

Shri Bhagwan Dutt

Vs

Smt. Kamla Devi and Another

Criminal Appeal No. 228 Of 1970

(Y. V. Chndrachud, A . C. Gupta, R. S. Sarkaria JJ)

17.10.1974

JUDGMENT

SARKARIA, J. –

1. Can the income of the wife be taken into account in determining the amount of maintenance payable to her under Section 488 of the Code of Criminal Procedure, 1898? This is the principal question for determination in this appeal by special leave.
2. Respondent No. 1, Kamla Devi was married to the appellant Bhagwas Dutt on January 22, 1957 according to Hindu rites. Out of this wedlock a daughter, respondent No. 2, was born on November 22, 1957. On October 18, 1966, respondent No. 1 filed a petition against the appellant for judicial separation on the ground of desertion and cruelty. During the pendency of that petition, she filed an application under Section 488 of the Code of Criminal Procedure, 1989, in the court of the Magistrate, First Class, Delhi, claiming maintenance for herself and for her minor daughter, on the ground that the appellant had neglected and refused to maintain them. At the date of the application respondent No. 1 was employed as a stenographer on a monthly salary of Rs. 600. The appellant was at that time earning about Rs.800 per month. However, later on when the case was in the Sessions Court in revision, the monthly income of each of them had increased by Rs. 150, approximately.
3. By his order dated June 6, 1969 the Magistrate directed the husband to pay Rs.250 per month i.e. Rs. 175 for the wife and Rs. 75 for the child for their maintenance. While fixing the amount of maintenance for his wife, the Magistrate did not take into consideration her own independent income.
4. Against the order of the Magistrate, the husband went in revision to the Court of Session. The Additional Sessions Judge was of the view that since the income of the wife was "substantial" and "enough to maintain herself", she was not entitled to any maintenance. He was further of the opinion that Rs. 75 p.m. allowed to the child being inadequate, it deserved to be raised to Rs. 125 p.m. for the period of the pendency of the application in the trial Court and thereafter to Rs.150 p.m. He referred the case to the High Court under Section 438 of the Code with a recommendation that the order of the Magistrate to the extent it allowed maintenance to the wife, be quashed, but the allowance of the child be enhanced as aforesaid.
5. A learned Single Judge of the High Court who heard the reference held that in making an order for maintenance in favour of a wife under Section 488 of the Code of Criminal Procedure the Court has not to take into consideration the personal income of the wife as Section 488 does not

contemplate such a thing. He therefore declined the reference pro tanto, but accepted the same in regard to the enhancement of the allowance of the child.

6. Aggrieved by the judgment of the High Court, the husband has now come in appeal before us.

7. The material part of Section 488 of the Criminal Procedure Code is in these terms :

(1) 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, a presidency magistrate, a Sub-Divisional magistrate or a Magistrate of the First Class may, upon 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 five hundred rupees in the whole as such Magistrate thinks fit, and to pay the same to such person as the magistrate from time directs. (2) to (5)

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8. The corresponding part of Section 125 in the new Criminal Procedure Code, 1973, which came into force on April 1, 1974, reads :

125. (1) If any person having sufficient means neglects or refuses to maintain -

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife, such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the magistrate may from time to time direct

9. A comparative study of the provision set out above would show that while in Section 488 the condition "unable to maintain itself" apparently attached only to the child and not to the wife, in Section 125, this condition has been expressly made applicable to the case of wife. Does this recasting of the old provision signify any fundamental change in the law? Or, has this been done merely to clarify and make explicit what was formerly implicit?

10. Section 488 does not confer an absolute right on a neglected wife to get an order of maintenance against the husband nor does it impose an absolute liability on the husband to support her in all circumstances. The use of the word "may" in Section 488(1) indicates that the power conferred on the Magistrate is discretionary. A neglected wife, therefore, cannot, under this section, claim, as of right, an order of maintenance against the husband. Of course, the Magistrate has to exercise his discretion in a judicial manner consistently with the language of the case. Nevertheless, the

Magistrate has to exercise his discretion primarily towards the end which the Legislature had in view in enacting the provision.

