

In Re: Khairunnissa

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Court : Mumbai

Decided On : Jul-08-1929

Reported in : (1929)31BOMLR931

Judge : Patkar and ;Wild, JJ.

Appeal No. : Criminal Application for Revision No. 133 of 1929

Appellant : In Re: Khairunnissa

Judgement :

Patkar, J.

1. In this case the complainant filed an application under Section 488 of the Criminal Procedure Code for maintenance against her husband. The learned Presidency Magistrate, 6th Court, held that he had no jurisdiction to entertain the application as the stay of the respondent of about eight days in Bombay with the applicant could not be said to constitute 'residence' within the meaning of Sub-section (8) of Section 488 of the Criminal Procedure Code. In support of his view he relied on the case of Bamdei v. Jhunni Lal (1926) 27 Cr. L.J. 820 where it was held that the words 'last resided' in Section 488 of the Criminal Procedure Code did not contemplate a mere casual residence in a place for a temporary purpose, and that where the husband is employed as a carpenter in the Railway workshops in Lahore and has been residing there continuously for eleven years, a temporary sojourn to Lucknow by him with his wife would not confer on Lucknow Court

jurisdiction to entertain an application by the wife for maintenance under that section.

2. It is urged on behalf of the applicant that the view taken by the lower Court is erroneous and reliance is placed on the decision in *Mrs. E. H. Jolly v. St. John William Jolly* (1917) 21 C.W.N. 872 where the husband ordinarily resided outside Calcutta but was temporarily in Calcutta on the date of the application, and it was held that the temporary residence was sufficient to give the Calcutta Court jurisdiction under Sub-section (8) of Section 488 of the Criminal Procedure Code.

3. The husband did not appear in the lower Court to contest the application. The applicant stated on oath that she was married to the opponent at Ambarakpur in the United Provinces about two and a half years ago. Then they went to Surat and lived there for six or seven months, and on account of ill-treatment she came to her father in Bombay from Surat. The respondent then came a day later and stayed with her father for about eight days and told her father that he would try and find employment but left afterwards, and after she learnt that he was at Karachi, she sent him a notice through a pleader to provide for her maintenance and subsequently filed the present application. The question, therefore, in this case is resided with his wife in Bombay.

4. According to Stroud's Judicial Dictionary 'residence' has a variety of meanings according to the statute in which it is used: per Erie C.J. in *Naef v. Mutter* (1862) 31 L.J.C.P. 357 . It is an 'ambiguous word' and may receive a different meaning according to the position in which it is found: per Cotton L.J. in *Ex part Breull: In re Bourie* (1880) 16 Ch. D. 484 *Id. Fernandez v. Wray* (1900) I.L.R. 25 Bom. 176 it was held that temporary residence gives the Court jurisdiction under Clause 12 of the Letters Patent, and that for the purpose of jurisdiction a man may be said prima facie to dwell where he is staying at any particular time, but it is open to him to show that he is not dwelling there, but at some other place, If a person has no permanent residence, he may be said to dwell where he may be found.

5. In *Arthur Flowers v. Minnie Flowers* I.L.R.(1910) All. 203 f. b. it was held that a mere temporary sojourn in a place, there being no intention of remaining there, would not amount to residence in that place within the meaning of Section 3 of the

Indian Divorce Act, 1869, so as to give jurisdiction under the Act to the Court within the local limits of whose jurisdiction such place is situated. In that case the husband and wife resided in Hyderabad and paid a flying visit to Meerut for a temporary purpose and not with any intention of remaining there, and it was held that the mere casual residence in a place for a temporary purpose with no intention of remaining is not dwelling, and that where a party has a fixed residence outside the jurisdiction, an occasional visit within the jurisdiction will not suffice to confer jurisdiction by reason of residence within the meaning of Section 3 of the Indian Divorce Act.

6. In *Bright v. Bright* I.L.R.(1909) . Cal. 946 the husband and wife, who had no permanent residence, were held to have last resided at a Calcutta hotel where they had stayed for about a fortnight. In *Murphy v. Murphy* . 22 Bom L.R. 1077 where the husband and wife had no permanent residence they having lived at several places since their marriage and last resided together in a hotel in Bombay, it was held that there was a sufficient residence within the meaning of the Indian Divorce Act to give the Court jurisdiction to entertain the petition.

7. It would follow from these decisions that where the husband and wife had a fixed place of abode or a permanent place of residence, a casual or temporary residence in any other place would not confer jurisdiction on the Court situate at that place. In the present case it appears that the husband and wife had no fixed place of abode and no permanent residence, and the husband came to Bombay and stayed with the complainant and her father for about eight days, and had the intention of remaining there as he told the complainant's father that he would try and find employment in Bombay but after eight days. The husband did not appear before the Magistrate and has not given any evidence as to his usual place of residence. On the evidence before us we hold that the husband has no fixed place of abode or permanent residence.

8. I think, therefore, that there was sufficient 'residence together' of the husband and wife in Bombay so as to give jurisdiction to the Magistrate under Sub-section (8) of Section 488 of the Criminal Procedure Code.

9. In the case relied on by the learned Magistrate the husband had a fixed place of residence in Lahore, and it was held that a mere temporary sojourn to Lucknow with his wife did not confer on the Lucknow Court jurisdiction to entertain the application.

10. We would, therefore, reverse the order of the lower Court dismissing the application, and direct the Magistrate to issue notice to the husband, and decide the application on the merits.

Wild, J.

11. This is an application by the petitioner Khairunnissa residing in Madanpura, Bombay, to set aside the order of the learned Presidency Magistrate, 6th Court, Bombay, dismissing for want of jurisdiction the application made by her under Article 488 of the Criminal Procedure Code for maintenance against her husband.

12. The case of the petitioner is that she was married to the respondent at Ambarakpur, that she and her husband went to Surat where they lived for six or seven months, that owing to ill-treatment by her husband she was taken to her father's house in Bombay, that her husband joined her there and stayed with her for eight days and that thereafter he left her and was not heard of for some time, Finally, however, he was found to be at Karachi and it appears that he is now at Mubarakpur in the United Provinces.

13. The learned Presidency Magistrate dismissed the application following the ruling in *Ramdei v. Jhunni Lal* 27 Cr. L.J. 820 on the ground that the words 'last resided' in Section 488 of the Criminal Procedure Code do not contemplate a mere casual residence in a place for a temporary purpose.

14. It is true that, according to the petitioner's statement, the residence of her husband at Bombay was merely a temporary one. The meaning of the words 'last resided' in Section 488 have apparently not been construed by this Court and I would prefer to follow the ruling in *Mrs. E.H. Jolly v. St. John William Jolly* (1917) 21 C.W.N. 872 where it was held that temporary residence was sufficient to give the Court jurisdiction under Sub-section (8) of Section 488. It is difficult enough for

a wife to recover maintenance from her husband who refuses to maintain her and to give a strict interpretation to the words 'last resided' in Section 488 would render the difficulty even greater. Moreover, in this case it would appear that the respondent has no settled place of residence and that this is not a case like that of Ramdei v. Jhunni Lal where the parties had a fixed place or residence, I would, therefore, set aside the order of the learned Presidency Magistrate dismissing the application and would direct him to proceed with it according to law.

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