Shri Laisram Nipamacha Singh Vs Smt. Khaidem Ningol Sakhi Devi and Others

Court: Gauhati High Court (Imphal Bench)

Date of Decision: June 18, 1965

Acts Referred: Cattle Trespass Act, 1871 â€" Section 20
Criminal Procedure Code, 1898 (CrPC) â€" Section 4, 403

Citation: (1965) CriLJ 785

Hon'ble Judges: Rajvi Roop Singh, J.C.

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Rajvi Roop Singh, J.C.

1. This revision petition is directed against the order dated 30-1-64 passed by S.D.M., I.W. by which he ordered the petitioner to pay Rs. 20/- to

opposite party No. 1 and Rs. 10/- per month to his minor daughter as a maintenance allowance.

2. The material facts are not in dispute and they may be briefly stated as follows:

On 14-12-62, the opposite party No. 1 on behalf of herself and 3 minor children opposite party Nos. 2 to 4 presented an application to the

S.D.M., I.W. for proceeding u/s 488 Cr.P.C. against her husband the petitioner with the contention that she was the legally married wife of the

petitioner and after their marriage they lived as husband and wife-for some years in the house of the petitioner and during that period she gave birth

to these 3 children. While their marriage was in subsistence the petitioner contracted a second marriage and thereafter he started illtreating her

without any reason. As she could not tolerate the cruelty and illtreatment of her husband so she left his house with her youngest daughter and began

to live with her parents. After sometime the other two respondents also came and joined them. As she had no means to maintain herself and her

children, so she approached the petitioner to maintain them, but he refused to maintain them. The Court, therefore, should order him to pay Rs.

30/- per month to her and Rs. 20/- for each of her children.

The petitioner opposed this petition on the ground that owing to a difference between them they had been living separately on mutual consent under

a written agreement in which she gave up her right to maintenance for herself and for the daughter whom she took to her paternal house at the time

of separation. He further pleaded that out of grace he gave them money and two pots of paddy per month for the maintenance of his wife and

daughter. It was also pleaded that he married the second wife for looking after the two sons whom she left with him. Those two sons, however, left

his house subsequently to live with her at her instigation. It was also pleaded that he has no means to maintain her and her children, as he is already

supporting 4 children by his second wife who are living with him.

3. The learned Counsel for the petitioner contended that Shrimati Sakhi Devi, started a case being Criminal Case No. 12 of 1962 u/s 488 Cr.P.C.

for the maintenance. That case was dismissed on 12-12-62 for default of appearance, therefore she is precluded from making a second application

u/s 488 Cr.P.C. I am not at all convinced by this argument. There is no provision in the Code which bars a second application u/s 488 Cr.P.C. But

when an application under this section has been heard and adjudicated upon, it is against the general principle of the rule of "res judicata" that a

subsequent application on the same facts should be entertained. Subject to this principle, a prior application is no bar to a subsequent application if

that application was dismissed for default and there was no adjudication on the merits. On the perusal of the records, I find that the previous case

was dismissed in default and there was no adjudication on the merits, therefore there is no bar against this application.

4. The learned Counsel for the petitioner next contended that the procedure laid down for summons cases is applicable to the hearing of

applications u/s 488 Cr.P.C. Chapter XIX Cr.P.C., governs such an application and the result of non-appearance of the complainant on that date

i.e. 12th December, 1962, was the acquittal of the applicant. Section 403, Criminal P.C. bars a second application on the same facts. I do not

accept the contention of the applicant.

5. There is no acquittal in proceedings u/s 488 of the Code. There should be a trial of an offence before there can be an acquittal or a conviction.

Offence is defined in Section 4(o), Criminal P.C. as follows:

"Offence" means any act or omission made punishable by any law for the time being in force; it also includes any act in respect of which complaint

may be made u/s 20, Cattle Trespass Act.

Neglect to maintain one"s wife and children is not an offence within the meaning of Section 4(o) of the Code. A finding of a Magistrate ordering a

person to pay a certain amount of money for the maintenance of his wife and children does not amount to a conviction for an offence. The object

of the proceedings u/s 488 is to secure maintenance for a woman and her children speedily and to secure that end the machinery is provided in

Chap. XXXVI, ibid.

6. Even though in recording evidence procedure for summons cases may be adopted that fact alone will not convert the proceedings u/s 488 into

summons cases. In a criminal case a trial cannot proceed in the absence of an accused unless his absence or attendance has been exempted for

sufficient reason. In proceedings u/s 488 the Magistrate is competent to hear the case ex parte and allow or disallow maintenance. It will thus be

clear that the default in maintaining the wife and children is not regarded as an offence as defined in Section 4(o), Criminal P.C. In this view there

was no acquittal of the applicant on 12th December, 1962 and Section 403 has clearly no application. Second application was therefore

maintainable arid the view taken by the two Courts was correct. I am supported in my view by the decisions in Mehr Khan v. Bakat Bhari 29 Cri

LJ 1002 : AIR 1929 Lah. 32, Monmohan Dey v. Surabala Dasi AIR 1920 Cal 38 : 21 Cri LJ 3. In AIR 1920 Cal 38 : 21 CriLJ 3 it was held that

where an application for maintenance u/s 488 is dismissed for default without any adjudication being made on the merits, it is open to the

complainant to make fresh application under that section.

