MYSORE HIGH COURT

H. Syed Ahmad

Vs

Naghath Parveen Taj Begum

Criminal Revn. Petn. No. 225 of 1957

(K.S. Hegde, J.)

09.01.1958

JUDGMENT

K.S. Hegde, J.

1. This revision petition is directed against the order of the learned City Magistrate, Bangalore, in Criminal Misc. No. 16 of 1956. It is an order passed under Section 48S, Criminal Procedure Code The petitioner is the husband. The respondent is his wife.

2. The petitioner is an advocate practising in the City of Bangalore. He is a young man aged about 28 years. He married respondent o-1955. She was about 16 or 17 years old at the time of her marriage. The parties come from very respectable families. The marriage was performed with due pomp and ceremony. The young couple started their life with love and affection. The petitioner presented a number of jewels to his wife. The petitioner says that he even purchased a car to humour his wife. But their happiness was short lived. Very soon after their marriage they seemed to have differed on small matters, and made mountains of mole hills. I have carefully scanned the evidence on record to find out the cause of this disagreement. I am unable to find any reason-able explanation. The petitioner complains that his wife was always conscious of the fact that she is the daughter of a District Superintendent of Police and she was more attached to her parents than to him. The respondent's grievance is that her husband is a fault finder. She alleged cruelty. But the learned Magistrate who enquired into the case has come to the conclusion that the cruelty" alleged has not been established. I agree with him. The parties seem to have been more conscious of their rights than their obligations. It is a case of immaturity on one side and jealousy on the other; a clear case of temparamental maladjustment. They refused to bend but were willing to break. Immediately after the first flush was over they seem to have started quarrelling. It is the case of the husband that his wife went to her parents' place on 1-10-1955, promising to return within a week. She refused to return. He and his relatives went to her parents' house and implored her to come back and begged of her parents to send her. His further grievance is that his father-in-law did not treat him fairly and he was more or less shown the door. On the other hand the complaint of the wife is that it is the husband that had dropped her at her parents' place after ill-treating her for a number of days. She also alleges that he came to her parents' house in the middle of November and assaulted her and later he tried to take her forcibly.

She was afraid of her life and hence declined to go. I regret that these young people have been lacking in discretion. The greater regret is that their parents who ought to know better, instead of bringing to bear their sober influence on these young people seemed to have wrecked their future by standing on prestige. Events seem to have moved in quick succession. As I said before the marriage took place on 17-4-1955, the wife went to her parents' house in about the beginning of October, 1955; letters and notices passed between the parties in the month of November each accusing the other of being responsible for the unhappy impasse. The husband married a second wife in about the end of November, 1955 and the maintenance application was filed on 15-12-1955. At no stage there was any real attempt at settlement. Each one was trying to dictate to the other. They were not even willing to allow things to cool down.

3. The learned Magistrate who tried the case awarded maintenance to the wife at the rate of ₹ 50/- per month. In his judgment the very fact of second marriage which is not disputed in this case entitled the wife to claim separate maintenance.

4. Hence arguments in this Court were focused on the true scope of the amendment to the first proviso to sub-section (3) of Section 488, Criminal Procedure Code It is contended before me that the Court below has misconstrued the amendment in question. According to the revision petitioner before his wife could get separate maintenance she must establish either neglect or refusal on his part to maintain her. On the finding of the Court below neither neglect nor refusal is established. It is urged that the fact of second marriage by itself does not tantamount to neglect or refusal to maintain the first wife. According to the learned Counsel for the petitioner the amended proviso merely provides an exception to the original first proviso to sub-section (3) of Section 488, Criminal Procedure Code The relevant portion of Section 488, Criminal Procedure Code is as follows :

> "(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 to time directs.
> (2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.
> (3) If any person so ordered (fails without sufficient cause) to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levving fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made;
> 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 may make an order under this section notwithstanding such

offer, if he is satisfied that there is just ground for so doing;

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...." Arguments on behalf of the revision petitioner proceeded on the following line.

