

(1970) 12 CAL CK 0016
In the Calcutta High Court
Case No : Criminal Revn. No. 41 of 1970

Hemendra Nath Chowdhury	Vs	APPELLANT
Sm. Archana Chowdhury		RESPONDENT

Date of Decision : 22-12-1970

Acts Referred:

Calcutta High Court Criminal Rules and Order — Rule 67(2)
Criminal Procedure Code, 1898 (CrPC) — Section 439, 488(6), 531, 561A, 69
Merchant Shipping Act, 1958 — Section 181(1)

Citation : AIR 1971 Cal 244 : (1971) CriLJ 817 : (1971) 2 ILR (Cal) 435

Hon'ble Judges : Talukdar, J

Bench : Single Bench

Advocate : Priti Bhusan Barman and Kiran Chandra Mitra, for the Appellant;
Amal Kumar Dutt and Alok Kumar Sengupta, for the Respondent

Judgement

Talukdar, J.—This Rule is at the instance of the second party-petitioner, Hemendra Nath Chowdhury, against an order dated the 17th November, 1969 passed by Sri S. C. Talukdar, Chief Presidency Magistrate, Calcutta in case No. M/1103 of 1968 u/s 488 of the Code of Criminal Procedure, rejecting the petitioner's prayer for setting aside an ex parte order dated the 21st April, 1969, passed by the learned Chief Presidency Magistrate, Calcutta directing him to pay Rs. 300/- per month as maintenance to the 1st party-opposite party, Sm. Archana Chowdhury, and also a further order dated the 15th December, 1969 passed by the learned Chief Presidency Magistrate Calcutta directing the issue of a distress-warrant against the petitioner.

2. The facts leading on to the Rule are short and simple. The first party Sm. Archana Chowdhury filed on 12-11-68 an application u/s 488 of the Code of Criminal Procedure in the court of the Chief Presidency Magistrate, Calcutta against the second party, Hemendra Nath Chowdhury, claiming a maintenance of Rs. 350/- per month. It was stated therein inter alia that the first party is the legally married wife of the second party, and their marriage was registered under Act XLIII of 1954 on 27-4-68, and subsequently solemnised also according to

Hindu rites; that after the marriage they lived together as husband and wife upto 14-9-68 in a house at 1, Deshapriya Park (East), Calcutta; that the second party who has no other dependant is employed under M/s. India Steamship Co., of 21, Old Court House Street, Calcutta drawing a pay of Rs. 900/- per month; that all on a sudden the second party left the Deshapriya Park residence on 14-9-68 without any previous intimation and the first party came to know that he had left for Bombay to board a ship therefrom; that the first party was in great difficulties and on 31-10-68 when the second party's ship returned to Calcutta, she and the other members of her family went to the ship to receive him, but the second party who appeared to be indifferent gave out that he will not keep any further connection with her; that the second party in spite of having sufficient means has been neglecting and refusing to maintain the first party who is forced to live with her mother at 4/1, Rajendra Lala Street, Calcutta; and that accordingly she claimed for maintenance. The address of the second party was given as 21. Old Court House Street, Calcutta, C/o. India Steamship Co. Ltd. The case thereafter had a chequered history. On the 12th December, 1968, the notice on the second party returned unserved and the report of the process-server stated that the person concerned could not be found there as he was serving on board the steamship owned by the company. The learned Chief Presidency Magistrate, Calcutta, thereupon by his order of the same date directed fresh notice to be issued for being served on the identification by the first party. 13-2-69 was fixed as the next date. On the 7th February, 1969, as the process-server's report shows, he served the summons by posting the same in presence of two witnesses at 21, Old Court House Street, Calcutta which is the office of M/s. India Steamship Co. Ltd. The report stated that it was duly served by the process-server. The learned Chief Presidency Magistrate, Calcutta, considered the said service to be good and by his order dated the 13th February, 1969 observed that "Notice on the O. P. served by affixture. O. P. is absent. To 3-4-69 for hearing". On 3-4-69 the second party was absent and it was directed by the Court that as none appears for him or any cause is shown on his behalf an ex parte hearing is to start. Thereafter one P.W. was examined. On 12-4-69, the next date, the first party who was present was examined and 16-4-69 was fixed for arguments. On that date the first party was further examined and arguments were heard and 21-4-69 was fixed for judgment. On 21-4-69 an ex parte order was passed by the learned Chief Presidency Magistrate, Calcutta wherein it was observed that "in spite of the notice served on the opposite party, he has not come to contest the claim of the petitioner" and ultimately awarded a maintenance of Rs. 300/- per month to be paid from 1st April, 1969 by the second party to the first party. An order of attachment for Rs. 301/- from the salary of the second party was issued and served at the head office of M/s. India Steamship Co. Ltd., at Calcutta and the second party, while he was at Mombasa, serving on his ship, was informed about the same on 18-8-69 along with the intimation that the amount would be deducted from his salary. Enquiries were made by the second party, who on coming to know about the proceedings and the order passed therein sent an authorization dated the 2nd October, 1969 while

