

Tara Devi And Another Vs Kumari Uma Devi And Another

Court: High Court Of Himachal Pradesh

Date of Decision: Oct. 1, 2019

Acts Referred: Code Of Criminal Procedure, 1973 â€” Section 125, 125(1), 125(3), 126(2), 128, 482, 488, 488(3), 488(6)

Code Of Civil Procedure, 1908 â€” Section 151, Order 22 Rule 4

Indian Penal Code, 1860 â€” Section 70, 421

Constitution Of India, 1950 â€” Article 15(3), 39

Hon'ble Judges: Anoop Chitkara, J

Bench: Single Bench

Advocate: Peeyush Verma, Pratap Singh Goverdhan

Final Decision: Dismissed

Judgement

Anoop Chitkara, J

1. Challenging the order of release of maintenance to minor children, born from another woman, granted to them during the lifetime of their father, his

widow and son admittedly from the lawful marriage, have come up before this Court, by way of filing a petition under Section of 482 Cr.P.C. seeking

reversal of the orders passed by Judicial Magistrate Kandaghat, Solan, HP, and affirmed by the Sessions Judge, Solan, HP, ordering the release of

arrears to the children, payable from the Estate of their deceased father.

2. The facts apposite to decide the present controversy trace their origin to the Petition No.34/4 of 07/2005, decided on 17.9.2012, by Judicial

Magistrate 1st Class, Kandaghat, District Solan, H.P. under Section 125 of the Cr.P.C. This petition under Section 125 of Cr.P.C. was filed by Leela

Devi claiming herself to be the wife of Bhagwan Singh; and her two minor children, namely, Kumari Uma Devi and Master Narinder Singh, claiming

themselves to have been born due to coitus between Bhagwan Singh and Leela Devi during the subsistence of their marriage. Leela Devi had stated

in the said petition that she was married to Bhagwan Singh somewhere around the year 1988. The wedding was performed, as per customs of the

village prevalent, between the parties. She further stated that during the subsistence of the marriage, two children were born. She also stated that the

behavior of Bhagwan Singh started turning from bad to worse and he had become Alcoholic. She further stated that as she was unable to cope up

with the cruel acts and habit of intoxication of Bhagwas Singh, she along with her children had no option but to take shelter in her maternal home. She

further stated that Bhagwan Singh was drawing a salary from his Government service and also had income from the agriculture pursuits and thus, she

claimed maintenance to the extent of Rs. 3,000/- per month, for each of the claimants.

3. In reply to the petition, Bhagwan Singh denied Leela Devi to be his legally wedded wife and also denied that the children mentioned earlier were

born from their wedlock. Bhagwan Singh claimed that he was married to one Tara Devi, following Hindu rites. He alleged that Leela Devi had

married one Sunder Singh, however, after some time, she had dissented him and without getting a legal separation or divorce from said Sunder Singh,

had started living with one Inder Singh, who after some time, dissented her. He stated that he had helped Leela Devi in her pitiable condition because

she had no roof to cover, no place to stay and no earnings to sustain, he gave her shelter on humanitarian grounds, and in return, Leela Devi used to do

agriculture work under the supervision of Tara Devi, wife of Bhagwan Singh. He explicitly denied marriage between him and Leela Devi. Bhagwan

Singh also stated that from the wedlock between him and his legally wedded wife Tara Devi, three children were born, out of whom, a son and a

daughter survived.

4. In rejoinder, Leela Devi explained that Bhagwan Singh had brought Tara Devi much after he had married her. It was further stated that said Tara

Devi was already married to one Keshav Ram at village Ghaar and the said marriage was subsisting and never annulled.

5. The Judicial Magistrate 1st Class, Kandaghat, Solan, HP, vide judgment dated 17.9.2012, passed in the said petition filed under Section 125 of

CrPC, relying upon the proved facts that Tara Devi had filed a petition for bigamy against Bhagwan Singh in the year 1995 and also a petition under

Section 125 of CrPC for maintenance, which was indelible evidence, held that Tara Devi was legally wedded wife of Bhagwan Singh. In conclusion,

Judicial Magistrate 1st Class held that Leela Devi could not prove herself to be the wife of Bhagwan Singh and as such, was not entitled to

maintenance under Section 125 of CrPC. However, the Ld. Judicial Magistrate held that minor children, namely, Kumari Uma Devi and Master

Narinder Singh were born due to coitus between Leela Devi and Bhagwan Singh and as such, Bhagwan Singh was under a statutory obligation to

maintain them. Accordingly, the Ld. Judicial Magistrate partly allowed the application filed under Section 125 of CrPC and ordered Bhagwan Dass to

grant maintenance @ Rs. 2,000/- per month, to each of his children, namely Kumari Uma Devi and Master Narinder Singh, until Uma Devi (daughter)

gets married and the son Master Narinder Singh attains the age of majority. The maintenance was granted from the date of filing of the petition, which

is 17.3.2005. This order was never challenged by Bhagwan Singh and has attained finality.