5. Before the Court could award separate maintenance to a wife she must establish either negligence or refusal on the part of the husband to maintain her. That is the very foundation on which separate maintenance could be granted. Negligence includes cruelty. But a second marriage is no cruelty to the first wife. Section 488 (1) is independent of Section 488 (3). Sub-section (3) of Section 488, Criminal Procedure Code refers to enforcement of the order made trader sub-section (1). During the enforcement of the order the husband could plead that he is willing to maintain his wife on condition of her living with him. This will be a good defense for him, if his plea is a *bona fide* one. The amendment incorporated in 1949 provides an exception to this plea. As per that amendment the wife can refuse to live with the husband if he has contracted marriage with another woman or keeps a mistress. This amendment can only come into play during the course of the enforcement of the order made under sub-section (1) of Section 488, Criminal Procedure Code and it has nothing to do with the order to be made under Section 488 (1), Criminal Procedure Code Reliance is also placed on the scheme of the section. It is said that sub-section (1) of Section 488, Criminal Procedure Code provides for the award of maintenance. Sub-section (2) lays down as from what date the same could be made payable; sub-section (3) provides for enforcement; first proviso to that sub-section gives the right to the husband to evade his responsibility of paying maintenance by offering to maintain his wife on condition of her living with him. Second paragraph of that proviso entitles the wife to refuse to live with him if he has taken a second wife or if he keeps a mistress. It is urged that if the Legislature intended to make the second marriage a per se cruelty or neglect on the part of the husband then the amendment should have been made to sub-section (1) of Section 488, Criminal Procedure Code and not to sub-section (3). It is also pointed out that the parties to this case are Muslims and as such the husband could take four wives according to their personal law. A Muslim taking a second wife cannot be said to be neglecting his first wife or even causing cruelty to her. It is urged that unlike parties who are monogamous, a wife of a Muslim cannot claim that her husband is her private property and that she is solely entitled to his attention and affection. After all the law enunciated under Section 488, Criminal Procedure Code is a law against destitution. It is not and it cannot replace the personal law of the parties. It is further urged that if the Legislature wanted to bring in monogamy for Muslims, it would have done so in a straightforward manner. There was no necessity to get it through the back door of Section 488, Criminal Procedure Code I am asked to read Section 488, Criminal Procedure Code subject to the personal law of the parties. 1 must confess that the line of arguments adopted on behalf of the revision petitioner has something new and refreshing about it. Its main virtue is its novelty and complete disregard of judicial opinion. The learned Counsel for the revision petitioner wanted me to ignore the numerous decisions on the subject. According to him these decisions have no basis on the wording of the section and they were clearly attempts on the part of Judges to impose their own views. He wants me to take the section in its pristine purity and ignore the gloss put upon it by the learned Judges. In his turn he has relied upon the cases reported in *The State v. Mt. Anwarbi*[1], and *Smt. Bela Rani Chatteriee v. Bhupal Chandra Chatterjee*[2], The Calcutta case is really of no assistance to him. It deals with a totally different aspect. It is true that

the Nagpur case lends some support to his argument, though petition in that case was dismissed primarily on another ground. The view expressed in that case as regards the scope of the first proviso to sub-section (3) of Section 488, Criminal Procedure Code is not in line with the generally accepted judicial opinion.

6. If I accept the validity of the petitioner's argument, it would be necessary to come to the conclusion that the entire first proviso to sub-section (3) of Section 488, Criminal Procedure Code will be relevant only when an action is taken under sub-section (3). It could have nothing to do with sub-section (1). To put it in other words no husband in proceedings under sub-section (1) of Section 488, Criminal Procedure Code can take a plea that he is willing to maintain his wife on condition of her living with him. That plea will be only available to him when the order is being enforced. This would make the whole section look ridiculous. Courts have uniformly accepted the view that a husband could in an application under Section 488, Criminal Procedure Code take the plea that he is willing to maintain his wife if she lives with him. It is a good defence if it is a *bona fide* one. If the main proviso is available in proceedings under sub-section (1) then it necessarily follows that the amendment made to that proviso will also be applicable to such cases. If the husband can plead that he is willing to maintain the wife, she in her turn can plead that she is not willing to live with him on the ground that he has taken a second wife. I see no particular reason as to why the plea in question should be available only at the time of enforcement of the order and not at the time of its passing. The learned Counsel for the revision petitioner has evaded this question. He seems to think that it is legislature's folly and nobody else's concern. I refuse to feel so helpless. The several sub-sections to Section 488, Criminal Procedure Code have never been considered by Courts in isolation. They are an integrated whole. They must be taken cumulatively. When the legislature amended the first proviso to sub-section (3) of Section 488, Criminal Procedure Code it knew full well the scope of the first proviso as interpreted by decided cases. If the decided cases did not truly represent the legislative intention, the legislature would have certainly clarified its intention. But the fact that the legislature left the first proviso untouched excepting to provide an exception to it shows that there was no conflict between the intention of the legislature and the judicial interpretation. Judicial opinion has been uniform on this point. I unhesitatingly reject the contention of the revision petitioner.

