

Sunanda and Another Vs. Bharat Naik

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Court : Karnataka Gulbarga

Decided On : Jan-31-2011

Judge : The Honourable Mr Justice Arali Nagaraj

Appeal No. : RPFC No.156 of 2006

Appellant : Sunanda and Another

Respondent : Bharat Naik

Advocate for Def. : Sri. R.V. Nadagouda

Advocate for Pet/Ap. : For the Petitioners: Chaitanya Kumar, Veeresh B. Patil, Advocates. For the Respondent: R.V. Nadagouda, Advocate.

Judgement :

Arali Nagaraj, J

The petitioners in Crl.Misc.No.47/2005 on the file of the Learned District Judge, Family Court, Gulbarga (hereinafter referred to as 'Family Court' for short) have sought for enhancement in the maintenance awarded in their favour by the order dated 27.9.2006 passed in the said case. The Family Court has awarded sum of Rs.700/- p.m. in favour of petitioner No.1 and Rs.800/- p.m. in favour of petitioner No.2 respectively being the wife and minor daughter of the respondent.

2. Heard the arguments of Sri Veeresh B. Patil Learned Counsel for the revision petitioners and Sri R.V. Nadagouda, Learned Counsel for the respondent.

3. Learned Counsel for the revision petitioners strongly contends that despite the Family Court observing in its impugned Judgment that the respondent has been a graduate in Engineering, has taken his income at Rs.5000/- p.m. instead of taking at Rs.10,000/- p.m and therefore the amounts awarded as monthly maintenance infavour of the petitioners deserve to be enhanced.

4. Per contra, Learned Counsel for the respondent contends that no acceptable evidence is placed on record by the revision petitioners as to the income of the respondent and therefore, the Family Court has rightly held that the respondent gets income of Rs.6,000/- p.m. He also contends that the Family Court, after considering the fact that petitioner No.1 has been a practicing Advocate, has rightly awarded the said amounts of maintenance. He further contends that the Family Court committed serious error in accepting the affidavit of the 1st petitioner in lieu of her examination-in-chief that too in the absence of the respondent and his counsel and therefore, the impugned Judgment and Order cannot be sustained in law for violation of mandatory provisions of Section 126(2) of Cr.PC. He also contends further that though the respondent has not chosen to file revision challenging the legality and correctness of the impugned Judgment and Order, when once the illegality committed by the Family Court is brought to the notice of this Court, in exercise of its revisional jurisdiction under Section 19(4) of the Family Courts Act, 1984 read with Section 397 of Cr.PC, this Court may set aside the impugned order.

5. I have perused the original records obtained from the Family Court. The order sheet dated 7.7.2005 reveals that on the said date of hearing 1st petitioner filed her affidavit in lieu of her examination-in-chief and the Family Court received the same. It further reveals that the respondent was not present and his counsel was also absent on that day and that the distress warrant issued against the respondent for enforcing the interim order of maintenance was not received. Thus it is clear that the affidavit of the 1st petitioner as her examination-in-chief was received in the absence of the respondent and his counsel.

6. As provided under Section 7(2)(a) of the Family Courts Act, 1984, the Family Court shall have and exercise the jurisdiction of the Magistrate of the First Class vested in him under Chapter IX of Cr.PC while dealing with the petition for maintenance of wife and children. Section 10(2) of the Family Courts Act, 1984 provides that subject to provisions of the said Act and the rules, the provisions of the Code of Criminal Procedure, 1973 or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court. Thus, from the combined reading of the provisions of Sections 7(2)(a) and 10(2) of the Family Courts Act, 1984, it is clear that the Judge of the Family Court exercises the jurisdiction of the Magistrate vested in him under Chapter IX Cr.PC while dealing with the petition for maintenance of wife and children. Section 19(4) of the Family Court Act, 1984 further provides that the High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of Cr.PC, 1973 for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceedings.

7. Therefore, it is clear from the above provisions of the Family Courts Act, 1984 and Cr.PC that the High Court can exercise its revisional jurisdiction vested in it under Section 397 of Cr.PC in respect of any order passed by the Family Court in maintenance proceedings before it. Therefore, I am of the considered opinion that even in the absence of a revision by the respondent challenging the legality and correctness of the impugned Order of the Family Court, this Court in exercise of its revisional jurisdiction under Section 397 of Cr.PC read with Section 19(4) of the Family Courts Act, 1984 can examine the legality, propriety or correctness of the Judgment and Order of maintenance passed by the Family Court. Therefore, the contention of the Learned Counsel for the revision petitioners that since the respondent has not filed his revision challenging the correctness of the impugned Judgment and Order, this Court cannot disturb the same in this revision cannot be accepted.

8. Further, Section 126(2) of Cr.P.C. provides that all evidence to proceedings under Chapter IX of Cr.P.C shall be taken in the presence of the person against

whom an order of 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. Further proviso to sub-Section(2) of Section 126 Cr.P.C. provides that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte.

9. As observed by me supra, on 7.7.2005 on which date the 1st petitioner filed her affidavit in lieu of her examination-in-chief, the respondent and his Counsel were not present. The order sheet does not reveal further that on that date of hearing, personal attendance of the respondent was dispensed with or that the Family Court was satisfied that the respondent, against whom an order of payment of maintenance was proposed to be made, was willfully avoiding service or willfully neglecting to attend the Court. Therefore, recording of the evidence for the petitioners by receiving the affidavit of the 1st petitioner therein in lieu of her examination-in-chief, in the absence of the respondent and his Counsel, is violative of the mandatory provisions of Section 126(2) of Cr.PC and proviso to it.

