

Captain Ramesh Chander Kaushal

Vs

Mrs. Veena Kaushal and Others

Petition for Special Leave to Appeal (Criminal) No. 1268 of 1977

(V. R. Krishna Iyer, D. A. Desai JJ)

22.04.1978

ORDER

KRISHNA IYER, J.

1. Social justice is not constitutional claptrap but fighting faith which enlivens legislative texts with militant meaning. The points pressed in the Special Leave Petition, which we negative, illustrate the functional relevance of social justice as an aid to statutory interpretation.

2. The conjugal tribulations of Mrs. Veena, the respondent, who hopefully married Capt. Kaushal, the petitioner, and bore two young children by him, form the tragic backdrop to this case. The wife claimed that although her husband was affluent and once affectionate, his romantic tenderness turned into flagellant tantrums after he took to the skies as pilot in the Indian Airlines Corporation. Desertion, cruelty and break-up of family followed, that sombre scenario which, in its traumatic frequency, flaring up even into macabre episodes, consternates our urban societies. The offspring of the young wedlock were not only two vernal innocents but two dismal litigations - one for divorce, by the husband, hurling charges of adultery, and the other for maintenance, by the wife flinging charges of affluent cruelty and diversion of affection after the Airlines assignment. These are versions, not findings.

3. We do not enter the distressing vicissitudes of this marital imbroglio since proceedings are pending and incidental moralizings, unwittingly injuring one or the other party, are far from our intent and outside the orbit of the present petition. Even so, we cannot help but observe that the current Indian ethos rightly regards the family and its stability as basic to the strength of the social fabric and the erotic doctrine of 'sip every flower and change every hour' and the philosophy of philandering self-fulfilment, unless combated on the militant basis of gender justice and conditions of service, are fraught with catastrophic possibilities. All public sector (why, private sector too) institutions, including the Airlines, must manifest, in their codes of discipline, this consciousness of social justice and inner morality as essential to its life style. Lascivious looseness of man or wife is an infectious disease and marks the beginning of the end of the material and spiritual meaning of collective life. The roots of the rule of law lie deep in the collective consciousness of a community and this sociological factor has a role to play in understanding provisions like Section 125, Criminal Procedure Code which seek to inhibit neglect of women and children, the old and the infirm. A facet of this benignancy of Section 125 falls for study in the present proceeding.

4. The husband sought divorce through the civil court and the wife claimed maintenance through the criminal court. As an interim measure, the District Court awarded maintenance and the High Court fixed the rate at Rs. 400 per mensem for the spouse as a provisional figure. Meanwhile, the

Magistrate, on the evidence before him, ordered ex parte, monthly maintenance at Rs. 1000 for the mother and two children together.

5. Sri. S. T. Desai urged two points which merit reflection but meet with rejection. They are that (i) a civil court's determination of the quantum is entitled to serious weight and the criminal court, in its summary decision, fell into an error in ignoring the former; (ii) the awardable maximum for mother and children, as a whole under Section 125 of the Code was Rs. 500, having regard to the text of the section.

6. Broadly stated and as an abstract proposition, it is valid to assert, as Sri. Desai did, that a final determination of a civil right by a civil court must prevail against a like decision by a criminal court. But here two factors make the principle inapplicable. Firstly, the direction by the civil court is not a final determination under the Hindu Adoptions and Maintenance Act but an order pendente lite, under Section 24 of the Hindu Marriage Act to pay the expenses of the proceeding, and monthly during the proceeding such sum as having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable. Secondly, this amount does not include the claim for maintenance of the children although the order does advert to the fact that the respondent has their custody. This incidental direction is no comprehensive adjudication.

7. Therefore, barring marginal relevance for the Magistrate it does not bar his jurisdiction to award a higher maintenance. We cannot, therefore, fault the Magistrate for giving Rs. 1000 on this score.

8. The more important point turns on the construction of Section 125, Criminal Procedure Code which is a reincarnation of Section 488 of the old Code except for the fact that parents also are brought into the category of persons eligible for maintenance and legislative cognizance is taken of the devaluation of the rupee and the escalation of living costs by raising the maximum allowance or maintenance from Rs. 100 to Rs. 500. The relevant portion of the section reads :

125. (i) 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

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, 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. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause - the cause of the derelicts.

10. Sri. Desai contends that Section 125 of the code has clearly fixed the ceiling of the monthly allowance "for the maintenance of wife or such child, father or mother, at such monthly rate not

exceeding five hundred rupees in the whole". Assuming the Parliament not to be guilty of redundancy it is argued that the words "in the whole" mean that the total award for wife, child, father or mother together cannot exceed Rs. 500. We do not agree. Both precedentially and interpretatively the argument is specious.