6. Despite these directions, Bhagwan Dass did not volunteer to pay the maintenance, and his children had to seek relief by invoking the provisions of

Section 128 of Cr.P.C. This Petition was registered as Case No. 29-S/4 of 2012, dated 5.12.2012. The case set up by the minor children is that

Bhagwan Singh never paid them even a single penny of maintenance during his lifetime.

7. During the pendency of this Petition, Bhagwan Dass expired. Ld. Judicial Magistrate 1st Class recorded the statement of the learned Counsel for

the present respondents about the death of Bhagwan Singh. Bhagwan Singh expired after the pronouncement of the judgment dated 17.9.2012 and

before 6.5.2013. The Order-sheets of Ld. Judicial Magistrate 1st Class, Kandaghat, Solan, HP, reveal that vide order dated 11.12.2013, Judicial

Magistrate 1st Class Solan allowed the application filed under Order 22 Rule 4 read with Section 151 CPC and issued notice to his wife and his son,

who were the legal representatives of deceased Bhagwan Singh, for enforcement of the order dated 17.9.2012.

8. The LRs of Bhagwan Singh contested this application on the grounds that the liability was personal liability of Bhagwan Singh and after his death, it

has come to an end; secondly, that arrears could have been recovered only within a period of one year of its becoming due; and lastly, that around 15

days prior to his death, Bhagwan Singh had told them that he had paid all the arrears, as directed by the Court and nothing remains unpaid.

9. Ld. Judicial Magistrate did not agree with the contentions of the LRs of Bhagwan Singh and vide order dated 16.7.2014, passed in case No. 29-S/4

of 2012, directed the payment of the arrears of maintenance from 2005 till November 2012, payable from the estate of Bhagwan Singh.

10. The LRs of Bhagwan Singh challenged the said order by filing a revision petition before Sessions Judge, Solan, HP. The said revision petition was

registered as Revision Petition No. 4ASJ-II/10 of 2014 and vide order dated 3.1.2015, Ld. Additional Sessions Judge dismissed the revision petition.

11. Challenging the dismissal of their revision petition, the petitioners have come up before this Court by filing the present petition under Section 482 of

CrPC.

12. I have heard learned counsel for the parties and have also waded through the record of the case, including the impugned orders.

ANALYSIS & REASONING:

13. Section 128 of the Cr.P.C. reads as follows,

128. Enforcement of order of maintenance. - A copy of the order of maintenance or interim maintenance and expenses of proceeding, as the case

may be] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to [whom the allowance

for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be,] is to be paid; and such order may

be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of

the parties and the non-payment of the [allowance, or as the case may be, expenses due

14. The matter under adjudication confines to the claim of maintenance for the period March, 2005 to November, 2012. The case for consideration

under this petition confined only to this limited period for which, according to the minor children, not even a single penny was paid by their biological

father during his lifetime.

15. Bhagwan Singh was alive at the time of filing of the present petition in the Court of Judicial Magistrate and notices had been served on him. He

did not tender any evidence in support of part payment to his minor children.

16. LRs of Bhagwan Singh contends that around fifteen days before his death, he had told them that no arrears were due and thus, had discharged all

his liability towards maintenance. This statement is not convincing, and no reliance can be placed on this uncorroborated oral statement. Even if such

lumpsum amount was paid, then there must be some withdrawal from the bank, and the evidence of mode and manner in which Bhagwan Dass had

made the payments. Redemption of some deposit must have taken place for such amount and must have been paid in Court or through some bank

instruments, like Demand Draft or Cheque. Therefore, this statement has been made by LRs to get rid of the liability, which according to Judicial

Magistrate 1st Class, was recoverable from the estate of Bhagwan Singh.

17. Bhagwan Singh, the biological father of the respondents, was in Government service and also had income from Agriculture. Thus, he had the

financial capacity to pay. After his death, his wife must be receiving family pension.

18. The proposition of law which involves in this case is as follows,

“Whether the maintenance granted under Section 125 of CrPC to the minor children is recoverable from the estate of the deceased father or

not?”

