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Court : Allahabad

Decided On : Dec-18-1987

Reported in : 1988CriLJ1227

Judge : Ravi S. Dhavan, J.

Appellant : Aklesh Kumar Jain

Respondent : State of Utter Pradesh and ors.

Judgement :
ORDER

Ravi S. Dhavan, J.

1. This matter had been before this Court earlier when an order of remand was made directing the Munsif Magistrate, Ghaziabad to reconsider the matter in the light of gudelines and observations of this Court in the order of 5 August, 1987 by which two petitions under Section 482 of the Criminal Procedure Code, 1973, were decided. The learned Magistrate, it may be set on record, did not follow the order of remand and evaded the direction of the High Court, The urgency of the situation thus warrants that this Court may now look into the matter and consider it on merits.

2. Aklesh Kumar Jain is the husband. He is married to Chitra Jain. They have twins, who are not three years of age as yet. Aklesh Kumar Jain, the applicant in

the present petition, holds a Nehru Fellowship for advanced studies in Geology, at the Cambridge University, England.

He had already begun this pursuit in the field of Geology at Darwin College, Cambridge. He contends that the terms of the Fellowship require that his travel expenses to and from England will be borne by the Jawaharlal Nehru Memorial Trust which has arranged for the Fellowship. The expenses for his wife are not paid by the Fellowship. The applicant had to return to Indiaf or some field work. He could not go back to Cambridge University as he had medical problems. He condends that his kidneys were malfunctioning. His wife had stayed behind in England. He asked her to return to India. She did not. He was back in England on 1st September, 3986. The relations between them were beginning to get strained. They returned to India with the twins on6 November, 1986.

3. On the day they arrived i.e. 6-11-1986 a first information report was instituted by the petitioner's father-in-law, Kampta Prasad Jain, not by the petitioner's wife. An allegation was made under Section 498A of the Penal Code. The allegation in the first information report, in effect, suggests a demand for dowry and harassment to the petitioner's wife Chitra Jain.

4. The time for the petitioner to get back and resume and pursue his Fellowship at Cambridge is drawing near, but, as he was facing a charge under Section 498A, Cr.P.C. he was virtually on bail consequent upon an amount against sureties which was not light. While the charge under Section 498A of the Penal Code was pending consideration before the Munsif Magistrate, Ghaziabad, the petitioner instituted proceedings for divorce against his wife. His allegations in effect were incompatibility of temperament.

5. The wife Chitra Jain also instituted proceedings for maintenance under Section 125 of the Code of Criminal Procedure. Thus, three proceedings entangled the husband and wife, one initiated by the wife under Section 498A ofthe Penal Code, the other proceedings for divorce instituted by the husband and the third for maintenance sought by the wife.

6. The trial under Section 498A of the Penal Code was to proceed and as it was unlikely to conclude expeditiously. One of the matters which was engaging the attention of the learned Magistrate was the plea of the petitioner that he ought to be permitted to go to England to resume his studies at Cambridge University. It was suggested by his wife that the petitioner must not be 'permitted to go alone and indeed if he must go then she ought to accompany him. The petitioner resisted this suggestion.

7. The petitioner contended that his Fellowship was such that it can only support a single person and it was not possible for him to take his wife and further relations between them were strained as she had made allegations against his honour.

8. The Magistrate found it difficult to deny permission to the petitioner not to pursue his studies at the Cambridge University and had permitted the petitioner to go to England., but upon a condition that he would take his wife. He made it clear that in case the petitioner does not intend to take his wife with him, he cannot go to England. Against this order, the petitioner Aklesh Kumar Jain filed a Criminal Misc. Petition No. 5095 of 1987. Aklesh Kumar Jain v. State of U.P. and Ors. The petitioner contended that the order of the Magistrate was illegal and the condition that he should, take his wife to England is beyond the jurisdiction of the Magistrate and the condition be waived and he be permitted, in effect, to pursue his studies at the Cambridge University.

