

HIGH COURT OF UTTARAKHAND AT NAINITAL

Hon'ble Justice Sri Rakesh Thapliyal

12th July, 2024

C528 No. 26 of 2024

Manish Singh Bisht Applicant

Vs.

State of Uttarakhand & Anr. Respondents

Counsel for the Applicant:

Mr. P.C. Petshali and Mr. Naveen
Singh Bisht.

Counsel for the State:

Mr. Sandeep Sharma, learned Brief
holder

**Upon hearing the learned Counsel, the Court made the
following Judgment:**

(Per :Sri Rakesh Thapliyal, J.)

1. Present petition has been preferred under Section 528 of Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as BNSS).

2. The present applicant is challenging the order dated 28.05.2024, passed by the Sessions Judge, Pithoragarh in Misc. Application No. 21 of 2024, Manish Singh Bisht vs. Jagdish Chandra Punetha & anr., whereby the application preferred by the present applicant for the purposes of taking effective steps to serve respondent through wife has been rejected.

3. The present applicant was convicted in a proceeding initiated under Section 138 of the N.I. Act, and sentenced to undergo rigorous imprisonment with fine of Rs. 7,50,000/- and being aggrieved with the said order of conviction, a statutory appeal was preferred on 17.10.2019 along with delay condonation application.

The said delay condonation application was rejected on the ground that no supporting document along with delay condonation application has been enclosed, subsequently, the applicant approach this Court and preferred an application under Section 482 Cr.P.C., being C482 No. 635 of 2024 has been preferred wherein he has annexed the supporting documents, and the same was disposed of by this Court on 10.04.2024 and a liberty was given to the applicant to move fresh delay condonation application along with the relevant documents.

4. In compliance to the opportunity given to the applicant by this Court vide order dated 10.04.2024 in C482 No. 635 of 2024, the applicant has submitted fresh delay condonation application on 13.05.2024 and along with said application another application was also moved with a request that the applicant be permitted to take fresh steps to serve the respondent through his wife. The said application was rejected by the learned Sessions Judge, Pithoragarh by order dated 20.05.2024, and being aggrieved with this, the present application has been preferred under Section 528 of BNSS 2023.

5. Learned counsel for the applicant submits that the respondent/complainant has been declared as an absconder and award of Rs. 50,000/- has been declared upon him since he is wanted in criminal case no. 109 of 2021, for the offences punishable under Sections 420, 406, 506, 120B PC read with Section 3 of UPID Act, at Kotwali Pithoragarh. It is submitted by the learned

counsel for the applicant that at present the applicant is not having correct address of the respondent/complainant, since he himself is absconding, and, therefore, he submits that there is no any option except to serve the complainant through his wife since, he himself in Criminal Case No. 109 of 2021 has been declared absconder.

6. The Session Judge, Pithoragarh rejected the application by observing that under Section 64 of Code of Criminal Procedure, the service cannot be affected upon the respondent/complainant through his wife, since in the said provision if the person summoned cannot be found then in such eventuality the service can be affected with some adult male members of his family residing with him.

7. The learned counsel for the applicant submits that the applicant is not aware about any male members of the respondent/complainant, and, therefore, he requested that he may be permitted to serve respondent/complainant, through his wife but the same has been rejected.

8. I perused the order passed by the Session Judge, Pithoragarh dated 28.05.2024, though, I do not find any illegality in the said order because mandate of Section 64 Cr.P.C provides that if the person summoned cannot be found then in that eventuality the service can be affected upon him only through adult male member.

9. Learned counsel for the applicant drew attention of Section 66 of the new Act, ie., Bhartiya Nagarik Suraksha Sanhita, 2021 and submits that in this provision the service can be affected through any adult members of the family of the person concerned. He submits that since there is no other way out to take fresh steps, therefore, by way of Section 66 of the BNSS 2023, the present applicant can be permitted to take steps to serve respondent/complainant through his wife, as there is no such restriction in the new provision that the service can only be affected through adult male member.

10. I perused both the provisions, i.e, Section 64 of Code of Criminal Procedure as well as Section 66 of B.N.S.S. 2023. No doubt the proceedings under Section 138 of the N.I. Act were initiated at the time when the new Act was not came in force but for the purposes of effecting service, the opportunity can be given to the applicant to take fresh steps to serve respondent/complainant through any adult member of his family because under new provision, i.e., Section 66 of BNSS 2023 there is no such restriction that service can be effected only through adult male member.

Section 64 of Old Act. Service when persons summoned cannot be found. *Where 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 residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.*

Section 66 of New Act. Service when persons summoned cannot be found. *Where 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 member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

11. As it appears from both the provisions, i.e, Section 64 of Old Act and section 66 of New Act, the purpose and mandate of both the provision is only to serve the other side for adjudication of the issue so that the other party may also be heard. Admittedly, under new Section 66, there is no such restriction that service can be effected only through adult male member, therefore for all purposes, since the applicant has preferred a statutory appeal, therefore, the service can be effected by invoking new provision i.e, Section 66 of the Act. Apart from this, the procedure as prescribed under the Old Act or new Act for effecting service upon the other side is only a procedural part and it has nothing to do with the actual merit of the case. Admittedly, application under Section 138 was filed when the new enactment, i.e, BNSS 2023 was not in fore but so far as service upon the respondent/ complainant is concerned, the procedure prescribed under the new Act can be followed.

12. There is another aspect of the matter that the respondent/ complainant is himself absconding which is evident from Annexure 7 which is a proclamation issued by the Kotwali, Pithoragarh wherein an award of Rs. 50,000/- was declared upon respondent/ complainant who in fact is wanted in Case Crime No. 109 of 2021,

and, therefore, in such an eventuality the Trial Court cannot compel to the applicant to give correct address of the respondent/complainant for effecting service upon him. Annexure 7 itself reveals that the applicant is not in a position to provide the correct address of the respondent/ complainant, therefore, the direction as issued by the learned Session Judge, Pithoragarh in my opinion is not justifiable.

13. Accordingly, the present C482 application is disposed of with a liberty to the applicant to move fresh application giving reasons about the fact that the respondent/complainant is wanted in Criminal Case No. 109 of 2021 and award of Rs. 50,000/- is also declared upon him and he has been declared as absconder and if such an application is moved, learned Session Judge may decide the same afresh in the light of Section 66 of the B.N.S.S. 2023 (Act No. 46 of 2023). Till such time applicant moved a fresh application and the same is decided, the NBW issued against the applicant shall remain suspended.

14. Subject to the aforesaid directions, the present 528 application is disposed of finally.

(Rakesh Thapliyal, J.)