

Birbal Vs. Bimla Devi and anr.

Birbal Vs. Bimla Devi and anr.

SooperKanoon Citation : sooperkanoon.com/889703

Court : Himachal Pradesh

Decided On : Nov-04-1992

Reported in : 1993CriLJ1124

Judge : Kamlesh Sharma, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 61 to 67 125, 126 and 126(2); ;[Constitution of India](#) - Article 227

Appeal No. : Criminal Misc. Petn. (Main) No. 682 of 1991

Appellant : Birbal

Respondent : Bimla Devi and anr.

Advocate for Def. : Anand Sharma, Adv.

Advocate for Pet/Ap. : Naresh Kumar Thakur, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

Kamlesh Sharma, J.

1. This petition under Section 482, Cr. P.C. read with Article 227 of the Constitution India has been filed by petitioner Birbal for quashing order dated 16-8-

1991 passed by the Sessions Judge, Hamirpur whereby his criminal revision No. 29 of 1990 was dismissed and the judgment dated 22nd October, 1990 of the Judicial Magistrate Ist Class, Hamirpur was confirmed. By judgment dated 22nd October, 1990, the Judicial Magistrate had dismissed his application under Section 126(2) Cr. P.C. for setting aside ex parte order dated 21st December, 1988, by which order the respondents, who are wife and minor daughter of the petitioner, were awarded maintenance allowance of Rs. 250/- per month and Rs. 150/- per month respectively.

2. In his application under Section 126(2), Cr. P.C. for setting aside ex parte order dated 21st December, 1988 the petitioner has alleged that he was not served in the application under Section 125, Cr. P.C. filed by the respondents. According to him, the summons sent by registered post at Jaishree Textile Mills, Village Daun, Tehsil Kharar, District Ropar address and reported to be refused by him could not be considered as proper service on him as he had left the service of that Mill in September, 1988. The petitioner had further alleged that he had come to know about the ex parte order dated 21st December, 1988 passed in application under Section 125, Cr. P.C. only on 31st March, 1989 when he received notice of the execution petition filed by the respondents. This application was resisted by respondents, inter alia, on the ground that it was barred by limitation and the petitioner had knowledge of the application under Section 125, Cr. P.C. much before 31st March, 1989. After framing the issues and taking evidence of the parties thereon, the Judicial Magistrate held that the petitioner was duly served with the notice of application under Section 125, Cr. P.C. and the application under Section 126(2) Cr. P.C. filed by him for setting aside ex parte order dated 21st December, 1988 was barred by limitation.

3. These findings were further confirmed by the Sessions Judge in his judgment dated 16th August, 1991 passed in Criminal Revision No. 29 of 1990. Hence, the present petition.

4. This Court has heard learned counsel for parties and gone through the record. First submission made by Shri N.K. Thakur, learned counsel for the petitioner, is that ex parte proceedings held and ex parte order dated 21-12-1988 passed by the

Judicial Magistrate against the petitioner are bad as Judicial Magistrate did not record his satisfaction that the petitioner (respondent in the petition before the Judicial Magistrate) was wilfully avoiding service or wilfully neglecting to attend the Court as required under Proviso to Sub-section (2) of Section 126 of the Code of Criminal Procedure.

5. Before this Court deals with this submission, let it be made clear that by now it is well settled that proceedings under Section 125 of the Code of Criminal Procedure are essentially of civil nature, since the claim made against husband or parents or children is essentially of civil nature. The person against whom claim for maintenance is made, is not an accused of any offence nor he can be convicted or sentenced. The provisions under Chapter IX of the Code of Criminal Procedure pertaining to maintenance of wife, children and parents, prescribe a summary procedure for compelling a person to maintain his wife, children and parents. Looking to the compelling nature of the relief, these provisions have been put in the Code of Criminal Procedure and proceedings thereunder are entrusted to Judicial Magistrate. The findings of a Judicial Magistrate under this Chapter are not final and the parties can legitimately agitate their rights in a Civil Court. This Chapter is a self-contained.

