

Savitri W/O Govind Singh Rawat

Vs

Govind Singh Rawat

Special Leave Petition

(E. S. Venkataramiah, R. B. Misra JJ)

09.10.1985

JUDGMENT

VENKATARAMIAH, J -

1. The short question which arises for consideration in this case is whether a magistrate before whom an application is made under Section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') can make an interim order directing the person against whom the application is made under that section to pay reasonable maintenance to the applicant concerned pending disposal of the application.

2. In the instant case, the petitioner was an applicant under Section 125 of the Code before the Metropolitan Magistrate, Delhi. In her application, she prayed for an order against her husband directing him to pay maintenance to her. Immediately after she filed the said application, she made another application before the magistrate for an interim order directing her husband to pay some reasonable sum by way of maintenance pending disposal of the main application. The learned magistrate declined to make such an interim order on the ground that there was no express provision in the Code enabling a magistrate to pass such an order. Aggrieved by the said order the applicant has filed this special leave petition under Article 136 of the Constitution.

3. It is true that there is no express provision in the Code which authorises a magistrate to make an interim order directing payment of maintenance pending disposal of an application for maintenance. The Code does not also expressly prohibit the making of such an order. The question is whether such a power can be implied to be vested in a magistrate having regard to the nature of the proceedings under section 125 and other cognate provisions found in chapter IX of the Code which is entitled "Order For Maintenance of Wives, Children and Parents". Section 125 of the Code confers power on a magistrate of the first class to direct person having sufficient means but who neglects or refuses to maintain (i) his wife, unable to maintain herself, or (ii) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or (iii) 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 (iv) his father or mother, unable to maintain himself or herself, upon proof of such neglect or refusal, to pay a monthly allowance for the maintenance of his wife or such child, father or mother, as the case may be, at such monthly rate not exceeding five hundred rupees in the whole as such magistrate thinks fit. Such allowances shall be payable from the date of the order, or, if so ordered from the date of the application for maintenance. Section 126 of the Code prescribes the procedure for the disposal of an application made under Section 125. Section 127 of the Code provides for alteration of the rate of maintenance in the light of the changed circumstances or an order or decree of a competent

civil court. Section 128 of the Code deals with the enforcement of the order of maintenance. It is not necessary to refer to the other details contained in the above said provisions.

4. A reading of the above provisions shows that they are intended to provide for a preventive remedy for securing payment of maintenance which can be granted quickly and in deserving cases with effect from the date of the application itself. The rate of maintenance that can be awarded is also limited even though under the law governing the parties a competent civil court may order payment of a larger sum by way of maintenance in appropriate cases. The civil courts have inherent power to grant interim maintenance pending disposal of the suit for maintenance. The point for consideration is whether the magistrate can also make such an interim order or not.

5. The jurisdiction of a magistrate under Chapter IX of the Code is not strictly a criminal jurisdiction. While passing an order under that Chapter asking a person to pay maintenance to his wife, child or parent, as the case may be, the magistrate is not imposing any punishment on such person for a crime committed by him. Chapter IX of the Code contains a summary remedy for securing some reasonable sum by way of maintenance, subject to a decree, if any, which may be made in a civil court in a given case provided the Personal Law applicable to the person concerned authorises the enforcement of any such right to maintenance. The Code, however, provides a quick remedy to protect the applicant against starvation and to tide over immediate difficulties. Chapter IX of the Code does not in reality create any serious new obligation unknown to Indian social life. In *Bhagwan Dutt v. Kamla Devi* ((1975) 2 SCR 483, 486 : (1975) 2 SCC 386, 390 : 1975 SCC (Cri) 563) this court has explained the object of Sections 488, 489 of and 490 of the Code of Criminal Procedure, 1898 which are replaced by the provisions in Chapter IX of the Code thus : (SCC p. 390, para 11)

Sections 488, 489 and 490 constitute one family. They have been grouped together in Chapter XXXVI of the Code of 1898 under the caption "Of the maintenance of wives and children." This chapter, in the words of Sir James Fitzstephen, provides "a mode of preventing vagrancy, or at least of preventing its consequences" These provisions are intended to fulfill 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 preventive, rather than a remedial jurisdiction : it is certainly not punitive. As pointed out in *Thompson Case* (6 NWP 205) : "the scope of the Chapter XXXVI is limited and the Magistrate cannot, except as thereunder provided, usurp the jurisdiction in matrimonial disputes possessed by the civil courts." Sub-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.

6. In view of the foregoing it is the duty of the court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the magistrate to direct the person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. It is quite common that applications made under Section 125 of the Code also take several months for being disposed of

finally. In order to enjoy the fruits of the proceeding under section 125, the applicant should be alive till the date of the final order and that the applicant can do in large number of cases only if an order for payment of interim maintenance is passed by the court. Every court must be deemed to possess by necessary to make its orders effective. This principle is embodied in the maxim "ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest" (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist). (Vide Earl Jowitt's Dictionary of English Law, 1959 Edn., p. 1797.) Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties. The magistrate may, however, insist upon an affidavit being filed by or on behalf of the applicant concerned stating the grounds in support of the claim for interim maintenance to satisfy himself that there is a prima facie case for making such an order. Such an order may also be made in an appropriate case ex parte pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the respondent is heard. If a civil court can pass such interim orders on affidavits, there is no reason why a magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a magistrate under Section 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to therein pending final disposal of the application. In taking this view we have also taken note of the provision of Section 7(2)(a) of the Family Courts Act, 1984 (Act 66 of 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by magistrates under Section 125 of the Code to the Family Courts constituted under the said Act

7. The above opinion according to us is based on the true construction of the relevant provisions of the Code. We are, however, informed that the dispute regarding maintenance is now finally settled between the parties. Hence no further orders are necessary in this case. The petition is accordingly disposed of.

</html