

Prithviraj Singh v. Pavanvir Kaur (M. M. Punchhi, J.)

too does not have any bearing on the facts of this case. In that case, claimants' petition under section 110-A of the Motor Vehicles Act had been dismissed for default on December 21, 1974 and later an application for restoration of the said claim petition had too been dismissed. It was in view of these facts that the Tribunal held that no second claim application under section 110-A of the Act was maintainable. The alternate argument that even though the claimants were not entitled to compensation under section 110-A of the Act, still they should have been awarded compensation under the Workmen's Compensation Act, 1923, too was repelled with the following observations:—

“The nature of proceedings under the 1923 Act and the Motor Vehicles Act is widely different. Different procedures and limitations have been prescribed in the matter of claim to be laid before the Tribunal under the two Acts. There is essential difference between the mode of payment of compensation under both the aforesaid Acts. Thus in my opinion the Accident Claims Tribunal could not exercise jurisdiction under the 1923 Act in substitution of the prescribed authority under the Motor Vehicles Act.”

Thus it is patent that the ratio of neither of the two judgments referred to above is even remotely relevant to the decision of the question before us.

(5) For the reasons recorded above, we find no merit in this appeal and dismiss the same with no order as to costs.

H.S.B.

Before : M. M. Punchhi, J.

PRITHVIRAJ SINGH,—Petitioner.

versus

PAVANVIR KAUR,—Respondent.

Criminal Misc. No. 2195-M of 1985

December 17, 1985.

Code of Criminal Procedure (II of 1974)—Section 125—Application of wife for maintenance allowed—Claim of the wife to arrears—Whether any more enforceable after the death of the husband—Husband's estate—Whether could be burdened with enforceability of maintenance order for any period beyond his death.

Held, that a deceased husband cannot after his death be present to participate in any enquiry under sub-section 3 of Section 488 of the old Code when sub-section (6) of that section required 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. There is a noteworthy change in the scheme of legislation, for, now in an enquiry under sub section (3) of Section 125 of the Code of Criminal Procedure, 1973 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 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 cannot be burdened with the enforceability of the maintenance order under the Code of Criminal Procedure, 1973 for any period beyond the date of the husband's death but is enforceable against it for the period till the husband's death.

(Para 6)

Petition Under Section 482 read with Section 397 Cr. P. C. praying that:—

- (i) records of the case be called for.
- (ii) order dated 11th March, 1985 passed by Additional Sessions Judge, Chandigarh (Annexure P/5) and all further proceedings before Judicial Magistrate Ist Class, Chandigarh be quashed.
- (iii) further proceedings before Judicial Magistrate Ist Class, Chandigarh be stayed till the disposal of this petition.
- (iv) such other further orders may be passed as deemed fit.

K. S. Grewal, Advocate, for the Petitioner.

D. N. Rampal, Advocate and D. S. Chahal, Advocate, for the Respondent.

Prithviraj Singh v. Pavanvir Kaur (M. M. Punchhi, J.)

JUDGMENT

Madan Mohan Punchhi, J.

(1) The question presently requiring determination is whether, by reason of death of the husband, the claim of the wife to arrears of maintenance is any-more enforceable. This question crops up on the facts mentioned hereafter.

(2) Pavanvir Kaur, the respondent (hereinafter referred to as the wife) filed an application under section 125 of the Criminal Procedure Code on 5th February, 1979 against her husband Major Joginder Pal Singh (hereinafter referred to as the husband), before the Judicial Magistrate, 1st Class, Chandigarh, claiming Rs. 500 per mensem as maintenance. The maintenance as claimed was allowed on 10th August, 1982 with effect from 5th February, 1979 by the Court. On 10th February, 1983, she filed an application under section 125(3) read with section 128 of the Code of Criminal Procedure before the same Court for the recovery of Rs. 24,000 as maintenance allowance for the period 5th February, 1979 till 4th February, 1983. A suitable warrant of attachment was issued against the property of the husband as also the conditional warrant of arrears by means of detention of the husband in prison. During that period on 29th May, 1983, the husband died. As it seems, before hand, the husband had executed a will on 20th August, 1981 and presented it on 16th September, 1981 before the Sub-Registrar, Kanpur, bequeathing, after his death, of his property, moveable and immoveable, to his nephew Prithviraj Singh, minor son of Surendra Pal Singh, resident of 3/106, Vishnu Puri, Kanpur, the petitioner. The will was registered in the books of the Registrar on 25th September, 1981. As willed therein, one R. K. Lal, Advocate was appointed the Executor of the will,—*vide* order dated 26th May, 1984 of the IV Additional District Judge, Kanpur.

(3) Becoming aware of the recovery process against the deceased and his property, the petitioner approached the criminal Court at Chandigarh, apprising it that since the husband had died, and since under the registered will, afore-referred to, he had become the sole owner of the moveable and immoveable properties of the deceased husband, the process of recovery of arrears of maintenance and the sought-after attachment of properties had become invalid and, accordingly prayed for the withdrawal of the warrants. The learned Magistrate acceded to the prayer, called back the warrants of attachment and dismissed the application of the wife for recovery of maintenance. She preferred a revision petition before the Court of

Session. The Additional Sessions Judge, Chandigarh, took the view that the amount of maintenance allowance for the period for which the husband was alive, could be realised by the wife as provided under section 421(1)(b) of the Code of Criminal Procedure and, thus, he restored the application of the wife, directing the magistrate to issue a warrant as provided under the aforesaid provisions for realisation of maintenance allowance for the period for which the husband was alive. It is this view of the learned Additional Sessions Judge which is the subject-matter of challenge in this petition, be it termed a revision under section 397 or a miscellaneous application under section 482 of the Code of Criminal Procedure.

