

## KERALA HIGH COURT

P.T. Ramankutty Achan

Vs

Kalyanikutty

Criminal Revn. Peta. No. 101 of 1970

(P. Narayana Pillai, J.)

06.07.1970

### JUDGMENT

#### **P. Narayana Pillai, J.**

1. Both the parties to this revision petition, the petitioner, Ramankutty Achan, whom for convenience I shall call Achan, and his wife, Kalyanikutty, who is the respondent, are teachers. Their marriage took place in 1953. From 14-1-1968 they began to live separate. So long as love persisted there was little need of law to rule the relations between them. But as love flew out of the window the lawyer stepped in through the door. On 26-10-1968 Kallianikutty applied before the District Magistrate, Palghat, for granting maintenance to her and her three children. Her application was resisted by Achan. The District Magistrate granted maintenance to Kallianikutty at the rate of Rs. 25/- and to each of the children at the rate of Rs. 20/- per month. Aggrieved by it Achan has filed this revision petition. ‘

2. After deductions from the salary of Achan which is Rs. 285/- he gets Rs. 240.63 every month. The monthly salary of Kallianikutty also is Rs. 285/-. Out of it after deductions she gets Rs. 210/- every month.

3. The liability of Achan to maintain the children was not disputed by his counsel. About the maintenance awarded to them the only argument advanced was that the rate fixed was excessive. Considering the means of Achan the rate fixed for the children is proper and cannot be said to be excessive.

4. The more serious dispute between the parties was about right of a person placed in the position of Kallianikutty to claim maintenance under Section 488 of the Criminal Procedure Code. I was referred to *Ponnambalam v. Saraswathi*<sup>1</sup>, *Ahmed Ali Sahib v. Sarafarajulnisa Begum*<sup>2</sup>, *Sardar Muhammad v. Nur Muhammad*<sup>3</sup>, *Mohd. Ali v. Sakina Begum*<sup>4</sup>, *Annan Narasimha Ayyar v. Ranganathayammal*<sup>5</sup>, *Arunachala Asari v. Anandayammal*<sup>6</sup>, (1) and *Syed Bahbood Ali v. Hassanuz Zaman Begum*<sup>7</sup>, by counsel appearing for *Achan and Joginder Singh v. Raj Mohinder Kaur*<sup>8</sup>,

<sup>1</sup> AIR 1957 Mad 693

<sup>3</sup> AIR 1917 Lah 213

<sup>5</sup> AIR 1947 Mad 304

<sup>2</sup> AIR 1952 Hyd 76

<sup>4</sup> AIR 1944 Lah 392

<sup>6</sup> AIR 1933 Mad 688

<sup>7</sup> 1957-1 Mad LJ (Cri) 622 (AP)

<sup>8</sup> AIR 1960 Pun 249

by counsel appearing for Kallianikutty in support of the respective positions they took.

5. In AIR 1957 Madras 693 the wife belonged to a class who did not go out for work for earning their livelihood and the husband was a Postman who was drawing a salary of Rs. 90/- per month. Rs. 25/- was fixed under Section 488 as the monthly allowance for the wife. In considering the principles to be kept in view before fixing the rate of maintenance Ramaswami, J., who disposed of that case said:

"Finally, the question of quantum of maintenance is also a matter for the discretion of the trial Magistrate, because he has to take into consideration several factors, like the status of the family, the earnings and the commitments and what is required by the wife to maintain herself. In regard to determining what is required by the wife to maintain herself, we have to steer clear of two extremes, viz., we must not give maintenance which would keep her in luxury and would make judicial separation profitable and also impede any future reconciliation.

We must also steer clear of the other extreme, viz., penuriousness, which used to be the case with our elderly Sub-Judges in civil suits and which used to be on such a scale as would be fitting only in the case of an unchaste Hindu widow. Steering clear of these two extremes we must see whether Rs. 25/- out of the Rs. 90/- is liberal or illiberal."

