



Crl.R.C.(MD).No.897 of 2021

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 17.08.2022

Pronounced on : 09.09.2022

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

Crl.R.C.(MD)No.897 of 2021

Pandiyarajan : Petitioner//Petitioner/Respondent

Vs.

1.Manimegalai @ Sawithri

2.Minor Pugalini : Respondents/Respondents/Petitioners

PRAYER: Criminal Revision Petition has been filed under Section 397 and 401 Cr.P.C, to call for the records and set aside the order in Un numbered Cr.M.P. No. of 2019 in M.C.No.21 of 2018 on the file of the Family Court, Srivilliputhur dated 11.08.2021 and consequently set aside the ex-parte order in M.C.No.21 of 2018 dated 16.04.2019.

For Petitioner : Mr.S.A.Ajmalkhan

For Respondents : Mr.M.Jothi Basu



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ORDER

This Criminal Revision is directed against the order rejecting a petition filed under Section 126(2) of the Code of Criminal Procedure dated 16.04.2019 passed in Un numbered Cr.M.P. in M.C.No.21 of 2018.

2. Admittedly, the marriage between the petitioner and the first respondent was solemnized on 27.11.2014 as per the Hindu Rites and Customs at Dhandal Dhayadiyar Kalyana Mandapam, Rajapalayam and that due to their wedlock, they were blessed with a female child, the second respondent herein on 04.11.2015.

3. It is evident from the records that the respondents have laid a maintenance claim against the petitioner in M.C.No.21 of 2018 on the file of the Family Court, Srivilliputhur, that though the petitioner, after the receipt of Court notice, has entered into appearance, has failed to file counter and to appear before the concerned Court subsequently and that therefore he was set ex-parte.

4. It is further evident that the learned Judge of the Family Court, after conducting enquiry, has passed an ex-parte order dated 16.04.2019 directing the



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petitioner to pay monthly maintenance at Rs.5,000/- (Rupees Five Thousand only) to the first respondent and monthly maintenance at Rs.3,000/- (Rupees Three Thousand only) to the second respondent from the date of petition.

5. It is not in dispute that the petitioner has filed a petition in H.M.O.P.No. 174 of 2015 for divorce, that the first respondent has filed a petition in H.M.O.P.No.131 of 2016 for restitution of conjugal rights, that the trial Court, after enquiry, vide common order dated 24.07.2019 dismissed the divorce petition and allowed the petition for restitution of conjugal rights and that the petitioner, aggrieved by the said common order, has preferred two appeals in H.M.C.M.A.Nos.39 and 40 of 2019 and the same are pending on the file of the District Court, Srivilliputhur.

6. Meanwhile, the petitioner, aggrieved by the ex-parte order of maintenance, has filed a petition under Section 126(2) Cr.P.C. seeking orders for setting aside the ex-parte order dated 16.04.2019 and the learned Judge of the Family Court, Srivilliputhur, by holding that since the said petition under Section 126(2) Cr.P.C. was filed, after the expiry of three months period from the date of order, the petition itself is not maintainable, rejected the said petition. Aggrieved



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by the said order of rejection, the petitioner/husband has come forward with the present revision.

7. No doubt, the ex-parte order was passed in M.C.No.21 of 2018 on 16.04.2019 and the petitioner has filed the above application under Section 126(2) Cr.P.C., for setting aside the ex-parte order on 26.11.2019.

8. At this juncture, it is necessary to refer Section 126(2) Cr.P.C., which reads as follows:-

“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 wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.”



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No doubt, previously there existed two views that the period of limitation of three months should be computed only from the date of order and the second view is that the same should also be computed from the date of knowledge of the ex-parte order. Now, the position is well settled that the application for setting aside the ex-parte order under Section 126(2) Cr.P.C., can be filed within three months from the date of knowledge of the ex-parte order provided he has to prove that no summons/notice were served on him or that he was not having any knowledge about the proceedings.

9. But in the case on hand, admittedly, the petitioner has entered into appearance, that the matter was referred to counsellors, that since the matter was not settled, the case was returned back to the Family Court, that the petitioner has filed permission petition under Section 13 of the Family Courts Act and got orders and that thereafter, he has not turned up for the hearings and consequently he was set ex-parte.