(4) Learned counsel for the petitioner relied on *Hari Singh v. Mst. Gulab Devi*, (1) a Division Bench judgment of the Peshawar Judicial Commissioner's Court, and *Ambadas Bajirao v. Annapurna Bai*, (2) a similar Bench judgment of the Nagpur High Court, to buttress his argument that a claim for arrears of maintenance abates on the death of the person against whom an order under section 488(1) of the Old code of Criminal Procedure, 1898, has been made and cannot be enforced thereafter against his estate. As against this, learned counsel for the respondent relied upon *Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and others*, (3), to contend that the old interpretation of the law must give way to an interpretation which would advance the cause of destitute women if it has to have social relevance in the post-independence period. Though the case of the Supreme Court is directly not on the point yet, nevertheless, is a beacon light to lead the way to a more beneficial interpretation of the law. But, before an attempt in that regard is made, the relevant statutory provisions require to be juxtaposed:—

OLD CODE OF CRIMINAL PROCEDURE, 1898.	NEW CODE OF CRIMINAL PROCEDURE, 1973
CHAPTER XXXVI.	CHAPTER IX.
Section 488, ORDER FOR MAINTENANCE OF WIVES AND CHILDREN:	Section 125 : ORDER FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS:—
(1) * * * *	(1) * * * *
(2) * * * *	(2) * * * *

(1) 1944 Criminal Law Journal 399.

(2) 1953 Cr. Law Journal 1267.

(3) A.I.R. 1978 S.C. 1807.

Prithviraj Singh v. Pavanvir Kaur (M. M. Punchhi, J.)

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinafter provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made;

(6) *All evidence under this Chapter shall be taken in the presence of the husband or 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:*

* * * *

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Section 126 : PROCEDURE :

(1) Proceedings under section 125 may be taken against any person in any district—

- (a) where he is, or
- (b) where he or his wife resides, or
- (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be

taken in the presence of the person against whom an order for payment of maintenance is proposed to be made or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-case:

* * * * *

(Emphas is supplied)

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 proceedings 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 logically follows that the version of the wife that the husband has failed to comply with the order without sufficient cause is enough to confer the jurisdiction on the Magistrate to issue a requisite warrant. The view afore-expressed would presently become more clear.

Prithviraj Singh v. Pavanvir Kaur (M. M. Punchhi, J.)

(5) A Division Bench of the Calcutta High Court in *Ead Ali v. Lal Bibi*, (4) 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 levying 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 stands 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,

(4) A.I.R. 1914 Cal. 172.

without sufficient reasons, to comply with the order as laid down in clause (3) of section 488, Criminal P.C., 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 of 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.

Prithviraj Singh v. Pavanvir Kaur (M. M. Punchhi, J.)

(7) At this stage, the observations of the Supreme Court in *Captain Ramesh Chand Kaushal's case* (supra), 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 fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must 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 derivable 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 whereunder 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 has 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.

(9) Before conclusion, an English case, cited by the learned counsel for the petitioner, of the Chancery Division reported in *Bidle v. General Accident, Fire and Life Assurance Corporation Ltd, and others*, is (5) and of the Court of Appeal report in *Re Bidle (deceased), Bidle v. General Accident, Fire and Life Assurance Corporation Ltd.*, (6) need barely be mentioned to say that

(5) 1948(1) All England Law Report, 1885.

(6) 1948(2) All England Law Report 995.

the principles evolved therein are valid to the statutory law existing in that country and can be of no assistance towards the interpretation of the provisions of the Code of Criminal Procedure, relating to the maintenance of wives and children, which are mainly directed towards prevention of vagrancy and for providing some succour to the destitute wives and children, and now parents, unable to maintain themselves.

(10) In view of the aforesaid discussion, I hold that the arrears of maintenance due up to the date of the death of the husband are recoverable from his estate in whichever hands it is found to be. Thus, this petition fails and is hereby dismissed.

N.K.S.

Before S. P. Goyal and G. C. Mital, JJ.

JUJHAR SINGH,—Appellant.

versus

TALOK SINGH,—Respondent.

Second Appeal Order No. 20 of 1985.

December 20, 1985.

Specific Relief Act (XLVII of 1963)—Sections 38 and 41—Suit for permanent injunction filed by coparcener against Karta to restrain him from alienating coparcenary property—Such suit whether maintainable.

Held, that the provisions of Section 38 of the Specific Relief Act, 1963 are circumscribed by the provisions of Section 41 which provide that an injunction cannot be granted in the cases enumerated in clauses (a) to (j). Clause (h) provides that an injunction cannot be granted when equally efficacious relief can be obtained by any other usual mode or proceedings except in case of breach of trust. Apparently the suit for permanent injunction does not fall under any of the clauses of sub section (3) of Section 38. The grant of injunction would further be barred by clause (h) of Section 41 because the aggrieved co-parcener has equally efficacious remedy to get the alienation set aside and recover possession of the property. Furthermore, the suit can at best be to restrain the proposed alienation because the manager or the karta cannot be restrained from making alienation of the coparcenary property for all times