

JAMMU AND KASHMIR HIGH COURT

Biro

Vs.

Behari Lal

Criminal Ref. No. 35 of 1958

(J.N. Wazir, C.J. and S. Murtaza Fazl Ali, J.)

10.04.1958

JUDGMENT

S. Murtaza Fazl Ali, J.

1. This is a reference by the Additional Sessions Judge of Jammu arising out of an application for maintenance filed by Mst. Biro before the Munsiff Magistrate First Class, Jammu.
2. The reference was heard in the first instance by Hon'ble the Chief Justice sitting singly and in view of the important question of law involved in the case, it has been referred to the Division Bench for hearing.
3. The reference has been made by the Additional Sessions Judge for setting aside the order of the Munsiff Magistrate dated 20-8-1957 by which he had dismissed the application of Mst. Biro for maintenance.
4. The facts out of which the present reference has arisen may be briefly stated thus: On the 26th of Jeth, 2011 Mst. Biro filed an application before the Magistrate under Section 488, Criminal Procedure Code, for maintenance of ₹ 30/- for herself and for her daughter. In the application it was alleged, inter alia, that Mst. Biro was the legally wedded wife of the opposite party, Bihari Lal, and she had a son 5 1/2 years old and a daughter about 3 years old from the opposite party. She was ill treated by her husband who drove her out of the house and as a result of this treatment she was living with her parents for the last two years and was being neglected by her husband. She also alleged in her application that her husband had kept his brother's widow as his mistress and had therefore, neglected her. It is also alleged by Mst. Biro that in view of the fact that the husband had contracted a second marriage with his brother's widow she was not prepared to live with him.
5. The opposite party, Bihari Lal, contested the application of Mst. Biro on the ground that he had not kept his brother's widow as a concubine but had actually married her and that he was willing to maintain his wife but th

e applicant refused to live with him because he had married his brother's widow.

6. The learned Munsif Magistrate held that the applicant failed to prove that she was being ill treated by her husband but he dismissed her application on the ground that the mere fact that the husband had contracted second marriage was not sufficient to entitle the applicant to maintenance when the husband had offered to maintain her and when no neglect on the part of the husband had been proved by the applicant.

7. Against this order the applicant Mst. Biro moved the Additional Sessions Judge in revision for making a reference to this Court for setting aside of the order of the Magistrate. The learned Addl. Sessions Judge has made this reference on the ground that the fact that the husband had contracted second marriage was sufficient to enable the applicant to an order for maintenance. The learned Additional Sessions Judge has also recommended that the case should be sent back to the Magistrate for determining the quantum of maintenance both so far as the wife and her daughter are concerned.

8. It further appears from the record that during the pendency of the proceedings under Section 488, Criminal Procedure Code, before the Magistrate a proceeding for appointment of guardian was also started and it ultimately came up to this Court. This Court by its order dated 22-12-1955 appointed the applicant as guardian of her minor son.

9. In the application although the applicant mentioned that she had a son and a daughter but she had claimed maintenance for the daughter only obviously for the reason that at that time the question of guardianship of the son had not been decided. Now that this Court has decided that the applicant will be guardian of the son, in my opinion, there is no reason why maintenance for the son should not be allowed.

10. Mr. J. L. Sehgal learned counsel appearing against the reference has contended that in view of the clear finding of the Magistrate that the applicant having failed to prove that she was neglected by the husband as contemplated by Section 488 (1), Criminal Procedure Code, she was not entitled to maintenance as a matter of law, merely on the ground that the husband had contracted a second marriage.

11. The learned counsel has submitted before us that the proviso to Section 488, Criminal Procedure Code, which runs as follows:

"If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him."

was added to the Criminal Procedure Code as applicable in India by Act 9 of 1949 and before this amendment the Courts in India had uniformly taken the view that the mere fact that the husband had contracted second marriage would not be just ground for the wife to refuse to live with her husband. The contention is that as the amendment referred to above has not been incorporated in the Criminal Procedure Code which applies to this State, the Court cannot give effect to the principle laid down in the aforesaid amendment.

