

(1995) 09 AHC CK 0065

In the Allahabad High Court

Case No : Criminal Miscellaneous Writ Petition No. 6870 of 1995

Neelam and Another

APPELLANT

Vs

VIIth Addl. Distt. and Sessions Judge and Others

RESPONDENT

Date of Decision : 15-09-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125

Citation : (1998) 1 DMC 456

Hon'ble Judges : T.P. Garg, J

Bench : Single Bench

Advocate : Sunit Kumar, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

T.P. Garg, J.—Smt. Neelam, wife of Sri Dinesh Kumar Agarwal, and her minor daughter have filed this petition under Article 226 of the Constitution of India with the prayer to stay the operation of the order dated 7.3.1995, passed by the VII Additional District & Sessions Judge, Bulandshahr, respondent No. 1 in Criminal Revision No. 88 of 1994, and also the order dated 1.2.1993, passed by the VIIIth Addl. Chief Judicial Magistrate/ Bulandshahr, respondent No. 2 in Misc. Case No. 1031 of 1993, Dinesh Kumar Agarwal v. Smt. Neelam, u/s 126, Cr.P.C. and also to direct Dinesh Kumar Agarwal, respondent No. 3, to pay the maintenance allowance to them in pursuance to the order dated 26.10.1991.

2. Briefly, the facts of the case are as under :

Smt. Neelam, petitioner No. 1 was married with Dinesh Kumar Agarwal, respondent No. 3, on 9.2.1989 at Bulandshahr. Sometimes in the year 1990 a daughter. Km. Isha @ Guriya, petitioner No. 2, was born to her from out of their wedlock. It is alleged that respondent No. 3 and members of his family started maltreating petitioner No. 1 ever since her marriage in order to get their demand of more and mere dowry satisfied. When she and her father failed to satisfy and fulfill the demand of respondent No. 3, she was turned out from his house by

respondent No. 3 on 20.9.1990 alongwith her daughter. On 26.9.1990, a notice was sent to respondent No. 3, but the same was not accepted. Another notice dated 4.5.1991 was served upon respondent No. 3 asking him to settle the dispute outside the Court, but to no effect. Finding no other alternative, she filed an application u/s 125, Cr.P.C., on 11.7.1991 praying for the grant of maintenance allowance at the rate of Rs. 500/- to each of them (both petitioners No. 1 and 2). It is alleged that despite personal service of notice issued by the Court, respondent No. 3 did not appear before the Trial Court and was, therefore, proceeded against ex parte, vide order dated 4.10.1991, respondent No. 2. Subsequently, on 26.10.1991, respondent No. 2, vide order (Annexure "T" to the petition), passed an ex-parte order whereby maintenance allowance at the rate of Rs. 300/- per month to petitioner No. 1 and Rs. 200/- per month to petitioner No. 2 was allowed. Since respondent No. 3 did not pay the amount of maintenance, so awarded, the petitioners filed an execution petition for realisation of the amount of maintenance from respondent No. 3, vide Misc. Case Nos. 557 of 1993, 731 of 1993 and 735 of 1993. In spite of service of notices, respondent No. 3 did not put in appearance and accordingly, an order of attachment as well as warrant of arrest of respondent No. 3. Respondent No. 3 moved an application u/s 126, Cr.P.C. with a prayer to set aside the ex parte order of maintenance dated 26.10.1991 (Annexure "4" to the petition). The application filed by respondent No. 3 was allowed by respondent No. 2, against which a Revision No. 88 of 1994 was filed by the petitioners. The learned Additional District & Sessions Judge, respondent No. 1 vide his order dated 7.3.1995 (Annexure "6" to the petition), dismissed the revision and maintained the order passed by the Additional Chief Magistrate, respondent No. 2, and directed that the case be decided on merits.

3. Feeling aggrieved by both the aforesaid orders, the petitioners (Smt. Neelam and Km. Isha) filed the present petition in this Court.

4. Since notice ordered to be issued to respondent No. 3 was not received back, it was directed that fresh notice be sent in ordinary course as well as given Dasti to the Counsel for the petitioners for service. As per affidavit filed on behalf of the petitioners, respondent No. 3 were not available and the members of his family including his brother and brother's wife were informed, but they also refused to accept service. Learned Counsel for the petitioners has been heard and the record gone through.

5. From a perusal of the impugned orders it is nowhere made out that the Courts below had either no jurisdiction to pass the same or they exercised the jurisdiction in excess of the powers conferred upon them by the statute. No doubt the Magistrate should be slow and cautious to set aside the ex-parte order when the husband willingly neglected to attend, but when cogent evidence is produced to satisfy that there was no willful avoidance of service or willful neglect to attend the Court, the Magistrate will be justified in setting aside the ex parte order. From a perusal of the impugned orders (Annexures "5" and "6" to

the petition) it is clearly made out that respondent No. 3 had been able to lead cogent evidence to satisfy the Court that his absence or alleged refusal to receive the notice was not willful. No illegality or infirmity has been pointed out nor made out in any of the two orders which both are just and proper and have been passed in accordance with law. Both the Courts below have exercised jurisdiction vested in them by virtue of the provisions of law and it cannot be said by any stretch of imagination that the exercise of jurisdiction by them was in any way in excess of the powers conferred in them by the statute.

6. Finding no merit, therefore, in the present petition the same deserves to be dismissed and is accordingly dismissed. However, having regard to the facts and circumstances of the case and the protracted litigation, it is directed that the Trial Court will now decide the matter in dispute between the parties within a period of four months from the date of production of a certified copy of this order by giving short adjournments.