(1927) 12 BOM CK 0017

Bombay High Court

Case No: Criminal Application for Revision No. 118 of 1927

Pandurang S. Katti		APPELLANT
	Vs	
Minnie Henrietta Katti		RESPONDENT

Date of Decision: Dec. 19, 1927

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 404, 413, 414, 435, 503

Citation: AIR 1928 Bom 117 : (1928) 30 BOMLR 350 : (1928) ILR (Bom) 262

Hon'ble Judges: Patkar, J; Mirza, J; fawcett, J; Baker, J

Bench: Full Bench

Judgement

Patkar, J.

This is an application for revision of the order passed by the Chief Presidency Magistrate confirming the order passed by the Marylebone Police Court on May 28, 1626, u/s 3 of the Act of 1920 to Facilitate Enforcement of Maintenance Orders (10 & 11 Geo. V, c. 33) whereby the petitioner was ordered to pay to his wife a sum of two pounds a week for maintenance, and a sum of two shillings for costs. The Chief Presidency Magistrate has confirmed the order under Act XVIII of 1921. Rule was issued on the question whether the High Court has jurisdiction to interfere in revision or otherwise with the order of the Chief Presidency Magistrate.

2. The principal Act relating to the summary jurisdiction of the Magistrates in reference to married women is the Act of 1895 (58 & 59 Vic. c. 39). u/s 4 any married woman can apply to a Court of summary jurisdiction for an order of maintenance under the Act. The Act of 1895 is amended by an Act of 1920 (10 & 11 Geo. V, c. 33) and by an Act of 1925 (15 & 16 Geo. V, c. 51). The enforcement in England or Ireland of the maintenance orders made in other parts of His Majesty''s Dominions and Protectorates and vice versa is regulated by the Act of 1920 (10 & 11 Geo. V, c. 33). A similar reciprocal legislation is enacted in India by Act XVIII of 1921. u/s 4 of Act XVIII of 1921 the certified copy of the maintenance order made by any Court in a reciprocating territory and transmitted by the proper authority of that territory to

the Governor General has to be sent for being registered in the High Court, if the Court which made the order was of a superior jurisdiction, and to a Court of summary jurisdiction if the said Court was not a Court of superior jurisdiction. u/s 2 of Act XVIII of 1921 "Court of summary jurisdiction" means the Court of a Chief Presidency Magistrate or of a District Magistrate. The order in this case was sent u/s 7 of Act XVIII of 1921 to the Court of the Chief Presidency Magistrate for confirmation. The learned Chief Presidency Magistrate on September 4, 1926, declined to confirm the provisional order, and remitted the case to the Court which made the order for further evidence, and on February 5, 1927, confirmed the order, and directed that steps be taken to have the order enforced. The only question arising at the present stage is whether the High Court has jurisdiction to interfere with the order of the Chief Presidency Magistrate. The point is one of first impression, and is not covered by any authority.

3. It was argued by the learned Government Pleader that an appeal was provided by Section 3, Clause 6, and Section 4, Clause 7, by the English Act of 1920 (10 & 11 Geo. V, c, 33) but no appeal was provided by the corresponding Sections 6 and 7 of the Indian Act XVIII of 1921, and that, u/s 404 of the Criminal Procedure Code, there could be no appeal except as provided by the Code, and that the order of the Chief Presidency Magistrate was intended by the Legislature to be final and was not subject to the revisional jurisdiction of the High Court, Reference was made to the decision in The Rangoon Botatoung Company, Limited Vs. The Collector, which has been explained in the case of Secretary of State v. Sri Rajah Chelikani Rama Rao (1916) 18 Bom. L.R. 1007. It is clear that no right of appeal is provided by Act XVIII of 1921. But it is contended, on the other hand, on behalf of the petitioner that the absence of any provision allowing an appeal from the order does not necessarily exclude the revisional jurisdiction of the High Court, that the Court of the Chief Presidency Magistrate is not a persona designata, but is referred to as a Court u/s 2 and Section 7 of the Act of 1921, and that the order of the Chief Presidency Magistrate in this case is subject to the revisional jurisdiction of the High Court u/s 107 of the Government of India Act and Clauses 27 and 28 of the amended Letters Patent if not u/s 435 of the Criminal Procedure Code. The absence of any provision allowing an appeal does not necessarily exclude the revisional jurisdiction of the High Court. On the other hand, cases in which there is express prohibition of an appeal, e. g., Sections 413 and 414, Criminal Procedure Code, are subject to revision by the High Court. We think that the order of the learned Chief Presidency Magistrate is a judicial and not merely an executive or administrative order. It was held in Emperor v. Huseinally (1905) 7 Bom. L.R. 463 that Section 15 of the Indian Extradition Act ousted the jurisdiction of the High Court to inquire into the propriety of the warrant, but left open the question of the High Court''s power to interfere with a Magistrate''s action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal. There is no provision in Act XVIII of 1921 similar to Section 22 of the Indian Press Act, excluding the

