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Rina Ganguly Vs Rashbeharl Ganguly

Criminal Rev. No. 1264 of 1982

Court: Calcutta High Court

Date of Decision: July 20, 1983

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 123, 125, 126, 126(2), 397#General Clauses Act, 1897 â€" Section 27#Limitation Act, 1963 â€" Section 5

Citation: 86 CWN 1076

Hon'ble Judges: N.G. Chaudhuri, J

Bench: Single Bench

Advocate: Haradhan Banerjee, for the Appellant;Satyanarayan Roy, for the Respondent

Final Decision: Allowed

Judgement

N.G. Chaudhuri, J.
This revisional application u/s 397 of the Code of Criminal Procedure at the instance of the wife in a proceeding u/s

125 of the Code is directed against order dated 13. 2. 82 passed in Misc. Case 1126 of 1980 by the Judicial Magistrate 1st Class, Howrah. By

the order impugned the learned Magistrate has set aside the exparte order for maintenance, passed in favour of the wife on the application of the

opposite party-husband u/s 126 of the Code. Alleging that marriage between her and opposite party had taken place on 18. 9. 79 under the

Special Marriages Act and the couple lived in the rented premises of the opposite party at 7/1 Girish Banerjee Lane, P. S. Sibpur for sometime,

the petitioner wife filed an application u/s 125 Cr. P. C. in the Court of S. D. J. M. Howrah on 23. 9. 80. Further she alleged that on 9. 2. 80 the

husband had left her alone in the above noted matrimonial home without making any arrangement for her maintenance and eventually refused to

maintain her. She alleged that opposite party was an Assistant Engineer under the C. M. D. A. and had his office at Sech Bhavan, Salt Lake,

Calcutta and was getting a salary of Rs. 1000/- per month. In the application the father''s name of the opposite party was given as late Bhabatosh

Ganguly and his residential address was given as Village Andul Mohuri (Kulya) near Mohuri Cotton Mill, P. S. Jagacha, District-Howrah and his

office address as Executive Engineer, C. M. D. A. Salt Lake, Sech Bhavan, 1st floor, Calcutta-64. The service return dated 29.10.80 indicates

that the opposite party expressed his reluctance to accept copy of the petition when the same was tendered to him at his residence and the notice

was hung up on the front door of his residence. Still the learned Magistrate was cautious and directed service of notice afresh under registered post

with acknowledgment due. The application etc. were sent to the two addresses of the opposite party noted above under registered post. The

cover addressed to the opposite party''s residence came back with peon''s endorsement "Refused" dated 12. 1. 81; and the other cover

addressed to the opposite party at his office came back with the peon''s endorsement "Not claimed" dated 20. 1. 81. Thereafter on 17. 3. 81 the

exparte order for maintenance of the wife was passed, allowing the wife maintenance at the rate of Rs. 300/- per month from the date of

application.

2. Thereafter the wife petitioner made various attempts to execute the order by issue of distress warrant. Inspite of the learned Magistrate''s order

the police did not take any interest in the matter. By order dated 27.7.81 the learned Magistrate ordered a copy of his order to be sent to S. P.

Howrah. The order dated 14. 9. 81 passed by the Magistrate indicates that O. C. Jagacha P. S. had come to the Court in connection with another

case and the learned Magistrate drew his attention to the police inaction in the matter of service of D. S. in this case and the O. C. gave him an

assurance that the matter would be looked into. Nothing was done and on 19. 10. 81 fresh D. W. was issued to O. C. Jagacha P. S. From the

report dated 15. 11. 81 of Anil Chatterjee, A. S. I. attached to Jagacha P. S. it transpired that he had been to village Puilla near Mohuri Cotton

Mill P. S. Jagacha found one Rashbehari Ganguly son of late Sachin Ganguly but he could not trace out Rashbehari Ganguly son of late Bhabatosh

Ganguly of village Kuilla. In the report he indicated that possibly there were mistakes in the warrant regarding the father''s name, the name of the

village of the opp. party. The opposite party filed a petition in the court below on 2.12. 81 praying for setting the exparte order passed on 17. 3.

81. The notable features of this petition are firstly the petition does not contain any verification with the signature of the opposite party, nor is it

supported by any affidavit; secondly it is admitted that opposite party had a rented room at 7,1 Girish Banerjee Lane and the opposite party was

getting a new house constructed at Pulla, P. S. Jagacha; and thirdly the opposite party alleged that his father''s name is Sachin Gangopadhyay while

in the wife''s petition it was given as Bhabatosh Ganguly, he did not however indicate if his father was dead and the name of his village was Puillya

whereas in the wife''s petition it was named as Kulliya. On the point of marriage it was alleged that the marriage did not take place as alleged by

the wife and he was made to sign some papers and to go through some formalities under duress and intimidation of some designing men. Lastly it

was alleged that the notice of the maintenance proceeding did not reach him.

3. The opposite party did not examine himself as a witness in support of his application for setting aside the exparte order. Still the learned

Magistrate concluded that a serious doubt arose regarding service of notice of the proceedings because of the wrong names of the husband''s

father end village given in the petition. Section 126(2) of the Cr. P. C. (proviso) expressly provides that an exparte order may be set aside for

good cause shown on an application made within three months from the date thereof and the husband''s application was filed long after the said

period, yet the learned Magistrate concluded that the husband had no knowledge of the proceedings before the Police Officer came to him in

November, 1981 in connection with execution of the warrant.

