

CASE NO.:
Appeal (crl.) 431 of 2004

PETITIONER:
Vijay Kumar Prasad

RESPONDENT:
State of Bihar & Ors.

DATE OF JUDGMENT: 07/04/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

(Arising out of SLP (Crl.) No.3151/2003)

ARIJIT PASAYAT, J

Leave granted.

The present case reflects a sad state of affairs, as it involves a fight between the father and his sons. While the appellant is son of respondent No. 2 [who is the petitioner claiming maintenance in terms of Section 125 of the Code of Criminal Procedure, 1973 (in short 'the Code'), the other respondents are appellant's step brothers.

The factual background projected by the parties need not be noted in detail as the pristine question involved is one of law relating to jurisdiction in terms of Section 126 of the Code where an application can be filed. The application was filed by the respondent No. 2 - father in the Court of Chief Judicial Magistrate, Siwan. The appellant filed an application for transfer of the case from Siwan to Patna alleging that an influential politician was behind the litigation, and he would not get justice if the case is tried at Siwan as he could not even arrange a lawyer to represent him. According to him, the Court at Siwan has no jurisdiction to entertain the application because the appellant lives in Patna and is practising as a lawyer. The Patna High Court rejected the application for transfer primarily on the ground that the alleged apprehensions of the petitioner were not established. The question relating to jurisdiction was not specifically adverted to.

In support of the appeal, learned counsel for the appellant submitted that the question relating to jurisdiction was specifically urged before the High Court. It was clearly stated that the appellant resides at Patna and the Court at Siwan could not have entertained the application. In addition to the other aspects like inability to get lawyer, the question of jurisdiction was specifically urged. With reference to the language of Section 126 it is submitted that the respondent no. 2 had filed the petition before the Siwan Court claiming that he resides within the jurisdiction of the said court. It is not his residence which would determine the jurisdiction, but the place where the person from whom he claims maintenance i.e. present

appellant resides.

In response, learned counsel for the respondents submitted that the allegations of political influence having been discarded by the High Court in a transfer petition, it was not open to the present appellant to raise the question of jurisdiction.

Though the impugned order relates to a transfer petition, the question of jurisdiction appears to have been specifically raised before the High Court. In normal course we would have remitted the matter to the High Court for a decision on that aspect; but considering the relationship of the parties and as rightly submitted by learned counsel for the respondents the importance of the question, we think it appropriate to examine the question of jurisdiction.

Section 126 of the Code is in essence a repetition of Section 488 (6) to (8) of the Code of Criminal Procedure, 1898 (in short the 'old Code'). Section 488 of the old Code corresponding to Section 126 so far as relevant read as follows:-

"Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child."

Section 125 deals with various categories of persons who can claim maintenance. Sections 125 and 126 of the Code appear in Chapter IX which carries the heading "Order for maintenance of wives, children and parents".

Section 125(1)(d) relates to the father or the mother, unable to maintain himself or herself.

Section 126(1) which is relevant for the purpose of this case reads as follows:

"Proceedings under section 125 may be taken against any person in any district -

(a) where he is, or
(b) where he or his wife resides, or
(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child."

The position of law relating to proper jurisdiction was highlighted by this Court in *Mst. Jagir Kaur and Another v. Jaswant Singh* (AIR 1963 SC 1521) as follows:

"The words of the sub-section are, 'resides', 'is' and 'where he last

resided with his wife". Under the Code of 1882 the Magistrate of the District where the husband or father, as the case may be, resided only had jurisdiction. Now the jurisdiction is wider. It gives three alternative forums. This in our view, has been designedly done by the Legislature to enable a discarded wife or a helpless child to get the much needed and urgent relief in one or other of the three forums convenient to them. The proceedings under this section are in the nature of civil proceedings, the remedy is a summary one and the person seeking that remedy, as we have pointed out, is ordinarily a helpless person. So the words should be liberally construed without doing any violence to the language."

As noted in the above said judgment the crucial expression for the purpose of jurisdiction in respect of a petition which is filed by a father is not where "parties reside" and "is".

It is to be noted that Clauses (b) & (c) of sub section (1) of Section 126 relate to the wife and the children under Section 125 of the Code. The benefit given to the wife and the children to initiate proceeding at the place where they reside is not given to the parents. A bare reading of the Section makes it clear that the parents cannot be placed on the same pedestal as that of the wife or the children for the purpose of Section 126 of the Code.

The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing at the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings under Section 125 of the Code are of civil nature. Unlike clauses (b) and (c) of Section 126(1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives.

As has been noted in Jagir Kaur's case (supra) the expression "is" cannot be given the same meaning as the word "reside" or the expression "the last resided". It connotes in the context the presence or the existence of the persons in the district where the proceedings are taken. It is wider in its concept than the word "resides" and what matters is his physical presence at the particular point of time. No finding has been recorded by the High Court on this particular aspect which needs a factual adjudication. The stand of the appellant is that he practises in Patna and was not present in Siman physically when the application was filed for maintenance. Respondent No. 2-

father has indicated about the son practising in the Patna High Court. Obviously if his son was practising at the time of presentation of petition in the Patna High Court, he could not have been physically present at Siwan, whatever extended meaning may be given to the expression "is". In view of this the position is clear that the Court at Siman has no jurisdiction to deal with the petition. One thing may be noted, which can clear lot of cobwebs of doubt. The expression "is" cannot be construed to be a fleeting presence, though it may not necessarily for considerable length of time as the expression "resides" may require. Although the expression normally refers to the present, often it has a future meaning. It may also have a past signification as in the sense of "has been". (See F.S. Gandhi (Dead) by LRs. V. Commissioner of Wealth Tax, Allahabad (AIR 1991 SC 1866)). The true intention has to be contextually culled out.

In the circumstances we direct the transfer of the case to the Sessions Division of Patna, with the direction that the learned Session Judge may pass appropriate orders so that the matter can be placed before the court of competent jurisdiction. We make it clear that we have not expressed any opinion on the merits of the case and/or on the truth or otherwise of the allegations relating to political influence or pressure as alleged.

We allow the appeal to the extent indicated.