7. The learned Counsel for the petitioner further contended that the parties are living separately for the last 10 years by mutual agreement, therefore

the opposite party is not entitled to get maintenance. There is no substance in this contention. The separate living must be the result of a deliberate

and express agreement between the parties. A hasty rejoinder to a husband, who in the course of a quarrel was manoeuvring for a consent from a

wife, is not a consent within the meaning of the section. Similarly, living separately under an agreement settled by a panchayat to whom disputes

between the husband and wife had been referred is not living separately by mutual consent. ""Mutual consent"" as used in Sub-section (4) means a

consent on the part of the husband and wife to live apart, no matter what the circumstances may be. Where a wife refuses to live with the husband

on some specific ground such as cruelty, or the fact that he is keeping another wife, it cannot be said that the husband and wife are living apart by

mutual consent if the husband does not insist that the wife should live with him. Where a husband is unwilling to allow his wife to live with him, or

has taken a second wife, the only course open to such wife would be to live apart and if she, under such circumstances agreed to accept

maintenance and live apart, such-separate living would not be deemed to be the result of mutual consent. The test therefore should be to find out if

the agreement for separate living and payment of maintenance was the outcome of the desire of both parties, independently reached by each of

them, or if one of the parties was forced to submit by circumstances to such agreement, Where the wife is not prepared to live in a separate house

but insists on living with the husband, but ha starts living separate, or where the husband having an option to live with his wife chooses to live

separate, it cannot be said that they are living separately by mutual consent. But where each party finds it impossible to live amicably and

comfortably with the other and each party is content that they should live separately, the separate living is by mutual consent. If the Court finds that

the husband and wife are living separately by mutual consent, no order can be passed under the section, as the Criminal Court is not intended to be

used for creating facilities for separation between husband and wife or for fixing alimony, In the instant case, the petitioner produced the divorce

deed Ext. B/1 to show that they are living separately by mutual consent. But both the Courts below have held that this is not a genuine document,

From the close scrutiny of the evidence I too find that there is not an iota of evidence on the record to show that the petitioner and the opposite

party are living separately by mutual agreement From the record it appears that the petitioner has taken a second wife and since then they are living

separately in separate houses.

8. The learned Counsel for the petitioner next contended that Shrimati Sakhi Devi was living separately from the petitioner since 1953, and the Cr.

P.C. was extended to the Union Territory of Manipur only in the year, 1957, therefore she is not entitled to get maintenance from the year, 1953.

This contention is devoid of force as Shrimati Sakhi Devi has claimed maintenance only from the year, 1962.

9. The learned Counsel for the petitioner contended that the petitioner has no sufficient means to maintain his first wife and her daughter as he is

maintaining a family of six members consisting of himself, his second wife and 4 children born to them. This argument too is without any substance.

The word "means" in Section 488 does not signify only visible means such as real property in the shape of income, revenue, or estate, or a definite

employment. It includes the capacity to earn money. If a man is healthy and able-bodied he must be taken! to have the means to Support his wife

or child. Before an order for payment of maintenance allowance can be passed it must be proved that the person to be so ordered has sufficient

means within the meaning of this section. In the case of an able-bodied man there is & presumption that he has sufficient means to support his wife

or child and the onus is on him to show that by accident, disease or the conditions of the labour market or the like he is not capable of earning

anything. This section requires that there should be not only ""means" but "sufficient" means. Where a person has means but so slender and meagre

that they can be hardly said to be "sufficient means" within this section, it would appear reasonable that he should be exempted. In the instant case,

this is an admitted fact that the petitioner is an able-bodied man and he is gold-smith by profession. From the evidence it is also clear that he gets

50 to 60 pots of paddy from his agricultural land, therefore it is clear that the petitioner has sufficient means to maintain his children and wife.

10. The learned Counsel for the petitioner contended that the amount of maintenance fixed by the Court is excessive so it should be reduced to Rs.

10/- and Rs. 5/- per month. There is no force in this contention. Under the Criminal Procedure Code (Amendment) Act (26 of 1955) the

maximum amount of maintenance awardable under this section has been raised from one hundred rupees to five hundred rupees. In fixing the rate

of maintenance under the Code, the following principle has to be taken into consideration.

No luxury should be allowed; but the necessaries should be provided for according to the status in life of the applicant and the means of the

respondent. The rate of allowance cannot be fixed on the hypothetical and abstract thing known as the capacity to earn money. The capacity to

earn money may be taken into consideration in coming to a conclusion with regard to the means of the husband.

In the instant case in view of the evidence on the record, I find that the maintenance amount fixed by the learned lower Courts is, in no way,

excessive.

11. No other argument was pressed before this Court.

12. In view of the foregoing discussions, I hold that this revision petition is without substance, and hence it is dismissed.