reviaional jurisdiction of the High Court. See Mrs. Annie Besant Vs. The Advocate General of Madras, . Under the old Criminal Procedure Code proceedings u/s 145 were expressly excluded from the revisional jurisdiction of the High Court u/s 435, Criminal Procedure Code, but it was held in several cases that the High Court had power u/s 107 of the Government of India Act to set aside proceedings u/s 145, Criminal Procedure Code, instituted without juriadiction notwithstanding Section 435, Clause (3), of the Code. It is sufficient to refer to the case of Pigot v. Ali Mahammad Mandal I.L.R (1920) Cal. 522. The absence of any provision in the old Criminal Procedure Code with reference to the inherent power to make consequential orders referred to in the said case is now remedied by Section 561A of the amended Criminal Procedure Code.

4. It is next contended that a remed is provided by Section 7, Clause (6), of Act XVIII of 19il, which enables the Chief Presidency Magistrate to vary or rescind the order which has been confirmed, and therefore the revisional power of the High Court is impliedly excluded. Similar powers are given to Magistrates under the Criminal Procedure Code, Section 48-, Clause (5), and Section 489. The existence of the power of varying or rescinding the order of confirmation would not, in our opinion, exclude the revisional power of the High Court. Rules u/s 12 of Act XVIII of 1921 are published in the Gazette of India for 1923, Part I, p. 263, and do not bear on the point in question. We think that the revisional power of the High Court is not either expressly or impliedly excluded, and that the High Court has jurisdiction to interfere with the order of the Chief Presidency Magistrate in this case.

Baker, J.

5. This is an application for revision of an order made by the Chief Presidency Magistrate under the Maintenance Order Enforcement Act XVIII of 1921 confirming a provisional order of maintenance made by the Marylebone Magistrate under the Maintenance Orders (Facilities for Enforcement) Act, 10 & 11 Geo. V, c. 33.

6. The sole question at this stage is whether the High Court has power to interfere in revision with the order. We are not directly concerned with the English Acts, viz., the Summary Jurisdiction (Married Women) Act 38 & 59 Vic. c. 3.4 (1895) and the Mainentance Orders (Facilities for Enforcement) Act 10 & 11 Geo. V, c. 33.

7. We have to interpret India Act XVIII of 1921 (the Maintenance Orders Enforcement Act) under which the order in question, confirming the provisional order of the Court of summary jurisdiction in England, is made.

8. At this stage it is not necessary to go into facts.

9. It has been argued by the learned Government Pleader that Baler J. while the English statute, Sections 3 and 4 of the Act 10 & 11 Geo, V, c. 33, provides for an appeal, there is no such provision in the corresponding Sections 6 and 7 of India Act XVIII of 1921 and therefore the intention of the Legislature was that the order of the

Magistrate should be final.

10. It is argued that when a special enactment lays down a special rule making an order final the finality of the order cannot be questioned indirectly by an application in revision.

11. The right of appeal only exists when it is specially given by statute, e. g., under the Code of Criminal Procedure.

12. It is further contended that under Act XVIII of 1921 a special remedy is given by Section 7, Clause 6, by which the Court is given power to vary or rescind its own order. This argument is no doubt correct as regards the question of appeal. There is no appeal under the Act, but this does not necessarily imply that the High Court has no power of revision. The fact that an appeal is expressly barred by statute does not answer the question. There are several classes of cases in which it is expressly declared that no appeal lies, e. g., under Sections 413-414 of the Code of Criminal Procedure, but these cases are subject to revision by the High Court.