6. As provided under Section 126 of the Code of Criminal Procedure, the Magistrate is duty bound to inform the person against whom the claim of maintenance is made to enable him to appear and contest the same. The Magistrate will further record evidence in the presence of that person if he puts in his appearance but the Magistrate cannot compel him if he chooses not to appear and contest the claim against him. In these circumstances, the Magistrate is at liberty to proceed ex parte but after satisfying himself that the person against whom the claim of maintenance is made is wilfully avoiding service or wilfully neglecting to attend the Court. The avoiding of service or failure to attend the Court should be deliberate. The perusal of the provision shows that the Magistrate is not required to record his satisfaction in his order and failure to do so will not vitiate the proceedings. On the other hand, it is always better if such a satisfaction of the Magistrate is explicit from his order. If not, it should be discernible from the facts and circumstances on the record to hold the ex parte proceedings valid.

(Please see : Balan Nair v. Bhawani Amma Valsalamma, 1987 Cri LJ 399 : (AIR 1987 Kerala 110) (FB) and S. Bhupinder Singh Makkar v. Smt. Narinder Kaur, 1990 Cri LJ 2265 (Delhi).)

7. In view of above interpretation of proviso to Sub-section (2) of Section 126 of the Code of Criminal Procedure, the submission made by Shri Thakur deserves to be rejected. In the present case, the order dated 14-10-1988 for proceeding ex parte is as under :--

Respondent served for today as he has refused to take the R.A.D. Hence proceeded ex parte. Now for ex parte evidence file be put up on 28-11-1988.

The satisfaction of the Judicial Magistrate is discernible from this order as refusal of notice sent by registered post was sufficient for the Magistrate to come to the conclusion that the present petitioner was wilfully avoiding service. Though there are concurrent findings of fact by both the courts below that there was proper service of the notice of petition of maintenance filed by the respondents, yet this Court has gone through the records of lower court to find out whether registered A.D. notice which was refused by the petitioner, was sent at his correct address, and whether the said refusal was sufficient to come to the conclusion that he was wilfully avoiding service.

8. The first date for the service of the petitioner and one Smt. Pawan Kumari, who was impleaded as respondent No. 2 in the petition on the allegations that petitioner has married with her, was fixed for 29th August, 1988 but notices sent by ordinary course were not served on them. Again, it was ordered that notices be sent to petitioner and Smt. Pawan Kumari by ordinary course as well as by registered post for the next date fixed on 30th September, 1988. Notice by registered post sent to petitioner Birbal at his address C/o Manager Jaishri Woollen Textile Mills, Post Office Down, Tehsil Kharar, District Ropar was returned with the remarks dated 12th September, 1988 that he was on leave but notice sent to Smt. Pawan Kumari care of the petitioner on the same address was returned with the remarks dated 11-9-1988 'refused'. Taking it as a proper service and wilful avoiding of service by Smt. Pawan Kumari, ex parte proceedings were held against her and to serve the petitioner fresh summons by ordinary course as well

as by registered (post were ordered for 14-10-1988. The notice sent by ordinary course was received back with the report dated 11-10-1988 that the Chowkidar of Jaishri Woollen Textile Mills had informed that no person of the name of Birbal, that is, the petitioner was working in the factory. But the other notice sent by registered post was received back with the remarks dated 7-10-1988 of the postman that it was refused by the addressee, that is, the petitioner. For the hearing on 14-10-1988 another registered A.D. notice was sent at village address of the petitioner which was returned with a different remark dated 8-10-1988 that he had left without address.