12. I have carefully considered the argument of the learned counsel. It seems to me that although

the contention is prima facie attractive but on close scrutiny it is without substance for the reasons that I shall give hereafter. But before I do so I would like to consider the authorities that have been relied upon by the learned counsel appearing for the non-applicant.

13. Mr. Sehgal strongly relied on the decision in the case *Sm. Bela Rani Chatterjee v. Bhupal Chandra Chatterjee*¹, In this case their Lordships of the Calcutta High Court have held that the mere fact that the husband had contracted a second marriage was not a sufficient ground to entitle the wife to an order for maintenance without there being any proof of neglect. Their Lordships were considering the effect of the amended proviso to Section 488, Criminal Procedure Code

14. With great respect to their Lordships I am not in a position to agree with the view expressed by their Lordships on the interpretation to the proviso. It is well settled that a proviso to the section is in the nature of an exception to the general provisions contained in the section. The proviso added by Act 9 of 1949 runs as follows :

"If a husband has contracted marriage with another wife or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

A careful perusal of this proviso clearly shows that this meant to be an exception to the general conditions laid down in clause (1) of Section 488, Criminal Procedure Code To limit it and to say that in spite of the proviso the conditions laid down in clause (1) of Section 488 have to be proved is, in my opinion, not a proper in relation of the proviso as it would render the effect of the proviso nugatory. In this connection their Lordships of the Supreme Court have held in *Ram Narain Sons Ltd. v. Asst. Commissioner of Sales Tax*², as follows :

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

It is, therefore, clear that the proviso is self-contained section and affords exception to the general condition laid down in clause (1) of Section 488, Criminal Procedure Code In this connection I may point out that while repelling a similar argument made before the Madhya Bharat High Court Mr. Justice Dixit in the case, *Gunni v. Babu Lal in*³ observed as follows:

"I am unable to accept the contention advanced on behalf of the non-applicant. There is nothing in the Criminal Procedure (Amendment) Act, 1949, to show that it would not be a just ground for the wife's refusal to live with her husband if the husband has contracted marriage with another wife or taken a mistress before the amendment made in Section 488.

Before the amendment, the fact of the husband's marrying a second wife or keeping a mistress was not by some High Courts considered a just ground for the first wife's

¹ AIR 1956 Cal 134

³ AIR 1952 Madh-B. 131

² AIR 1955 SC 765

refusal to live with him, although it was taken into account in considering whether the husband's offer to maintain his first wife was really 'bona fide' or not. The amendment is clearly intended to put an end to an unsatisfactory state of law utterly inconsistent with the progressive ideas of the status and emancipation of women, in which women were subjected to a mental cruelty of living with a husband who had taken a second wife or a mistress on the pain of being deprived of any maintenance if they chose to live separately from such a husband. In my view to hold that the amendment is intended to afford a just ground for the wife's refusal to live with her husband only in those cases where he has after the amendment taken a second wife or a mistress is to defeat in a large measure the very object of the amendment." This interpretation in my opinion is in consonance with the intention of the Legislature because the Amendment Act came into effect after Act 19 of 1946, the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 under which Act a wife was entitled to maintenance merely on the ground that the husband had contracted a second marriage. Section 2 of the said Act reads as follows:

"Notwithstanding any custom or law to the contrary a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds, namely,-

"X X X X"

(4) if he marries again;

"X X X X X"

15. I am supported in this view by the decision of the Allahabad High Court in the case, *Smt. Maiki v. Hemraj*⁴, as also of the Madras High Court in the case *Bayanna v. Devamma*⁵, In the Madras case Mr. Justice Govinda Menon, as he then was, on an interpretation of Section 2 of Act 19 of 1946 observed as follows:

.....under Section 2, Hindu Married Women's Right to Separate Residence and Maintenance Act when the husband takes a second wife, the first wife is entitled under law to live separately and claim separate maintenance. So her residing separately is legal and once she resided separately the duty of the husband is to give her separate maintenance"