6. In AIR 1952 Hyderabad 76, the wife who applied for maintenance was a school mistress drawing a total monthly salary of Rs. 148/-. Shripat Rao, J., who dismissed her petition said:

"Mr. Appa Rao has cited 45 Cri LJ 254 : AIR 1944 Lahore 392 in which it has been held that the Magistrate's power to make an order under Section 488, Criminal Procedure Code is discretionary and where, therefore the evidence in a case shows that the wife has a private income of her own which is sufficient to keep her (wife) from starvation, an order granting her maintenance is bad. I agree with the said statement of the law as propounded by Mr. Justice Blacker of the Lahore High Court. The wording of Section 411, H. Criminal P. C.: Section 488 sub-section (1) is that the Magistrate concerned may order the payment of monthly allowance towards maintenance to wife or child. Thus, from the word "may" it is clear that discretion has been given to the Magistrates to pass an order under the Section. This discretion should be exercised judicially. The object of the proceedings for maintenance under the Section is to prevent vagrancy by compelling the husband or the father to support his wife or child who is unable to support itself. I am fortified in this view by the ruling cited in *Ibrahim Mohamed v. Kurushed Bai*<sup>9</sup>, It is to be noted that the provisions of this chapter are not in the nature of penal provisions. The allowing of maintenance is not a punishment under the penal laws of the country. Its purpose is the enforcement of a duty wherever necessary. In 18 Cri LJ 811 : AIR 1917 Lahore 213, it has been held that the

object of maintenance proceedings is not to punish a parent for his past neglect.....  
..... Whether under her civil rights she is entitled to get maintenance from her husband under the Mohamedan Law though she is earning herself is a question which must be decided by the Civil Court. The Criminal Court cannot decide this question."

7. In AIR 1944 Lahore 392 the wife who applied for maintenance had private income of her own derived from certain mortgages. It was conceded on her behalf that the monthly income from the same was Rs. 18/-. The husband who was not a young man and who had been employed in the municipality was discharged from that employment on account of ill-health. The income from the amounts that he got by drawing from provident fund and by recovery of a debt was not more than Rs. 20/- a month. In those circumstances nothing was granted to the wife for maintenance. Blacker, J., who disposed of that case said:

"There is ample authority for the proposition that Section 488 provides only a speedy remedy against starvation for a deserted wife or child, that it is only a summary procedure which does not cover entirely the same ground as the civil liability of a husband or father under his personal law to maintain his wife or child, and that when substantial issues of civil law are raised between the parties their remedy lies only in the civil Courts: AIR 1926 Madras 346, 1937 Mad WN 1127 and ILR 39 Mad 957 : AIR 1917 Madras 276 inter alia..... The evidence shows that the wife has a private income of her own derived from mortgages. The Courts below have given no finding as to the amount of this income. Her counsel, however, stated at the bar before me that it was Rs. 18/- per month, and this statement was not challenged. Admittedly this income is far from princely but it is sufficient to keep the wife from starvation. Whatever may be her rights under the civil law, she is not entitled to a maintenance allowance under this summary procedure greater than her bare needs for food, clothes and lodging: AIR 1925 Allahabad 73."

8. In AIR 1917 Lahore 213 the application was on behalf of a child and in dealing with the object of the Section Broadway, J. observed:

"The object of maintenance proceedings, however, is not to punish a parent for his past neglect, but to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and have a moral claim to support."

9. In AIR 1947 Madras 304 taking into account the fact that the wife who applied for maintenance was getting a monthly income of at least Rs. 7/- the rate of Rs. 15/-fixed by the lower Court was reduced by Yahya Ali, J., to Rs. 7-8-0 per month.

10. In AIR 1933 Madras 688 (1), the husband who resisted the wife's application for maintenance offered to maintain her in his house but wanted her to live in a separate room and not to associate with the other members of his family. She refused that offer without sufficient grounds. In refusing separate maintenance to her Burn, J., said:

"I cannot see that Section 488, Criminal Procedure Code has anything to do with ordinary

conjugal rights; it deals with "maintenance" only and I see no reason why maintenance should be supposed to include anything more than appropriate food, clothing and lodging..... She cannot claim under Section 488, Criminal Procedure Code, to be treated "as a wife", she can only claim to be maintained on the scale appropriate to her station in life."

11. In 1957-1 Mad LJ (Cri) 622 (AP) separate maintenance was awarded to the wife repelling the contention of the husband that she was not entitled to it as she had a calling from which she got sufficient income. The following observations of Kumarayya, J., in that case show that although the wife's application for maintenance could not be dismissed as incompetent on account of her having independent income of her own in fixing the quantum her resources could also be taken into account.

