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Court : Mumbai

Decided On : Sep-01-1926

Reported in : AIR1927Bom46

Appellant : Palmerino

Respondent : Mrs. Palmerino

Judgement :

Shah, J.

1. This is a very unusual case An order was made by the Special First Class Magistrate, Poona Cantonment, on 12th April 1924, on the application of the wife for her maintenance and the maintenance of her child against her husband. At that time apparently there was no dispute between the parties as to the fact of the marriage. The learned Magistrate made an order directing the present petitioner to pay Rs. 150 per mensem for the maintenance of the wife and the child. This order was apparently acquiesced in without objection by the husband for considerable length of time. The present petition was made in July last for setting aside that order. The petition is based on two grounds, first that the order directing Rs. 150 to be paid per month is in excess of the jurisdiction of the Magistrate under Section 488, Criminal P.C. ; and. secondly that the petitioner has subsequently found that, before the marriage between him and his wife, which took place on 8th February 1921, the present opponent had already married one Patrick Durney, and that,

though, in fact, he was alive, it was falsely represented by her at the time of the marriage with the petitioner that she was a widow. In other words, the allegation is that at the time of the marriage it was falsely represented to the petitioner that Patrick Durney was dead. The petitioner now alleges that on inquiry he has learnt that Patrick Durney is alive. It is contended that the marriage being null and void on account of her first husband being alive at the time of 'the marriage in question an order under Section 488, Criminal P.C., could be made.

2. As regards the first ground, we think that the contention of the petitioner is right. The Magistrate can make an order for the maintenance of his wife and child at such monthly rate, not exceeding one hundred rupees on the whole, as he thinks fit. In the present case the order of the Magistrate directing a monthly allowance to be paid at the rate of Rs. 150 per month was clearly in excess of his jurisdiction. Though, in this case, a notice has been served upon the person who claimed to be the wife of the petitioner she has not appeared, and we have not heard any argument on her behalf. The first contention of the applicant appears to be right. In fact, it is difficult for one to understand how the learned Magistrate made an order so clearly in excess of his jurisdiction, and how the present petitioner came to acquiesce in that order for so long a time. However that may be, it seems that the order is open to that objection, and can be, and ought to be, corrected now.

3. As regards the further question whether the marriage, which is said to have been gone through in February 1921 between the present petitioner and the opponent, was null and void in consequence of her first husband being alive, we think that the question cannot properly be dealt with on this application. That is a matter in respect of which it is perfectly open to the petitioner to take such steps as he may be advised under the matrimonial jurisdiction of the proper Court to have that marriage declared nul and void. It is obvious that a question of this nature cannot be considered on this revisional application. This matter might have been different if the present petitioner had been in a position to adduce evidence, at the time when the application of the wife was heard, that she was not his wife according to law. However, he was not in that position then. Under the circumstances, it must be left to be determined in a proper proceeding under the matrimonial jurisdiction of the Court which may have jurisdiction to deal with the

matter. It may be open to the petitioner to obtain a proper interlocutory order by way of injunction from that Court restraining the present opponent from taking benefit of the order which has been made against him under Section 488, Criminal P.C. But, until that is done, we do not think it would be reasonable for us, under the circumstances of this 'case, to make any further order on the basis of the allegation affecting the validity of the marriage.

4. We, therefore, modify the order made by the learned Magistrate on 12th April 1924, by reducing the allowance to Rs. 100 per month. This will be without prejudice to any relief that the applicant may seek from the proper Court in the exercise of its matrimonial jurisdiction.

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