

BOMBAY HIGH COURT

Bai Prabhavati Sumatilal Dholidas

Vs.

Sumatilal Dholidas

(Chagla, C.J., Dixit and Shah, JJ.)

Criminal Ref. No. 167 of 1953

07.04.1954

JUDGMENT

Chagla, C.J.

1. This reference which has been made to us by the Additional Sessions Judge, Ahmedabad, arises out of an application made by a wife for maintenance against her husband under Section 488 of the Code of Criminal Procedure. The application was for the maintenance of herself, a daughter and a son. The learned Magistrate who heard the application was of the opinion that on merits a sum of Rs. 100 should be awarded to the wife and Rs. 70 to the two children. But he felt bound by the decision of this Court reported in - '*Palmerino v. Palme rino*'¹, and therefore he awarded a sum of Rs. 100 in respect of all the three. When the matter came before the learned Additional Sessions Judge, he felt that the decision of this Court should be reconsidered in view of the fact that the other High Courts had taken a contrary view. He thereupon made this reference.

2. Now, Mr. Thakor for the husband has raised a preliminary point that the learned Additional Sessions Judge should have followed the decision of this High Court and should not have made a reference. In our opinion, the learned Additional Sessions Judge has done the right thing in drawing our attention to the state of the law which results in great injustice being done, as has been done in this case by the order made by the learned Magistrate.

3. Before we consider the authorities, let us consider the section itself. It is clear that Section 488 confers upon the wife and the child, legitimate or illegitimate, of a person who neglects or refuses to maintain the wife or the child, an independent right to obtain maintenance under the section, and it is equally clear that it imposes upon the person neglecting or refusing to maintain his wife or child an independent obligation in respect of his wife and child. The jurisdiction of the Magistrate is to make a monthly allowance for the maintenance of the wife of the person or such

child, at such monthly rate, not exceeding one hundred rupees in the whole. It is pertinent to note that the Legislature has used the expression "or" and not "and". Therefore, the jurisdiction of the Magistrate is with regard both to the wife or the child and the limit of his jurisdiction is to allow a maintenance and the monthly rate of that maintenance should not exceed one hundred

¹ AIR 1927 Bom 46

rupees. The expression "in the whole" applies to the limit of the Magistrate's jurisdiction conferred with regard to the allowance of the maintenance, and in its context it can only mean that the Magistrate cannot allow anything more than one hundred rupees when he is fixing the maintenance of the wife or the child. He can not, over and above one hundred rupees, allow anything else to the wife or the child either with regard to the medical expenses or education or anything else. The suggestion that the 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 favor 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. The construction which has been urged before us by Mr. Thakor on behalf of the husband in this case receives some support from the decision of a division bench of this Court reported in '*Palmerino v. Palmerino (A)*'. In that case the Magistrate had made an order directing the husband to pay a monthly allowance of Rs. 150 for the maintenance of the wife and her child and this order was challenged before Mr. Justice Shah. At p. 47 Mr. Justice Shah observed :

"In the present case the order of the Magistrate directing a monthly allowance of Rs. 150 per month was clearly in excess of his jurisdiction."

4. Now, there are two or three important aspects of this case which must be borne in mind. In the first place, the order made by the Magistrate was patently erroneous, because although the wife applied for maintenance for herself and her child, the Magistrate made a compendious order

allowing Rs. 150 both to the wife and to the child. Now, as already pointed out, Section 488 gives effect to the principle that a wife and a child has an independent right to be maintained by the husband or the father and therefore in making an order under Section 488 the Magistrate must award maintenance to each one of the parties appearing before him. Now, in this particular case, what the Magistrate did was that he awarded Rs. 150 jointly to the wife and the child, and therefore on that ground alone the order was liable to be set aside. The second aspect of the case, which is equally important, is that although the wife was served with a notice she did not appear in Court and therefore the decision was 'ex parte' and, with respect, the matter was not as fully argued as it would have been if the wife had been represented. The third aspect of the case is that again, with respect to the learned Judges, the learned Judges, it appears from the judgment, seemed to have thought that the expression used in the section was "and" and not "or" because Mr. Justice Shah says at p. 47 :

"The Magistrate can make an order for the maintenance of his wife and child at such monthly rate, not exceeding one hundred rupees on the whole as he thinks fit."

If that was the expression used in the section, very likely the decision of the Bench would be right. But the section does not, as already pointed out, state that the power of the Magistrate in making an order for maintenance is with regard to the wife and child but it is with regard to the wife or child, which puts an entirely different complexion on the section. Therefore, with respect, 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.

5. Now, we find that excepting our High Courts all other High Courts which had to consider this question have taken a contrary view of the proper construction of the section. In - '*Kent v. Kent*²', the matter came before a single Judge Mr. Justice Devadoss and the learned Judge emphasised the fact that the section speaks of "wife or his legitimate or illegitimate child" and does not speak of "wife and child" and that the words had to be given their plain meaning. Further, the learned Judge says that the Legislature used the expression "in the whole" to prevent the Magistrate making an order that the husband should pay so much for the schooling of the children, or so much for clothing, and so much for medical expenses and so on. This case came to be again considered by a Division Bench of the High Court in - '*Bulteel v. Bulteel*³', It seems that after Mr. Justice Devadoss Mr. Justice Newsam of the Calcutta High Court had taken a contrary view in - '*Tulsi Das v. Sarju Dei Devi*⁴', and in this case Sir Lionel Leach, C. J., approved of the decision in '*Kent v. Kent* (B)' and dissented from the view taken by Newsam, J., and by our High Court in '*Palmerino v. Palmerino* (A)' pointing out that the latter was an 'ex parte' application and it was not fully argued. The same view has been taken by the Calcutta High Court in 'AIR 1933 Calcutta 406'.

6. The result, therefore, is that we must accept the reference and hold that the Magistrate had

jurisdiction to award separately to the wife and each of the children of the husband a sum not exceeding Rs. 100. There is not much difficulty in this case as to the merits, because the learned Magistrate has carefully considered the question of the income of the husband and he has come to the conclusion that even on his own showing in the return he has made for the purpose of income-tax the income amounts to about Rs. 3,000 peryear. But the learned Magistrate has taken the view that this is not the real income of the husband and that he had concealed it. Taking a reasonable view he came to the conclusion that Rs. 100 should be awarded to the wife and Rs. 70 to the two children.

7. We would, therefore, modify the order passed by the learned Magistrate and direct that Rs. 100 permonth should be paid to the wife and Rs. 35 permonth to each child. This order will become effective from March 30, 1951, when the application for maintenance

² AIR 1926 Mad 59

⁴ AIR 1933 Cal 406

³ AIR 1938 Mad 721

was made by the wife. Mr. Thakor says that the difference of arrears would amount to a large sum of about Rs. 2,500 and he wants some time to pay this amount. On the opponent undertaking to pay the arrears within two months from to-day we would stay execution of this order to the extent that it relates to the arrears of maintenance - the difference between Rs. 100 permonth and Rs. 170 permonth. Mr. Thakor's client - the husband - to pay to the applicant - wife, costs of this application quantified at Rs. 150.

Reference accepted