"The last argument advanced is that the wife has a calling and gets sufficient income and that no order for maintenance should therefore have been made. I cannot agree with this. The husband has the legal duty to maintain his wife. Of course, while fixing the quantum the resources or the income of the wife may also be taken into consideration. In this particular case, it appears that the wife is not a permanent employee. She is holding a temporary post. Under these circumstances, Rs. 50/- per month by way of maintenance would have been the reasonable amount especially so when the husband has to pay another sum of Rs. 50/- per month for the child."

12. In AIR 1960 Punjab 249, in the application filed by the wife she claimed maintenance both for herself and her minor son. The husband was Major in the Army. His monthly income was Rs. 1070/-. Rs. 150/-per month was granted to the wife for maintenance by the Magistrate before whom the application was filed. That was upheld in revision. Dua, J., who disposed of the Revision Petition said:

"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 this 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 the legislature to deprive her of the right of maintenance conferred by this section, if she is otherwise found entitled to it. The use of the word "may" in the context does not, in my view, confer an absolute discretion on the Court to refuse to the wife maintenance if she has otherwise brought her case within the purview of the section. But even if the power conferred on the Magistrate be assumed to be discretionary, the discretion has, in my view, to be exercised on sound judicial principles, considering the equities of each case. The contention of Mr. Gujral with respect to the quantum of maintenance appears also to be unsound on the ground that had the Parliament intended the rate of maintenance to be the bare subsistence allowance merely

to save the dependant from starvation, the amount permissible under Section 488 would not have been raised to Rs. 500/-, by the amendment effected in 1955. This amendment clearly suggests that it is not bare subsistence allowance which alone is intended by the Parliament to be grantable under this Section. Some of the cases cited by Mr. Gujral do contain observations which apparently go to support the counsel but on considering the actual facts and circumstances of those cases the final conclusions and decisions in most of them would be found supportable independently of those observations. But if those authorities intend to lay down any rigid rule of law that the only right which a wife possesses under Section 488 Criminal Procedure Code, 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. The language of the Section does not clearly and unequivocally support this view and on general principles I find it difficult to endorse it. It is also not possible for me to ignore the drastic changes which the social conditions in this country have recently undergone, particularly with respect to the rights of women. The old view, therefore, which treated women as inferior members of the family can no longer hold good. This change in the social trend is discernible in other civilised countries as well; for example in England recently marked development has taken place about the position of married women and also of wives who have been deserted by their husbands. Law there has kept pace with the changing social conditions. In my view, therefore, a deserted wife must, according to the law of the Indian Republic, be held entitled to suitable maintenance which is in accord with the status of the family and not to bare food and clothing as some learned Judges have observed in some of the decided cases. It has been contended that proceedings under Section 488 being summary proceedings the question of the right of maintenance conferred on the deserted wife by the civil law involving, as they do, complicated questions of fact and law should not be decided in these proceedings. There is certainly support for this proposition in some decided cases but if there are no complex or complicated questions of fact and law and the status of the parties, the means of the husband and the requirements both of the husband and the dependant are either admitted or are properly and fully established on the record, I fail to see why the Court dealing with the question of maintenance under Section 488 should not grant proper maintenance to the dependant and must direct the parties to protracted civil litigation."

According to the learned Judge it was not bare subsistence allowance confined to food, clothing and lodging that she was entitled to, but maintenance which was in accordance with the status of the family. One of the reasons given for taking that view was that if it was the contrary that was intended by the legislature the maximum amount that could be awarded would not have been restricted by Section 488 to Rs. 500/-. Of course in granting her allowance for food, raiment and lodging the status of the family would be considered. But that does not mean that if the husband gets a fat income and has no other liabilities his wife is entitled to get a rate fixed under Section 488 which would enable her to live a luxurious life in keeping with the husband's financial position. 'Luxury' is a comparative term. What is luxury for one may be only a necessity for

