
(1961) 02 CAL CK 0013
In the Calcutta High Court

Baidhyanath Ghosh

APPELLANT

Vs

Sm. Shefali Ghosh and Others

RESPONDENT

Date of Decision : 28-02-1961

Acts Referred:

Evidence Act, 1872 — Section 47, 50

Penal Code, 1860 (IPC) — Section 494, 495, 497, 498

Citation : (1962) CriLJ 812 : (1962) 1 ILR (Cal) 149

Hon'ble Judges : Amaresh Roy, J

Bench : Single Bench

Judgement

Amaresh Roy, J.—This is a Rule issued at the instance of one Baidya Nath Ghose against an order u/s 488, Cri.P.C. by which he has been ordered by the learned Magistrate to pay maintenance of Rs. 30/- per month to the opposite party No. 1 Shefali Ghose and Rs. 20/- per month to each of her four minor children opposite parties Nos. 2 to 5 with effect from 19th December, 1958.

2. The allegation made by opposite party No. 1 Shefali Ghose in her application u/s 488, Cri.P.C. was that she had lost her father in her infancy and lived in the house of her maternal uncle in a village at Tiperan, while her mother was working in the house of Baidya Nath Ghose at Calcutta as a cook at his residence in Mahesh Dutta Lane, Chetla. Her maternal uncle Surendra Nath Dey, (P.W. 2) brought her to his residence at Pathuriaghata in Calcutta when she was about 17 years old. While living there Shefali used to go to the house of Baidya Nath Ghose to see her mother and an intimacy grew between them leading to a situation that impelled Baidya Nath Ghose to make a proposal of marriage between Shefali and Baidya Nath. As Baidya Nath had a wife and children at first Shefali's mother and maternal uncle rejected the proposal but subsequently it was accepted on assurance that Shefali would be maintained well. In pursuance of that proposal it was alleged that the marriage took place on 21st January, 1942 at No. 3, Kali Krishna Thakur Street between Baidya Nath, Ghose and Shefali. After some time Baidya Nath took Shefali to a three roomed flat in the second floor of 4B, Ashutosh Mukherjee Road which was taken on rent by Baidya

Nath and Shefali and her mother lived there. At about that time Baidya Nath Ghose had shifted his family to Jessore due to the apprehension of Japanese attack on Calcutta and he also lived in the house at 4R, Ashutosh Mukherjee Road. It was further alleged that five children were born to Shefali and they were all begotten by Baidya Nath Ghose and they were all maintained by Baidya Nath until April 1958 when Baidya Nath retired from his service at Statesman Office where he was Chief Clerk. After his retirement Baidya Nath ceased to maintain Shefali and her children. She went to the Palm Avenue residence of Baidya Nath for maintenance but she was insulted and driven out. So she has been compelled to make tile application u/s 488 Cr.P.C. for maintenance for herself and her four minor children. The eldest daughter is in employment as a nurse and no maintenance has been claimed for her.

3. Baidya Nath Ghose denied that there was any marriage between him and Shefali or they lived as husband and wife at 4B Ashutosh Mukherjee Road. He also resisted the application u/s 488 Cr.P.C. by setting up a positive story that the name of the applicant is not Shefali but Nanda Rani and she hails from Banares. He admitted that the mother of the petitioner was a cook in his house. But he alleged that the applicant was born by concubinage between her mother and one Tinkari Mukherjee, she was married to one Baidya Nath Das and fled away from Benares to Calcutta with one Rani Gupta and for some time lived at 36, Tollygunge Circle Road. Baidya Nath Ghose had occasion to go to that Louse and he alleged to have witnessed sexual intercourse between Rani Gupta and the girl and he himself admitted having sexual intercourse with that girl at that address in Tollyunge and also in Towel Hotel at Sealdah. It was further alleged that the applicant was a prostitute and she carried on. prostitution at 4B, Ashutosh Mukherjee Road but he denied having ever visited the applicant at that place. He further alleged that the applicant used to go to the Statesman Office and he paid money in the amounts of Rs. 10/- or 15/- on several occasions for fear of scandal. He also alleged that on 13th April 1958 the day when he retired from his service in the Statesman Office the applicant went there and inquired about the cheque for his Gratuity and Provident Fund money but he sent away the cheque through his son and got rid of the applicant who then went to his residence and tried to get a portion of the money by threatening him with scandal. He also alleged that the applicant in her career as a woman-of-the-town used to accept engagements as an actress on the stage and she acted She role of Ghaseti Begam in Tipusultan, and Chitrangada in Partha Sarthi play at Gorerhat.