11. Sections 488, 489 and 490 constitute one family. They have been grouped together in Chapter XXXVI of the Code of 1889 under the caption, "Of the maintenance of wives and children". This chapter, in the words of Sir James Fitstephen, provides "a mode of preventing vagrancy, or at least of preventing its consequences". These provisions are intended to fulfil a social purpose. Their object is to compel a man to perform the moral obligation which he owes to society in respect of his wife and children. By providing a simple, speedy but limited relief, they seek to ensure that the neglected wife and children are not left beggared and destituted on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. Thus, Section 488 is not intended to provide for a full and final determination of the status and personal rights of the parties. The jurisdiction conferred by the section on the Magistrate is more in the nature of a preventive, rather than a remedial jurisdiction; it is certainly not punitive. As pointed out in Thompson's case (6 NWP 205)

the scope section (2) of Section 489 expressly makes orders passed under Chapter XXXVI of the Code subject to any final adjudication that may be made by a civil court between the parties regarding their status and civil rights.

12. The stage is now set for appreciating the contentions canvassed by the learned Counsel for the parties.

13. Mr. Nijhawan, learned Counsel for the appellant contends that if Section 488(1) is construed in the light of its primary object and the nature of the jurisdiction conferred by it, together with Section 489(1), it would be amply clear that in determining the wife's claim to maintenance and its quantum, her independent income is a relevant consideration. In support of this contention, Counsel has referred to *Motd. Ali v. Mt. Sakina Begum* (AIR 1944 Lah 392 : 45 Cri LJ 254); *Narasimha Ayyar v. Ranganthayammal* (AIR 1947 Mad 304 : 48 Cri LJ 284); *Ponnambalam v. Saraswathi* (AIR 1957 Mad 693 : 1957 Cri LJ 1282); *Ahmed Ali Sahib v. Sarfarajulnisa Begum* (AIR 1952 Hyd 76 : 1952 Cri LJ 681) and *P. T. Rammankutty Achan v. Kalynikutty* (AIR 1971 Ker 22 : 1971 Cri LJ 318).

14. As against the above, Mr. Sardar Bahadur Saharya maintains that the very fact that the section does not make the inability of a wife to maintain herself, a condition precedent to the grant of maintenance was that the wife's own income or means should not be taken into account either for determining her right to maintenance or for fixing its amount. It is further urged that the language of Section 489 cannot be called in aid to construe Section 488(1). Reliance for the main argument has been placed on *Major jogindar Singh v. Bibi Raj Mohinder Kaur* (AIR 1960 Punj 249 : 1960 Cri LJ 640).

15. In major Jogindar Singh's case (supra), the wife had claimed maintenance under Section 488, Cr. P.C., both for herself and her minor son. The husband was a Major in the army, getting Rs. 1,070 p.m. It is not very clear from the report as to whether the wife was having any substantial income of her own. However, an argument was raised that she had her own means of support which should be taken into account for determining her right to maintenance. The learned Judge who decided the case, negatived the contention, thus:

It is obvious from the language of the section that in order to enable a child to claim maintenance it

has to be proved that the child is 'unable to maintain itself. No such condition has been imposed in the case of a wife. Cases in which maintenance was refused to the wife merely on the ground that she was in a position to maintain herself have, in my view, omitted to consider the implication of the distinction while construing the scope and effect of Section 488. In my opinion, the ability of the wife to maintain herself was not intended by section, if she is otherwise found entitled to it

16. Commenting on the cases cited before him, the learned Judge further observed :

But if those authorities intended to lay down any rigid rule of law that the only right which a wife possesses under Section 488, Cr. P.C., is to claim just subsistence allowance which should merely provide bare food, residence and raiment and that also only if she has no other means or source, then I must with respect, record my emphatic dissent.

17. It may be noted that the above principle spelled out from the interpretation of Section 488(1) in major jogindar Singh's case (supra), was carried a step further by the Division Bench in Bench in Nanak Chand benarsi Das v. Chander Kishore (AIR 1969 Delhi 235 : 1969 Cri LJ 965) to deduce the proposition that the wife's right to receive maintenance under Section 488, Criminal Procedure Code is an absolute right.

18. In our opinion, one wrong assumption has led to another false deduction. The mere fact that the language of Section 488(1) does not expressly make the inability of a wife to maintain herself a condition precedent to the maintainability of her petition, does not imply that while determining her claim and fixing the amount of maintenance, the magistrate is debarred from taking into consideration the wife's own separate income or means of support. There is a clear distinction between a wife's locus standi to file a petition under Section 488 and her being entitled, on merits, to a particular amount of maintenance thereunder. This distinction appears to have been overlooked in Major jogindar Singh's case (supra). Proof of the preliminary condition attached to a neglected child will establish only his competence to file the petition but his entitlement to maintenance, particularly the fixation of its amount, will still depend upon the discretion of the Magistrate. As the Magistrate is required to exercise that discretion of the Magistrate. As the Magistrate is required to exercise that discretion in a just manner, the income of the wife, also, must be put in the scales of justice as against the means of the husband,

19. The object of these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor prnurious, but is modestly consistent with the status of the family. The needs and rquirements of the wife for such moderate living can be fairly determined, only if her separated income, also, is taken into account together with the earnings of the husband and his commitments.