9. The stand taken by the petitioner that he had left the service of Jaishri Woollen Textile Mills on 31st August, 1988 or September, 1988 and he was residing in his native village is not proved from the record. On 12-9-1988 he was on leave as reported on the Registered A.D. cover sent at his address Jaishree Woollen Textile Mill. On 7-10-1988 he had refused to receive another registered A.D. notice sent on the same address as per the remarks of the postman. He was also not available at his village address to receive notice on 8-10-1988 and it was reported that he left without address. It is correct that it was reported on the notice sent by ordinary course for 14-10-1988 that no person by the name of the petitioner was working in the factory but from the totality of documents on record it could be concluded that he knew about the filing of petition under Section 125 Cr. P.C. by the respondents and he was wilfully avoiding the service thereof. This was also stand taken by the respondents in reply to the petition under Section 126(2) of the Code of Criminal Procedure. If he was not working in Jaishri Woollen Textile Mills after 31st August, 1988 as stated by him in the Court, how could the postman make a remark dated 12-9-1988 on the registered A.D. cover that he had gone on leave? On the other hand, from the remark dated 11-9-1988 of 'refused' made on the registered A.D. cover sent to Smt. Pawan Kumari C/o the petitioner at his address of Jaishri Woollen Textile Mills, it is clear that the petitioner knew about filing of the petition by the respondents. Therefore, this Court finds no reason to differ with the findings of both the courts below that the petitioner was wilfully avoiding the service of the petition under Section 125, Cr. P.C. filed by the respondents and trial Magistrate was justified in holding ex parte proceedings and passing ex parte order dated 21st December, 1988.

10. Another submission made by Sh. Thakur is that service of notice of proceedings under Section 125, Cr. P.C. by registered post, is not a valid service. According to him, it was required to be in accordance with the mode prescribed under Chapter VI of the Code of Criminal Procedure.

11. Again, this Court finds no substance in this argument. As noticed earlier, Chapter IX of the Criminal Procedure Code is a self-contained one and Section 126 provides the procedure to be followed by the Magistrate for holding summary inquiry to decide the claim of maintenance made before him. Consistent with the principles of natural justice it has been provided that Magistrate will take all evidence in the presence of person against whom an order of payment of maintenance is proposed to be made. Therefore, when a claim is made, the opposite party; must be informed about it to enable it to appear in the Court either to admit it or to contest it by putting in its defence in writing, cross-examining the witnesses of the claimant and producing its own witnesses. The mode of service of notice is not provided in Section 126 Cr. P.C., therefore, it cannot be presumed that service of notice must be effected in accordance with the modes provided under Chapter VI of the Code of Criminal Procedure. Though, broad principles laid down under Sections 61 to 67 Cr. P.C. may be invoked yet the Magistrate is free to adopt any other mode keeping in view the urgent nature of relief sought before him. The Magistrate is only to ensure that the person against whom claim is made is given due information thereof to enable him to appear and contest, if he so desires.

12. If the Magistrate adopts the mode of sending the notice by registered post, the service of such a notice cannot be termed as invalid as it is not provided under Chapter VI of the Code of Criminal Procedure. It has been held in number of authorities by various High Courts that in addition to the modes provided under Chapter VI of the Code of Criminal Procedure, mode of service by registered A.D. post may be adopted. In the opinion of this Court, for the reasons given hereinabove, if in the facts and circumstances of a case the Magistrate considers it proper and expedient he may resort to the mode of service by registered post directly without sending notice by modes provided in Sections 61 to 67 of the Criminal Procedure Code. For holding this opinion, this Court has taken support

from Full Bench judgment of Kerala High Court in Balan Nair v. Bhavani Amma Valsalamma, 1987 Cri LJ 399 : (AIR 1987 Kerala 110).

13. One more point urged by Shri Thakur is that limitation of three months for filing application under Section 126(2), Cr. P.C. for setting aside ex parte order starts from the date of knowledge of the ex parte order and not from the date of the ex parte order. This point has been raised to be rejected. In a case in which ex parte proceedings are held for the reason that service of notice is avoided wilfully, as in the present case, the limitation of filing application for setting aside ex parte order starts running from the date of ex parte order. It cannot be from the date of knowledge because that will be self-contradictory. The findings of wilfully avoiding service are based on the fact that the person has the knowledge of pendency of the proceedings. If yes, he is supposed to know the result of proceedings i.e. ex parte order when it is made.

The result of above discussion is that there is no merit in the petition and it is dismissed. The records of the lower courts be sent back immediately.

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