9. The applicant's wife also filed a petition under Section 482, Cr.P.C. being Criminal Misc. Petition No. 5965 of 1987. Smt. Chitra Jain v. Aklesh Kumar Jain and Anr. In her petition Chitra Jain contended that the order of the Magistrate permitting him to go to England is illegal; that her husband be called upon to surrender his passport.

10. The two petitions aforesaid i.e. Cr. Misc. Petition No. 5095 of 1987 and Cr. Misc. Petition No. 5965 of 1987 were heard together upon which this Court passed its detailed order on 5 August, 1987. When the matter was being considered at the Bar, Chitra Jain, the wife of the petitioner made an issue of the fact that her husband may not be permitted to leave except with her and the children. It was contended on her behalf that the order of the Magistrate in reference to the

condition imposed upon the petitioner to take his wife and children and such an order is not illegal.

11. this Court remanded the matter to the Magistrate. this Court was of the view that the Magistrate did not set on record why it would be illegal for the petitioner to go to England alone and yet it would be proper for him if he were accompanied by his wife and children. this Court felt that in principle the Magistrate had agreed that the petitioner can go to England but it could not give any reason why his wife and children must accompany him. this Court guided the Magistrate that the only restraint needed if there was any, was under the Passport Act, 1967, which could affect the liberty of the applicant to leave India. Reference being had to certain circumstance, this Court was of the view that whether the applicant's wife accompanies him or not, was irrelevant and the permission whether the petitioner ought to leave. India or not is to be examined in reference to the Passport Act, 1967. this Court felt that it would be appropriate if the Magistrate were to exercise his discretion under the Passport Act, 1967 and examine the issue.

12. The observations of this Court in the order of 5 August, 1987 are reproduced below:

The Court is now constrained to examine the merits of the order of the Magistrate being totally conscious of the fact that in case the petitioner does not leave to pursue his study at the Cambridge University his Scholarship award may be in jeopardy but as a criminal case is pending against him any dispensation to the petitioner must be in accordance with law.

Once the Magistrate has permitted the petitioner to leave the country with his wife and children, then, he has agreed in principle that he may leave; with or without his wife may not be relevant.

The only restraint which may come in the petitioner's way, is in reference to the Passport Act, 1967. A conviction has not taken place. Under Sub-clause (7) of Section 10 of the Passport Act, 1967 a Court may impound or revoke the passport upon a conviction of the holder. The contingency of conviction has yet to happen as the trial has yet to proceed. Thus, the Magistrate has not acted upon the

principle as set in Section 10 of the Act, aforesaid or any other provisions of the Passport Act, 1967. In the light of this the Magistrate may determine whether the petitioner may leave the country, on his own and upon such terms and conditions which his Court may set upon the permission.

13. The Magistrate evaded the order of remand and far from examining the possibility whether the petitioner could leave for England or not, avoided the exercise of either allowing the petitioner to leave for England or curtailing his liberty. The Magistrate took recourse to instead of acting on the order of remand, directing that he would hear the matter on merits; i.e. the trial. This is the order of the Magistrate dated 20 August, 1987. Against this order the applicant has filed another petition under Section 482, Cr.P.C. by which he sought that (a) he be permitted to leave the country immediately; (b) the. order of 5 August, 1987 of this Court be modified, in effect, permitting him to pursue his studies in Cambridge, and (c) further proceedings in Cr. Misc. Case No. 5965 of 1987 instituted by his wife upon allegations under Section 498A of the Penal Code may remain stayed during his absence from India. When the petition was presented, this Court intimated learned Counsel for the parties at Bar that the Magistrate has evaded the order of remand and, thus, he must be given one more opportunity in terms of the order of remand made by this Court on 5 August, 1987. this Court felt that while the present petition remains pending the learned Magistrate must be given an opportunity to act on the order of remand made by this Court on 5 August, 1987. this Court cautioned the learned Magistrate that he must apply his mind to the issue which was remanded to his Court and not to evade the order passed by this Court, subsequently, in reference to the context on 7 September, 1987.

