

BOMBAY HIGH COURT

Tejabai

Vs.

Shankarrao Baswanappa

Criminal Ref. No. 108 of 1964

(Naik and Palekar, JJ.)

03.03.1965

JUDGMENT

Palekar, J.

1. This is a reference by the learned Additional Sessions Judge, Latur, arising out of an order passed under Section 488, Criminal Procedure Code by the learned Judicial Magistrate, F.C. Udgir, awarding separate maintenance at the rate of Rs. 30 per month to the wife. The wife, Tejabai was married to Shankarrao Baswanappa in about 1954, when she was a minor. Shankarrao had a first wife living at the time. Tejabai filed the application under Section 488 Criminal Procedure Code on 29-11-1963, alleging that she was treated well for about a year after the marriage, and that, she was ill-treated thereafter, and, finally, beaten and driven out of the house on 23-11-1963. She, therefore, claimed maintenance at the rate of Rs. 50 p.m., pointing out that her husband had an annual agricultural income of Rs. 3,000 and used to earn Rs. 90 p.m. by way of salary as a Talathi. The allegations of ill-treatment were denied by the husband. He alleged that Tejabai lived with him for about eight years after her marriage, and that she had left him and gone away to her parents' house at the time of Nagpanchami in the year before the application was filed. He further alleged that he had called her to his house, but, she was refusing to return to him. He, therefore, contended that she was not entitled to any maintenance.

2. The learned Judicial Magistrate held that the alleged ill-treatment had not been proved. At the same time, he was of the opinion that she was entitled to claim separate maintenance, "neglected or refusal to maintain" being presumed on account of the husband having another wife. He, therefore, ordered that the husband Shankarrao should pay Rs. 30 p.m. as maintenance to her.

3. Shankarrao, thereupon, filed a revision petition in the Court of the Sessions Judge at Latur. The learned Additional Sessions Judge held that the Magistrate had no jurisdiction to pass the order of maintenance merely on the ground of Shankarrao having a second wife. He was of the

view that the amendment to Sub-Section (3) of Section 488 Criminal Procedure Code by Act 9 of 1949, did not enlarge the ambit of the provision of Section 488(1) of the Criminal Procedure Code and did not supply a new ground for claiming maintenance.

4. Both the courts have held that there was no ill-treatment of the wife. That is a finding of fact and is binding on this Court. The wife Tejabai had put forward the ground of ill-treatment as the cause of her staying with her parents, but, since, the ill-treatment has not been proved, it must be held that she had voluntarily left her husband's house to stay with her parents. The question is whether, living separate from her husband, she is entitled to claim maintenance under Section 488 Cri P.C., on the ground that her husband has contracted marriage with another wife.

5. Sub-Section (1) of Section 488 Criminal Procedure Code provides that, if any person having sufficient means neglects or refuses to maintain his wifea 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 Sub-Section (2) of Section 488 provides for payment of such allowance from the date of the order or of the application for maintenance. Sub-Section (3) is important. It says :

"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 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."

This last provision, which explains the words "just ground" in the proviso in its application to a particular situation, has been added by Section 2 of Act 9 of 1949. That brings us to Sub-Section (4) of Section 488 which provides that, no wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

6. There has been considerable divergence of opinion as to whether the proviso under Sub-Section (3) referred to above, is a proviso to Sub-Section (3) only or, to Sub-Section (1) This Court has taken the view that it is a proviso to Sub-Section (1)..... See, for example. (*Thagubai v. Vedu!*) by Naik, J. (unreported). Some other High Courts have taken the view that it is a proviso to Sub-Section (3) only and will come into play when the offer has been made after an order has been passed granting maintenance under Sub-Section (1). The point of view put forward is that

the order for maintenance can be made only under Sub-Section (1) of Section 488 when two requirements have been fulfilled, viz., that the husband, in the case of a wife, has sufficient means, and yet neglects or refuses to maintain her. Once an order has been passed under Sub-Section (1), Sub-Section (3) deals with the case, where, in execution of that order, the husband comes forward and offers to maintain his wife, and, that sub-