4. Evidence was adduced by both sides before the learned Magistrate and documents were proved by both the parties. An outline of the evidence and their characteristic need be stated for appreciating the point of law that has been raised before me on behalf of the petitioner Baidya Nath Ghose. (After discussing the evidence (paras 5, 6, 7 and portion of 8), His Lordship proceeded:)

8. *** What is more, defence produced documents from kidderpore Maternity

Hospital in 1941, in the records of which the girl who gave birth to the child signed her name as "Nanda Rani wife of Bani Gupta of 36, Tollygunge Circular Road". This writing and signature was said to be of Shefali and opinion has been given by hand-writing expert to be of Shefali. Shefali Ghose, however, denied having given birth to a child at any time in die Kidderpore Maternity Hospital or having made that writing or signature. There was no direct evidence nor there was any circumstance to provide evidence that the writing and signature purporting to be of Nanda Rani was that of Shefali. The learned Magistrate rightly rejected the claim of Baidya Nath Ghose to prove this writing and signature as being of Shefali because Baidya Nath Ghose does not come within any of the categories mentioned in Section 47 of the Indian Evidence Act. In the absence of any direct and substantive evidence on the point, the opinion of the Handwriting Expert which could have only corroborative value has no use at all. Moreover what is evidence in the Expert's testimony is the reason given by him and not the assertion of opinion divorced from reasons. Having examined the writings themselves in the back ground of the reasons mentioned by the Expert witness I am definitely of the view that the opinion of the Expert cannot be accepted. (His Lordship discussed the evidence (para 9) and proceeded:)

10. Upon the totality of the evidence the learned Magistrate came to the finding that the applicant Shefali Ghose was married to Baidya Nath Ghose and she had five children by him and that defence case is false from start to finish, and the evidence of all the D.Ws are wholly false. Desertion by Baidya Nath Ghose of Ms married wife Shefali Ghose and her children was accepted by the learned Magistrate and he made an order u/s 488 Cr.P.C. which I have mentioned above.

11. Against that order the present Rule has been obtained and the learned Advocate Mr. Ajit Kumar Dutta appearing in support of the Rule has raised one contention of law and the learned Advocate in exercise of his excellent discretion has assailed the views on fact and assessment of witnesses by the learned Magistrate only on the ground that his conclusion is not the only possible conclusion on the evidence in the case. Suffice it to say that so long as the conclusion of the learned Magistrate is possible conclusion, the mere fact that another conclusion may have also been possible is not a ground for upsetting a finding arrived at by the trial court in Revision. The point of law raised by Mr. Dutt was that inasmuch as the proceeding u/s 488 Cri.P.C. can only be maintained when there is a relationship of husband and wife between the "Parties strict proof of marriage according to a legal form with all the details and formalities of that particular form is a necessity before an order u/s 488 Cr.P.C. can be made in favour of an alleged wife. That being the standard, Mr. Dutt contended, that the evidence in the present case falls far short of proof of marriage and therefore Shefali Ghose was not entitled to maintenance u/s 488 Cr.P.C. Effect of Mr. Dutt's contention is that if marriage has not been proved then Shefali was not entitled to maintenance for herself and the children could be entitled to maintenance u/s 488 Cr.P.C. only if it could be established by evidence aliunde independently of marriage that the petitioner Baidya Nath Ghose was the

father of these four children. But evidence admittedly, has not been of that nature at all Mr. Butt's contention is based on the opening words of Section 488(1) which says "neglects or refuses to maintain his wife." If marriage need have to be proved with the strictness which is insisted upon by law in cases under the Divorce Act or other matrimonial cases in Civil Courts then certainly the evidence in the present case would fall short of that standard because besides the applicant Shefali Ghose herself asserting that there was a legal form of marriage of herself with Baidya Nath Ghose the only other evidence is that of P.W. 2 her maternal uncle. Mother of Shefali Ghose has not been examined and an explanation was offered that she is aged about 90 years and is completely confined to bed and is not in a fit state of health to depose as a witness. In that state of evidence it can be said with a degree of cogency that strict proof has neither been offered nor attempted. The question, therefore, is whether in a proceeding u/s 488 Cr.P.C. where the applicant claims a maintenance as wife on the averment that there was a legal marriage it is necessary as a matter of law to prove strictly that all the formalities to establish the fact of her marriage had been performed. The characteristic of a proceeding u/s 488 Cr.P.C. has been held to be quasi-civil in nature for certain purposes and also even civil for certain other purpose See *Tokee Bibee v. Abdool Khan* ILR 5 Cal 536. But all the same the proceeding is essentially a judicial proceeding of a criminal court and is governed by the Criminal Procedure Code See *Rajana Appadu v. Rajana Appamma* ILR 39 Mad 472 : AIR 1916 Mad 632 , ILR 5 Cal 536, *Appichi Goundan Vs. Kuthujammal*, . Keeping that characteristic in view it appears to me that the question of the legal validity of the marriage is not the primary issue in that proceedings although the Magistrate must be satisfied about the relationship of man and wife for making an order under S488 Cr.P.C. In the peculiar nature of the proceeding the standard of proof in this respect fell for decision in a case before a Division Bench of this High Court reported in *Abdur Rohoman v. Sakhina* ILR 5 Cal 558. The question in that case referred to this High Court was when the fact of divorce or its legality is disputed by the wife what are the powers of the criminal courts in trying the question. In discussing that question Ainslie, J. observed:

It a woman makes an application to a Magistrate for an order for maintenance against her husband, she must, if the relation of husband and Wife is disputed, prove its existence. It may, perhaps, be admitted that there had. been a marriage, but alleged that it had been dissolved. A Magistrate must, of necessity, inquire into the fact of marriage in the one case, and into the fact of dissolution of marriage in the other, and we find that in one of the cases referred to, the learned Chief Magistrate did try the plea of divorce. Unless the woman making the application is a wile, he has no power to make an order of maintenance. In the case of alleged divorce, the divorce must be proved, whether the parties are Christian or Mahomedan; the means of proof are different, but the mode of procedure, as far as the Magistrate is concerned, is the same: he is to determine on evidence whether the allegation of divorce is true. In the one case, the only

possible mode of divorce is by a decree of a competent Court, and the decree is conclusive as evidence; in the other, recourse to a Court is wholly unnecessary, and unless it should happen that the question has been already decided between the parties in a competent Court, the Magistrate must draw his own conclusions from the oral and other evidence put before him as best as he may.

That being the law laid down as early as 1879 in this Court and having stood as good law for over 80 years, it gives sufficient guidance to me to hold that in a proceeding u/s 488, Cri.P.C. of necessity an enquiry into the fact of marriage must be held by the Magistrate and he is to determine on evidence whether the allegation that there was a marriage is true and the Magistrate must draw his own conclusion from the oral testimony and other evidence put before him as best he may.

12. The decision made under Sec 488, Cri.P.C. is subject to any decision of a competent Civil Court and when such a decision of Civil Court is forthcoming as to non-existence of relationship of husband and wife, the order u/s 488, Cri.P.C. shall be cancelled as provided in Section 489(2) Cri.P.C. I, therefore, hold that to decide if the existence of a relation of a husband and wife has been proved to the satisfaction of the Magistrate for the purpose of Section 488, Cri.P.C. it is not necessary to insist on the strict proof of all the formalities of a particular form of legal marriage as is necessary in civil proceedings where the question of the legality of marriage is a primary issue. This conclusion of mine is strengthened by the terms of Section 50 of the Indian Evidence Act. That Section clearly recognises difference in standard of proof and in the Proviso the proceedings where strict standard is necessary have been mentioned. In making exceptions to the sufficiency of proof by opinion as to relationship Sections 494, 495, 497 and 498 of Indian Penal Code and also proceedings under Indian Divorce Act have been mentioned, but Section 488 of the Criminal Procedure Code has not been mentioned in that exception, In the present case the total effect of the evidence before the learned Magistrate satisfies the test by Section 50 of the Indian Evidence Act because the opinion expressed by conduct of the parties and witnesses reflected, also in the documents of dates before any controversy as to relationship arose strongly point to the existence of relationship Of husband and wife between Baidya Nath Ghose and Shefali Ghose. Therefore the finding of the learned Magistrate that the existence of the relationship of husband and Wife has been proved for the puproses of Section 488, Cri.P.C. is justified on the evidence on record. The point of law raised by Mr. Dutt therefore fails.

13. Mr. Dutt also contended that the quantum of maintenance awarded has been too high in view of the reduced capability of the petitioner by the fact of his retirement from service. But evidence shows that on retirement the petitioner received a substantial sum to the tune of Rs. 32.000/- as Gratuity and Pension and out of the earnings of that sum even in safe investments, it should not be unreasonable to hold that, he is capable of paying the maintenance awarded by the learned Magistrate. The rates of monthly maintenance in respect of Shefali

Chose and each of the four children ordered by the learned Magistrate are upheld.

14. In the result, therefore, the Rule is discharged.