19. A father who abnegates all his responsibilities towards his minor and dependent children cannot run away from his liability even after escaping

from this mortal world. The initiation of birth of a child is a voluntary act of the male, which for him, is ecstatic and leads to orgasm and his role in the

birth of a child ends, but the role of upbringing and making of a child into a good human, begins. During the coitus, the sperm, without the need of the

donor, makes its way down the fallopian tube and fertilizes the egg after penetrating it, which in turn, implants itself in the lining of the uterus, leading

to the pregnancy. And it is the female partner, who bears the labor pain.

20. Yuvaan Noah Harari, in his treatise, *Sapiens- A Brief History of Humankind*, states,

“Natural selection consequently favoured earlier births. And, indeed, compared to other animals, humans are born prematurely, when many of their

vital systems are still underdeveloped. A colt can trot shortly after birth; a kitten leaves its mother to forage on its own when it is just a few weeks old.

Human babies are helpless, dependent for many years on their elders for sustenance, protection and education. This fact has contributed greatly both

to humankind's extraordinary social abilities and to its unique social problems. Lone mothers could hardly forage enough food for their offspring

and themselves with needy children in tow. Raising children required constant help from other family members and neighbours. It takes a tribe to raise

a human. Evolution thus favoured those capable of forming strong social ties.”

21. In *Yugeshwar Nath Mishra v. Arpana Kumari and another*, 2003 Cri.L.J 2625, the Patna High Court observed that:

“15. A law reflects the ground realities prevailing in the society to which it is applicable and while interpreting law such ground realities are also to

be taken into account, particularly when it is a piece of beneficial legislation. By and large unmarried daughters, having no property or personal

income, have to be dependent for their maintenance upon their parents as without that protection most of them could be exposed to the dangers that

stalk a female child in the society.”

22. In *Badshah v. Sou. Urmila Badshah Godse*, (2014) 1 SCC 188, the Hon'ble Supreme Court holds as under:

“The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to

understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given

factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most

cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as

change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the

history of adapting the law to society's changing needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in

determining the proper relationship between the subjective and objective purpose of the law.”

23. Coming to the contention of the petitioners that the claim abated on the death, a survey of the following judicial precedents will clarify the legal

position.

24. In *Ramesh Chander Kaushal v. Veena Kaushal*, AIR 1978 SC 1807, the Hon'ble Supreme Court holds that:

“9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of

Article 15 (3) reinforced by Article 39.”

25. In *Prabhavati v. Sumatilal*, AIR 1954 Bombay 546, Full Bench of the Bombay High Court, speaking through Chagla J., held as under:

“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 to wards his wife or children.”

26. In *Prithviraj Singh v. Pavanvir Kaur*, 1986 , Cr.L.J 1432, Punjab and Haryana High Court observed as under:

“A comparative study of the provisions surfaces one important change. Whereas under section 488 (6) of the Old Code, all evidence under

Chapter XXXVI was required to be taken in the presence of the husband or, when his personal attendance was dispensed with, in the presence of his

pleader, the necessary sequence was that all evidence about the husband's failure to comply with maintenance order without sufficient cause had also

to be taken in the presence of the husband because such provision was in the said Chapter XXXVI; now under the New Code though the method of

recording evidence is the same, as is clear from section 126(2) but such method is only applicable to proceeding in which payment of maintenance is

proposed to be made and not every proceeding under the chapter. In other words, it is not mandatory to take evidence in proceedings under section

125(3) of the New Code in the presence of the husband or his pleader, as the case may be. The Magistrate may, on ex-parte proof rendered by the

wife take recourse to section 125(3) of the New Code and issue the necessary warrants to have the maintenance order obeyed and it is for the

husband to come and oppose the process by pleading that he had sufficient cause not to comply with the order. Till that step is taken, it is logically

follows that the version of the wife that the husband has cause is enough to confer the jurisdiction on the Magistrate to issue failed to comply with the

order without sufficient cause a requisite warrant. The view afore-expressed would presently become more clear.

5. A Division Bench of the Calcutta High Court in *Ead Ali v. Lal Bibi*, AIR 1914 Calcutta 172 took the view that an order of the Magistrate passed

under section 488 of the Code for maintenance is not enforceable after the death of the person against whom the order was passed, against his estate.

The ratio is based on the following extract from the precedent :-

In order that a warrant may be issued under section 488 sub-section (3), for lying the amount due, it must be found that there had been a wilful neglect

to comply with the order and to enable a Magistrate to find that there had been a wilful neglect, evidence has to be taken under sub-section (6),

section 488 and that sub-section says that "all evidence under Chapter 36, shall be taken in the presence of the husband or the father as the case may

be, or, when his personal attendance is dispensed with, in the presence of his pleader and shall be recorded in the manner prescribed in the case of

summons cases." From the language of the sub-section, it is quite clear that in the mind of the legislature the instance of a deceased person against

whose estate arrears of maintenance may be claimed was never present, That, of course, is merely a surmise that we express and we cannot say

anything more; but the law as it stand is quite explicit in regard to the necessity for the presence of the party against whom evidence is being taken

and it has been pointed out by the learned vakil, who has appeared in support of the rule, that the man against whom the order was passed, being dead,

there is no claim that can be now enforceable under section 488 of the Code against the estate of the deceased.