13. The powers of revision given by Section 435 of the Code of Criminal Procedure are very wide. The section refers to any proceeding of an inferior criminal Court. There can be no doubt that the Chief Presidency Magistrate is a criminal Court inferior to the High Court within the meaning of Section 435 of the Code. The re-visional powers of this Court are further declared by a 107 of the Government of India Act and Clauses 27 and 28 of the Letters Patent.

14. It is nowhere stated in Act XVIII of 1921 that the order of the Chief Presidency Magistrate is final.

15. In these circumstances, I agree that it has not been shown that the revisional powers of this Court are excluded by the Act in question, and I am, therefore, of opinion that this Court has power to revise the order in question.

16. The Court accordingly issued a rule and ordered notice to be served on the Public Prosecutor and on the opponent through the Chief Presidency Magistrate.

17. The rule was heard.

O''Gorman, with H.B. Oumaste, for the applicant.

P.B. Shingne, Government Pleader, for the Crown.

The opponent did not appear.

Fawcett, J.

18. In this case, the Marylebone Police Court, on May 28, 1926, issued a provisional order u/s 3 of the Maintenance Orders (Facilities for Enforcement) Act, 1920, wherein the petitioner, Mr. P.S. Katti, was on the ground of desertion asked to pay the opponent, his wife, a sum of two pounds a week and a sum of two shillings for

her costs. In accordance with the provisions of the corresponding Indian Act XVIII of 1921, the Presidency Magistrate gave the petitioner an opportunity of showing cause why the provisional order should not be confirmed, and recorded certain evidence of the petitioner and two others on his behalf, disputing some of the evidence that had been given by the opponent. The Presidency Magistrate thereupon considered it necessary to remit the order back to the London Police Court so that the opponent might have an opportunity of adducing rebutting evidence. That evidence was taken, and the order came back again to the Presidency Magistrate. He heard the petitioner further in the matter, and eventually on February 5, 1927, confirmed the provisional order of the London Police Court. The petitioner applies to have this order set aside in revision. It has already been held by this Court that we have power to interfere in revision with that order. There are two points that have been put before us by Mr. O''Gorman on behalf of the petitioner.

19. His first one is that the Magistrate''s order, by which after taking the evidence of the petitioner and two others he directed that the case should be remitted to the London Police Court, was erroneous, and that he should, in accordance with the provisions of Act XVIII of 1921, finding that he could not then confirm the provisional order, have refused to confirm it, It is contended by Mr. O''Gorman that Sub-section (5) of Section 7 of Act XVIII of 1921 provides for the Court remitting the ease back for the taking of further evidence in one case only, viz., when that is desired by the person to whom the summons was issued for showing cause against the confirmation of the order and that person satisfies the Court that for the purpose of any defence it is necessary to take further evidence; so that it only authorizes the Court to get further evidence necesaary for the purpose of any defence, whereas here the Magistrate acted suo motu to give an opportunity to the opponent to adduce evidence in answer to that of the petitioner and his witnesses. This is an objection, which�if it is raised at all�certainly should have been taken before the order of the Magistrate, on September 4, 1926, remitting the case for further evidence, was acted on; but not only was no such objection taken but on receipt of the further evidence the petitioner acted upon the notice issued to him to give him an opportunity of rebutting this further evidence, and he himself wanted the Court to remit the case again for further evidence under Sub-section (5) of Section 7 of Act XVIII of 1921. In view of these facts, the principle of not allowing a party to blow hot and cold in the same matter applies, and I do not think we would be justified in interfering in revision upon such a ground.

20. But, in any case, I think the objection is not sound. Sub-section (4) of Section 3 of the English Act of 1920 (10 & II Geo. V, c. 33) directs the English Court, which made the provisional order, to take evidence at the instance of the Court before which the order has come, whenever "the order has by that Court been remitted to the Court of summary jurisdiction, which made the order, for the purpose of taking further evidence" : and it contains no limitation that the evidence should be taken only

when it is deemed necessary "for the purpose of any defence", as in Sub-section (5) of Section 4 of the same Act. In these circumstances. I do not think the Court would be justified in applying the maxim expressio unius est exclusio altering merely because of the provisions of Sub-section (5) of Section 7 of Act XVIII of 1921. At best this particular maxim is "an uncertain guide to the true moaning of a statute", as is observed in Midnapore Zemindary Company, Ltd. v. Hrishikesh Ghosh I.L.R (1914) Cal. 1108. And the Indian Legislature in adopting the provisions of Sub-section (5) of Section 4 of the English statute cannot properly be taken to have intended to enact that that was the only case in which an Indian Court could remit the provisional order for taking further evidence. The Section 7 deals with the opportunities to be allowed to the person affected by the provisional order to oppose its confirmation, and naturally therefore provides for the case of further evidence being taken when necessary for the purpose of defence. The general power to call for further evidence in other cases, which is implied by Sub-section (4) of Section 8 of the English Act of 1920 is not, in my opinion, affected.