at Venice from his ship "S. S. Indian Merchant" to Sri Bidyut Kumar Banerjee, Advocate wherein he stated that he had no knowledge regarding any proceeding brought by Sm. Archana Chowdhury against him nor had he any notice thereof and instructed him "to take all steps to set aside the decree and/or order passed against him by the learned C. P. M.. Calcutta and for that purpose to present plaint, application, memo of appeal etc., in the said Court for the said purpose". He further agreed to ratify all the actions that will be taken by him in connection with the same. Thereafter on 13-10-69 an application u/s 181(1) of the Merchant Shipping Act, 1958 was filed by the said learned lawyer in the Court of the Chief Presidency Magistrate, Calcutta for setting aside the ex parte order of maintenance dated the 21st April, 1969 and for an ad interim stay of the order pending the hearing of the application. In the body of the said petition it was inter alia stated that there has been an illegal suppression of the facts in the application for maintenance by the first party, including the factum of the second party's absence from Calcutta as a serving seaman. For the ends of justice it was ultimately prayed that the order may be set aside. It was directed thereupon that the petition was to be put up in court along with the original records on 14-10-69. It was then heard in part and adjourned to 28-10-69 for further hearing when the matter was adjourned and on 6-11-69 the learned Advocates of both the sides were heard and two letters filed by the learned Advocate for the second party were kept on the record. After further hearing on the 14th and 15th November, 1969 Sri S. C. Talukdar who succeeded the previous incumbent as the Chief Presidency Magistrate, Calcutta, held inter alia that the said application was not maintainable u/s 181(1) of the Merchant Shipping Act, 1958; that it was also barred by limitation and that as the petition was unsigned by the affected party, it cannot form the legal basis for any action by the court and in that view he rejected the application without entering into the merits thereof. This order was impugned and the present Rule was obtained.

3. Mr. Priti Bhusan Barman, Advocate (with Mr. Kiran Chandra Mitra, Advocate) appearing in support of the Rule on behalf of the second party fairly submitted at the outset that he was not challenging the impugned order on the ground of maintainability of the petition u/s 181(1) of the Merchant Shipping Act, 1958. He conceded that the ratio decidendi of the learned Chief Presidency Magistrate, Calcutta in this context are quite proper but he pressed the Rule on the alternative ground that was urged in the court below viz., under the proviso to Section 488(6) of the Code of Criminal Procedure. He further submitted in this context that there is no bar to such a consideration in view of the inherent powers of this court u/s 561-A of the Code of Criminal Procedure. The said provisions do not really incorporate any fresh powers for the court but reiterate the fact that the court has already such inherent powers. As was observed by Sir Asutosh Mukherjee, J. in the case of Nanda Kishore Singh v. Ram Gulam Sahu, reported in (1913) ILR 40 Cal 955 that "the existence of this inherent power to do justice has been recognized from earliest times.....