14-16. this Court had passed the first order of remand on 5 August, 1987. The learned Musif Magistrate whose order of 15 April, 1987 was under consideration was Mr. Kushaipal Singh. When the order of remand had been passed he had been transferred. The matter then went before the Court of the 1st Munsif Magistrate, Ghaziabad Mr. M.C. Sharma. On 7 September, 1987 the Court gave one more opportunity to the trial Court to act on the order of remand. On that date the learned Magistrate was Mr. M.C. Sharma, as 1st Additional Munsif Magistrate, Ghaziabad. On the next date, the directions of this Court dated 7 September, 1987

were being considered by yet another Presiding Officer, Mr. Ashok Kumar, Judicial Magistrate, Ghaziabad. The Judicial Magistrate records in the order of 16 September, 1987 (under consideration of this Court) that normally the 1st Additional Munsif Magistrate, Ghaziabad Mr. M.C. Sharma is seized of the matter but nevertheless on the directions dated 8 September, 1987 of the Chief Judicial Magistrate the matter was being sent to his Court. This was inappropriate. If the Presiding Officer who was meant to act on the order of remand was available at Ghaziabad, the matter ought to have been considered by the said Presiding Officer only, and no other. In the order of 16 September, 1987 now under consideration it is placed on record that the Judicial Magistrate concerned was considering the matter upon sufferance after it was laid before his Court by an order of 8 September, 1987 passed by the Chief Judicial Magistrate, Ghaziabad. The exercise to evade the order of remand is thus apparent. The Chief Judicial Magistrate committed a judicial impropriety in permitting a state of affairs so that the order of remand was not acted upon by the judicial officer though available in the same district.

17. Nevertheless, even the aforesaid Judicial Magistrate, a perusal of the order of 16 September, 1987 suggests, was totally conscious of the matter which he was required to consider upon direction of remand by this Court. The directions of remand were evaded While this Court had guided the Magistrate) to consider whether his Court could in pursuance of Sub-clause (7) of Section 10 of the Passport Act, 1967, curtail a person's liberty to go abroad, the Magistrate was aware of the fact that under Sub-clause (7) aforesaid the jurisdiction of the Court to revoke a passport for a travel document was contingent upon an order of conviction being passed. Implying thereby that in the absence of an order of conviction it was beyond the jurisdiction of the Court, in reference to Sub-clause (7), aforesaid, to revoke a passport or a travel document. The Magistrate then ought to have passed a positive order, in view of the absence of conviction and regard being had to the fact that as the Presiding Officer had permitted the petitioner to go abroad the fact that he ought to be accompanied by his wife was an irrelevant factor. The learned Judicial Magistrate did not pass such an order though agreeing that there was no conviction and retracted the order of his predecessor though agreeing that the petitioner's wife accompanying him or not

was an extraneous consideration. The learned Judicial Magistrate was suggesting to the petitioner's wife that she may take recourse to having the passport of the petitioner impounded. This was a wrong thing to do and the Magistrate exceeded his jurisdiction in making such a suggestion.

18. The grounds for impounding a passport are given in Section 6 of the Act, aforesaid, and the Magistrate ought not to have given vent to such light expressions without responsibility. The Magistrate refers to Clause (5) of Sub-section (3) of Section 10. Clause (g) refers to, in effect, a reading of Section 10(1) and Section 6 of the Act, together. The petitioner has not indulged in any activities referred to in clauses (a) to (d) of Sub-section (7) of Section 6 of the Act, aforesaid. In any case, this was not an issue before the Magistrate. The learned Magistrate declined to follow the order of remand and instead asked the applicant to answer irrelevant enquiries on the question whether his Fellowship to the Cambridge University had been revived or not. The Magistrate forgot that if the Fellowship was placed in jeopardy it was because of the issues which were pending before his Court, as the petitioner was restrained from leaving the country except with his wife and the petitioner desired to proceed for his studies in Cambridge alone.