I fully agree with the view of his Lordship, Mr. Justice Menon that by virtue of the said Act the right to reside separately in the event of the applicant's husband marrying again being legal she was entitled to maintenance. I am further supported in my view by the cases reported in *Banarsi Bai v. Ghisoolal*⁶, (2) and *Rajeswariamma v. K. M. Viswanath*⁷, Even the Calcutta High Court had in its previous decision in the case, *Kunti Bala Dassi v. Nabin Chandra Das*⁸, had taken the view that if the husband had contracted another marriage it would be a sufficient cause for the wife to be entitled to an order for maintenance. Except the decision of the Calcutta High Court referred to above no other decision is cited before us which lays down that the ground that the husband married a second wife is not sufficient to entitle the wife to an order for maintenance.

⁴ AIR 1954 All 30

⁶ AIR 1955 Ajmr 8

⁸ AIR 1955 Cal 108

⁵ AIR 1954 Mad 226

⁷ AIR 1954 Mys 31

16. The learned counsel, however, relied on certain decisions before the amendment which held

that the fact that the husband had contracted a second marriage was not sufficient to entitle the wife to an order for maintenance and these are *K. Pullamma v. K. Jhatalingam*⁹, *P. Amaldoss v. Mrs. Kamala Amaldoss*¹⁰, *Kirpal Singh v. Mt. Santi*¹¹, and *Sukrulla Fakir v. Fatma*¹². In these cases it appears that the wife had been living separately several years before she applied for an order of maintenance and in this context their Lordships held that the mere fact that the husband had contracted second marriage was not a sufficient ground to entitle the wife to an order for maintenance.

17. Whatever may have been the position before the amendment it is doubtful whether the law laid down in the cases cited above can be held to be good law after the amendment referred to above.

18. In this particular case we are not really concerned with the effect of the amended proviso to Section 488 as it has been conceded by counsel appearing for the applicant that the proviso has not been incorporated in the Criminal Procedure Code which applies to this State. The argument of Mr. Sehgal, however, is that as the amended proviso has not been applied to the Criminal Procedure Code, prevailing in this State we should construe the words "just ground for so doing" according to the decisions which were given before the amendment and hold that the mere fact that the husband has contracted a second marriage would not be sufficient ground to entitle the wife to maintenance.

19. I have carefully analyzed this argument. The proviso to Section 488, Criminal Procedure Code, as applied to this State runs as follows:

"Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing."

It appears that the Legislature itself has not defined as to what "just ground" for refusal by the wife is. We have, therefore, to construe the true meaning and import of the words "just ground" having regard to the circumstances and facts of this case. In my opinion it is difficult to lay down as a hard and fast rule that where the husband contracts a second marriage it is not necessarily a just ground for the wife to be entitled to maintenance in every case. The question whether such a conduct on the part of the husband amounts to just ground for refusal will naturally depend upon various factors, such as, the conditions prevailing in a particular State, the conduct of the wife and the husband, state and set up of a particular society etc. etc.

20. It seems to me that in view of the fact that the Legislature passed an Act, namely, the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 and which Act has been applied to this State we cannot ignore the changes brought

⁹ AIR 1945 Mad 44

¹¹ AIR 1927 Lah 168

¹⁰ AIR 1937 Mad 794

¹² AIR 1924 Nag 297

about in the conditions of the society and the rights and status conferred on Hindu women by virtue of this Act. We have, therefore, to construe the words "just ground" in the light of the changed conditions of the society and the new status given to a Hindu wife under the law

which has been applied to this State as mentioned above. In this connection the learned counsel for the applicant has cited before us a decision of the Allahabad High Court reported in *Pancho v. Ram Prasad*¹³, That was also a case arising out of proceedings under Section 488, Criminal Procedure Code, and his Lordship was considering as to whether Section 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act was retrospective. In that case his Lordship also construed the provisions of Section 488 and his Lordship Mr. Justice Roy made the following observations:

"Conception of legal cruelty undergoes changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty it is not necessary that physical violence should be used."