It is exercised ex debito justitiae to do that real and substantial justice for the

administration of which alone the court exists". It is pertinent in this context to refer to the principles laid down in Domat's Civil Law, Chapter 12, Section 17 page 88 that "since laws are generally rules, they cannot regulate for all time to come so as to make express provision against all inconveniences which are infinite in number so that their disposition shall express all the cases that may possibly happen". I agree with the contention of Mr. Barman and apart from the alternative submissions already made in the court below for setting aside the ex parte order of maintenance under the proviso to Section 488(6) of the Code of Criminal Procedure, the same can also be interfered with in exercise of the inherent powers of this court, if and when it can be established that it is so expedient in the interests of justice. A reference in this context may also be made to the case of Hukum Chand Boid v. Kamalanand Singh reported in (1906) ILR 33 Cal 927 decided by Sir John Woodroffe and Sir Asutosh Mukherjee, JJ. Sir John Woodroffe, J. delivering the judgment of the court observed at page 930 that "for my part I am always slow to believe that the court's powers are unequal to its desire to order that which it believes to be just". I respectfully agree with the said observations. Finality is a good thing but justice is better and I accordingly hold that the application for setting aside the ex parte order of maintenance filed in the court below cannot be thrown out merely because it purported to be u/s 181(1) of the Merchant Shipping Act, 1958.

4. The first contention of Mr. Barman relates to procedure and is to the effect that the application dated the 13th October, 1969 filed on behalf of the second party-petitioner, Hemendra Nath Chowdhury, for setting aside the ex parte order of maintenance passed against him on 21-4-69 is in order and could constitute the legal basis for action by the court. Mr. Amal Dutt, counsel, appearing on behalf of the first party-opposite party joined issue and referred to Rule 67 of the Criminal Rules and Orders, Vol. I in support of his contention. A reference therefore is necessary to the said Rule which is as follows:--

"All petitions memoranda of Appeals, Affidavits and papers of similar character presented to the court, shall as far as possible be..... (2) dated and signed by the person presented and where necessary by such other person as may, by law, be required to sign them.....".

Mr. Dutt contended that Sub-rule (2) to Rule 67 enjoins that petitions presented to the court must be signed by the person presenting the same. In this particular case the application dated 13-10-69 was not at all signed by Hemendra Nath Chowdhury but was merely filed by the lawyer Bidyut Kumar Banerjee, Advocate. The learned counsel accordingly submitted that the learned Chief Presidency Magistrate, Calcutta had not acted properly in refusing to proceed on an unsigned application forming the legal basis for any action. The said contention however overlooks the material fact that the provisions of Rule 67 stated above, significantly contain the words "as far as possible". Some meaning and effect must be given thereto in order to cover exigencies which are out of the ordinary. The present case undoubtedly constitutes such an exigency relating to a seaman

who had sailed away from his home port and was on board his ship, in the discharge of his duties. It also overlooks the material fact that the said application was accompanied by a proper authorisation dated the 2nd October, 1969 duly signed by the second party counter signed by the Master of the ship and accepted by the learned Advocate concerned who signed the application for setting aside the ex parte order and filed the same on 13-10-69. I accordingly hold that in the facts and circumstances referred to above, the learned Chief Presidency Magistrate had erred in not acting upon the said petition and the same has prejudiced the second party-petitioner. The first contention of Mr. Barman accordingly succeeds.

5. The next contention of Mr. Barman is one of law and relates to the interpretation of the proviso to Sub-section (6) to Section 488 of the Code of Criminal Procedure enjoining the period of limitation within which the application for setting aside an ex parte order of maintenance is to be filed. Mr. Barman submitted that the period of three months as provided for thereunder is not to run from the date of the ex parte order in all cases but will depend on the facts and circumstances of each case and if it be so required, may run from the date of the knowledge of the ex parte order by the affected party. It is pertinent therefore to refer to the said provision which is as follows: "provided that if the magistrate is satisfied that he is wilfully avoiding service or wilfully neglects to attend the court the magistrate may proceed to hear and determine the case ex parte. Any order so made may be set aside for good cause shown on an application made within three months from the date thereof". It is abundantly clear therefore that the first part of the provision enjoins the subjective satisfaction of the learned magistrate arrived at from the facts and circumstances of the case that the party is wilfully avoiding service or wilfully neglecting to attend the court; then only he can proceed to determine the case ex parte. The second part lays down that when an order is "so made" it may be set aside for good cause shown by a relevant application and the period of limitation therefore is three months running from the date of the order. Mr. Barman contended in support of his submission that it had never been the intention of the legislature to circumscribe the period of three months as starting from the date of the ex parte order only as thereby injustice may be caused in deserving cases. In support of his contention Mr. Barman made a three-fold submission. Firstly that the learned magistrate must be satisfied and record that there has been wilful neglect on the part of the husband or the father as the case may be, to attend the court or in avoiding service and in case the same be not done the ultimate order passed ex parte would not come within the ambit of "any orders so made" in the second part of the proviso that will attract the period of limitation of three months running from the date of such order. In the ex parte order dated the 21st April, 1969 the learned Chief Presidency Magistrate, Calcutta had not conformed to the provisions of the first part of the proviso and therefore the period of limitation as enjoined in the second part thereof shall not run from the date of such an order which is not a proper order within the bounds of the said first part.