another and in the case of a person belonging to the latter category claims for monthly allowance of Rs. 500/- to meet bare necessities are not inconceivable. Therefore from the mere fact that the Section has fixed Rs. 500/- as the maximum amount that could be granted by way of monthly allowance it cannot be readily inferred that something more than what was necessary for food, lodging and clothing was contemplated by the Section. Another reason given is that drastic changes have taken place in the social conditions in the country and that in the changed circumstances a wife is entitled to suitable maintenance according to the status of the family. As the summary procedure provided for in the Section does not cover entirely the same ground as the civil liability of the husband to maintain his wife and the object of the section being only to prevent vagrancy a wife applying under the Section is entitled to get only that which is necessary to keep her away from destitution. With great respect I do not consider the changed circumstances in the status of a married woman as justifying the granting to her under Section 488 of more than what is needed for food, clothing and lodging although it may be a relevant matter for the Civil Court to consider when enforcing the liability of a husband to maintain his wife under their personal law. The actual decision in AIR 1960 Punjab 249 shows that although the husband who had Rs. 1070/- per month as income had no other liabilities, the wife was awarded maintenance only at the rate of Rs. 150/- per month. The learned Judge did not say that the fixing of the rate of maintenance was not a matter in the discretion of the Court. He only said that the Court had no absolute discretion to refuse maintenance to the wife if her case otherwise came within the purview of the section. There is nothing in that judgment to show that the wife had independent income of her own.

13. Section 488 of the Code of Criminal Procedure so far as is relevant for the present purpose reads:

"488(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."

It is a long section containing matters introductory and consequential. A break-down of it shows that while the former part gives jurisdiction the latter part is consequential because on the earlier part being established the obligation to consider the rate of maintenance follows and one asks what is the rate. It may as well be nothing.

14. A plain reading of the section shows that it is competent for the wife to claim maintenance provided the husband has sufficient means and he has refused or neglected to maintain her. But the competency of the wife to claim maintenance is different from the actual granting of maintenance to her. In every case in which it is competent for a wife to claim maintenance it is not obligatory on the part of the Magistrate to grant her maintenance. In other words it may as well be that she may be competent to claim it but on merits the Magistrate may not grant her anything towards it.

15. As regards the granting of maintenance what is stated in the section is that the Magistrate may order monthly allowance for maintenance. There is nothing in the section to show that in fixing the monthly allowance the Magistrate should consider the means of the husband alone and shut his eyes to the means of the wife. Cases of ladies getting fabulous income being attracted by and marrying gentlemen with moderate income are not rare. In the case of such persons if a husband refuses or neglects to maintain his wife should she be awarded anything under Section 488 towards maintenance ? The answer must clearly be in the negative because the power to grant maintenance allowance is purely discretionary and the object of the section and its social purpose are to prevent vagrancy and destitution and not to punish a husband for having neglected or refused to maintain the wife or to enrich a wife who has already sufficient income for her maintenance. The position is not different where the personal income of the wife is moderate and is sufficient to meet her needs and requirements. Although our law has not gone to that extent in Russia it is so common for wives to earn their own living that the wife if she has means is bound to support a destitute husband.

16. 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 itself" 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.

17. It is true that where the word 'may' is used it does not always mean that the provision is only permissible or directory. But whether it was intended to be only directory or mandatory can be ascertained from the context in which the word is used and the purpose and object thereof. The words "may .... order at such .... rate .... as such Magistrate thinks fit" appearing in the Section the object of which is to prevent vagrancy and which is applicable to all communities irrespective of their personal laws, when read together irresistibly lead to the conclusion that the word 'may' is used only as directory, that the rate has to be fixed according to the satisfaction of the Magistrate and that in fixing it there is a possibility of nothing being fixed also. The fixing of the rate is to be done on the merits of each case and the income of the wife is a relevant circumstance to be taken into account in fixing the rate. I can find no contrary intention expressed in the Section. I can find nothing in the Section that requires the Court to exclude from consideration the means of the wife in fixing the rate of maintenance. I am satisfied that her means have also to be taken into account in fixing the rate. I conclude this part by saying that without the clearest words I cannot think that the means of the wife can be excluded from consideration in fixing the rate of maintenance to be granted to her under the section and in so saying hoping that between cross tides I have swum as much with the current as against it and at the same time taken note of the under current.

18. Returning now to the instant case the income of Achan and Kallianikutty is almost the same and Kallianikutty's income is more than sufficient for her maintenance according to her status. Therefore that portion of the order sought to be revised wherein the rate of maintenance for her is fixed as Rs. 25/-per month is set aside. To that extent alone this revision petition is allowed. In all

other respects it shall stand dismissed.

Order accordingly.