With great respect we fully agree with the observations made by his Lordship quoted above.

21. It is well settled that Section 488, Criminal Procedure Code, is a provision which is initially meant for the benefit of neglected or deserted wife and it should be liberally construed in favor of the wife.

22. The question, therefore, before us is as to whether in construing the words "just ground" we are debarred from taking into account the changed circumstances and particularly changed status brought about by the Legislature by virtue of Act 1946 as also by virtue of the amendment to the Code of Criminal Procedure. As I have already stated that the Legislature has not defined the words "just ground" therefore we do not consider that any limitation has been placed on our power to construe the statute in the light of the changed circumstances and the present state of society. If the statute which has been applied to this State gives a complete right to a Hindu woman to claim maintenance and also to live separately if her husband contracts a second marriage, there is no reason why this should not be construed as a just ground within the meaning of Section 488 for the refusal of the wife to live with her husband.

23. It is rather unfortunate that the Legislature of this State has not thought it fit so far to incorporate the amendment referred to above in the Code of Criminal Procedure which applies to this State. In our opinion the sooner it is done the better, particularly in view of the fact that the State Legislature has in fact applied Act 19 of 1946 to this State. The learned counsel appearing against the reference cited no decision in support of the view that it is not permissible to pray in aid of the provisions of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, except the case reported in AIR 1956 Calcutta 134. Their Lordships in the Calcutta decision have given no reasons at all for making the observations, nor have they

¹³ AIR 1956 All 41

relied on any decision for the purpose of making these observations. We, therefore, do not find ourselves in a position to agree with the decision given by their Lordships in the aforesaid Calcutta case.

24. On a careful consideration, therefore of the authorities cited before us, we are of the opinion that the fact that the husband has contracted second marriage is by itself a sufficient ground to

entitle the wife to an order for maintenance and this is a just ground as contemplated by the proviso to Section 488, Criminal Procedure Code, applicable to this State.

25. We, therefore, agree with the recommendation of the learned Additional Sessions Judge that the order passed by the learned Magistrate dismissing the application for maintenance to the wife should be set aside.

26. The next question that has to be decided in this case and on which also the reference has been made to this Court, is as to whether the children of the applicant are entitled to maintenance. The learned Additional Sessions Judge has rightly pointed out that the learned Magistrate has completely over-looked this aspect of the case and given no reason for disallowing maintenance to the children. The learned counsel appearing against the reference has conceded that he is not in a position to support this part of the learned Magistrate refusing maintenance to the daughter of the applicant, but he has submitted that as the applicant did not claim any maintenance for the son, no order for maintenance so far as the son is concerned could be passed.

This argument, in our opinion, is based on misconception. The applicant had clearly stated in her application that she had a son and a daughter by the non-applicant. The necessary facts which would entitle the son and the daughter to maintenance were thus pleaded and proved before the learned Magistrate. As I have already pointed out above that as the matter of the guardianship of the son had not been decided at the time when the proceedings under Section 488, Criminal Procedure Code, were pending before the Magistrate, it was not possible for the wife to have claimed maintenance for the son as long as the question of his guardianship was left undecided. Now that the question has been decided by this Court and it is admitted on all hands that both the daughter and the son are living with the applicant, there is no reason why an order for maintenance should not be made even in favor of the son.

27. We would have decided the entire case here, but as the learned Magistrate has not applied his mind to the quantum of maintenance to be granted to the applicant and her children it will be necessary to remand the case to the learned Magistrate.

28. For the reasons given above we would hold that the order of the learned Magistrate refusing maintenance to the applicant and her children should be set aside and the case should be remanded to the Magistrate for determining the quantum of maintenance. The parties will be at liberty to adduce fresh evidence on the question of quantum of maintenance.

29. The result is that the reference is accepted, the order of the Magistrate dated 20-8-1957 is set aside and the case is remanded to the learned Magistrate only for decision of the question of quantum of maintenance to be allowed to the applicant and her children.

Order accordingly.