10. Besides the above, the very filing of the affidavit in lieu of examination-in-chief of either the petitioner or the respondent, in a maintenance proceeding is also violative of provisions of Section 126(2) of Cr.PC inasmuch as, the said provision provides that the evidence shall be recorded in the manner prescribed for summons-cases. The receiving of affidavit in lieu of examination-in-chief of a witness is not prescribed under any of the provisions of Cr.P.C. providing for recording of the evidence in summons-cases. Therefore, I am of the opinion that the receiving of the affidavit of the 1st petitioner in lieu of her examination-in-chief and placing reliance on it, cannot be sustained in law. In this regard, there is a decision of Division Bench of this Court in the case of GAYATHRI vs. RAMESH (ILR 1993 KAR 1857) wherein it is held as under:

“Family Courts Act, (Central Act No.66 of 1984)-Section 7: Criminal Procedure Code, 1973 (Central Act No.2 of 1974) - Sections 125 and 126 - Grant of Maintenance - In proceeding under Section 125 Family Court bound to follow

procedure under Section 126 - Recording of evidence: procedure to be adopted.

HELD

(i) Undoubtedly the Family Court exercises jurisdiction to grant maintenance by virtue of Section 7 of the Act. It is by virtue of Section 7(2) (a) of the Act that the Family Court gets jurisdiction to exercise powers of Magistrate in this regard. When Section 126(2) of the Code prescribes the procedure to be followed regarding recording of evidence in a proceeding initiated under Section 125 thereof and when Section 10(2) of the Act enjoins that the provisions of the Code shall apply to the proceedings under Chapter IX of the Code before the family Court, it is clear that though the proceeding is initiated before the Family Court and not a Magistrate, in a proceeding under Section 125 of the Code, the Family Court is bound to follow the procedure prescribed in Section 126 of the Code, so far as the recording of evidence is concerned..... there is no question of inconsistency between the provisions of the Act and the Code of the over-riding effect of the provisions of the Act in preference to Section 126 of the Code. (Para-3)

Para5. In a proceeding under Section 125 of the Code, the evidence shall be recorded in the manner prescribed for summons case. There is no provision in the Code enabling a Magistrate to take affidavit evidence in a summons case. Therefore the procedure of taking an affidavit in a summons case completely unknown to the provisions of the Code and evidence has to be recorded as prescribed by Section 274 of the Code which relates to recording summons cases and inquiries. If the party against whom the order for payment of maintenance is proposed to be made is absent, the Court cannot straight-away place the said person ex-parte and proceed as in a civil matter. It must be come to a conclusion that, that person is willfully avoiding service or was willfully neglecting to attend the Court and then only he could proceed and determine the case ex-parte as per proviso to sub-Section (2) of Section 126 of the Code. The Learned Judge of the Family Court has not recorded any finding that the respondent was willfully neglecting to attend the Court. Therefore we have come to the conclusion that the procedure adopted by Learned Judge of the Family Court in merely placing the respondent ex-parte and calling upon the petitioner to file an affidavit is highly

illegal and therefore the order has to be set-aside solely on that ground and in that view of the matter there is no necessity to enter into any kind of discussion in relation to the merits of the case put forwarded by the appellant. Therefore it is clear that the order passed by the Family Court should be set aside and the matter should be remitted back to it with a direction to follow the procedure prescribed by Section 126 of the Code and thereafter proceed to dispose of the case according to law.”

11. Respectfully following the above decision of the Division Bench of this Court, I am of the considered opinion that the Family Court committed serious error in accepting the affidavit of the 1st petitioner as her evidence in examination-in-chief and it committed further serious error in recording the evidence of the petitioners in the absence of the respondent without recording its satisfaction that the respondent was willfully avoiding service, or willfully neglecting to attend the Court on the date on which the case stood posted for recording the evidence for the petitioners. Therefore, I am of the considered opinion that the impugned Judgment and Order awarding maintenance to the petitioners herein cannot be sustained in law.

12. However, the fact that the revision petitioners are respectively the wife and minor daughter of the respondent is not in dispute. Though the question ‘whether the 1st petitioner - wife is entitled to maintenance in view of the undisputed fact that she has been a practicing advocate’ is to be decided by the Family Court after recording evidence of both the sides, nevertheless, petitioner No.2, being the minor daughter of the respondent, shall have to be maintained by him. Therefore, I feel it reasonable to direct the respondent to pay some reasonable amount to the petitioners pending disposal of the main petition which amount shall be adjusted towards the maintenance payable by the respondent either to both the petitioners or to 2nd petitioner only in terms of the final order to be passed by the Family Court. Hence the following:

ORDER

The revision petition is allowed. The impugned Judgment and Order of maintenance passed by the Family Court is hereby set aside. The matter is

remanded to the Family Court with a direction to record evidence of both the parties in strict compliance with the provisions of Section 126(2) of Cr.PC and then dispose of the maintenance petition in accordance with law. The respondent, being the husband of the 1st petitioner and father of petitioner No.2, the minor daughter, shall pay to them or deposit with the Family Court a sum of Rs.10,000/- within four weeks from today, towards arrears of maintenance and shall also pay to them Rs.1000/- every month towards current maintenance pending disposal of the maintenance petition and the entire amount to paid or deposited by him shall be adjusted towards maintenance that may be held payable by him either to both the petitioners or to 2nd petitioner only in terms of the final order to be passed in the said case. No order as to costs.

Since it is old matter, the Family Court shall dispose of the same as expeditiously as possible preferably within four months from the date of receipt of copy of this order.

A copy of this order shall be sent forthwith to the Family Court for information and compliance

Both the parties shall appear before the Family Court without any further notice on 10.02.2011.

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