PATNA HIGH COURT

Nalini Ranjan Chakravarty

Vs

Kiran Rani Chakravarty

(Ramratna Singh and S Singh, JJ.)

21.04.1964

JUDGMENT

Ramratna Singh, J.

1. The opposite party is the first wife of the petitioner. She made an application before the learned Sub-divisional Magistrate of Katihar under Section 488 of the Code of Criminal Procedure for maintenance on the ground that he had neglected her and refused to maintain her. The petitioner was asked to show cause against this prayer of his wife. He asserted that, as she was an idiot and mentally deranged, he took a second wife in 1947 with her consent and thereafter the opposite party was living separate from him by mutual consent. The learned Magistrate, however, rejected the assertion of the petitioner and allowed a monthly allowance of Rs. 40/- to the opposite party with effect from the 26th September, 1960, on the ground that he had neglected her and refused to maintain her. An application in revision against this order was dismissed on merits by the Additional Sessions Judge of Purnea. Hence, the present application in revision to this Court.

2. Mr. B.C. Ghose, who appeared on behalf of the petitioner, submitted that an unusual procedure had been adopted by the learned Magistrate and, therefore, the order granting maintenance to the opposite party was illegal and improper. The application under Section 488 Cr. P. C. was filed on the 24th August, 1959, but it was not signed by anybody. On that date a notice was issued to the husband to show cause why maintenance should not be allowed to the lady. On the 27th May 1960, both parties were present, cause was shown by the husband and the court directed the parties to adduce evidence on the 27th June 1960. On this date, i.e. on 27th June 1960, the case was adjourned, as the trying magistrate was absent. On the 23rd July 1960, the following order was passed.

> "O. P. present examined, cross examined and discharged 3 witnesses for the O. P. A petition has been tiled for further evidence. Put up on 9-8-60. No further time will ordinarily be allowed".

It is not clear whether the wife was present in court on that dale as the order is silent on that point. On the 9th August, 1960, both parties were present and more witnesses were examined on behalf of the husband. It is not necessary to mention the contents of the next two orders except

that on the 24th August 1960, a petition was filed on behalf of the wife for permission to sign the application under Section 488 Cr. P. C., and, as the omission to put her signature thereon was unintentional, the learned Magistrate allowed her to sign the application.Mr. Ghose submitted that the husband was not informed about this petition nor was he heard before this petition was allowed but this irregularity was of no significance. On the next date, i.e. on the 29th August 1960 which had been fixed for "orders", a petition was filed on behalf of the wife to examine her and the President of the Katihar Municipal Board and a medical practitioner of Katihar Dr. Parasar Bhattacharji, as court witnesses. This application was allowed and the ease was adjourned to 13-9-1960. It is remarkable that no complaint was made on 29-8-60 on behalf of the husband about the order passed on the 24th August, 1960, allowing the wife to sign the application under Section 488. On the 18th September, 1960, the husband was absent and his lawyer also did not appear before the Magistrate in spite of repeated messages sent to him by the learned Magistrate; and both the court witnesses were examined on that date. Mr. Ghose submitted that the husband or his lawyer did not appear on the 13th September 1960 as they had no information about the application or order to examine court witnesses. In this connection, he referred to the order of the 24th August, 1960, in which the magistrate directed the case to be put up on the 29th August 1960 'for orders' and submitted that it was not necessary for the husband to be present in court on that date; but there is no reason why his lawyer would not be present in court on that date.
Moreover, the order for examining two court witnesses made on the 29th August 1960 was passed in presence of the husband. Mr. Ghose submitted, however, that the words "O. P. present" in the order dated the 29th August 1960 did not state the true state of affairs, because his client was not present before the learned Magistrate on that date inasmuch as no hazri had been filed on his behalf. But, it was not necessary to file a hazri when no witness had to be examined on his behalf. Of course, in the application in revision in this court, which is supported by an affidavit, it is stated that the husband was not present in the court of the magistrate on the 29th August 1960, and he did not instruct his pleader to appear before the magistrate on that date or any time thereafter; but, no petition to that effect was ever filed before the Magistrate or before the court of session. Of course, the order of the learned Additional Sessions Judge shows that, during the arguments before him, the husband's pleader said that on the 29th August 1960, the husband was not present; but in the absence of any affidavit, such a statement by itself cannot be preferred to the fact recorded by the learned Magistrate in his order on the 29th August 1960 *(See Union of India v. T.R. Varma*[1]*,* and Madhusudan v. Mt. Chandrawati,[2] and the learned Judge rightly preferred the fact recorded by the learned Magistrate.

