1960

State of Uttar Pradesh v. Khushi Ram

Sarkar J.

such circumstances is itself void. Neither do we understand Mulla, J., to take the view that apart from s. 21 of the Act, the commitment was void because the learned Magistrate could himself have awarded the maximum sentence provided. We have said that s. 21 does not take away the power of the Magistrate if he has such power, to commit, nor affect the jurisdiction of a Court of Session to try a case committed to it by a Magistrate empowered to do so. Therefore it seems to us that the learned Sessions Judge had full jurisdiction to try the case against the respondent.

In the result we allow the appeal and set aside the order of the High Court. The case will now go back to the High Court to be heard on merits.

Appeal allowed.

NANDLAL MISRA

v.

K. L. MISRA

1960

April 1.

(K. SUBBA RAO and J. C. SHAH, JJ.)

Maintenance—Provisions of s. 488 of the Code of Criminal Procedure—Mandatory—Preliminary enquiry not contemplated—Proceedings under Chapter XXXVI, Code of Criminal Procedure—of civil nature—Question of paternity to be decided by the Magistrate.

The appellant who was a minor filed an application by his mother as his guardian under s. 488 of the Code of Criminal Procedure in the Court of the City Magistrate, Allahabad, praying for an order against the respondent, for maintenance alleging that he was his putative father. The Magistrate summarily dismissed the appellant's application without issuing notice to the respondent as required by s. 488, Criminal Procedure Code. The Court of Session in revision against the Magistrate's order came to the conclusion that it was a fit case in which the Magistrate ought to have issued summons to the respondent and submitted the record to the High Court recommending that the order passed by the Magistrate be set aside and that the Magistrate be ordered to proceed with the application in accordance with law. The High Court rejected the Sessions Court's reference and refused to certify that the case was a fit one for appeal to the Supreme Court. On appeal by special leave :

Held, that the appellant was not given full opportunity to establish his case in the manner prescribed by law.

1960

Nandlal Misra v. *K. L. Misra*

Section 488 of the Code of Criminal Procedure does not contemplate a preliminary enquiry before issuing a notice but lays down that all evidence under that section should be taken in the presence of the respondent or his pleader indicating thereby that one enquiry only should be held after notice.

Sub-section (6) of s. 488 is mandatory in form and in clear terms it prescribes the procedure to be followed by the Magistrate. It is the duty of the Court, before making the order, to find definitely, though in a summary manner, the paternity of child.

Chapter XXXVI of the Code of Criminal Procedure is a self-contained one and the relief given under it is essentially of a civil nature. It prescribes a summary procedure for compelling a man to maintain his wife or children. The findings of a Magistrate under this chapter are not final and the parties can legitimately agitate their rights in a civil court.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 64 of 1958.

Appeal by special leave from the judgment and order dated December 3, 1956, of the Allahabad High Court in Criminal Reference No. 159 of 1956.

N. C. Sen, for the appellant.

C. K. Daphtary, Solicitor-General of India, Purshottam Tricumdas, G. C. Mathur and *C. P. Lal*, for the respondent.

1960. April 1. The Judgment of the Court was delivered by

Subba Rao J.

SUBBA RAO, J.—This appeal by special leave is directed against the judgment of the High Court of Judicature at Allahabad rejecting the reference made by the learned Sessions Judge under s. 488 of the Code of Criminal Procedure.

The appellant is a minor and lives under the guardianship of his mother, Smt. Gita Basu. On September 14, 1955, the appellant, through his mother, filed an application under s. 488 of the Code of Criminal Procedure (hereinafter referred to as the Code) in the Court of the City Magistrate, Allahabad, praying for an order against the respondent, Advocate-General, Uttar Pradesh, Allahabad, for maintenance alleging that he is his putative father. Without giving notice to the respondent, the Magistrate posted the petition for evidence on September 20, 1955. On that date, the appellant's guardian was examined and she was also cross-examined by the Magistrate at some length.