Mr. Barman secondly contended that each case must depend on its own facts and that the provision for a limitation of three months to run from the date of the ex parte order is not an inflexible rule as would be borne out by several decisions on the point. Mr. Dutt also contended that the decisions are also the other way and the same would be considered presently. Mr. Barman thirdly submitted in this context that there has been no proper service and due to the same the ultimate order for maintenance passed ex parte is an order without jurisdiction and as such there is no question of any limitation.

6. The first branch of Mr. Barman's contention in this context is found to be correct. In the ex parte order passed on the 21st April, 1969 the learned Chief Presidency Magistrate, Calcutta has merely found that "in spite of notice served on the opposite party he has not come to contest the claim of the petitioner." He further found that "as this proceeding has not been contested by the opposite party I do not allow any cost". The said findings undoubtedly fall short of the requirements of the proviso viz., that the learned Magistrate is to be satisfied that the defaulting party was "willfully avoiding service or wilfully neglects to attend the court." In the absence thereof, the order ultimately passed is not an order "so made" as enjoined in the second part of the proviso attracting the period of limitation of three months to run from the date of the said order. As to the second branch of Mr. Barman's contention relating to whether the period of limitation is to run from the date of the order or the date of the knowledge of the order, I will now refer to the cases cited by the learned counsel for both the parties. Mr. Dutt referred to the case of A.S. Govindan Vs. Mrs. Margaret Jayammal, . Mr. Justice Somasundaram held therein that the period of three months does not mean three months from the date of the knowledge of the order and observed at pages 153 and 154 that

"I do not see any reason why section should be read with the word "knowledge" which is not there. If the intention of the legislature was that it should be three months from the date of the knowledge of the order it would have said so."

Mr. Barman submitted that this view circumscribes in fact the intention of the legislature and is also against the principles of natural justice. He referred to the case of Revappa v. Gurusanthawwa reported in AIR 1960 Mys 198. In that case the learned Magistrate dismissed the application for setting aside the ex parte order of maintenance on the ground that the same was made more than three months after the date of the ex parte order and as such cannot be entertained under the proviso to Section 488(6) of the Code of Criminal Procedure. Mr. Justice K. S. Hegde (as his Lordship then was) while quashing the ex parte order of maintenance so passed by the learned magistrate observed at page 199 that

"I am of the opinion that the error or irregularities in the issue of the summons have in fact occasioned a failure of justice, in the sense that an adverse order against the first respondent in this court has been passed without giving him an opportunity to place his case before the court."

It would therefore appear that the period of limitation running from the date of the ex parte order do not stand in the way of interference by the High Court in the interests of justice. A reference was also made to the case of the State v. Bhimrao reported in AIR 1963 Mys 239. Mr. Justice T. K. Tukol observed therein at p. 240 that

"The period of three months is with reference to the date of "any order so made". The words "order so made" must necessarily imply an order passed in conformity with the first part of the proviso. If the order itself is not in conformity with the first part of the proviso, the second part of the proviso prescribing a period of three months from the date of the order so made will not come into operation."

