000 passed in Execution Case No. 52 of 1998 by the learned Judicial

Magistrate, Additional Court, Lalbagh, Murshidabad.

2. The petitioner's case is that O.P. No. 1 obtained an ex parte order of maintenance @ Rs. 200 p.m. each for self and her child on 2.4.1998 from the Court of learned Judicial Magistrate, Additional Court, Lalbagh in M.R. Case No. 204/ 1997 under Section 125, Cr.P.C. without any notice being served upon the petitioner who on coming to learn about the said ex parte order, filed an application under Section 126(2), Cr.P.C, being registered as Misc. Case 11/1998 on 26.1.1998 for setting aside the said order. O.P. No. 1 in the meantime filed Execution Case being No. 52/1998 which was stayed by the learned Magistrate vide order dated 17.9.1999 till 17.12.1999 and it was further extended till 1.4.2000. On 1.4.2000 the learned Magistrate instead of extending the period of stay directed the petitioner to make payment on 3.5.2000. The petitioner moved in revision being Criminal Motion 258/2000 which was dismissed on contest on 19.1.2001.

3. Being aggrieved by and dissatisfied with the said order, the petitioner has come up before this Court with the above prayer.

4. All that now requires to be considered is whether the learned Court below was justified in passing the said order.

5. Mr. Bratindra Narayan Ray, learned Counsel for the petitioner contended that since the order of maintenance was passed ex parte without service of any notice upon his client, he filed an application under Section 126(2), Cr.P.C. for setting aside the ex parte order and when the learned Magistrate was pleased to stay the execution proceeding for a limited period, the learned Revisional Court considering the aspect ought to have set aside the order of learned Magistrate as the very object of filing the said Misc. Case 11/1998 under Section 126(2), Cr.P.C. would be frustrated. Mr. Saidur Rahman, learned Counsel for the O.P., on the other hand, while supporting the impugned order contended that there was no prayer on behalf of the petitioner for extending the order of stay, in other words, no basis for extension and so the learned Court below could not extend the same suo motu.

6. Section 125, Cr.P.C. provides a swift and cheap remedy against any person who despite means neglects or refuses to maintain his wife, children and parents, the primary object being to prevent starvation and vagrancy. Generally, non-service of notice in respect of the main proceeding may be a good ground for stay of execution proceeding. But such principle may not be applied blindly in a proceeding of this nature where it will be the duty of the learned Magistrate, having regard to the above avowed object, to consider the prayer for stay on behalf of the petitioner only in a deserving case taking into account the facts, circumstances and other materials available in the record. In short, mere filing of an application for setting aside the ex parte order of maintenance by the petitioner will not ipso facto lead the learned Magistrate to grant stay of execution proceeding. In the case on hand, the petitioner has prayed for setting aside the ex parte order on the ground that notice was falsely served upon him in collusion with the O.P./wife. So, service is not denied, but it has been contended to be a false which is a matter for decision in the said proceeding. Nevertheless, when there was no prayer for extension of stay on 1.4.2000 on behalf of the petitioner thereby suggesting his unwillingness in this regard, there was no scope on the part of the learned Magistrate to extend the period of stay suo motu.

Accordingly, there being no material to interfere with the impugned order, the present application be dismissed on contest but without any cost.

Let a copy of this order be sent down at once to the learned Court below.

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