After she was examined, the Magistrate directed her to produce any further evidence she might like to lead under s. 202 of the Code and, for that purpose, he adjourned the petition for hearing to September 26, 1955, on which date one police constable was examined and the learned Magistrate made the endorsement that the applicant said that she would examine no other witness. On September 27, 1955, the appellant filed a petition before the Magistrate stating that s. 200 of the Code had no application and that no enquiry need be made before issuing notice to the respondent. If, however, the Court treated the application as a complaint, the applicant asked for time to adduce further evidence in support of the application for maintenance. On that petition the learned Magistrate made the endorsement "lead the further evidence, please, if you like". On October 6, 1955, the guardian of the appellant examined one more witness. On that date, the learned Magistrate made in the proceeding sheet the endorsement "no further evidence to be led at this stage".

On October 10, 1955, the learned Magistrate made an order dismissing the application. He agreed with the petitioner's contention that ss. 200 to 203 of the Code did not apply to the application for maintenance; but he expressed the view that he should be satisfied that the petitioner had a *prima facie* case before he issued notice to the respondent. He then proceeded to consider the evidence and came to the conclusion that he was not satisfied that the respondent was the father of Nand Lal, and on that finding he refused to issue notice of the application to the respondent, and dismissed the application. The appellant filed a revision against that order of the learned Magistrate to the Sessions Judge, Allahabad. The learned Sessions Judge, after considering the materials placed before the Magistrate, came to the conclusion that it was a fit case in which the Magistrate ought to have issued summons to the respondent under sub-s. (6) of s. 488 of the Code. He submitted the record to the High Court of Judicature at Allahabad recommending that the order passed by the Magistrate be set aside and that the Magistrate be ordered to proceed with the

1960

Nandlal Misra
v.
K. L. Misra

Subba Rao J.

application in accordance with law. The reference came up for hearing before Chowdhry, J., who, on the analogy of other sections of the Code held that the Magistrate in holding a preliminary enquiry acted in consonance with the general scheme of the Code and that, therefore, the order dismissing the application was not vitiated by any illegality or irregularity. He observed that it was conceded by the appellant before the Magistrate that the Magistrate could hold a preliminary enquiry and that, therefore, it was not open to the appellant to question its propriety. He also found that every opportunity was given to the guardian of the appellant to lead such evidence as he desired to produce and that, therefore, the appellant was not prejudiced by the alleged irregularity. On the maintainability of the reference, he held that the finding arrived at by the learned Magistrate was one of fact on the materials placed on the record and, as the Magistrate did not act perversely or in contravention of some well-established principles of law or procedure, the learned Sessions Judge should not have made the reference. The learned Judge finally pointed out that the proceedings were only summary in nature and that they did not deprive the appellant of his right to seek remedy, if any, in a civil court. In the result, the reference was rejected. The appellant by this appeal questions the correctness of that order.

Learned counsel for the appellant contends that the learned Magistrate followed a procedure not contemplated by the Code of Criminal Procedure and that in any event he conducted the enquiry in a manner which, to say the least, was unjust to the appellant.

The learned Solicitor General, appearing for the respondent, supported the procedure adopted by the Magistrate and also the finding arrived at by him. He further contended that the appellant in the High Court as well as before the Magistrate conceded that the Magistrate had power to make a preliminary enquiry and that, therefore, he should not be allowed to question the validity of the enquiry for the first time before this Court.

Ordinarily, in a case like this we should have been disinclined to interfere with the order of the High

Court in an appeal filed under Art. 136 of the Constitution. But, this appeal discloses exceptional circumstances which compel us to depart from the ordinary practice.

It is not correct to state that the appellant had conceded throughout that a Magistrate can make a preliminary enquiry under s. 488 of the Code before issuing notice to the respondent. Indeed the judgment of the Magistrate discloses that on behalf of the appellant certain decisions were cited in support of the contention that an application under s. 488 of the Code does not come under the purview of ss. 200 to 203 of the Code. Section 200 of the Code provides for the examination of the complainant and the witnesses present in court. Section 202 enables him to make a further enquiry before issuing notice. Section 203 empowers him to dismiss a petition, if in his judgment no sufficient ground for proceeding with the case has been made out. The contention raised by the appellant, therefore, can only mean that the Magistrate cannot make a preliminary enquiry in the manner contemplated by the said provisions. Indeed, the Magistrate accepted this contention; but he observed: "But, as the learned counsel submit, I have to be satisfied that a notice under s. 488 Cr. P.C. should issue to the opposite party before I issue it and that, therefore, all that has come on record as yet is admissible for consideration of the question whether the notice should be issued or not". This observation did not record any concession on the part of the appellant that the Magistrate could make a preliminary enquiry. In the context of the first submission, the second submission could only mean that the Magistrate could satisfy himself before issuing notice, whether the application was *ex facie* not maintainable or frivolous. In the revision petition filed before the Sessions Judge, the appellant raised the following ground:

> "Because the court below while correctly holding that application made by the applicant under s. 488 Cr. P. C. did not attract the operation of the provisions made in ss. 200 to 203 of the said Code and further that in pursuance of the mandatory provision in s. 488(6) all evidence under

1960

Nandlal Misra
v.
K. L. Misra

Subba Rao J.

Chapter XXXVI of the said Code shall be taken in the presence of the opposite party, has erred in law in directing evidence to be led under s. 200 Cr .P. C. and in considering the said evidence has usurped a jurisdiction not vested in it by law."

The judgment of the learned Sessions Judge also disclosed that this point was raised before him. Though the learned Sessions Judge accepted the contention that ss. 200 to 203 of the Code had no application, he remarked that "in this case the learned Magistrate thought it fit to satisfy himself if this was a case fit enough in which he should issue a notice." Before the learned Judge of the High Court, it does not appear that any concession, even in a limited form, was made. Chowdhry, J., observes in his judgment "...it appears that it was conceded by the learned counsel appearing for the applicant that the Magistrate had to satisfy himself in limine that a notice of the application in question should issue to the opposite party." This observation is only a reproduction of what the Magistrate stated in his judgment. Learned counsel, who appeared for the appellant in the High Court, does not appear to have made any fresh concession before the High Court and we do not think that the learned Judge was justified in drawing from the observations of the Magistrate that it was conceded on behalf of the applicant that it would be a proper procedure for the court to make such a preliminary enquiry in order to satisfy itself that notice should issue to the opposite party. As we have pointed out, the main contention of the petitioner throughout was that the Magistrate had no power to make a preliminary enquiry and the concession, even if it had been made, can only mean, in the context, that the Magistrate could satisfy himself whether, on the allegations in the petition, it was a frivolous petition.

The first question is whether s. 488 of the Code contemplates any preliminary enquiry on the part of a Magistrate before he could issue notice to the opposite party. The answer to this question turns upon the construction of the provisions of s. 488 of the Code. Chapter XXXVI of the Code contains three

provisions. The heading of the Chapter is "Of The Maintenance of Wives and Children". The relevant provisions read:

Section 488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency, Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

x x x

(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:

x x x

Section 489 provides for the alteration in the allowance under s. 488, and s. 490 prescribes the procedure for the enforcement of the order of maintenance. The relief given under this Chapter is essentially of civil nature. It prescribes a summary procedure for compelling a man to maintain his wife or children. The findings of a magistrate under this Chapter are not final and the parties can legitimately agitate their rights in a civil court. This Chapter is a self-contained one. It recognizes the right of a child or wife to claim maintenance. It prescribes the procedure to be followed and provides for the enforcement of the decision of the magistrate. Under s. 488, so far as it is relevant to the present enquiry, an illegitimate child unable to maintain itself is entitled to a monthly allowance for its maintenance, if the putative father having sufficient means neglects or refuses to maintain it. It is suggested that unless the child is admitted by the putative father to be his illegitimate child, the

1960

Nandlal Misra v. K. L. Misra

Subba Rao J.

magistrate has no power to make an order for payment of maintenance. This argument, if accepted, would make the entire section nugatory. The basis of an application for maintenance of a child is the paternity of the child irrespective of its legitimacy or illegitimacy. The section by conferring jurisdiction on the magistrate to make an allowance for the maintenance of the child, by necessary implication, confers power on him to decide the jurisdictional fact whether the child is the illegitimate child of the respondent. It is the duty of the court, before making the order, to find definitely, though in a summary manner, the paternity of the child. Sub-s. (6) of s. 488 is mandatory in form and in clear terms it prescribes the procedure to be followed by the Magistrate. Under that sub-section, all evidence under that Chapter 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. The word "all" with which the sub-section opens emphasizes the fact that no evidence shall be taken in the absence of the father or his pleader. It is conceded that ss. 200 to 203 of the Code do not apply to an application under s. 488 of the Code. As the proceedings are of a civil nature, the Code does not contemplate any preliminary enquiry. When the terms are clear, there is no scope for drawing inspiration from other sections of the Code, or for deviating from the procedure prescribed to fill up an alleged lacuna. It is said that if no preliminary enquiry be held, even in a blackmailing action notice will have to go to the respondent. There is nothing incongruous in this position; for, if a suit is filed in a civil court for a decree for maintenance by a child against the alleged putative father, summons will go to him without any preliminary enquiry. We are not impressed by the argument that the sub-section itself is intended only for the benefit of the respondent. It appears to us that notice to the respondent is in the interest of both the applicant as well as the respondent while it enables the respondent to be present when evidence is taken against him, it lightens the burden

