

Mr. E.C. Kent Vs. Mrs. E.E.L. Kent

Mr. E.C. Kent Vs. Mrs. E.E.L. Kent

SooperKanoon Citation : sooperkanoon.com/776632

Court : Chennai

Decided On : Mar-27-1925

Reported in : AIR1926Mad59; 90Ind.Cas.669; (1925)49MLJ335

Appellant : Mr. E.C. Kent

Respondent : Mrs. E.E.L. Kent

Judgement :

ORDER

Devadoss, J.

1. This is an application to revise the order of the District Magistrate, Civil and Military Station, Bangalore, directing the petitioner to pay Rs. 300 a month under Section 488 of the Code of Criminal Procedure. The petitioner is a well-to-do planter who neglected to maintain his wife and two children. The wife made an application to the District Magistrate and he has passed the order which is sought to be revised.

2. The first contention on behalf of the petitioner is that under Section 488 the Magistrate has jurisdiction to award only Rs. 100 in all for the support of the wife and the children. Mr. Mockett, who appears for the petitioner, relies upon the Words ' Rs. 100 in the whole ' and argues that the Magistrate cannot award more than Rs. 100 in all for the support of the wife and the children and that the award by the Magistrate of Rs. 300, Rs. 100 for the wife and Rs. 100 for each of the

children is ultra vires. Clause 1 of Section 488 reads as follows:

If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, etc., may, on proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate not exceeding one hundred rupees in the whole, as such Magistrate thinks fit.

3. To contend that when a woman makes an application for herself and for children she could only be given Rs. 100 for the maintenance of herself and of her children whatever be the number, is opposed to the clear wording of the section. If the petitioner's construction of the section is correct, it would amount to this : if a person has an illegitimate child and an application is made under this section and Rs. 100 is awarded to that child and if that person afterwards refuses to maintain his wife and his legitimate children, the wife and the legitimate children would have no remedy against him, for the sum of Rs. 100 has already been awarded for the support of the illegitimate child, and no further order can be made on behalf of the wife and legitimate children as no Magistrate can award more than Rs. 100 for all the persons whom he is bound to maintain.

4. This section was enacted to suit Indian conditions. A Muhammadan can legally marry four wives at the same time; supposing he neglects or refuses to maintain one wife and her children and supposing she obtains an order under this section and gets Rs. 100 and if he afterwards refuses or neglects to maintain any of the other wives and children, they would be helpless, and if he refuses to maintain all the four wives at the same time, is it to be said that the section requires that all the four wives should apply by a joint petition for payment of maintenance to them and their children? Supposing a European has legitimate children by a deceased wife, and children by a living wife and also illegitimate children, supposing the illegitimate children obtain an order for their maintenance and the Magistrate directs the payment of Rs. 100 for their maintenance and if the man after some time refuses to maintain his legitimate children by the deceased wife, are they to be without any remedy? And still further, if he refuses to maintain his wife and legitimate children are they to be without any remedy I think the contention that a

person can only be ordered to pay Rs. 100 for the support of his illegitimate children, for the support of his family by the deceased first wife and for the support of the living wife and her children is, on the face of it, an untenable one.

5. Mr. Mockett relied upon the summary jurisdiction of Magistrates, Act 58 and 59 Vict. c. 39, S. 5, Clause (c) and contended that the sum awardable under that section was for the maintenance of the wife and the children with her, and a Magistrate has no power to award more than 72 a week. Section 5, Clause (c) gives the Court of summary jurisdiction power to make an order among other things for the legal custody of the children under 16 years of age, and an order for maintenance under Clause (c) which is as follows:

A provision that the husband shall pay to the applicant personally or for her use to any officer of the Court, or a third person on her behalf, such weekly sum not exceeding 2 as the Court shall, having regard to the means both of the husband and the wife, consider reasonable.

6. There is no provision in this section for the payment of any amount for the maintenance of any child unable to maintain itself. But the Justices in considering what amount should be awarded to the wife may take into consideration what would be required for the maintenance of the child or children in the custody of the wife. The maximum is fixed at 2 a week, as the object of the Act is to give relief to the wife. There are other enactments like the Bastardy Act and the Poor Law Act under which a father could be made to pay maintenance for his illegitimate and legitimate children.

7. The case of Hill v. Hill (1902) P 140 does not help the petitioner. Sir Francis Jeune, President of the Probate Division, observes as follows at page 142:

Therefore the whole sum ordered is to be paid to the applicant personally. There is in the Act no express power to order that sums shall be paid for children, even the children of his (the husband's) own marriage. But in considering what amount should be ordered to be paid by the husband, if the justices were right in taking into account the expenses of maintaining any child or children of the marriage, they would be equally justified in taking into account the expenses in respect of

children whom the husband under the Poor Law, at any rate, was legally liable to maintain and they were right in ordering such amount to be paid as only it could be paid to the wife.

8. 58 and 59 Vict. c. 39 was specially enacted for giving speedy relief to married women who, on account of desertion or neglect on the part of their husbands to maintain them, have to seek speedy remedy for provision for maintaining themselves. That Act is not similar to Section 488 which specially provides for the maintenance of ' wife and child legitimate or illegitimate, which is unable to maintain itself.'

9. In considering what amount should be paid for the wife it need not be taken into consideration whether she has children to be maintained or not. The position of the husband and his means and the position of the wife alone should be considered. In the case of each child the needs of the child should be considered. The words 'in the whole ' mean that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment either in the shape of fees or medical expenses, etc., should be ordered to be paid ; nor can the Magistrate order the husband to provide a house for the wife. It is to prevent the Magistrate making an order that the husband should pay so much for the schooling of the children, or so much for clothing or so much for medical expenses and so on, that the words ' in the whole ' have been put into the section. The Magistrate can only order one sum not exceeding Rs. 100 to be paid for the wife and for each of the children unable to maintain itself.