¹ Cri. Reference No. 140 of 1959 decided on 16th December 1959 (bom)

section permits the Magistrate to consider if there are any "just grounds" for the wife to refuse to live with her husband. If "just grounds" are made out, he may issue an order under Sub-Section (3). But, if just grounds are not made out for living separately from the husband, the Magistrate notwithstanding the order made under Sub-Section (1), may pass an order disallowing the maintenance by the execution of that order. What was "just ground" under the proviso to Sub-Section (3) was always a matter of opinion on the facts of each case, but, after the Hindu Married Women's Right to Separate Residence and Maintenance Act 19 of 1946, made provision for separate maintenance to a wife whose husband took a second wife, the Legislature thought that a similar provision should be made by suitably amending Section 488, to meet a similar situation. In other words, if after an order had been passed granting maintenance under Sub-Section (1), that order was sought to be executed under Sub-Section (3), it would be no longer open to the Magistrate to refuse execution of that order on the ground that the wife refuses to live with her husband due to his having contracted marriage with another wife. In that view, some High Courts have held that the explanation cannot be made a ground for granting maintenance but must be regarded as making special provision in relation to the execution proceedings, when an order for maintenance has already been made under Sub-Section (1).

7. But, what happens when the husband offers to maintain his wife on condition of living with him before any order under Sub-Section (1) is passed ? Sub-Section (4) is the answer. That Sub-Section says that, no wife shall be entitled to receive an allowance from her husband under this section. if, without any sufficient reason, she refuses to live with her husband. It will be seen that in the proviso to Sub-Section (3), the words used are 'just ground', and, in Sub-Section (4), the words used are "sufficient reason". In view of the enactment of 1946, already referred to, it may be taken as a principle of general acceptance that, if a husband contracts marriage with another wife, the wife would be justified in refusing to live with him, and, what is a "just ground" for the proviso under Sub-Section (3) would also be a "sufficient reason" under Sub-Section (4). In *Ramji Malviya v. Smt. Munni Devi*², Desai, J., as he then was, observed, with reference to the proviso under Sub-Section (3) and Sub-Section (4), as follows :

"Sub-Section (4) governs the whole section including Sub-Section (1); no maintenance can be granted to a wife under Sub-Section (1) if she is living in adultery, or if without any sufficient reason she refuses to live with her husband, or if she and her husband are living separately by mutual consent. In the face of Sub-Section (4) it was unnecessary for the legislature to apply the first proviso (to Sub-Section (3)) to Sub-Section (1) also. The proviso seems to have been enacted in order to give the husband one more opportunity of

offering to maintain the wife on condition of her living with him. He might not have made such an offer while the application for maintenance under Sub-Section (1) was pending against him; he might have thought that the wife would not succeed in proving a sufficient reason for her living separately from him.

"So the legislature might have enacted the proviso (to Sub-Section (3)) to give him the right to make such an offer when an order made against him under Sub-Section (1) was sought to be enforced through issue of a warrant."

"..... .Though the proviso governs only Sub-Section (3), the provision that

² AIR 1959 All 767

remarriage by the husband is a just ground for the wife's refusal to live with him, lays down a general principle, which must be borne in mind when it is to be considered whether the wife's refusal to live with her husband is without any sufficient reason within the meaning of Sub-Section (4). A just ground for refusal to live with the husband must necessarily be a sufficient reason. A sufficient reason may not be a just ground, but a just ground must always be a sufficient reason."

8. It is, therefore, really not necessary to decide whether the proviso in Sub-Section (3) governs Sub-Section (1), or, only Sub-Section (3), so far as the ground of the wife's refusal to stay with her husband is concerned. As pointed out in the case cited above (AIR 1959 Allahabad 767), it is open to the husband to make his offer to maintain his wife on condition of her living with him before any order under Sub-Section (1) is passed, and, when such an offer is made the wife is entitled to point out that the husband has contracted a marriage with another wife, and, therefore, it was a sufficient reason for her not to live with him. It will be, therefore, seen that in view of Sub-Section (4), it will make no material difference to the situation arising from the wife's refusal to live with her husband on the ground that he has contracted another marriage, whether the proviso in Sub-Section (3) is read as a proviso to Sub-Section (1) or to Sub-Section (3).

