

(1968) 12 AHC CK 0003**Allahabad High Court****Case No:** F.A.F.O. No. 44 of 1966

Smt. Gauri Devi

APPELLANT

Vs

Bishwanath Banerjee

RESPONDENT

Date of Decision: Dec. 10, 1968**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 20, 9
- Criminal Procedure Code, 1898 (CrPC) - Section 488

Citation: AIR 1970 All 185 : (1969) 39 AWR 143 : (1970) CriLJ 310**Hon'ble Judges:** K.B. Asthana, J**Bench:** Single Bench**Advocate:** Narendra Kumar Verma, for the Appellant;**Final Decision:** Dismissed**Judgement**

K.B. Asthana, J.

This appeal is directed against an order of remand passed by the lower appellate Court to the effect that the suit to be reheard and decided in accordance with law and in the light of the observations made by the lower appellate Court.

2. The suit which has given rise to this appeal was filed by Vishwanath Banerji, the plaintiff-respondent, in the Court of the Munsif of Varanasi for a declaration that an order dated 19-7-1961 passed by Sri H. K. Sharma, Magistrate First Class, Deoghar District Santhal Parganas Bihar in Criminal Case No. 376 of 1961, misc., case No. 125 of 1961, Smt. Gauri Banerji v. Vishwanath Banerji, u/s 488, Criminal P.C., was illegal, ultra vires, void, ineffective and unenforceable and for a permanent injunction restraining the defendant from taking any steps to realise by distress warrants or otherwise any sum of money from the plaintiff in pursuance of the said order. Admittedly Vishwanath Banerji and Smt. Gauri Banerji are husband and wife having been married at Deoghar in Bihar in 1958. Admittedly both of them last resided in Varanasi.

It was alleged by the plaintiff that his wife Smt. Gauri went away to her father's place in May 1959 to see her ailing father but refused to return to him despite his best efforts. The plaintiff then took proceedings u/s 9 of the Hindu Marriage Act against his wife Smt. Gauri Devi for restitution of conjugal rights and it was registered as case No. 29 of 1960 in the Court of District Judge, Varanasi During the pendency of the said proceedings for restitution of conjugal rights Smt. Gauri Banerji applied for interim maintenance and expenses for defending the case. This application was rejected. It was then alleged that without the knowledge of the plaintiff and without any notice being served upon him, Smt. Gauri took proceedings before the Magistrate in Deoghar u/s 488, Criminal P.C. and that she and her fattier fraudulently before the Court having represented that the notices had been served, got an order behind the back of the plaintiff directing the plaintiff to pay a sum of Rs. 70 per month as maintenance. It was also alleged that the plaintiff only knew of the said order when distress proceedings were started against him by the police at Varanasi and a threat was made for attachment of his properties. To protect himself from the alleged illegal attachment the plaintiff filed the suit giving rise to this appeal and for the relief mentioned above.

3. The learned First Additional Munsif before whom the instant suit came up for hearing held that the Civil Court had no jurisdiction to entertain a suit for setting aside of an order duly passed by a Magistrate u/s 488 of the Cri. P.C. and dismissed the suit on this preliminary point. On appeal by the plaintiff the learned Judge of the lower appellate Court took a contrary view and held that the suit was cognizable by a Civil Court as it was based on a cause of action alleging fraud and because the order of the Magistrate of Deoghar passed u/s 488, Criminal P.C. was impugned as vitiated not having been duly passed. The learned Judge set aside the decree of the learned Munsif and remanded the suit for rehearing in accordance with law. It is against this order that Smt. Gauri Banerji the defendant, has filed this appeal.

4. On behalf of the appellant it was urged by her learned counsel that an order passed u/s 488 of the Criminal P.C. even assuming there was some procedural irregularity could not be set aside by a Civil Court and the only remedy Which was open to the aggrieved party was to file an appeal or revision under the Criminal Procedure Code. It was also urged that the Court at Varanasi had no jurisdiction as no part of the cause of action arose within its jurisdiction. The submission was that the impugned order was passed by the Magistrate in Deoghar in Bihar and even if a suit would lie in a Civil Court for a declaration that the said order was null and void and for an injunction restraining the defendant from enforcing that order, it could be filed only in the Civil Court at Deoghar which will have jurisdiction and where the defendant resided.

4-A. In order to meet the second contention of the learned counsel for the appellant indicated above, the learned counsel for the plaintiff-respondent submitted that since the order of the Magistrate u/s 488 was tried to be enforced in Varanasi

through the police of Varanasi and a threat was made by the police at Varanasi to attach the property of the plaintiff, it was always open to the plaintiff to seek a declaration that his property was not attachable in execution of the said order and for such a suit the cause of action, at any rate, a part of it, arose at Varanasi within the jurisdiction of the Civil Court of Varanasi. The learned counsel for the defendant-appellant strenuously contended in reply that no such plea was raised in the plaint and no such relief was sought in the plaint so as to bring the suit within the jurisdiction of the Civil Court at Varanasi. On a reading of the plaint and the reliefs claimed it did appear to me that the real intention of the plaintiff was to seek such a relief and the cause of action based on the process issued by the local police can be said to be pleaded.