7. The plea of personal law makes no appeal to me. The Criminal Procedure Code is a law of the land and not of any community. If there is a conflict between the law enacted by the legislature and the personal law then the former prevails. The legislative will is supreme in this land unless controlled by the Constitution. There is no constitutional guarantee to respect the personal law of any community. There is no doubt that the amendment in question is the result of the working of social forces.

[1] AIR 1953 Nag133

[2] AIR 1956 Cal 134

It is but natural in a Country like ours, the social forces make themselves felt more
effectively amongst certain sections of the people; but the common will is perceptible. These changes are not accidental but are intended to usher in a new way of life. They represent a new ideal and a trend. It is true that the personal law of the Muslims as such has not been changed. But if they come within the mischief of Section 488, Criminal Procedure Code they shall be governed by its provisions notwithstanding their personal law. A large number of decisions have been brought to my notice in support of the view taken by the trial Court. I may usefully refer to

the cases reported in *Srimati Maiki v. Hemraj*[3], *Rajeshwariamma v. K. M. Viswanath*[4], and *Bhanwarlal v. Gitabai*[5], I am in complete agreement with these decisions. Neglect or no neglect the petitioner in this Court is liable to pay separate maintenance to his wife on the sole ground that he has taken a second wife. His plea that he has been compelled to take a second wife by the conduct of the first wife and her parents, is not a plea that is open to him in law. His grievance may be genuine but law does not recognize it as a good defense.

8. This takes me to the next question as to what would be the proper rate of maintenance to be awarded. The trial Court has directed the husband to pay to the wife separate maintenance at the rate of ₹ 50/- per month and that from the date of the petition. There is no finding by the lower Court as to what, approximately is the monthly income of the husband nor is there any finding as to what his assets are. It has proceeded on the footing that the capacity to earn is itself sufficient means as contemplated in Section 488, Criminal Procedure Code The husband is a young advocate.

The trial Court thinks that he has the whole world before him and a long future to count. Hence he ought to pay at least ₹ 50/- per month. It is true that the visible, assets are not necessary before the husband is made to pay maintenance to his wife. His capacity is sufficient. That itself is a resource. But there must be a reasonable assessment of that capacity. There is no specific criteria to measure it. The fact that a young advocate has the whole world and the future before him is both encouraging and discouraging. He may make his mark or he may lose himself in the wilderness. It is no use ignoring the realities of life. There is evidence on record to show that he has not yet made any appreciable beginnings for a successful career. He is still on the threshold. For the present he depends on his parents for his existence. His senior has been examined and according to him his monthly income averages between ₹ 50 to 80/-. He is not shown to possess any other assets. The fact that he purchased a car to humour his wife is not a proof of his capacity to earn or of his existing assets. It is clear that his father provided him with the car. While capacity to earn is good ground for providing maintenance at a minimum rate actual earning is necessary to provide for a comparatively decent rate. In my judgment the respondent and her parents are in no small measure responsible for this sorry situation. It is a combined folly of all concerned. Again in awarding maintenance under Section 488, Criminal Procedure Code the Court should see that the rate is not such as would tempt the wife to permanently live separately from her husband. The respondent is still in her teens. For the present it is likely that she has not fully realized the consequences of the steps she has taken. The revision petitioner has shown more bravado than wisdom. Maturity is likely to bring in mellowness and better realization of life and its problems. I have still hopes of their patching up their differences and making their married life a success. I think the ends of justice will be met if the husband (petitioner in this Court) is made to pay at the rate of ₹ 30/- per month. He shall pay the same from the date of the petition. To show my disapproval of the conduct of all concerned in this case, I disallow costs both in this Court and in the Court below.

[3] AIR 1954 All 30: 1953 ALJ 473

[4] AIR 1954 Mys 31

[5] AIR 1957 Mad Pra 221 (E)

9. The petition is allowed to the extent hereinabove indicated.

10. Parties will bear their own costs in this Court as well as in the Court below.

Order accordingly.