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Janni Bibi Vs. Mohammed Abdul Rahaman

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Court : Andhra Pradesh

Decided On : Oct-28-1954

Reported in : AIR1955AP1; 1955CriLJ149

Judge : Subba Rao, C.J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 488, 488(6), 489, 489(1) and 490

Appeal No. : Criminal Revn. No. 693 and Cri. Revn. Petn. No. 647 of 1954

Appellant : Janni Bibi

Respondent : Mohammed Abdul Rahaman

Advocate for Def. : M.A. Khader, Adv.

Advocate for Pet/Ap. : N.C.V. Ramanujachari, Adv.;Public Prosecutor for State

Judgement :
ORDER

(1) This is a revision against the order of the Court of the District Magistrate, West Godavari, setting aside the order awarding maintenance to the petitioner under S. 488, Criminal P. C.

(2) The petitioner and the respondent are Muhammadans. She married the respondent some years ago, and had three children by him. She filed M. C. No. 5

of 1950 on the file of the Sub-Divisional Magistrate's Court, Eluru, under S. 488. Criminal P. C., and obtained an order for maintenance at the rate of Rs. 30/- per month. Subsequently, in M. C. No. 2 of 1952, the Honorary Additional Ist Class Magistrate enhanced the rate of maintenance from Rs. 30/- to Rs. 32/- permonth.

The respondent alleging that he divorced the petitioner by uttering 'Talak' thrice before repectable people on or about 27.4.1954, filed M. C. No. 10 of 1954 before the District Magistrate. Eluru, for cancelling the order of maintenance. After infructuous attempts to serve the petitioner, she was declared ex parte. After examining P. W. 1 and the documents filed, the learned District Magistrate declared that the orders made in M. C. No. 5 of 1950 and 2 of 1952 were unenforceable from 27.4.1954 and accordingly set them aside. The wife has filed the aforesaid revision.

(3) The learned counsel for the petitioner contended that the District Magistrate had no jurisdiction to cancel the order of maintenance on the ground that the wife was divorced. He also argued that the learned Judge violated the principles of natural justice in making an order behind the back of the petitioner. The learned counsel for the respondent countered the argument by contending that the Magistrate had ample power to do so under S. 489, Criminal P. C., and that, under the provisions of that section, the presence of the wife was not required for making any order against her.

(4) To appreciate the contention of the parties, it may be convenient at this stage of read the relevant provisions of the Criminal Procedure Code:

'Sec. 488:

(1) If any person having sufficient means neglects or refuses to maintain his wife ..... the District Magistrate, a Presidency Magistrate a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such persons to make a monthly allowance for the maintenance of his wife ..... of such monthly rate.....

(6) All evidence under this chapter shall be taken in the presence of the husband .....or when his personal attendance is dispensed with, in the presence of his pleader and shall be recovered in the manner prescribed in the case of summons cases:

Provided, that if a Magistrate is satisfied that he is wilfully avoiding service or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case ex parte. Any order so made may be set aside for good cause shown on application made within three months from the date thereof.

Sec. 489:

(1) On proof of a change in the circumstances of any person receiving under S. 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit: Provided that if he increases the allowance the monthly rate of one hundred rupees in the whole be not exceeded.

Sec. 490:

A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid, and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.'

(5) A combined reading of the provisions may be stated thus: A wife, who has been neglected, or refused to be maintained, may apply to a Magistrate against her husband for payment of a monthly allowance. Such an application shall be decided in the presence of the husband. But to prevent abuse of the provisions an ex parte procedure is prescribed, which enables the Magistrate to pass an ex parte order and also gives a right to the husband to get it set aside for good cause. If there is a change in the circumstances of either party, the order can be altered suitably. The order originally made or subsequently modified can be enforced by a

Magistrate against a persons bound by that order.

The entire fascicule of the sections pre-supposes the continued existence of the martial relationship. If a woman files an application under S. 488 (1) for maintenance against her alleged husband the said claim can be certainly be defeated by alleging the proving that she is not his wife, for in that case, the foundation of the claim disappears.