9. In *Sm. Bela Rani Chatterjee v. Bhupal Chandra Chatterjee*³, a Division Bench of the Calcutta High Court took the view that, the mere fact of a second marriage cannot ipso facto establish "such neglect or refusal" within the meaning of Sub-Section (1) of Section 488, Criminal Procedure Code, the reason given being that, a man may marry a second time and still not refuse to maintain his first wife. It was held that the mere fact that a husband has contracted marriage with another wife or keeps a mistress cannot, without more, be said to amount to neglect or refusal on the part of the husband to maintain his wife within the meaning of Sub-Section (1) of Section 488, Criminal Procedure Code. This view has been expressly dissented from in this court by my learned brother, Mr. Justice Naik, in Criminal Ref. No. 140 of 1959 dated 16-12-1959 (Bom). The learned Judge observed :

". . . The very fact that the wife is entitled to live separately from the husband is sufficient to show that she has a right to claim maintenance from the husband. Of course, it will be open to the husband to provide separate maintenance for the wife if she is, living away

from him in case, however the husband does not provide separate maintenance, then the only conclusion that would follow is that he is refusing or neglecting to perform his duty qua husband. On this basis, it can even be said that the case would fall within the ambit of the word 'neglects or refuses to maintain'. . . .

It may not be quite accurate to say that the explanation to the proviso to Sub-Section (3) supplies a further ground to the wife for claiming maintenance under Section 488. The basis for passing an order under Sub-Section (1) of Section 488 is 'neglect or refusal to maintain' by a person having the means. There can be no two opinions on the question that there should be either neglect or refusal to maintain before a wife is entitled to claim maintenance under that section. The question therefore, is not whether the explanation to

³ AIR 1956 Cal 134

the proviso to Sub-Section (3) gives a new ground for claiming maintenance, but the question is, whether the offer made by the husband to a wife, entitled to live separately, that, he will maintain her on condition of living with him does or does not virtually amount to a refusal to maintain her. We think, there could be only one answer to that question. When the husband knows that the wife has 'sufficient reason' or 'just ground' to live separately from him, the offer to maintain her on condition of living with him is not a valid offer at all. It is merely an evasion of his liability to maintain his wife who is destitute. That, in our opinion, really amounts to a refusal within the meaning of Section 488(1). When the wife makes an application for maintenance, the husband contests that application by making an offer to maintain her on condition that she lives with him, though, he knows that she was entitled to remain separate from him by reason of his contracting another marriage. The offer is made with the knowledge that the refusal would be the only answer in such a case, therefore, the offer cannot be considered a valid offer, but only an indirect way of refusing to maintain. The proviso to Sub-Section (3) read with its explanation does not create a new ground for claiming maintenance but requires the magistrate to test the validity of the offer made by the husband to the wife to live with him. Similar is the position when the offer is made under Sub-Section (4). If the offer is not valid, there is nothing for the Magistrate to consider further, and, in view of the fact that a destitute wife is entitled to maintenance by a husband having sufficient means, an order for maintenance or its execution must be passed. It makes no difference whether the offer is made before the issue of any order under Sub-Section (1), or, after the issue of the order under Sub-Section (3). As already stated, the question to be considered is whether there has been neglect or refusal to maintain within the meaning of Sub-Section (1) of Section 488. It has been long held that a refusal or neglect must be a refusal or neglect in praesenti, that is, at the time of the proceedings. (See in re. Kuppa Mudali, 2 Weir 630). The Magistrate having jurisdiction under Section 488(1) will have to consider whether at the time of the proceeding before him, there has been a neglect or refusal to maintain the wife. If he comes to that conclusion, he has no alternative but to pass an order of maintenance.

10. Considerations extraneous to the requirements of that section cannot be entertained. Observations have been made in some of the reported cases to the effect that a husband is

relieved from the obligation to maintain his wife so long as she voluntarily remains absent. . . .(See *Ishar v. Soirm Devi*⁴). Or, that, where a wife deserts her husband first without any sufficient reason and the desertion continues for 4-5 years in spite of the husband pressing her to live with him with the result that the husband remarries and the desertion continues thereafter, the wife, in such a case, is not entitled to claim maintenance under Sub-Section (1) merely because of her husband's remarriage.(See AIR 1959 Allahabad 767). It is, undoubtedly, true that in a majority of cases, where the wife voluntarily leaves her husband and refuses to return to her husband without a just ground or sufficient reason, it may be a good ground for refusing maintenance to her. But, the situation may radically change if the husband remarries. In the last mentioned case (AIR 1959 Allahabad 767), the wife was held to be disentitled to maintenance from the husband, because, she had deserted him and he was required to take, a second wife, after several years, to look after their minor daughter. We doubt very much, with respect, if such considerations can legitimately enter into the question as to whether maintenance should be allowed under Sub-Section (1) of Section 488. It would appear that the wife had been