19. By now it is a matter of record that the learned Magistrate before whom the case No. 738 of 1987; State v. Aklesh Kumar Jain, as a consequence of which the charges under Section 498A of the Penal Code, was pending, was not confident in giving the directions in reference to permitting the petitioner to leave the country. The petitioner was permitted to leave the country for one year but with the wife and children. In the subsequent order the learned Magistrate argued that it was an error as in principle he did not accept that the petitioner should leave the country and that his wife ought to accompany him was irrelevant. While making this observation the learned Magistrate did not consider it appropriate that the wife ought to accompany the petitioner, but sought an irrelevant satisfaction of the petitioner to answer his court whether the petitioner's study Fellowship was subsisting. Issues were being complicated unnecessarily.

20. Another order of remand, a third, would be a travesty of justice.

21. It is now in the interest of justice that this Court may itself examine the directions of the Magistrates and the incompatibility of the respondent's pleas on record which have delayed the departure of the petitioner to pursue his studies at the Cambridge University.

22. It is a charge under Section 498A of the Penal Code which confronts the petitioner with this problem, and is the genesis of the Issue whether he could leave for England to pursue his studies. Respondent Chitra Jain, the petitioner's wife was prepared to maintain a charge under Section 498A, aforesaid against the applicant, but had no hesitation in pleading before this Court that if the applicant were to go to England she should accompany him along with the children but, if she were not to accompany the applicant to England she would then hold the applicant upon the charge she has made under Section 498A. The charge under Section 498A yet to be made out, renders the present acts of the respondent as indeed surprising. It gives the impression to the Court that it is the visit to England that seems tempting to the respondent wife and which may assume precedence over the charge of harassment. Given the occasion she would like to cash in on the visit to England and put the trial which she has initiated into abeyance till she returns provided she could go, but if she cannot go, then her husband must face trial. She has filed an action for maintenance against her husband but has no hesitation in living with him on any visit to England. To be in England she is prepared to abandon both the charges under Section 498A and the maintenance which she sought. If she could go to England she would rather not twist her husband's arm on the charge under Section 498A or saddle him with maintenance.

23. Then there is another contradiction. The petitioner Aklesh Kumar Jain has filed an action for divorce. The plea is incompatibility of temperaments between the two. Would it be fair of any Court while the matter is pending consideration to direct parties to live together abroad and on returning to the shores of India fight it out amongst themselves whether their marriage ought to be dissolved? Would it be fair on the part of the respondent Chitra Jain to accompany the applicant when she has made an allegation under Section 498A and sought maintenance under the Code of Criminal Procedure as a wife who has been abandoned and who is facing proceeding for divorce and yet live under the same roof with her husband in

England?.

24. The pleas of respondent Chitra Jain are too contradictory and incompatible for any reasonable or prudent man to accept. She has made a charge against her husband but is prepared to forget it if she accompanies him abroad and to jeopardise proceedings for' divorce. If the two of them were to live together the plea which the petitioner seeks is that as respondent wife is herself prepared that the proceedings before the Magistrate in Case No. 738 of 1987 upon a charge under Section 498A brought at her initiative must remain in abeyance, should she accompany the applicant to England, then such should be the situation. The plea under Section 498A alsoon the face of it ought not to become a handle for blackmail or be used at convenience. This is precisely what has been done in the present case. If the order of the Magistrate dated 5 September 1987 had been acted upon then Chitra Jain would have accompanied her husband during pendency of the proceedings, and the proceedings in so far as she was concerned were of no consequence to her. Such would have been the case also in her claim for maintenance under Section 125, Cr.P.C. but then what would have happened to this claim for maintenance, if she had on her suggestion accompanied the petitioner to England?.