Mr. Barman contended on the basis of the said observations that the period of three months running from the date of the ex parte order is not an inflexible rule and can be extended in fit and proper cases. It is pertinent in this context to refer to a decision of the Supreme Court in the case of Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another, . Mr. Justice P. B. Gajendragadkar (as his Lordship then was) delivering the judgment of the court observed at p. 1504 that

"The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fairplay and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to S, 18 in a literal or mechanical way."

The provisions contained in the proviso to Section 18(2) of the Land Acquisition Act, 1894 are pari materia with the provisions contained in the proviso to Section 488(6) of the Code of Criminal Procedure relating to limitation and agreeing respectfully with the aforesaid observations of the Supreme Court and of the Mysore High Court I hold that if there was no knowledge on the part of the affected party about the relevant proceedings and the ultimate order passed ex parte therein, the period of limitation is not to run from the date of the order but from the date of the knowledge. Any other interpretation will unnecessarily circumscribe the intention of the legislature and would not be expedient in the interests of justice. The third branch of Mr. Barman's submission in this context is also pertinent. If the ex parte order for maintenance is vitiated because of the absence of a legal service, the ultimate order passed is not a legal and proper one and as such there is no question of any limitation running from the same. I agree therefore with the three submissions made by Mr. Barman in this context and I hold that the second contention of Mr. Barman also succeeds.

7. The third and last contention of Mr. Barman relating to a defective service is a material one, going to the root of the case, Mr. Barman has urged that there has

been no proper service at all in accordance with law and as such the ex parte order of maintenance dated the 21st April, 1969 is bad and without jurisdiction, vitiating ultimately the impugned order dated the 17th November, 1969, that rejected the second party's application for setting aside the said ex parte order. The return of the summons by the process-server shows that it could not be served because the second party was away on his ship since November, 1968 and his present address could not be gathered. Further directions were prayed for. The order dated the 12th December, 1968 stated that the notice on the second party was returned unserved and that there was a direction by the learned Chief Presidency Magistrate, Calcutta for the issue of a fresh notice to be served on the identification by the first party. The said direction however was not carried out by the process-server, who for reasons best known to him, proceeded to serve the aforesaid notice on the second party by way of affixture. The relevant return of service which is on the record shows that the notice was "duly served by posting in presence of Sukharam Jamadar and Sibsankar Singh of same premises on 7-2-69 at 4 p.m." The same premises is No. 21, Old Court House Street, Calcutta which is the office of the company. Order No. 3 dated the 13th February, 1969 passed by the learned Chief Presidency Magistrate, Calcutta, is that "Notice on the O. P. served by affixture. O. P. is absent. To 3-4-69 for hearing." The learned Chief Presidency Magistrate, Calcutta apparently took the said service as a good one and holding that the second party was still absent, he directed that the case will be heard on the date fixed. He had apparently overlooked his earlier order dated the 12th December, 1968 whereby he categorically directed that the notice will have to be served on identification by the first party. On this ground alone the service of the notice is bad, improper and without jurisdiction. A reference may be made to the relevant provisions of the Code of Criminal Procedure in this context. Section 69 (1) of the Code of Criminal Procedure relating to the service of summons is as follows:

"The summons shall, if practicable be served personally on the person summoned by delivering or tendering to him one of the duplicates of the summons. (2) Every person on whom a summon is so served shall, if so required, by the serving officer, sign a receipt therefore on the back of the other duplicate. (3).....".

Section 70 relates to service when the person summoned cannot be found and is as follows:

"When the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family or in a presidency town with his servant residing with him.....".

Section 71 of the Code runs as follows:

"If service in the manner mentioned in Sections 69 and 70 cannot, by the exercise of due diligence, be effected, the serving officer shall affix one of the

duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served."