20. There is nothing in these provisions to show that in determining the maintenance and its rate, the Magistrate has to inquire into the means of the husband, alone, and exclude the means of the wife altogether from consideration. Rather, there is a definite indication in the language of the associate Section 489(1), that the financial resources of the wife are also a relevant consideration in making such a determination. Section 489(1) provides inter alia, that on proof of a change in the circumstances of any person receiving under Section 488 a monthly allowance, the magistrate, may make such alteration in the allowance as he thinks fit.

The "circumstances" contemplated by Section 489(1) must include financial circumstances and in that view, the inquiry as to the change in the circumstances must extend to a change in the financial

circumstances of the wife.

21. Keeping in view the object, scheme, setting and the language of these associate provisions in Chapter XXXVI, it seems to us clear that in determining the amount of maintenance under Section 488(1), the Magistrate is competent to take into consideration the separate income and means of the wife.

22. We do not wish to burden this judgment with a discussion of all the decisions that have been cited at the Bar. It will suffice to notice one of them rendered by the Kerala High Court in which Major Jogindar Singh's case (supra) was explained and distinguished. That case is P. T. Ramankutty v. Kalyanikutty (supra). Therein, the husband was getting a net salary of Rs. 200, while the monthly salary of the wife was (after a net salary of Rs. 210). The question was, whether the wife in such a financial position had a right to claim maintenance under Section 488, Criminal Procedure Code. After referring to the observations of Dua, J. in Major Jogindar Singh's case (supra) and surveying the case law on the subject, the learned Single Judge of the Kerala High Court correctly summed up the position thus :

To take the view that in granting maintenance under Section 488 to a wife her personal income also can be considered may prima facie appear to be against the language of the section because the condition "unable to maintain herself" appearing therein attaches itself only to child and not to wife. But that condition has application only in considering the maintainability of a petition filed under Section 488. A wife can file a petition under that section irrespective of the question whether she is able or unable to maintain herself. But on her application at the time of the granting of monthly allowance to her there is nothing prohibiting the Court from considering whether she can maintain herself with her own income and if she can, granting her nothing by way of allowance.

23. Any other construction would be subversive of the primary purpose of the section and encourage vindictive wives having ample income and means of their own, to misuse the section as a punitive weapon against their husbands.

24. It is next contended on behalf of the appellant that Section 488 must be deemed to have been partially repealed and modified by Section 23 of the Hindu Adoptions and Maintenance Act, 1956 (for short, called the Act) which provides that in determining the amounts of maintenance, the Court shall have, inter alia, regard

to the value of the wife's property and any income derived from such property or from the claimant's own earning or from other sources.

25. Clause (b) of Section 4 of that Act provides:

Save as otherwise expressly provided in this Act -

(a) * * *##

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

26. The Question therefore resolves itself into the issue : whether there is anything in Section 488 which is inconsistent with Section 23 or any other provision of the Act ? This matter is no longer res

integra. In *Nanak Chand v. Shri Chandra Kishore Agarwala* ((1970) 1 SCR 565 : (1969) 3 SCC 802), this Court held that there is no inconsistency between Act 78 of 1956 The Act of 1926 is an Act to amend and codify the law relating to adoption and Maintenance among Hindus. The law was substantially similar before when it was never suggested that there was any inconsistency with Section 488, Cr. P.C. The Scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties.

27. We have said and it needs to be said again, that Section 488 is intended to serve a social purpose. It provides a machinery for summary enforcement of the moral obligations of a man towards his wife and children so that they may not, out of sheer destitution become a hazard to the well-being of orderly society. As against this, Section 23 and other provisions of the Act relating to fixation of the rate of allowance, provided for the enforcement of the rights of Hindu wives or dependents under their personal law. This contention therefore is meritless and we negate the same.

28. For the reasons aforesaid, we allow the appeal, set aside the judgment of the High Court and send the case back to the trial Magistrate to re-fix the amounts of maintenance. In the case of the wife, he shall together with other relevant circumstances, take into account her income to lead fresh evidence and then re-fix her allowance.

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