⁴ AIR 1959 Pun 295

penalised, because, she had deserted her husband. It may be that, on account of the callous manner in which she desecrated her husband while their child was young, she deserved no better treatment. But, these are extraneous considerations for the purpose of Sub-Section (1). Desertion by the wife at some anterior date is not made a ground under the section for disallowing maintenance. It is her refusal to go back to her husband when a genuine offer is made which disentitles her to maintenance. For the purposes of that section, the Magistrate has to see whether the wife is destitute, and, the husband having means has refused or neglected to maintain her. If he finds that these requirements are fulfilled in praesenti, that is, at the date of the proceeding, it would be no answer to her claim that some five years previously, she had voluntarily deserted her husband. In our opinion, the proper approach to the case of a husband's offer and wife's refusal to live with her husband on account of the remarriage would be to hold that there was no valid offer by the husband to maintain his wife. And, if there was no such offer, it must be held for the purposes of Section 488(1) that there had been either neglect or refusal to maintain the wife.

11. In the present case, the learned Magistrate had rightly come to the conclusion that the wife was entitled to stay away from her husband and claim separate maintenance, because, a refusal to maintain her could be spelt out from the written statement filed by the husband and the contest he raised to the application.

12. It is next contended that the 'just ground' or 'sufficient reason' of a husband contracting marriage with another wife was only available to the first wife vis-a-vis the second, and, not the second wife vis-a-vis the first. It is contended that the provision was not made for the benefit of the wife, who, with open eyes, marries a husband, who has already contracted a marriage. We do not think that we can accept this argument. We know that the second wife is many a time a minor when she is married, and, is hardly responsible for her marriage. It may also happen in some cases that a man may marry a second wife keeping her in ignorance of his first marriage. To

refuse a second wife maintenance on this ground would, therefore, be clearly unjustified. Moreover, there is nothing in the explanation to the proviso which compels us to put the particular interpretation suggested. The words "If a husband has contracted marriage with another wife" are quite general in terms. The dichotomy between "has contracted marriage with another wife" and "keeps a mistress" is obvious. So far as the keeping of the mistress is concerned, the verb "keep" is used in its present tense. But, so far as the contracting of marriage is concerned, the verb is present perfect viz., "has contracted". The marriage may have been contracted at any time and will refer to the first as well as the second marriage. Much the same view has been taken of this provision by the Calcutta High Court in *Kunti Bala Dassi v. Nabin Chandra*⁵. There too, the application for maintenance under Section 488 had been made by a second wife. It was held that there was nothing in the explanation to the proviso under Sub-Section (3) of Section 488 which prevented a second wife from making an application for separate maintenance on the ground that the first wife had been living. The learned Judge observed :

"This proviso obviously places the wife on a stronger footing. It has been contended, however, on behalf of the husband that this proviso means that its benefit can be taken only by the first wife when her husband marries for the

⁵ AIR 1955 Cal 108

second time and that so far as the second wife is concerned she is not entitled to the benefit of it except where the husband takes one wife or more after her that is, the second wife's marriage. In my opinion, there is nothing in the proviso justifying such limited construction of it the phrase used in the proviso is 'has contracted' and not 'contracts'. The former phrase is, in my opinion, sufficiently wide to entitle the second wife to its benefit even in case where the husband has not married for the third time during the lifetime of the second wife. That being the position, when on the facts of the present case it has been proved that the husband is living with the first wife, that would be just ground on the part of the second wife to refuse to live with him even if he made an offer to the second wife inviting her to live with him at the same house with the first wife."

We agree, with respect, with the view stated above. In our opinion, the order passed by the learned Magistrate is correct.

13. The rule is, therefore, discharged.

Rule discharged.