It is this view which was followed by the Peshawar Judicial Commissioner's Court in Hari Singh's case (supra) and the precedent was understood by

observing as follows :-

The ruling chiefly relies on the fact that, after his death, a deceased husband cannot be taken to have failed, without sufficient reasons, to comply

with the order as laid down in clause (3) of section 488, Criminal Procedure Code, 1973 and that evidence could not be recorded in the presence of

the husband as required by clause (6) of that section when the husband had died.

And both the above views were endorsed by a Single Bench of the Nagpur High Court in Ambadas Bajirao's case (supra).

6. The pivot on which the aforesaid three decisions revolve is that a deceased husband cannot, after his death, be present to participate in an enquiry

under sub-section (3) of section 488 to the Old Code when sub-section (6) of that section requires his presence or that of his lawyer, and further by

his death, the husband cannot be taken to have failed, without sufficient reasons, to comply with the order as conceived of in sub-section (3) of section

488 of the Old Code. As expressed earlier, there is a noteworthy change in the scheme of legislation, for, now in an enquiry under sub-section (3) of

section 125 of the New Code of Criminal Procedure, the presence of the husband or his lawyer at the time of recording of evidence is not absolutely

necessary. And as long as the husband is alive, he is capable of approaching the Court pleading sufficient reasons which occasioned failure on his

behalf to comply with the order. The fact that he had, without sufficient reasons, failed to comply with the order, has not now necessarily to be

determined in his presence and as observed earlier, on a prima facie proof in that regard the Magistrate can set the law in motion for the recovery of

the arrears of maintenance unless and until the husband comes forth pleading and proving that he had sufficient cause or reasons for not complying

with the order. Unless such an objection is raised, the criminal Court would be well within its right to assume absence of such sufficient reasons or

cause by the mere fact that arrears of maintenance are due. And this assumption can validly last till the date of the death of the husband. It is only on

the demise of the husband that he becomes immune of showing sufficiency of cause and an order of maintenance becomes unenforceable, for the

opportunity provided under the law becomes dead with his death. Thus, his estate, as is my considered view, cannot be burdened with the

enforceability of the maintenance order under the Criminal Procedure Code for any period beyond the date of the husband's death but is enforceable

against it for the period till the husband's death.

7. At this stage, the observations of the Supreme Court in Captain Ramesh Chand Kaushal's case (AIR 1978 SC), which have been very helpful to

arrive at the above view, need be reproduced here:-

This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article

15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words

with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children much inform

interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which

advances the cause - the cause of the derelicts:

8. Considerable strength also is desirable from the provisions of section 70 of the Indian Penal Code. Section 125(3) of the New Code of Criminal

procedure takes aid of the provisions of section 421 where under methods for recovery of fine have been mentioned. Section 70 of the Indian Penal

Code provides that fine is normally leviable within six years after the passing of the sentence and that the death of the offender (the person who have

to pay the fines) does not discharge from the liability any property which would, after his death, be legally liable for his debts. The process of recovery

of fine remaining the same, death of the person liable to pay does not ipso facto stop recovery in the context of the case in hand. It can safely be said

that accumulation of arrears of maintenance stops on the date of the death of the husband and the accumulated arrears are recoverable as fine from

his estate after his death.

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29. The above discussions lead to a conclusion that the maintenance granted under Section 125 of CrPC to the minor children is recoverable from the

estate of the deceased father.

30. Coming to the contention of the petitioners, that the claim could not have been claimed before a period of one year, has no substance because the

arrears of maintenance were claimed within one year from the date of the order granting the maintenance. Moreover, the Proviso to Section 125 (3)

of Cr.P.C., prescribing the limitation of one year, has no application, if such maintenance is claimed from the Estate of the deceased, who during

her/his lifetime was directed to maintain the person mentioned in 125(1) of CrPC, because the deterrence of imprisonment vanishes with the death.

31. It is unfortunate that due to the legal jargons and the pendency of the proceedings, the system failed to provide the timely payment to the minors at

the time when they needed it the most.

32. Given the above discussion, there is no ground to interfere in the impugned orders, and thus the present petition is dismissed. All pending

applications, if any, are closed.