On a perusal of the abovementioned provisions, it is abundantly clear that there has been no conformance to the mandatory provisions referred to above. The direction by the learned Chief Presidency Magistrate, Calcutta, was for a personal service on the identification by the first party. The process-server, for reasons best known to him, switched over to the procedure for service by affixture without conforming to the provisions of Section 70 or even Section 71 of the Code of Criminal Procedure and the same appears to have been accepted as good service ultimately by the learned Chief Presidency Magistrate, Calcutta. There is no material on the record to establish as provided for u/s 70, that the person concerned could not be found by the exercise of due diligence and that there was any attempt to serve the summons by leaving one of the duplicates meant for the person summoned with some adult male member of his family. The materials on the record further rule out a compliance with the provisions of Section 71 of the Code of Criminal Procedure. Firstly there is no indication that the service could not be effected in the manner mentioned in Sections 69 and 70 by the exercise of due diligence and secondly the serving officer did not affix one of the duplicates of the summons to some conspicuous part of the "house or homestead in which the person summoned ordinarily resides". The service by affixture was made in the office and that also in non-conformance to the provisions of Sections 69 and 70. In view of the same the presumption enjoined in Section 71 cannot be available and the service in this case must be held to be bad and repugnant, vitiating the ex parte order passed for maintenance and the subsequent orders passed on the footing thereof.

8. Several cases were cited at the Bar bearing on the aforesaid ground and I will now proceed to consider the same along with some other decisions on the point, in the light of the facts and circumstances of the present case. In the case of Beni Madhab Sapui and Another Vs. Jadu Nath Sapui and Others, . Chief Justice Sir Lancelot Sanderson and Sir George Rankin J. (as his Lordship then was), delivering the judgment of the court held at p. 149 (of Cal WN) = (at p. 1209 of AIR) that

"It is plain that the procedure, which is provided by Section 71 cannot be made use of unless service in the manner mentioned in Sections 69 and 70 cannot be effected by the exercise of due diligence".

Their Lordships ultimately made the rule absolute and set aside the impugned order. In the case of Kalipada Das Vs. The State, Chief Justice Sir Arthur Trevor Harries and Mr. Justice H. K. Bose (as his Lordship then was) observed at p. 209 that

"In the case before us there is no evidence that personal service could not be effected and no evidence that service on an adult male member could not be

effected. That being so, the service proved in the peon's report was no service at all and, therefore, this order u/s 144, which to my mind was invalidly made ex parte, was never served and therefore no proceedings could be commenced for breach of it."

Their Lordships ultimately held that in the aforesaid circumstances the service by affixing the copy of the order on bamboo pole near the scene of the dispute was no service at all, and in that view held the ex parte order u/s 144(2) to be unjustified. Mr. Justice D. N. Sinha (as his Lordship then was) observed, though in a different context viz., under Order 5, Rule 17 of the Code of Civil Procedure, in the case of Tripura Modern Bank Ltd. Vs. Bansen and Co., that

"In the case of a service by affixation, it is not sufficient to state in the affidavit or service that the process-server was satisfied upon enquiry that the defendant could not be found at his residence within a reasonable time. Facts must be stated in the affidavit to show what enquiries were made and whether it was reasonable under the circumstances to assume that the defendant could not be found at his residence within a reasonable time. The court must be satisfied that the process-server was justified in coming to such a conclusion, and in the absence of particulars it cannot do so."

In the present proceedings however there is a clear absence of the exercise of due diligence, u/s 70 of the Code of Criminal Procedure. The next case on the point is the case of Parambot Thayunni Balakrishna Menon Vs. Govind Krishnan and Another, wherein Mr. Justice Somasundaram held at page 166 that

"As it is clear from the endorsement of return that the summons had not been served. I must hold on the facts of the case and on the materials placed before me that there had been no service of the summons in accordance with the provisions of Section 69 of the Code and the Lower Court was not justified in proceeding ex parte, passing an order ex parte".