3. Mr. Ghose then submitted that the petitioner was prejudiced, as the wife was not examined by the Magistrate on solemn affirmation when she made the application under Section 488 and that the wife aid not examine any witness before the evidence adduced on behalf of the husband. But, it is well settled that such an application is not a complaint within the meaning of Section 4(h), Criminal Procedure Code, and, therefore, the husband was not in the position of an accused. Moreover, there is nothing on the record to show that the husband was forced to adduce any evidence, even though the wife had not examined herself or any of the witnesses; and, as the evidence of the husband and his witnesses formed a part of the evidence in the case, the learned Magistrate, was absolutely justified in taking the same into consideration and acting upon the admissions made therein.

4. Another argument of Mr. Ghose was that the learned Magistrate was not justified in examining

the wife as a court witness. This was at the most an irregularity which would not vitiate the order of the learned Magistrate. Moreover, Section 540 Cr. P. C. does not debar a court from examining a party as a court witness, if the court considers the evidence of that party essential to the just decision of the case. Of course, the wife had to prove neglect or refusal on the part of the husband to maintain her; but, when the husband volunteered to give evidence before the evidence of the wife, the latter can take advantage of the husband's evidence in support of her case and the court was justified in taking into consideration the entire evidence on the record for decision of the controversial question. None of the aforesaid arguments of Mr. Ghose can, therefore, vitiate the order of the learned Magistrate.

5. Learned advocate for the parties have taken us through the order of the learned Magistrate and we find that the evidence on the record justifies the conclusion arrived at by him. Dr. Parasar Bhattacharji, one of the court witnesses, was an independent witness. On his intervention, the two parties were reunited and began to live together, though subsequently the wife was sent to Purnea for nurse's training. She has spoken of this reconciliation and subsequent difference and neglect. The witnesses examined on behalf of the husband admitted that the opposite party has no shelter and she sleeps on the railway platform or the railway bridge. The husband does not claim to have been maintaining her; rather according to him, she has been loitering about and, as she has no source of living, he presumes that she must have taken recourse to adultery. Hence, the wife's statement that she lives on charities from railway employees of Katihar is quite probable. The finding of the learned magistrate is, therefore, justified.

6. The next contention of Mr. Ghose was that the order of the learned Magistrate is without jurisdiction inasmuch as Section 488 Cr. P. C. stands repealed, so far as Hindus are concerned, on account of the enactment of the Hindu Adoptions and Maintenance Act, 1956. In this connection, he relied on Clause (b) of Section 4 of the 1956 Act, which reads as follows:

> "Save as otherwise expressly provided in this Act-
> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
> (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act".

He submitted that, inasmuch as Section 488 Cr. P. C. was a law in force immediately before the commencement of the 1956 Act, that Section ceased to apply to the Hindus. But the words "in so far as it is inconsistent with" are significant, and the words mean that only such provisions, if any, of an earlier law as may be inconsistent with any of the provisions of the 1956 Act would stand, repealed. Mr. Ghose submitted that the use of the expression "inconsistent with" in Clause (b) indicated express repeal of the earlier law; but I am unable to agree. Mr. Ghose tried to make a distinction between the meanings of the expression "repugnant to" and the expression "inconsistent with", but, I confess my inability in appreciating any difference in the meanings of the two expressions.In order to explain the difference, Mr. Ghosh brought in the theory of occupied field and submitted that two statutes are inconsistent with each other if they occupy the same field, but they are repugnant, to each other if they contradict each other. He referred in this connection to the discussion in the judgment of Sri Shah Sulaiman J. in the case of

Subrahmanyan Chettiar v. Muttuswami Goundan[3], There, his Lordship spoke of the theory of "occupied field" and "unoccupied field" in considering the question whether a central law and a Provincial law covered the same legislative list or different legislative list, incorporated in the seventh schedule to the Government of India Act 1935. Though his Lordship said that a particular Provincial Law was "repugnant" to an existing Indian Law, he did not point out any distinction between the meaning of the two expressions "inconsistent with" and "repugnant to". On the other hand, in Articles 251 and 254 of the new Constitution of India the two expressions are used in the same sense. Moreover, in the instant case, both the laws are Central and relate to the concurrent list. Hence, there is no substance in the contention of Mr. Ghose.