21. It would be very unsatisfactory, if a Court in India could not call for such evidence in a case like this, where the evidence before it cannot be tested by cross-examination and introduces matter not mentioned in the evidence on which the provisional order is based : and the course taken by the Magistrate in remitting the order in such a case for further evidence seems obviously desirable, especially as an Indian Court cannot issue a commission for the examination of witnesses in England either u/s 503 of the Criminal Procedure Code or the Evidence Commission Act, 1885 (48 & 49 Vic. c. 74, B. 3): cf. Empress v. Moorqa Chetty I.L.R (1880) Bom. 338. This would not, of course, be a legitimate consideration, if the Act of 1921 clearly prohibited an Indian Court from remitting an order for further evidence, except in the cases specified in Sub-sections (5) and (6) of a 7; but, in my opinion it does not do this.

22. The second point taken by Mr. O''Gorman is that the Chief Presidency Magistrate can confirm the provisional order, only if he finds desertion at the date of that order to be established, viz., May 28 1926, and not because of any subsequent desertion, such as is relied on in the Presidency Magistrate''s judgment of February 5, 1927.

23. "Desertion" in a case like this, where the parties separated voluntarily on January 23, 1926, when the opponent sailed for England really means "wilful neglect to provide reasonable maintenance for her" which is also a proper basis for the revisional order in this case u/s 4 of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vic. c. 39). At the date when the provisional order was passed, according to Mrs. Katti''s evidence, she had not received anything from her husband except £ 5, which he gave her when she sailed. Evidence was adduced by Mr. Katti that he sent her £ 8, in July, 1926 Mrs. Katti in her deposition of November 19, 1926, denied having received it: but it appears from the Home Office letter of December 7, 1926, which is in the file before us, that £7-10-0 had since been received by her. It

would have been perfectly open to the petitioner to adduce evidence not only that he had Bent her this sum in July 1926, but also that he had been regularly sending other remittances sufficient to provide reasonable maintenance for her, so that he could contend there was no real "desertion", and the provisional order should not be confirmed by the Magistrate.

24. Sub-section (4) of Section 7 of Act XVIII of 1921 obviously contemplates evidence of this kind being taken into consideration, for it is relevant to the question whether there has been a real "desertion", and the Court can either refuse to confirm the provisional order or confirm it "without modification or with such modifications as to the Court after hearing the evidence may seem just." I can see no good reason why evidence of the reverse kind (viz., that the petitioner has made no other remittances and refuses to make any) should not be equally admissible and relevant for the consideration of the Court. The Act gives a wide discretion to the Magistrate, and I do not think it has been exercised here in an improper manner.

25. The petitioner seems to have been actuated by an undue and illadvised sense of amour propre, and I do not think there is anything erroneous or improper in the Magistrate''s treatment of his attitude as "tantamount to his refusing" to maintain the opponent and as supporting the provisional finding of the Court in England that he had "deserted" his wife.

26. It is, however, open to the petitioner to take steps to maintain his wife voluntarily, and get the order varied and rescinded under Sub-section (6) of Section 7 of Act XVIII of 1921; and this would be a more satisfactory way of attaining his object than the method he attempted during the proceedings in the Magistrate''s Court.

27. I would dismiss the application.

Mirza, J.

