

(2014) 02 BOM CK 0199

In the Bombay High Court

Case No : Criminal Revision Application No. 21 of 2014

Umakant Bhaskarao Nawarkhele

APPELLANT

Vs

Sou Sneha Umakant Nawarkhele, Master Samarth and The
State of Maharashtra

RESPONDENT

Date of Decision : 05-02-2014

Acts Referred:

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

Citation : (2014) 3 BomCR(Cri) 161 : (2014) 2 DMC 654

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : S.R. Dheple, for the Appellant; V.B. Garud, Advocate for Respondent Nos. 1 and 2 and Mr. P.N. Muley APP, for the Respondent

Final Decision : Allowed

Judgement

Abhay M. Thipsay, J.—Heard the learned counsel for the applicant. Heard the learned counsel for the respondent nos. 1 and 2. Heard the learned APP. By consent, admitted and heard finally.

2. By consent, calling for the Record and Proceedings is dispensed with.

3. The applicant is the husband of the respondent no. 1. The respondent no. 2 is minor child of the applicant and the respondent no. 1. The applicant is aggrieved by the order dated 2.8.2013 passed by the Principal Judge, Family Court, Aurangabad, awarding maintenance @ Rs. 5,000/- p.m. each, to the respondent nos. 1 and 2 herein from the date of the petition. He has, therefore, approached this Court by filing the present revision application.

4. Though a number of contentions have been raised in the revision application, in the oral arguments what is submitted is that, the impugned order came to be passed without participation of the applicant in the inquiry proceedings that took place before the Family Court. It is submitted that, though the applicant had appeared before the Family Court initially, he did not file his written statement. It

is submitted that matter was sent for conciliation, but after conciliation failed, it was heard without say of the applicant.

5. The learned counsel for the respondent submitted that the petitioner had every opportunity to participate in the proceedings, and if he has not participated in the proceedings, no fault can be found with the impugned judgment and order.

6. I have carefully gone through the impugned order. It is a fact that the respondent did not participate in the proceeding before the Family Court in any manner. The proceedings were held in his absence.

7. Section 126 of the Code of Criminal Procedure requires that all evidence in the proceedings u/s 125 should be taken in presence of the person against whom an order for payment of maintenance is proposed to be made i.e. the respondent to the maintenance application. This is the rule. An exception to this rule is provided for in the proviso to Sub-section (2) of Section 126 of the Code. It would be convenient to reproduce the relevant part of Sub-Section (2) of Section 126 of the Code here.

126. (2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proceed 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: Provided 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...

8. Thus, the general rule viz.:- that, the evidence should be taken in presence of the respondent to the application stands modified, by the proviso, and in case of the satisfaction of the Magistrate (in this case the Family Court) that the respondent is willfully avoiding the service of the notice and/or willfully neglecting to attend the Court, the Magistrate (here the Family Court) may proceed to hear and determine the case ex-parte. It is clear provisions that satisfaction that the respondent is willfully avoiding the service of notice, or that, he is willfully neglecting to attend the Court is a pre-condition for enabling the Magistrate to proceed against the respondent in his absence.

9. In this case, no such satisfaction appears to have been arrived at by the Family Court, in as much as, the impugned judgment does not show so. What it records in paragraph no. 7 is as follows:-

7. The respondent appeared, but did not file his say. The matter was sent for conciliation, but it failed. So, the matter was heard without say of the respondent.

10. Thus, the learned judge of the Family Court has automatically proceeded with the matter by simply noting the absence of the respondent and has not concluded that such absence was willful or deliberate. The impugned order, therefore, cannot be said to be in accordance with law.

11. In the circumstances, the applicant deserves to be given an opportunity to contest the claim of maintenance on merits. The impugned order, therefore, needs to be interfered with.

12. The Revision Application is allowed.

The impugned order is set aside.

The matter is remanded back to the Family Court for deciding it afresh on merits, after giving to the respondent an opportunity to file his say in the matter.

The Family Court shall decide the application afresh within a period of THREE MONTHS from the date of receipt of this order.

The Revision application is disposed of in the aforesaid terms.