

Mariyam Vs. Ouseph

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Court : Kerala

Decided On : Nov-01-1960

Reported in : 1961CriLJ233

Judge : P. Govinda Menon, J.

Appellant : Mariyam

Respondent : Ouseph

Judgement :

ORDER

P. Govinda Menon, J.

1. This is a petition to revise the order of the 1st Class Magistrate, Thodupuzha refusing to-order maintenance to the minor daughter of the 2nd petitioner aged 4 years who is living with the petitioner. The contention of the counter-petitioner-husband is that he is prepared to maintain the child if the child is given to him and that since he has not neglected to maintain the child' he is not bound to pay any maintenance allowance. This position is not tenable.

A child does not stay away by its own choice and cannot be deprived of the right of maintenance simply because the child is in custody of the mother. The father cannot in a petition under Section 488 CrI. P.C. insist that the child should be given in his custody as a condition precedent for maintaining the child.

2. This position is well-settled. In *Ebrahim Mohamed v. Khurshedbai* AIR 1941 Bora 267,. Beaumont, C.J., stated:

The object of the section, no doubt, is to avoid vagrancy by providing that the Magistrate may up to a limited extent see that a wife and children are maintained by a husband or father able to maintain them. But...the Magistrate must take the facts as he finds them to be. If in fact the children are living with the wife, and if in fact the father is refusing or neglecting to maintain them where they are living, I think that the Magistrate has jurisdiction to make an order. If the father's case is that the children ought not to be living with the wife, but ought to be living with him or under his direction, then he must take proper proceedings in a civil court to get the children removed from the custody of the mother.

3. This was the view taken in two earlier cases reported in *Emperor v. David Sassoon* AIR-1925 Bom 259 and in *In re Bai Manek* AIR 1928 Bom 418. The same view has been taken in the case reported in *Dinsab Kasimsab v. Mahamad Mussen Dinsab* AIR 1945 Bom 390 where it is stated that in a proceeding under Section 488, so far as the maintenance of a child is concerned, the criminal court is concerned only with the fact of its custody and not with the propriety of that custody.

4. The same view has been taken by the Madras High Court in *In re Parathy Valappil Moideen*, 14 Crl. L.J. 597 and *Kuppala Krishtappa v. Premaleelamani* AIR 1942 Mad 705. In the latter case it has been held that it would be improper for the court to refuse maintenance for the child, merely because it was of opinion that the mother has no right to the custody of the child.

5. The Rangoon High Court in *Mating San Pe v. Ma Lai Mai* AIR 1932 Rang 183 and the Hyderabad High Court in *Rahimunnissa v. Mohd. Ismail* AIR 1956 Hyd 14 have adopted this view.

6. In all these cases the decision is based on the construction of Section 488, Cri. P.C. Proviso 1 to Sub-section (3) relating to an offer to maintain, refers only to the wife and not to the child, and Sub-sections (4) and (5) disentitle only the wife 'to receive an allowance from her husband', if she refuses to live with her husband

'without sufficient reason'.

Hence a Magistrate from whom a wife seeks an order for maintenance against her husband has power to see if there are sufficient reasons for her living separate from him. The reason why no reference is made to a child in the proviso and in Sub-sections (4) and (5) is well pointed out in the case in *Mi Saw v. S.*, 11 Cri. L.J. 488 (Upp Bur). There it is stated:

Living together in the case of husband and wife is a thing of a special character. It is an incident of matrimony. It is, therefore intelligible that the legislature should provide that maintenance is not to be paid to a wife living separate, unless she has good cause for refusing to live with the husband.

The case of children is different. Where the parents have divorced, the children, if in the mothers' custody, must be living separate from the father. But that is no reason why he should not maintain them.

If he wishes them to live with him, his obvious course is to get an order from the proper authority giving him the custody of them. Until he does that he cannot justly refuse to maintain them on the plea that they will not live with him. I think this is why the Code says nothing about children living separately.

I am in respectful agreement with the view taken in all these cases.

7. The learned Counsel for the counter-petitioner has brought to my notice two decisions of the Lahore High Court which take a contrary view. *Sita Devi v. Har Narain* AIR 1930 Lah 886 and *Ralia v. Me. Atti* AIR 1914 Lah 417 P. The view taken in the former case was that the requirements of neglect to maintain under Section 488 must be fulfilled before any order is made under this section. In the second case it was held that the father cannot be made liable for the maintenance of his minor child, when he is willing to maintain the child if it is given in his custody.

Both these decisions give no reasons for the view taken by them. In a later case in *Mt. Akhtari Begum v. Abdul Rashid* AIR 1937 Lah 236, it was held that father's readiness to maintain the child provided he is given into his custody, does not disentitle the child to maintenance if the mother refuses to give him, in the custody

of his father. The order of the learned First Class Magistrate cannot therefore be supported and is set aside.

8. Regarding the quantum of maintenance to the petitioner the learned First Class Magistrate has recorded a finding that Rs. 5/- per mensem would be a reasonable amount for her maintenance. The petitioner has not challenged this finding in the revision petition, even though it is now stated that the amount is wholly inadequate. I do not find any reason to differ from the finding of the learned First Class Magistrate. On proof of any change in the circumstances, it would be open to the petitioner to move the court under Section 489, Cri. P.C.

The revision petition is therefore allowed and there would be an order awarding maintenance to the child at the rate of Rs. 5/- per mensem.

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