(6) There is consensus of judicial opinion in support of this view. It has been held by all the High Courts that it is the duty of the Magistrate to decide that question if raised. The 'ratio decidend' of the said decisions is clearly brought out by Mahmood J. in a very early decision in --' the matter of the petition of Din Muhammad', 5 All 226 (A), wherein the learned Judge stated that it is

'as essential to the continued opeation, as to the original making of an order of maintennace, that the recipient of the allowance should be a wife at the time for which maintenance is claimed, and consequently a Magistrate must, when a question of divorce arises, determine on such evidence as may be before him, whether there has or has not been a legally valid divorce.'

It cannot also be disputed that, if the conjugal relationship ceases, the order of maintenance becomes unenforceable under S. 490, Cr. P. C. This view has been accepted by a long line of cases: -- 'Abdue Rohoman v. Sakhina', 5 Cal 558 (B); -- 'In re. Kasam Pirbhai', 8 Bom HCR Cr 95 (C); -- 'In re. Abdul Ali Ismailji', 7 Bom 180 (D); -- 'Mahomed Abid Ali v. Ludden Sahiba', 14 Cal 276 (E) and -- 'Ahmad Kassim v. Khatun Bibi', AIR 1933 Cal 27 (F). The principles accepted by those decisions is succinctly stated by Mahmooc J. at page 229:

'The whole of Chapter XLI, Criminal Procedure Code, so far as it relates to the maintenance of wives, contemplates the existence of conjugal relation as a condition precedent to an order of maintenance, and, on general principles, it follows that as soon as the conjugal relation ceases, the order of maintenance must also cease to have any enforceable effect. When and in what manner a cessation of the conjugal relation takes place, is a question which 'ex necessitate rel' must be determined acording to the personal law to which the parties

concerned are subject.'

(6a) There ends the unanimity of opinion. There is a conflict on the question whether, in such a contingency, an application under s. 489, Cr. P. C., is maintainable. Under S. 489 an order fixing a monthly allowance under S. 488 can be altered on proof of a change in the circumstances of a party to that order. The question is whether the dissolution of the marriage by divorce is one of the changes in the circumstances which empowers a Court to alter the allowance given to the wife. There are two views on this question. Mahmood J. in --'In the matter of the petition of Din Muhammad (A)' while construing the provisions of S. 536 of Act 10 of 1872, corresponding to the present S. 489, held that the alteration in the allowance contemplated therein only refers to a power to alter the amount and not to a total discontinance thereof. The view of Mahmood J. was accepted by the Full Bench in -- 'Shah Abu Ilyas v. Ulfat Bibi', 19 All 50 (G). Alkaman J. who delivered the leading judgment, made the following observations:

'The change in circumstances referred to i S. 489 is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed and not a change in the status of the parties which would entall the stoppage of the allowance.'

(7) A contrary view was expressed by the Nagpur High Court in -- 'Emperor v. Shaik Daudi', AIR 1921 Nag 7 (H) wherein Halifax A. J. C. countered the arguments advanced for the former view in the following terms:

'I am unable in the first place to see what the position of the words 'wife are merely a part of the description of one of two classes of persons in whose circumstances a change would empower the Magistrate to make an alteration in the allowance. They are indeed otiose and might easily have been omitted. As to the limitation of the amount, that is merely a maximum, and to say that because of that limitation the alteration could not be to ntohing, would be to say that because of the same limitations in S. 488 the Magistrate could not refuse to give allowance on proof that the applicant was not the wife or child of the non-applicant.'

(8) The former is a stricter view, but the later is a more equitable one. Though equity has no place in construing statutory provisions, there is no reason why it should not be adopted if the express words without doing violence to the language bears such a meaning. Yahya Ali J. in -- 'In re Mohammed Rahimullah', AIr 1947 Mad 461 (I) had to consider the conflict between these two views and concluded his discussion in the following words:

'I hold, therefore, in agreement with the view expressed by the Nagpur High Court in the case cited above which is the view consistently obtained in all the courts that in circumstances such as those which are assumed to exist in the present case, the Magistrate is not only bound to refuse to enforce the order under S. 490, Cr. P. c., but is also empowered under S. 489, Cr. P. C., to alter the amount payable under it to nothing, that is to say by a combined effect of both these provsiions he is competent to set aside the order.'