10. Since the petitioner has entered into appearance and is having knowledge about the proceedings, as rightly contended by the learned counsel for the respondents, he has to file a petition for setting aside the ex-parte order within three months from the date of ex-parte order.



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11. But as already pointed out, the petitioner has filed the petition only on 26.11.2019, after the lapse of seven months.

12. It is pertinent to note that the Full Bench of Kerala High Court in ***Balan Nair vs. Bhavani Amma*** reported in ***AIR 1987 Ker 110*** has taken a view that Section 5 of the Limitation Act can be invoked for condoning the delay in filing the application under Section 126 of the Code.

13. In ***Meenakshi Ammal vs. Somasundara Nadar*** reported in ***AIR 1970 Mad 242***, a learned Judge of this Court has specifically held that Section 5 of the Limitation Act could be applied for extending the period of limitation, if the aggrieved party against whom the order the maintenance is made, makes out of a good cause for such invocation.

14. It is pertinent to note that since there is no specific and express exclusion of the applicability of Section 5 of the Limitation Act in the said proviso and application under Section 5 of the Limitation Act can be filed to extend the period prescribed under the proviso to Section 126(2) of the Cr.P.C.



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15. In support of the above proposition, in ***Sukhirthammal vs. Subramanian*** reported in ***1985 CriLJ 1294***, reliance was placed on the judgment of the Hon'ble Supreme Court in ***Mangu Ram vs. Delhi Municipality***, wherein, an argument was advanced before the Hon'ble Supreme Court that the time limit of 60 days prescribed in Sub-Section (4) of Section 417 of the Cr.P.C., 1898, for the making of an application for special leave under Sub-section (3) of that section, was a mandatory and inexorable time limit which could not be relieved against or relaxed and it excluded the applicability of Section 5 of the Limitation Act, 1963. It was further urged that having regard to the clear and specific language of Sub-section (4) of Section 417, which left no scope for doubt or ambiguity, the High Court was statutorily obliged to reject an application for special leave made after the expiry of 60 days from the date of the order of acquittal and it had no jurisdiction to extend this time limit of 60 days by resort to Section 5 of the Limitation Act, 1963. The Hon'ble Supreme Court, after referring to various decisions rendered on this aspect, finally held that since under the Limitation Act, 1963, Section 5 is specifically made applicable by Section 29(2) it could be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the applicant could show that he had sufficient cause for not presenting the application within the period of



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limitation and that it was only if the special or local law expressly excluded the applicability of Section 5 that it would stand displaced.

16. Considering the above, there is no dispute about the position that provision under Section 5 of the Limitation Act can very well be invoked for condoning the delay in filing the petition under Section 126(2) for setting aside the ex-parte order.

17. As already pointed out, in the case on hand, the only reason assigned for rejection is that the petition filed, after the expiry of three months, is not maintainable. As rightly contended by the learned counsel for the petitioner, the learned Judge should have returned the petition directing them to explain as to how the petition was maintainable or directed them to file an application under Section 5 of the Limitation Act to condone the delay. While hearing the above petition, the Family Court should have given liberty to file an application under the relevant provision of Limitation Law for condoning the delay.

18. Considering the above, this Court is of the view that the impugned order dated 16.04.2019 is not good in law and the same requires interference and consequently, the impugned order, dated 16.04.2019 is hereby set aside and the



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matter is remitted back to the Family Court and the Family Court is directed to rehear the matter and offer opportunity to file an application for condonation of delay and after hearing both the parties, pass orders in accordance with law.

19. The petitioner as well as the first respondent are hereby directed to appear before the learned Judge of the Family Court, Srivilliputhur, on 23.09.2022 along with their counsels for further hearing.

20. It is made clear that the Family Court while considering the application for setting aside the ex-parte order and the application to condone the delay in filing the petition for setting aside the ex-parte order, shall take into account the fact that the petitioner had been pursuing his remedy before this Court for filing the present criminal revision case.

21. With the above directions, this Criminal Revision petition is allowed.

09.09.2022.

Index : Yes/No
Internet: Yes/No
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K.MURALI SHANKAR, J.

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Pre-Delivery order made in
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