4. Mr. Haradhan Banerjee, the learned advocate for the petitioner assails all the findings of the learned Magistrate. He contends that the opposite

party had all along notice of the proceedings started by the wife and he was ""wilfully avoiding or wilfully neglecting to attend the court"". He further

contends that the learned Magistrate acted in excess of his jurisdiction and illegally in allowing the husband''s petition filed more than three months

after the date of the exparte order. He contends further that an exparte order could be set aside only for good cause shown and in the present case

no good cause was shown by the opposite- party husband and there is no finding to that effect by the learned Magistrate. Mr. Banerjee

accordingly contends that the impugned order is liable to be set aside. The learned advocate for the opposite party, however, points cut that there

was no personal service of the notice of the case of the opposite party and the probability of the notice being suppressed cannot be ruled out.

5. I take up the point of limitation first for consideration. The exparte order for maintenance was passed on 17.3 81 and the application for setting

aside the order was filed on 2.12.81. The proviso to section 126(2) Cr. P.C. prescribes three months limitation from the rate of order. There is

divergence of judicial deciders as to from which date namely, date of order or date of knowledge of the proceedings the period should be counted.

In the decisions in cases of A. S. Govindan v. Miss Margaret, AIR 195C Mud. 168, Hari Singh v. Musammat Dhanu 1962 (2) Cr. L. J. 581,

Haider v. Safoora Bee AIR 1968 Mysore 98 and Parson Kaur v. Bakshish Singh AIR P & H 888 it has been held that the period of limitation

should be courted from the date of order as expressly provided. But in the cases of Zahira Begum v. Mohammad Ghouse AIR 1S66 A.P. 50 and

Hemendra Nath Chowdhury Vs. Sm. Archana Chowdhury, it has teen held that limitation begins from the date of knowledge of the applicant. The

text and terms of the proviso to section 126(2) Cr. P. C. leave no scope for computing the period from the date of knowledge as it has been

explicitly provided ""any order so made may be set aside for good cause shown on an application mace within three months from the date thereof"".

If the date of knowledge falls within three months from the date of order no question of limitation arises and non-service of notice if proved

satisfactorily may be urged as a good cause for setting aside the order. But when this date of knowledge falls beyond the period of three months

from the date of older, question of limitation arises no doubt. In this connection it is worthy of note that there is no Article like Article 122 of the

Limitation Act, 1963 prescribing limitation for application for setting aside exparte orders under Sec. 123 Cr. P.C.. In such circumstances aid of

section 5 of the Limitation Act, 1963 may be taken and non service of notice may be pleaded as sufficient ground for consideration of delay. But in

the present case no application has been made u/s 5 of the Limitation Act 1963 for condonation of delay. The conclusion therefore, is inescapable

that the application was time barred and the learned Magistrate was wrong in entertaining the petition. Next I come to the question if "good cause"

for setting aside the exparte order has been made out. Proviso to Section 126(2) Cr. P. C. explicitly provides that the learned Magistrate may

proceed to hear and determine the case exparte once he 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. So a Magistrate is required to arrive at a positive

conclusion before he passes an exparte order that the person against whom the order is proposed to be made is wilfully avoiding service or

neglecting to attend the court. When an exparte order u/s 126 of the Code has been made the conclusion is inescapable that the learned Magistrate

was satisfied not only regarding due service of process but also regarding opposite party''s wilful avoidance of service or wilful neglect to attend the

court. Consequently subsequent to such exparte order the Magistrate should be slow and cautious to set aside the exparte order. Only when

cogent and convincing evidence is produced to satisfy him that there was no wilful avoidance of service or wilful neglect to attend court the

Magistrate will set aside the exparte order. In the present case the husband did not depose before the learned Magistrate that the process server

did not tender to him the notice of the case or that the postal peon did not offer to him the registered covers addressed to him. The endorsements

of the postal peon''s on the registered covers attracted presumption of service u/s 27 of the General Clauses Act. Further who was more likely to

influence the process server or postal peon, the husband or wife ? According to the husband the wife is a maid-servant and her mother is also

maid-servant whereas he himself is a man of higher social status namely, an Assistant Engineer. Moreover Inspite of some inaccuracy in the name

of the father and village of the husband given in the petition it was not impossible to find out the husband from other particulars of him as given in

the petition. The house of the husband is situated near Mohuri Mill Gate, P. S. Jagacha, P. O. Andul Mohuri. The Police Officer, who had been to

the locale to execute the warrant against the petitioner as a matter of fact found out the husband. So there is no reason to believe that the process-

server or postal peon because of inaccuracies in the description of the husband failed to find him out. The learned Magistrate does not appear to

have considered these aspects of the case. I am, therefore convinced that the husband failed to make out good cause for setting aside the exparte

order. The learned Magistrate''s findings to the contrary are untenable.

Both on the ground of limitation as well as on account of the husband''s inability to make out good cause for setting aside the exparte order this

application of the husband was liable to be dismissed. The learned Magistrate while allowing the application for setting aside the exparte order

appears to have acted illegally and in excess of his jurisdiction. The revision petition will accordingly succeed. The petition is accordingly allowed

on contest. The order of the learned Magistrate passed on 13.2.82 is set aside and the husband''s application for setting aside the exparte order for

maintenance is dismissed on contest.