(9) So too, Krishnana J. in -- 'Meenakshi Ammal v. Karuppanna Pillai', AIR 1925 Mad 491 (J), rejected the contention that, under S. 489 the Magistrate could not altogether cancel the order of maintenance, but could only alter it or reduce it. In the learned Judge's view the word 'alter' was not used in any such restricted meaning and the reduction of the maintenance to nothing would also come within the meaning of the word 'alteration'. The opinion expressed by Kuppuswamy Ayyar J. at the earlier stage, when the learned Judge remanded the matter for freshdisposal, was explained by Yahya Ali J. in -- 'AIR 1947 Mad 461 (I)' when he finally disposed of the case on the ground that the observations were only obiter.

(10) The legal position may, therefore, be enumerated. The existence and continuation of conjugal relationship is the foundation of an order directing payment of maintenance under S. 488, Cr. P. C., and for enforcing it under S. 490 Cr. P. C. The Magistrate is, therefoe, bound to decide the question of the woman's status as a wife, or the question of divorce if raised at the time of making the order or even at the time when the wife seeks to enforce it. To that extent, there is no conflict. so much conceded, I do not see any justification for not conferring that power on a Magistrate to cancel an order of maintenance, if an application to that effect is filed before him.

The question is whether the working of S. 489(1) is comprehensive enough to make in an application to cancel an order of maintenance on the question of divorce. It may be that the wording is susceptible of conflicting views. But when the power of the Magistrate to decide the status of the woman is conceded, there is no reason to prefer the narrower view to a more comprehensive one. The words 'change in the circumstances' and 'alteration in the allowance' are wife enough without doing violance to the language to take in divorce and cnacellation of the allowance.

Divorce of the wife is certainly a change in the circumstances for she loses her status as a wife. Consequently the Magistrate can alter an order giving allowance by cancelling it. This interpretation woiuld prevent a lacuna in the Code and also multiplicity of proceedings. I would prefer to accept the broader view expressed by Yahya Ali J. to that of Mahmood J. I would hold that the application under S. 489 read with S. 490 was maintainable for cancelling the order giving maintenance to the petitioner.

(11) It is then argued for the petitioner that from a comparative study of the provisions of Ss. 488 (5) and 489, S. 488 (5) expressly provides for ex parte procedure, whereas S. 489 does not prescribed any such procedure. It is clear that, in the latter case, no exparte order can legally be made. An equally extreme contrary view was suggested by the learned counsel for the respondent that, in the case of a cancellation or modification of an order affecting the wife, her presence is not legally required, under the section. The two views, If I may say so, are based on a misapprehension. There is a distinction between ex parte procedure and the procedure complying with the principles of natural justice. Unless a statute expressly conferred a power, a final decree or order, whether ex parte or on merits, cannot be set aside.

But in accordance with the maxim 'aude alteram partem' no judicial order can be made affecting the rights of a person, unless a reasonable opportunity has been given to him to show why it should not be made. This necessarily implies a notice to the affected party giving him an opportunity to show cause. The fact that S. 488(6) provides that evidence shouldbe taken in the presence of the husband and

the fact that such a provision is absent in the case of an applicatioin for modifying that order cannot, in my view, by necessary implication abrogate the salutary rule based upon principles of natural justice, that a judciial order cannot be made affecting a party without giving reasonable notice.

In the case of an order against the husband for maintenance a specific provision was made an it would be an executable order. But once an order is made in favour of the wife, there is no reason or principles why it should be modified either in favour of the husband or wife without giving them reasonable opportunity to show cause against it. In such circumstances, the procedure should be governed by principles of natural justice. Though an abortive attempt was made to save the petitioner, I am not satisfied from the record that such an opportunity was given. Now that the petitioner is before this Court, in the interests of justice, the matter may be remanded to be disposed of in her presence in accordance with law.

(12) Before I leave this case, another argument advanced by the learned counsel for the respondent may be mentioned. It is said that the divorce was in bidat (sinful or abominable) form and not in ahaam (best) form and that the bidaat form operates as an immediate and effective divorce. This question also may be raised before the Magistrate.

(13) In the result, the order of the Magistrate is set aside and the matter is remembered to him for fresh disposal according to law.

(14) Order set aside.

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