

(1998) 02 BOM CK 0037

In the Bombay High Court

Case No : Criminal Writ Petition No. 287 of 1997

Shankar Kishan Gohane

APPELLANT

Vs

Kalpana Shankar Gohane and others

RESPONDENT

Date of Decision : 18-02-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 254, 296

Citation : (1998) 5 BomCR 396 : (1998) CriLJ 4455 : (1999) 1 DMC 405 :
(1998) 2 MhLj 553 : (1998) 3 RCR(Criminal) 152

Hon'ble Judges : A.B. Palkar, J

Bench : Single Bench

Advocate : A.S. Sonare, app, M.H. Rizwy, for the Appellant; G.G. Modak, for the Respondent

Judgement

A.B. Palkar, J.

Rule. Shri G.G. Modak, the learned Counsel for respondent No.

1. accepts service of rule and Shri A.S. Sonare, the learned Additional Public Prosecutor accepts the same on behalf of State. Rule. Heard forthwith by consent.

2. This petition raises a very simple point regarding jurisdiction of the Magistrate to decide an application for maintenance u/s 125 of the Criminal Procedure Code, on the basis of an affidavit. The petitioner herein was a respondent in proceeding u/s 125 commenced at the instance of the present non-applicant respondent No. 1 Kalpana Shankar Gohane. The said application of non-applicant No. 1 the wife of the present petitioner was registered as Misc. Criminal Application No. 197/95 which was decided on 12-3-1996 by Chief Judicial Magistrate, Wardha and the said order was confirmed in Criminal Revision Application No. 30/96 by the Additional Sessions Judge, Wardha by order dated 8-10-1997 granting monthly maintenance at the rate of Rs. 500/- from the date of the application to the present respondent Kalpana Shankar Gohane. The order of the learned Magistrate clearly shows that the present petitioner was served with a summons.

He had appeared in Court. He had engaged an Advocate for his defence but he did not file any written statement and he did not remain present on further dates and therefore the learned Magistrate called upon the non-applicant No. 1 who was applicant before him to file an affidavit and proceeded to decide the application on the basis of the affidavit filed by the wife.

3. The only point that is canvassed before me in this writ petition is whether the learned Magistrate could proceed to decide the substantive application u/s 125 of the Criminal Procedure Code on the basis of an affidavit that also by calling upon the applicant to file an affidavit instead of recording her evidence. The procedure prescribed for an application u/s 125 is contained in section 126 and sub-section (2) of section 126 clearly states that the procedure applicable to the trial of summons cases shall be applicable to the proceedings u/s 125 of Criminal Procedure Code. Therefore, the law is clearly laid down in section 126 itself and that being the position, the substantive application u/s 125 cannot be decided merely on the basis of an affidavit. This view has been taken by this Court in a case reported in 1982(1) Bom.C.R. 329 : 1982 Mh. L.J. 352, Ramesh Laxman Contractor v. Mrs. Jayshreeben Ramesh Contractor. It reads as under:---

"The proviso to section 126(2) provides that if the Magistrate is satisfied that the person against whom an order for maintenance is proposed to be made is wilfully avoiding service or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex-parte. However, this does not mean that the Magistrate shall pass an order without recording evidence as required in the main part of sub-section(2) of section 126. The proviso only dispenses with the necessity of recording evidence in the presence of the other side if that other side is wilfully avoiding service or wilfully neglecting to attend the Court. Section 126(2) itself provides that all the evidence shall be recorded in the manner prescribed for summons cases, under Chapter 20. Section 254 in the said Chapter lays down that if the Magistrate does not convict the accused, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence. The recording of evidence, therefore seems to be mandatory even when the opponent in proceedings u/s 125 is avoiding service or is wilfully neglecting to attend the Court. Section 296 of the Code, which permits the Court to receive the affidavit of any person whose evidence is of a formal character, cannot obviously apply when u/s 125 of the Code, questions relating to the neglect or

cruelty on the part of the husband and the quantum of maintenance to be given to the wife are to be decided."

4. On behalf of the respondent, reliance was placed on a Judgment of the Apex Court reported in Savitri Rawat Vs. Govind Singh Rawat, . However, the point involved in that case was different and the Apex Court has held that although there is no specific provision for grant of interim maintenance pending the final disposal of an application u/s 125, the Court has powers to do it and while laying

down this proposition, the Apex Court has also observed that in the absence of any express prohibition, it is appropriate to construe the provisions of Chapter 9 as conferring an implied power on the Magistrate to direct a person against whom an application is made u/s 125 of the Code, to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. This legal position cannot be disputed. The Apex Court has however not laid down that the Magistrate can ignore any express provision of law prescribing a particular procedure to be followed. In my view the Magistrate cannot follow such course in flagrant disregard to the express provisions of the Code of Criminal Procedure. Therefore, in my view, the learned Magistrate was in error in passing the order of maintenance and disposing of the application u/s 125 of Criminal Procedure Code, merely on the basis of an affidavit of the applicant before him.

5. This point was no doubt argued before the learned Sessions Judge but it appears that the learned Counsel for the revision applicant did not place any legal provision or authority before the learned Sessions Judge in support of his contention and, therefore, the learned Sessions Judge appears to have not taken into consideration the arguments advanced before him seriously and the revision came to be dismissed.

6. It is true that the petitioner would get some advantage of this situation as it was due to his negligence in conduct of the proceedings that the Court passed the impugned order on the basis of affidavit. None-the-less once it is found that the Court could not enter into such an exercise, the order cannot be justified and has to be quashed. However, the respondent No. 1, i.e. the wife can be to some extent compensated by giving direction to the learned Magistrate to treat the affidavit filed in support of the application by her as an application requesting the learned Magistrate to pass an order of interim maintenance with a further direction to dispose of the original application within a specified time.

7. The petition is allowed. The order passed by the learned Chief Judicial Magistrate in Misc. Criminal Application No. 197/95 on 12-3-1996 and the order passed by the learned Additional Sessions Judge, Wardha in Criminal Application No. 30/96 on 8-10-1997 are hereby quashed and the Original Misc. Criminal Application No. 197/ 95 is remanded to the learned Magistrate for decision according to law with a direction that the learned Magistrate shall treat the affidavit filed by the applicant in support of her claim as an application for grant of interim maintenance. Both the parties are directed to appear before the learned Magistrate on 9-3-1998 and the petitioner shall file his reply if any to the said affidavit which is to be treated as an application for interim maintenance within seven days thereafter and the learned Magistrate shall dispose of the said application by the end of March, 1998 and shall thereafter proceed to decide the original application. The petitioner is also directed that within seven days of his appearance before the learned Magistrate he shall file written statement to the original application so that there is no further delay on the part of the learned Magistrate in hearing the application. The learned Magistrate is directed to

dispose of the application u/s 125 of Criminal Procedure Code within a period of three months thereafter. Rule is made absolute in the aforesaid terms.

8. Petition allowed.