25. If the parties were coerced to act on the order of the Magistrate that they go to England together, it would have affected the divorce petition filed by the applicant. The court may suggest to the husband and wife to consider reconciliation but the parties to live together under the circumstances cannot be ordered. The Magistrate was in error in issuing directions to respondent Chitra Jain that pending consideration of charge under Section 498A she could accompany her husband and live with him. All this shows that though a charge under Section 498A is pending consideration, it was made or rendered without foundation by the conduct of the respondent Chitra Jain herself.

26. All that has happened is that the petitioner's departure for England to resume his studies at Cambridge University has been delayed. It is also on record, because of the charge initiated by respondent Chitra Jain, that the Fellowship has been in jeopardy as the Trustees of the Nehru Fellowship now desire that the

applicant may give a definite answer as to when he will join the Cambridge University and pursue his studies. With a restraint order from the Magistrate, the petitioner is hardly in a position to assure the Cambridge University of the date of his arrival In reference to this, this Court suggests to the trustees of the Nehru Fellowship that the circumstances as are narrated in this Order may be taken into account and the petitioner's Fellowship may not be in jeopardy, as he was under a restraint order of a Magistrate to remain in India.

27. Indeed if the respondent Chitra Jain had a grievance against the petitioner then that ought to have been presented in such a way so that her conduct was consistent with the charges contained in it. Her plea that he is guilty and ought to be prosecuted under Section 498A is absolutely incompatible with the suggestion that given an occasion she would like to accompany her husband with the children. Likewise, her claim for maintenance would be incorrect the moment she joins her husband in England. Further, if she were to live with her husband and if any court were to order it so it would render the divorce petition filed by the petitioner a nullity. There are differences between the two of them, but the pleas taken by the respondent Chitra Jain are a bundle of contradictions. In these circumstances this Court does not consider it appropriate or in the interest of justice that the academic pursuits of the applicant at the Cambridge University must fail.

28. The Magistrate was conscious of the fact that the applicant cannot be restrained from going to England unless the charges made against him had led to conviction. He ought to have, discretion having been granted to him, permitted the applicant to go and pursue his studies at Cambridge University upon such conditions as he could impose. This was not done. Now this Court considers it appropriate and in the interest of justice that the applicant be permitted to join Cambridge University to complete his studies in England. He has already been released on bail upon surety being fixed by the Magistrate; the order requiring surety shall remain.

29. The additional conditions being imposed on the applicant while he remains in England are that:

(a) During the first two weeks of every second month the applicant should report to the Legal Adviser, the Indian High Commission, Aldwych, London. His presence will be recorded by the Legal Adviser. The Legal Adviser will thereafter send his report on, the call of the petitioner to the Court of the Judicial Magistrate, before whom case No. 738 of 1987 is pending. On grounds of illness or any other emergency, the Legal; Adviser, may postpone the date of the call to another day.

(b) the applicant shall provide maintenance for his wife during his absence which will be Rs. 600/- p.m. This amount will be tendered to the respondent Chitra Jain by arrangement made by the applicant on the 7th of every month. It would be appropriate if he were to make arrangements for transfer of the amount in the name of respondent Chitra Jain through a Bank.

30. The applicant is an employee of the Oil and Natural Gas Commission, Dehra Dun. As divorce proceedings are pending between the applicant and the respondent Chitra Jain, proceedings have not terminated and till a decree for divorce is granted the status of the respondent as wife continues. If an accommodation is allotted to or can be allotted by the Oil and Natural Gas Commission, then the respondent Chitra Jain has a right of residence in this, during the absence of the petitioner when he is away from India.

31. The proceedings before the Magistrate Ghaziabad in Criminal Case No. 738 of 1987 in reference to Crime No. 243 of 1986, shall remain in abeyance till 31-12-1988 or when the Fellowship which requires the petitioner to be at the Cambridge University is completed, whichever is earlier.

32. The petition under Section 482 of the Code of Criminal Procedure, 1973, is allowed in terms of the observations and directions made.

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