7. The next question is whether there was an implied repeal of Section 488 Cr. P. C. by the Act of 1956. Mr. Ghose has referred to two passages in Craies on Statute Law (6th Edition). At page 368, it is stated--"where the legislature has passed a new statute giving a new remedy, that remedy alone can be followed". But, a few lines later, Craies has said:

> "and the rule could perhaps be more accurately laid down thus: In the case of an Act which creates a new jurisdiction a new procedure, new forms, or new remedies, the procedure, forms or remedies there prescribed, and no other, must be followed until altered by subsequent legislation".

I shall show presently that the 1956 Act has not created any new jurisdiction or new procedure or new remedy; and, therefore, the above passage of Craies does not help Mr. Ghose. On the other hand, at page 367 Craies has said:

> "Where a new Act is couched in general affirmative language, and the previous law can well stand with it, and if the language used in the later Act is all in the affirmative, there is nothing to say that the previous law shall be repealed, and, therefore, the old and the new laws may stand together".

The learned author has also said:

> "Where two Acts are inconsistent or repugnant the later will be read as having impliedly repealed the earlier. The court leans against implying a repeal; unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied".

"To determine whether a later statute repeals by implication an earlier it is necessary to scrutinise the terms and consider the true meaning and effect of the earlier Act".
Mr. Ghose then referred to another passage from Craies at page 372 of his book which reads thus:

> "From this rule it follows that if one statute enacts something in general terms, and afterwards another statute is passed on the same subject, which although expressed in affirmative language, introduces special conditions and restrictions, the subsequent statute will usually be considered as repealing by implication the former for 'affirmative statutes introductive of new law do imply a negative".

But, I shall show Mater that the 1956 Act does not introduce any special conditions or restrictions.

8. Maxwell, in his book on the Interpretation of Statutes, 1962 edition, has also used the expressions "repugnant to" and "inconsistent with" in the same sense. The learned author has said at page 153 as follows:

> "And the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not m express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. But, it is impossible to construe absolute contradictions. Consequently, if the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later",

9. At one stage Mr. Ghose submitted that the books of English authors on interpretation would not be of much help to understand the difference between the expressions "repugnant to" and "inconsistent with", because in the United Kingdom there is a unitary Government while in India there is a federal Government. But, the two expressions are used in the same sense even by an American writer, Crawford, in his took on Statutory Construction (1940 Edition.) In Section 311 of this book, it is stated as follows:

> "The inconsistency or repugnancy between two statutes necessary to supplant or repeal the earlier one, must be more than a mere difference in their terms and provisions. There must be what is often called 'such a positive repugnancy between the provisions of the old and the new statutes that they cannot be reconciled and made stand together'. In other words, they must be absolutely repugnant or (sic) or irreconcilable. Since there is a presumption against an implied repeal, and since the court will seek to avoid such a repeal by any fair and reasonable construction the inconsistency must be clear, manifest, and irreconcilable".