But I thought it proper, as the suit was still in its infancy, to allow an opportunity to the plaintiff to amend his plaint so that what was implicit in the plaint be made explicit. The learned counsel for the plaintiff-respondent filed an application for amendment of the plaint which despite time having been granted to the learned counsel for the defendant-appellant has not been opposed. I have allowed the amendment to be incorporated in the plaint. It would be open to the defendant to file a fresh written statement to meet the explicit pleas raised for which reasonable time will be granted by the lower Court after the record had been received by it from, this Court. The pleas of a specific nature having been raised in the plaint and the proper relief having been sought, the Court at Varanasi will have jurisdiction to entertain the suit.

5. Coming to the main question arising on the appeal, namely, the competency of the Civil Court to set aside an order passed by the Magistrate u/s 488, Criminal P.C., I have no doubt in my mind that a Civil Court will have no jurisdiction to set aside an order: duly and properly passed by a Magistrate u/s 488 of the Criminal P.C. That is to say, that if an order is made against a husband for payment of maintenance to his wife after a contest it could only be modified or set aside in appeal or revision by the higher Court as provided by the Criminal Procedure Code. But where the order of the Magistrate is challenged on the ground that it was obtained by fraud having been played upon the Court and the cause of action is based on the fraudulent conduct of a party who obtained that order in his or her favour, its validity could always be questioned by way of a suit in the Civil Court as ultimately that order affects the civil rights of the parties concerned relating to status, money and property.

The learned Munsif relied upon certain reported cases in support of his view that the Civil Court will have no jurisdiction to set aside an order passed u/s 488, Criminal P.C. All the cases relied upon by the learned Munsif are distinguishable on facts. In none of them the suit which was filed in Civil Court was based on a cause of action attributing fraud or concealment to the defendant. It appears to me that in the instant case the attempt of the defendant Smt. Gauri Banerji to enforce that order

against the plaintiff, her husband, in Varanasi involving a threat to his property could only be warded off by the husband by filing a suit in the Civil Court at Varanasi for a declaration that the order was null and void and was not binding on him and for an injunction restraining the defendant from enforcing that order. If the order passed u/s 488, Criminal P.C. by the Magistrate at Deoghar is ultimately found to have been duly passed the suit will fail on merits. But what is found here is that the plaintiff has challenged the very jurisdiction of the Magistrate at Deoghar and his competency in law to pass such an order.

Where an order u/s 488 is not duly passed any action taken on the basis of that order affecting the status and property of an aggrieved party can; always be questioned in the Civil Court by seeking the appropriate relief, order or injunction. It is only a suit expressly or impliedly barred from the cognizance of the Civil Court which would not be triable by it as provided by Section 9 of the Civil P.C. The learned counsel for the defendant-appellant has failed to satisfy me that a suit for a declaration that an order passed by a Magistrate u/s 488, Criminal P.C. is vitiated by fraud and concealment of true facts and has been fraudulently obtained, is expressly or impliedly barred by the provisions of Criminal Procedure Code or any other law. It has been observed by the Supreme Court in the case of [Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh](#), to para 6 of the report as follows:--

"In dealing with the question whether Civil Courts" jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind the fact that there is a general presumption that there must be a remedy in the ordinary Civil Courts to a citizen claiming that an amount has been recovered from him illegally and that such, a remedy can be held to be barred only on very clear and unmistakable indications to the contrary. The exclusion of the jurisdiction of the Civil Courts to entertain civil cases will not be assumed unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may not by itself necessarily exclude the jurisdiction of the Civil Courts to deal with a case brought before it in respect of some of the matters covered by the said statute."

6. From the above quoted observations it is clear that the Supreme Court enjoins that the Civil Courts ought not to readily infer in favour of excluding their jurisdiction to entertain a civil cause unless it is found that a statute expressly or by necessary implication excludes their jurisdiction. The observations of B.N. Nigam, J. in the case of [Kumari Nafees Ara Vs. Asif Saadat Ali Khan](#), tend to show that a Civil Court has jurisdiction to declare an order u/s 488, Criminal P.C. to be not binding on a party to it. In the case of Johnson v. Sarasamma, AIR 1956 Trav-Co 204 a Division Bench of Travancore Cochin High Court seem to favour the view that a Civil Court has jurisdiction in such matters. I need not notice the other reported cases which had been cited before me at the Bar by the learned counsel for the parties as I am of the

view that the validity of the order u/s 488, Cri. P.C. having been questioned on the alleged fraud played upon the Court by the defendant Smt. Gauri Banerji, the suit was cognizable by a Civil Court at Varanasi where a part of cause of action arose when the said order was tried to be enforced at Varanasi against the plaintiff-appellant.

7. For the reasons given above, I dismiss this appeal but make no order for costs.