In Re: Hanifabai

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Court : Mumbai

Decided On : Sep-16-1930

Reported in : (1930)32BOMLR1499

Judge : Madgavkar and ;Barlee, JJ.

Appeal No. : Criminal Revision Application No. 287 of 1930

Appellant : In Re: Hanifabai

Judgement :

Madgavkar, J.

1. This is an application in revision by the petitioner Hanifabai against the order passed by the Presidency Magistrate, second Court, Bombay, dismissing her application for separate maintenance against the opponent husband, Mahomed Yakub.

2. The petitioner alleged brutal ill-treatment such as knocking out of a tooth and causing miscarriage so that she had to go to her adopted father, Oomar Master's. In support of the application she adduced, besides giving her own evidence, the evidence of two other witnesses, and also produced subsequently a copy of her complaint to the police. The main evidence in the case was taken on March 5, hut there is no record of it in writing. The case was adjourned to May 9, when her former complaint to the police was brought on the record, and it was adjourned

further to enable her to produce the rest of her evidence which she was unable to do. On June 6, the respondent made a statement denying the ill-treatment; and on June 13, the order made was as follows :

There is no sufficient evidence before me to justify an order for separate maintenance. I therefore dismiss the petition.

3. It is argued for the petitioner that the evidence under Section 488 (6) of the Code of the Criminal Procedure is to be recorded in the manner prescribed in the case of summons-cases, and that manner is prescribed in Section 355, and therefore, Section 362 has no application. The Magistrate was in error in not 'recording the memorandum of evidence and likewise in not writing a full judgment.

4. The opponent contends that Section 355 has no application but rather Section 362 (4), under which it is not necessary for the Presidency Magistrate to record evidence.

5. The difficulty arises from the words 'a Magistrate other than a Presidency Magistrate' in Section 355, It was held by the Calcutta High Court in Kali Dassi v. Durga Charan Naik ILR (1892) Cal. 351 that Magistrates other than Presidency Magistrates are bound in an application under Section 488 to record evidence and write a proper judgment. By virtue of the words quoted above Section 355 has no application to the Presidency Magistrates. We are unable to accept the contention for the petitioner that Section 362 applies only to criminal offences and not to an application under a 488, and therefore, notwithstanding the words in Section 355, under s 862 (4) and s 488 read together it is incumbent on the Presidency Magistrates under Section 488 to record evidence in the manner laid down in Section 355. In the absence of any specific provision of the legislature it appears that in applications under Section 488, Presidency Magistrates are bound to record evidence in writing in the manner they record evidence in summons-cases ; ordinary Magistrates, therefore, under Section 355 and Presidency Magistrates under Section 362, their order on such applications not being appealable.

6. Nevertheless, as pointed out by this Court in Emperor v. Harischandra (1907) 10 Bom. L.R. 201, under Section 362, Presidency Magistrates have a discretion,

judicial and not arbitrary, and it is necessary for them to consider the evidence judicially and to pass a judicial order, A summary case ordinarily is disposed of immediately after the evidence is recorded at a single hearing, and if a judgment or order, however concise, is properly written, it would necessarily be a record of the abstract of the evidence and the reasons for appreciation by the Magistrate as the basis on which his conclusion is reached.

7. In the present case, as the matter was not disposed of on . March 5, the Magistrate ought to have made some notes for his own information.

8. It is argued for the opponent that the learned Magistrate in this case is a Magistrate of great experience. But without in any way disparaging the experience and capacity of the learned Magistrate, it is impossible to expect him to remember on June 18, the evidence which he had omitted to record on March 5, with the hundreds of other cases he must have tried in the interval. Neither the law nor this Court places such an unreasonable burden on Presidency Magistrates; rather as pointed out in Emperor v. Harischandra, in a summary trial, which is likely to be adjourned for a long date, it is difficult for the Magistrate to remember the evidence or the appreciation of which it is necessary for him to make without a sufficient memorandum to enable him on a subsequent date to write a proper judgment. In this case, unfortunately, both the evidence and this order are lacking.

9. We have no other course left but to allow the application, set aside the order of dismissal by the Presidency Magistrate, 2nd Court, and direct a retrial of the case by the Presidency Magistrate, 6th Court, Mazagaon.

Barlee, J.

10. I agree. Granting that it is not necessary for a Presidency Magistrate to record evidence in a case under Section 488,1 think that, when it appears to him that he cannot finish the case at one hearing and he finds that he is obliged to put off the decision for a considerable time, he should in the exercise of his wide discretion make notes so as to enable him at the time of judgment to remember what evidence has been recorded. In the same way when he is not able to give judgment immediately after hearing the evidence, I think that he should give his

reasons for his decision in such detail as to make it clear to the parties as well as to this Court that his judgment is based on a proper consideration of the evidence which has been given in the case. In the present case there is nothing to show what were the reasons which led him to dismiss the applicant's petition and we cannot feel confident that he retained the evidence in his memory so long as three months and a half and that his judgment can be looked upon as a considered judgment based on the evidence.