10. Keeping in view the above rules of interpretation, let us now examine whether any part of Section 488 Cr. P. C. is inconsistent with or repugnant to the provisions of the 1956 Act as would justify the inference that it has been impliedly repealed by the latter Act. The provisions of the 1956 Act which relate to maintenance are contained in Sections 18 to 29. The provisions contained in these sections are substantially the same as those contained in the uncodified Hindu law, which might be said to be the common law. That uncodified law also provided for the separate residence and maintenance of a wife and the same was incorporated in Central Act 19 of 1946 which liberalised the law in certain respects in favour of wife. That Act was repealed by Section 9 of the 1956 Act, but the provisions thereof were substantially incorporated in Sub-sections (2) and (3) of Section 18 of 1956 Act. Sub-section (1) of Section 18 speaks, however, of the wife's right to maintenance only. Section 19 provides for maintenance of a widowed daughter-in-law by the father-in-law, when she has no other means of maintenance. Section 20 incorporates the right of maintenance of minor children, legitimate or illegitimate, and the right of maintenance of aged and infirm parents from their sons and daughters. Section 22 lays down rules relating to the right of maintenance of dependants as defined in Section 21, from the heirs of a deceased Hindu or others who have inherited the estate of such deceased person. Section 23

provides that it shall be in the discretion of the court whether any, and if so, what maintenance, shall be awarded under the provisions of this Act. Section 24 lays down that maintenance under this Act shall not be allowed to a non-Hindu. Sections 26 to 28 contain miscellaneous matters.An important change made by this Act is that under Section 20 even illegitimate daughters are entitled to maintenance and a female Hindu is also now under a legal obligation to maintain her children and infirm parents. Otherwise the provisions of this Act are substantially the same as those contained in the Hindu Law before the commencement of this Act. Does the Act of 1956 then create a new jurisdiction, a new procedure or a new remedy? Is it a new law? Does it introduce special conditions and restrictions? The answers to all these questions are in the negative. The Act merely codifies the uncodified Hindu Law relating to maintenance, which was in force immediately before the commencement of this Act. The civil court is the forum for the enforcement of the codified law as was the case for the enforcement of the uncodified Hindu Law. The new Act does not introduce any special condition or restriction. Now, is there anything in the Act of 1956 to show that it cannot stand together with Section 488 Cr. P. C.? Is there anything to indicate that effect cannot be given to both at the same time? Again, the answers are in the negative.

11. Before the enactment of 1956 Act, it was well settled that the right conferred by Section 488 Cr. P. C. was independent of the personal law of the parties. The right of maintenance under Section 488 was irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right being in the case of a wife the acceptance of the conjugal relation. Further, Section 488 provided for only a speedy remedy and a summary procedure before a Magistrate against starvation of a deserted wife or child. This section did not cover the civil liability of a husband or a father under his personal law to maintain his wife and children. The civil court was the forum for the enforcement of the civil liability under the uncodified Hindu Law and that court is the forum to enforce the right under the 1956 Act. If, therefore, effect could be given to Section 488 Cr. P. C. before 1956, there is no reason why effect cannot be given to it when the old civil liability has been substantially incorporated in the 1956 Act.
12. Again, is there any inconsistency between the provisions of Section 488 and those of the 1956 Act that would make the two laws irreconcilable? The answer to the question must be in the negative. Under Section 488, maintenance is payable by the husband or father to his wife or child, as the case may be, if he neglects or refuses to maintain the claimant and the amount of maintenance cannot exceed five hundred rupees. In respect of these matters, the only difference in the Act of 1956 is that the quantum of maintenance is enlarged as will appear from the following definitions in Section 3(b).

Maintenance includes-

(i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;
(ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage;
But, on account of this difference, it cannot be said that the two enactments cannot stand or that it is not possible to administer the two simultaneously.

13. In view of the foregoing discussion, my concluded opinion is that the Hindu Adoptions and Maintenance Act, 1956, does not repeal or affect in any manner the provisions contained in

Section 488 Cr. P. C. and the right conferred by this section is still enforceable in the criminal court. The same view was taken by single judge decisions of the Calcutta High Court and the Allahabad Court, which were cited by Mr. Bhabanand Mukherji, who appeared for the opposite party, namely, *Mahabir Agarwalla v. Gita Roy*[4], *a*nd *Ram Singh v. State*[5],

14. In the result, the application is dismissed.

S.P. Singh, J.
15. I agree.

Cases Referred.

1A.I.R 1957 SC 882
2AIR 1917 PC 30
31940 F. C. R. 188 at p. 229 : (AIR 1941 FC 47 at p. 62)
41962 (2) Cri LJ 528 (Cal)
5AIR 1963 All 355