The learned Judge thereafter proceeded to set aside the ex parte order and directed the lower court to take the petition concerned on its file and dispose of it according to law. In the case of Pahilajrai Vs. Jethi Bai, Mr. Justice N. Imam held that service of notice has to be effected as contemplated u/s 68 read with Sections 69 and 70 of the Code before making an ex parte order against the husband u/s 488, Cr. P. C. The learned Judge further observed that mere publication of the notice in the Government Gazette cannot serve the purpose of notice as understood u/s 68 read with Section 69 unless provision to that effect has been made by the State Government. Ultimately the learned Judge proceeded to set aside the ex parte order holding that in the absence of the service of summons the ex parte order made u/s 488 of the Code of Criminal Procedure is bad. A reference may also be made to the case reported in AIR 1960 Mys 198 wherein Mr. Justice K. S. Hegde (as his Lordship then was) observed at page 199 that

"I have not been able to appreciate the learned Government Pleader's distinction

between the "service" as mentioned in Sub-section (6) of Section 488, Cr. P. C. and summons referred to in Section 68 of the Cr. P. C. To my mind, they appear to be one and the same..... I am of the opinion that the error or irregularities in the issue of the summons have in fact occasioned a failure of justice, in the sense that an adverse order against the first respondent in this court has been passed without giving him an opportunity to place his case before the Court."

It was ultimately found that such errors or irregularities in the summons are not cured by Section 537 of the Code of Criminal Procedure. In a more recent decision viz., in the case reported in AIR 1963 Mys 239 Mr. Justice T. K. Tukol observed at page 240 that

"So if the court comes to the conclusion after scrutinizing the records of the proceedings that the methods for service of summons followed by the process-server had not complied with Section 70 before resorting to service by affixing a copy of summons to some conspicuous part of the house occupied by the person to be served, then service u/s 71 would be bad in law".

I respectfully agree with the said observations and I hold that the service in the present case has been bad and repugnant, vitiating the ex parte order of maintenance passed on the 21st April, 1969, as it gave no opportunity to the second party of being heard.

9. The point at issue may also be approached from another standpoint viz., the standpoint of a non-conformance to procedure established by law. The ex parte order of maintenance dated the 21st April, 1969 having been not in accordance with the procedure established by law, the consequential order dated the 17th November, 1969 relating to the same is also unwarranted and untenable and is liable to be set aside. In the well-known case of Taylor v. Taylor reported in (1876) 1 Ch D 426 Jessel M. R. observed at p. 431 that

"When a statutory power is conferred for the first time upon a court, and the mode of exercising it is pointed out. it means that no other mode is to be adopted.....".

The said principles were approved of and applied by their Lordships of the Judicial Committee in the case of AIR 1936 253 (Privy Council) .

Lord Roche, delivering the judgment of the Judicial Committee, observed at pp. 381 and 382 (of Ind. App.) = (at p. 257 of AIR) that

"The rule which applies is a different and not less well recognized rule viz., that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

In a later decision the Supreme Court again reiterated the said principles when in the case of State of Uttar Pradesh Vs. Singhara Singh and Others, A. K. Sarkar, J. (as his Lordship then was) delivering the judgment of the court observed at p.

361 that

"The Rule adopted in (1876) 1 Ch D 426 is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power is to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted".

I agree with the said observations and I hold that in this case also there has been a non-conformance to the procedure established by law resulting in a material prejudice to the second party-petitioner who was denied the opportunity of being heard before being saddled with an order of maintenance. A failure on the part of the learned Chief Presidency Magistrate, Calcutta, to take this point into consideration has resulted in a failure of justice and the ultimate order passed by him on the 17th November, 1969 is also bad and improper on this count. The third and last submission of Mr. Barman . accordingly succeeds.

10. In the result, the Rule is made absolute; the impugned orders dated the 17th November, 1969 and the 15th December, 1969 passed by Sri S. C. Talukdar. Chief Presidency Magistrate, Calcutta, are set aside; and it is directed that the learned Chief Presidency Magistrate, Calcutta shall proceed to dispose of the application filed on behalf of the second party-petitioner for setting aside the ex parte order of maintenance, in accordance with law and expeditiously, after giving the said second party-petitioner an opportunity of being heard, on condition that he deposits in the court below the arrears of maintenance, if any, as passed by the learned Chief Presidency Magistrate, Calcutta for the period before this Rule was issued, along with the costs which are fixed at Rs. 300/- (three hundred only) to be paid to the first party--opposite party, within three months from date; and thereafter goes on depositing in court the sum of Rs. 200/- (Rupees two hundred only) per month on account of maintenance, without any prejudice to the rights and contentions of the parties.

11. The records are to go down as early as possible.