10. The section speaks of ' wife or his legitimate or illegitimate child ' and does not speak of ' wife and child.' The words have to be given their plain meaning. To construe the words as meaning wife and children is opposed to all rules of construction. If a man has the luxury of more wives than one, his liability to maintain them is not lessened thereby. Every wife and every legitimate child and every illegitimate child could be awarded up to Rs. 100 provided the husband or the father has the means to pay the amounts.

11. The contention that Section 488 is modelled on the lines of 58 and 59 Vic. c. 39, Section 5 cannot hold water. Section 488 of the Code of 1898 is not a new

provision enacted in 1898. The same provision was found in the Code of 1882 and the Codes of 1875 and 1872 and in Act XXV of 1861. Section 316 contained a provision corresponding to that of Section 488, Clause 1. All that has to be proved in order to give jurisdiction to a Magistrate under Section 488 is that the child is unable to maintain itself and that the father neglected or refused to maintain it, and in the case of the wife that the husband refused or neglected to maintain her. Even a grown-up child, if unable to maintain itself, is entitled to get maintenance from the father if he has the means. Vide *In re Moideen* : (1913)25MLJ355 and *In the matter of W. B. Todd* (1873) 5 NWP HCR 237.

12. The next contention urged by Mr. Mockett is that there has been no neglect to pay for the maintenance of the wife and the children. This is a question of fact and the learned Magistrate has found that the petitioner herein has neglected to maintain his wife and children. A mere offer to maintain them is not sufficient, and Mr. Mockett has admitted that nothing has been paid for the maintenance of the wife and children for at least some years. There is nothing in this contention.

13. The third contention raised by Mr. Mockett is that there is an order of the Probate, Divorce and Admiralty Division of the High Court in England whereby the petitioner is directed to pay his wife so much alimony per month, and it is seriously urged before me that this order is a bar to an application under Section 488 of the Criminal Procedure Code. It is admitted that the wife finds it impossible to execute the order for alimony against the petitioner who is a planter in the Mysore State. Whether the order is executable or not is immaterial for the present purpose. The section gives jurisdiction to the Magistrate to award maintenance if he is satisfied that a person has neglected or refused to maintain his wife or child. The existence is not sufficient to oust the jurisdiction of the Magistrate for a mere order for maintenance is not equivalent to maintaining the wife ; and the order, whatever may be its force or nature, cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife.

14. Reliance was placed upon *Craxton v. Craxton* 71 Justice of the Peace 399 where Bargrane Deane, J. observed : ' There can be no desertion in law when a suit is pending once the Divorce Court has seized with the matrimonial suit.

justices have no right to interfere in the matter.... Here the President had actually made an order, how then can the Justices claim to overrule it.' In that case an order for alimony had been made by the President of the Probate Division and the Justices could not therefore pass an order under the Summary jurisdiction Act. That case has no application to the present, for the proceedings in the Probate Division do not control the jurisdiction of a Magistrate in India.

15. As I have already observed, if it is proved to the satisfaction of the Magistrate under Section 488 that the husband has neglected to maintain his wife, the Magistrate has jurisdiction to order the husband to pay for the maintenance of his wife. In this case the order for alimony is unexecutable. Even if held to be executable, I am of opinion that so long as the husband does not maintain the wife either by payment of alimony or otherwise, the Magistrate's jurisdiction to order him to pay maintenance is not taken away.

16. The case, in *Subbaramakkamma* 11 Weir 615 does not help the petitioner. In that case a decree for monthly allowance or maintenance had been obtained in the High Court and that decree was in force and the wife could not get a further and separate order for maintenance from the Magistrate. The case would be different if the execution of the decree for maintenance had become barred or had become unexecutable. This was distinctly held so far back as 1872. In a case *John Meiselback* (1872) 17 WR40 a Bench consisting of Sir Richard Couch, C.J. and Ainslie, J., held that a decision of the Civil Court refusing to enforce a contract or agreement against a sum for the maintenance of a woman cannot conclude either the woman from applying or a Magistrate from making an order under Section 316 of the Criminal Procedure Code for the maintenance of their illegitimate daughter. The learned Chief Justice observed : 'The proceeding in the Civil Court was of a different nature. It was founded on an alleged contract, and the decision of the Civil Court even if it had not proceeded as it appears to have done on the Law of Limitation would not have concluded the woman from applying under Section 316 of the Criminal Procedure Code for the maintenance of the illegitimate daughter.... The only question in this case is whether the matter was so put before the Magistrate that he had jurisdiction to make the order under Section 316 for the maintenance of the illegitimate daughter. She stated in her petition that

both she and the daughter were starving and required maintenance, and she asked for a sum to be paid for maintenance. The Magistrate had power to make an order for the maintenance of the daughter.' Under Section 316 of Act XXV of 1861 (now Section 488) the only questions were whether the child was a child of the man and whether he had neglected to maintain the child; and on these facts being found the Magistrate had jurisdiction to pass an order even though there was a previous contract between the man and the woman for payment of maintenance.

17. Considering the position of the parties, the order for payment of Rs. 100 to each of the person's wife and two children is eminently a just order. I dismiss the petition with costs of the counter-petitioner.

18. Counsel's fee is Rs. 100.

19. Memorandum of costs will follow.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com