of the petitioner, for an honest respondent may admit his paternity of the child, if that was a fact and may contest only the quantum of maintenance. We, therefore, hold that s. 488 of the Code does not contemplate a preliminary enquiry before issuing a notice, but lays down that all evidence under that Chapter should be taken in the presence of the respondent or his pleader, indicating thereby that one enquiry only should be held after notice.

The more objectionable feature in this case is that the Magistrate followed a procedure, which is, to say the least, unjust to the appellant. The appellant's guardian was examined by the Magistrate, and she related the circumstances that led to her illicit intimacy with the respondent; she has stated in what circumstance the intimacy commenced. She filed copies of the notices sent by her, through an advocate, by registered post to the respondent demanding maintenance and stated that she received the acknowledgments but the respondent did not think it fit to reply. She filed a photograph wherein she and the respondent were seated on chairs with the appellant standing between them. A servant was also examined, who deposed that she had seen the respondent visiting the appellant's mother at odd hours. This evidence, ordinarily, would be sufficient, even if the procedure followed by the Magistrate was permissible, to give notice to the respondent. But the learned Magistrate cross-examined the mother of the appellant at great length. The cross-examination discloses that the Magistrate had either uncommon powers of intuition or extraneous sources of information, for he elicited so many minute details of her life that only an advocate well instructed in his brief could possibly do. The singularity of the method adopted by the Magistrate does not end there. The learned Magistrate, though he subsequently held that he could not make a preliminary enquiry as contemplated by ss. 200 to 203 of the Code, examined the mother of the appellant at great length and then gave her opportunity under s. 202 of the Code to produce other evidence. After examining two more witnesses, the learned Magistrate ordered that "no further evidence to be led at this

1960

Nandlal Misra
v.
K. L. Misra

Subba Rao J.

stage". This order indicates that the learned Magistrate prevented the appellant at that stage to examine other witnesses. Even if a liberal meaning was given to the terms of the order, it would mean that at that time the Magistrate was inclined to give notice to the respondent but changed his mind subsequently. Thereafter, the Magistrate considered the evidence and delivered a judgment holding that the paternity of the appellant had not been established. While there was uncontradicted evidence sufficient for the Magistrate to give notice to the respondent, he recorded a finding against the appellant before the entire evidence was placed before him. While accepting the contention of the appellant that the procedure under ss. 200 to 203 of the Code did not apply, in fact he followed that procedure and converted the preliminary enquiry into a trial for the determination of the question raised. Indeed, he took upon himself the role of a cross-examining counsel engaged by the respondent. The record discloses that presumably the Magistrate was oppressed by the high status of the respondent, and instead of making a sincere attempt to ascertain the truth proceeded to adopt a procedure which is not warranted by the Code of Criminal Procedure, and to make an unjudicial approach to the case of the appellant. In the courts of law, there cannot be a double-standard—one for the highly placed and another for the rest: the Magistrate has no concern with personalities who are parties to the case before him but only with its merits.

After carefully going through the entire record, we are satisfied that the appellant was not given full opportunity to establish his case in the manner prescribed by law. We should not be understood to have expressed any opinion on the merits of the case; they fall to be considered on the entire evidence which may be produced by the appellant in the presence of the respondent or his pleader, as the case may be.

In the result, the order of the High Court is set aside and the reference made by the Sessions Judge is accepted and the application is remanded to the Court of the Magistrate, First Class, Allahabad, for disposal according to law.

Appeal allowed.