11. The words which connote that the total, all together, cannot exceed Rs. 500, namely "in the whole" have been inherited from the previous Code although some ambiguity in the sense of the clause is injected by these words. Clarity, unfortunately, has not been a strong point of our draftsmanship, at least on occasions, and litigation has been engendered by such deficiency. Luckily, these words have been subject to decisions which we are inclined to adopt as correct. A Full Bench of the Bombay High Court in *Prabhavati v. Sumatilal* (AIR 1954 Bom 546) has held that the sum specified is not compendious but separate. Chagla, C.J. explained the position correctly, if we may say so with respect :

The suggestion that jurisdiction of the Magistrate is limited to allowing one hundred rupees in respect of maintenance of the wife and the children jointly is, in our opinion, an impossible construction once it is accepted that the right of the wife and of each child is an independent right. Such a construction would lead to extremely anomalous results. If, for instance, a wife applies for maintenance for herself and for her children and the Magistrate allows a maintenance of one hundred rupees, and if thereafter an illegitimate child were to come forward and to make an application for maintenance, the Magistrate having allowed an allowance to her up to the maximum of his jurisdiction would be prevented from making any order in favour of the illegitimate child. Or, a man may have more than one wife and he may have children by each one of the wives. If the suggestion is that maintenance can be allowed in a compendious application to be made and such maintenance cannot exceed one hundred rupees for all the persons applying for maintenance, then in a conceivable case a wife or a child may be deprived of maintenance altogether under the section.

The intention of the Legislature was clear, and the intention was to cast an obligation upon a person who neglects or refuses to maintain his wife or children to carry out his obligation towards his wife or children. The obligation is separate and independent in relation to each one of the persons whom he is bound in law to maintain. It is futile to suggest that in using the expression "in the whole" the Legislature was limiting the jurisdiction of the Magistrate to passing an order in respect of all the persons whom he is bound to maintain allowing them maintenance not exceeding a sum of one hundred rupees.

Meeting the rival point of view Chief Justice Chagla held :

.... we are unable to accept the view taken by the Division Bench that the jurisdiction of the Magistrate is confined to making a compendious order allowing one hundred rupees in respect of all the persons liable to be maintained.

12. A recent ruling of the Calcutta High Court in *Md. Basir v. Noor Jahan Begum* (1971 Cri LJ 547 at 553) has taken a similar view reviewing the case law in India on the subject. We agree with Talukdar, J. who quotes Mr. Justice Mccardie : "All law must progress or it must perish in the esteem of man. " In short, the decided cases made a sociological approach to conclude that each claimant for maintenance, be he or she wife, child, father or mother, is independently entitled to maintenance up to a maximum of Rs. 500.

13. Indeed, an opposite conclusion may lead to absurdity. If a woman has a dozen children and if the man neglects the whole lot and, in his addiction to a fresh mistress, neglects even his parents and all these members of the family seek maintenance in one petition against the delinquent respondent, can it be that the Court cannot award more than Rs. 500 for all of them together ? On the other hand if each filed a separate petition there would be a maximum of Rs. 500 each awarded by the Court. We cannot, therefore, agree to this obvious jurisdictional inequity by reading a limitation of Rs. 500 although what the section plainly means is that the Court cannot grant more than Rs. 500 for each one of the claimants."In the whole" in the context means taking all the items of maintenance together, not all the members of the family put together. To our mind, this interpretation accords with social justice and semantics and, more than all, is obvious : "It is sometimes more important to emphasize the obvious than to elucidate the obscure." (Attributed to Oliver Wendell Holmes).

14. We admit the marginal obscurity in the diction of the section but mind creativity in interpreting the provision dispels all doubts. We own that Judges perform a creative function even in interpretation.

"All the cases in this book are examples, greater or smaller, of this function"

writes Prof. Griffith (J. A. G. Griffith : "The Politics of the Judiciary", p. 175).

15. The conclusion is inevitable, although the argument to the contrary is ingenious, that the Magistrate did not exceed his powers while awarding Rs. 1000 for mother and children all together.

16. (Substituted by Para 17E) We have been told by Shri S. T. Desai that the divorce proceeding terminated adversely to his client but an appeal is pending. If the appeal ends in divorce being decreed, the wife's claim for maintenance qua wife comes to an end and under Section 127 of the Code the Magistrate has the power to make alteration in the allowance order and cipherise it. (This part of the Order reconsidered under Art. 137 in the Order dated 22-8-1978, paras 17A to 17F) We make the position clear lest confusion should breed fresh litigation.

17. The special leave petition is dismissed.

Order under Article 137 dated 22-8-1978

17A. Noticing a patent error which has unfortunately crept in the above judgment in the last paragraph thereof, counsel on both sides were given notice to appear and they were heard.

17B. Section 125(1), Explanation (b) of the Cr.P.C. reads :

"Wife" includes a woman who was been divorced by, or has obtained a divorce from, her husband and has not remarried.

17C. The last paragraph in the judgment concludes with the statement "If the appeal ends in divorce being decreed, the wife's claim for maintenance qua wife comes to an end and under Section 127 of the Code, the Magistrate has the power to make alterations in the allowance order and cipherise it."

17D. The judgment would seem to indicate that once divorce is decreed the wife ceases to have any right to claim maintenance and that such an impact can be brought

about by an application under Section 127 of the Code. It is clear that this conclusion contradicts the express statutory provision. The advocates on both sides agree that this is a patent error and further agree that the law may be correctly stated and the contradiction with the statute eliminated. Therefore, we direct that in substitution of the last paragraph (herein para 16), the following paragraph will be introduced.

17E. "We have been told by Shri S. T. Desai that the divorce proceeding has terminated adversely to his client but that an appeal is pending. Whether the appeal ends in divorce or not, the wife's claim for maintenance qua wife under the definition contained in the Explanation (b) to Section 125 of the Code continues unless parties make adjustments and come to terms regarding the quantum or the right to maintenance. We make the position clear that mere divorce does not end the right to maintenance."

17F. We regret the error and pass this order under Article 137 of the Constitution with the consent of both sides so that the ends of justice and the law that this Court lays down may be vindicated.

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