

Subhwanti Vs. State and anr.

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Court : Allahabad

Decided On : Apr-19-1967

Reported in : AIR1968All214; 1968CriLJ727

Judge : S.D. Khare and ;Yashoda Nandan, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 438, 439 and 488;
Code of Criminal Procedure (CrPC) (Amendment) Act, 1956 - Sections 438(1)

Appeal No. : Criminal Ref. No. 157 of 1965

Appellant : Subhwanti

Respondent : State and anr.

Advocate for Def. : Sushil Kumar, Addl. Govt. Adv., ;J.N. Tewari and ;M.K. Shukla, Adv. for ;O.P. Dhanni, Adv.

Advocate for Pet/Ap. : C.S. Saran, Adv.

Judgement :

S.D. Khark, J.

1. This is a reference made by the Temporary Sessions Judge, Varanasi, recommending that the order passed by the Magistrate on 4-1-1965 dismissing an application under Section 488 Cr. P. C. be set aside and the case be sent back to

the Magistrate for disposal in accordance with law. A learned Single Judge of this Court, while admitting the reference, expressed the view that it was not at all clear whether the revisional jurisdiction of the High Court under Section 439 Cr. P. C. could be exercised to correct an error in the order passed under Section 488 Cr. P. C. However, inasmuch as such a revision application had been entertained in the case of *Shamsher Khan v. Sm. Siddiquunnisa*, AIR 1953 All 720 he admitted the reference but directed that the papers be laid before the Hon'ble the Chief Justice for getting the matter decided by a Division Bench of this Court. That is how the case has come before us.

2. The undisputed facts of the case leading to this reference, briefly stated, are that Sm. Shubwanti applicant was the legally wedded wife of Dhanni Ram, Opposite party. About twelve years before the date of the application under Section 488 Cr. P. C. a daughter was born to the applicant and she was alive on the date of the application. The applicant claimed a monthly allowance of Rs. 50 for herself and her minor daughter. The plea taken up by Dhanni Ram opposite party, was that about twelve years prior to the date of the application and soon after the daughter was born the Panches with the consent of both the parties had effected divorce between them and as such customary divorce was recognised in their community, they had nothing to do with each other from the date of the divorce and had been keeping separate from each other with mutual consent.

The applicant had filed two documents, to wit (1) certified copy of the kutumb register for the year 1960 to show that she and her daughter had been living with her husband in the same house till the year 1960, and (2) certified copy of the complaint dated 5th August, 1964, filed by one Ram Briksh against Dhanni opposite party under Section 494/498 I.P.C. in respect of Sm. Muneshwari whom the opposite party claimed to have married 12 years ago immediately after having divorced the applicant. The purpose of filing these documents obviously was that the case taken up by the opposite party was not true. The Magistrate, while considering the effect of the entries made in the kutumb register observed that the same indicated that 'Sm. Shubwanti lived in the house of Dhanni Ram the opposite party with her daughter' However, he did not consider the effect of that finding during the course of the order which he passed at the time of rejecting the

application of Shubwanti and her daughter for maintenance allowance under Section 488 Cr. P. C. He also did not consider the effect of another document filed by the applicant, that is to say, the copy of the complaint referred to above.

3. In view of what has been stated above, the learned Additional Sessions Judge has observed that there are two serious infirmities in the order passed by the Magistrate. The first infirmity is that he did not consider the question of the right of the daughter of the applicant to get any maintenance allowance. Even if the wife was divorced according to the custom prevalent in the society, the right of the daughter to get maintenance allowance was not negatived by the order passed by the Magistrate. However, no maintenance allowance was allowed to her.

The second infirmity pointed out was that the Magistrate has failed to consider the effect of the two documents to wit, the copy of the kutumb register for the year 1960, and the certified copy of the complaint under Section 494/498 I.P.C. made on 5th August. 1964. The effect of these documents could be to demolish the merits of the case of the opposite party.

4. The grounds for accepting' the revision as mentioned in the reference order are, therefore, fairly good and strong. The only question that has to be considered is whether the High Court can exercise its revisional powers under Section 439 Cr. P. C, in respect of an order passed under Section 488 Cr. P. C.

5. Sub-section (1) of Section 438 and Sub-section (1) of Section 439 Cr. P. C. read as follows:--

438(1) 'The Sessions Judge or District Magistrate may, if he thinks fit, on examining under Section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence or an order be reversed or altered, may order that the execution of such sentence or order be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.'

439(1) 'In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its

knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence; and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 429.'

6. The words 'or an order' and 'or order' occurring in Section 438(1) Cr. P. C. were incorporated by the Amending Act 39 of 1956. Prior to the Amending Act 39 of 1956 there could have been some doubt whether or not an order under Section 488 Cr. P. C. can be revised or can be interfered with by the High Court in its revisional powers under Section 439 Cr. P. C. However, after the addition of the word 'order' in Sub-section (1) of Section 438 Cr. P. C. that doubt has been set at rest. It is now clear that after the Amending Act 39 of 1956 an order passed under Section 488 Cr. P. C. can be questioned in revision before the High Court in the exercise of its revisional powers under Section 439 Cr. P. C.

7. It is unnecessary to refer to the case-law prior to the year 1956. All the cases decided after the year 1956 are consistent on the point that the revisional power under Section 439 Cr. P. C. can be exercised by the High Court in the case of an application under Section 488 Cr. P. C. All that has been said is that such power should be rarely exercised. It has been held that the High Court would interfere when the lower court has not exercised its discretion judicially (vide *Bhaskaran v. Kunhipannu*, AIR 1960 Ker 110 and *Gangamma v. Subbarayudu*, AIR 1961 Andh Pra 510. It was held in the case of *Tajabai v. Shankarrao*, AIR 1966 Bom 48 that so long as the proceedings of the Magistrate are in order and so long as he has estimated the evidence his decision should not be disturbed even if the revisional Court could have come to another conclusion on the evidence.

8. These are, however, matters which concern the extent to which and the proper cases in which, the revisional powers should be exercised. There is no difference of opinion whatsoever on the point that the re-visional jurisdiction under Section 439 Cr. P.C. can be exercised by the High Court against an order passed in proceedings under Section 488 Cr. P. C.

9. In the result we accept the reference and direct that the order of the Magistrate dated 4-1-1965 be set aside and the case be sent back for disposal in accordance with law. (10) Before parting with this case we might mention that an affidavit was filed today on behalf of the opposite party to indicate that the daughter of the applicant has been married in the year 1965. The learned counsel for the applicant says that he has not been able to verify whether the facts contained in the affidavit are true or false. This matter can be raised by both the parties in the court of the Magistrate.

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