28. I am of the same opinion.

29. The petitioner is a professor of Mathematics in the Elphinstone College, Bombay. While in England he married the opponent on April 25, 1918. They came out together to India early in 1920; and within a short time the opponent returned to England as the climate of this country did not agree with her. She came out again and joined her husband in India early in 1921, and in 1923, they both left together again for England. The petitioner returned to India and the opponent followed him here in September 1925. The opponent finally left the petitioner for England on January 23, 1926. On that day the petitioner wrote a letter to his brother-in-law, Mr. Draycott, with whom the opponent was to reside in England, informing him that she had left Bombay on that day and was expected to arrive in England in February. He informed his brother-in-law" at the same time that the opponent had [illegible] 40 with her in the Post Office Savings Bank, and that she was to maintain herself out of that

money and certain jewellery which she possessed, as well as certain silver articles which were in a warehouse and which were given to her by her father. He thought that she would be able to maintain herself in that manner for a period of one year. He also complained that owing to the opponent''s frequent visits to England he had incurred debts and would not be in a position to remit any sum to her for maintenance for a long time to come. The brother-in-law, by his letter in reply, did not agree with that view and threatened proceedings against the petitioner. The petitioner replied to that letter by his letter dated March 7, 1926, by which he modified the position ho had originally taken up and promised to send £ 7 or £ 8 per month from August or September 1926. He expressed the opinion that the money his wife had would last her till then for her maintenance. The opponent''s petition was lodged in the London Court on May 28, 1926, and the Marylebone Magistrate made his order the same day. The order was transferred to Bombay for confirmation and came up before the Chief Presidency Magistrate after notice to the petitioner. In the meanwhile, it appears that the petitioner had sent up a sum of £ 7-10s. in July 1926 for the maintenance of the opponent. But the matter having come up before the Magistrate in Bombay, owing to what I consider to be a wrong sense of amour propre, the petitioner stopped sending any further moneys to the opponent for her maintenance. It was open to the petitioner before the Magistrate in Bombay to have proved that the matter of the complaint was not true. The Magistrate after taking evidence of the petitioner was satisfied that on the ex parte statements of the petitioner he could not confirm the order made by the Marylebone Magistrate. The Magistrate, however, did not make any final order refusing to confirm the order of the Marylebone Magistrate, but left the matter open and remitted the proceedings to the original Court with a certified copy of his order and the proceedings that had taken place before him. If the petitioner had any objection to raise in regard to the procedure adopted by the learned Magistrate, ho should, in my opinion, have raised that objection at that stage, Ho not only did not do so, but acquiesced in the position and after the further evidence was taken in London and the proceedings were returned to the Magistrate in Bombay, he appeared before the Magistrate and applied for the proceedings to be remitted once again to the Marylebone Court, for further evidence of his wife to be taken. In my judgment, it is not open to a party to approbate and reprobate, and it is too late for the petitioner to raise that objection now, when the proceedings have gone against him. The learned Magistrate was right in this case in sending back the proceedings to the original Court. He could not very well act upon the ex parte statements made before him by the petitioner and very wisely decided to have the version of the other side before him in respect of that evidence, before making any final order in the matter. The matter came on again before the learned Magistrate on February 5, 1927, when the further evidence taken in the Marylebone Court showed that the opponent did not admit the receipt by her of the £ 7-10-0 alleged to have been sent to her by the petitioner, nor did she admit that she had been maintained by the petitioner out of any moneys left with her by him, It was open to

the petitioner to have satisfied the learned Magistrate on the evidence before him that the provision the petitioner had made for the maintenance of the opponent was sufficient up to the date of the order made by the Marylebone Magistrate. That, it the petitioner did not do. The position he then took up, with regard to the claim of the opponent to maintenance after the date of the order, was one, which, in my opinion, was untenable. The right of a wife to maintenance is not lost because she makes a false or scandalous allegation against her husband. The allegations of the kind the opponent made against the petitioner, no doubt, must have been very annoying to him, and the subsequent proceedings have shown that there was no foundation for the scandalous allegations the opponent had made against the petitioner. But that would not by itself justify the petitioner in denying his wife''s right to a continuance of her maintenance or to insist that those allegations should be unconditionally withdrawn in a Court of law before he would agree to maintain her. The learned Magistrate is right in holding that the attitude taken up by the petitioner is tantamount to a denial of the opponent''s right of maintenance. The learned Magistrate gave a reasonable opportunity to the petitioner to make up his quarrel with the opponent, but the petitioner did not avail himself of the Magistrate''s suggestion. In revision, we are not primarily concerned with the findings of facts, The application, in my opinion, fails on the only grounds of law which were urged by Mr. O''Gorman.