
(1973) 01 CAL CK 0003
In the Calcutta High Court

Md. Akbar Ali Gazi

APPELLANT

Vs

Mt. Ambia Khatoon

RESPONDENT

Date of Decision : 31-01-1973

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 488

Citation : (1973) CriLJ 950 : 77 CWN 390 : (1973) 2 ILR (Cal) 238

Hon'ble Judges : Talukdar, J

Bench : Single Bench

Judgement

Talukdar, J.—This Rule is at the instance of the second party petitioner. Md. Akbar Ali Gazi, directed against an order of maintenance passed on 26-6-72 by Shri L. V. Saptarishi, Subdivisional Magistrate, Basirhat in Case No. M109 of 1972.

2. Some intriguing, sometimes even amazing, orders are brought to light in course of a proceeding purported to be u/s 488 Criminal Procedure Code. The facts required for appreciating the points at issue are short and simple. An application, not having all the trappings of a petition u/s 488 Criminal Procedure Code, was filed on 6-6-72 before the learned Subdivisional Magistrate. Basirhat by the first party-opposite party, Mt. Ambia Khatun, alleging neglect and refusal to maintain her as well as the factum of a second marriage on the part of the second party and containing an ultimate prayer that the learned Magistrate may be pleased to pass necessary orders. On this petition the learned Sub-divisional Magistrate straightway passed an order calling upon the O/C of the local thana to arrest the second party as "the man who has abandoned his wife" and to produce him in course of the day. When produced before the learned Subdivisional Magistrate on 8-6-72, the second party filed an application stating, inter alia, that he is quite innocent; and that he had divorced his wife in writing a few months ago. Thereupon the learned Subdivisional "Magistrate ordered that the second party shall produce the talaknama and other documents by 10 A-M. on the following day positively, and in the meanwhile granted him a bail of Hs. 8,000/- with a local lawyer as surety. He further directed that "as there was

strong reason to believe that the documents might be fabricated, the accused would not leave Basirhat Municipal area". It is not quite clear from the records as to what happened thereafter excepting that two haziras were filed on 17-6-72 and 19-6-72 showing that the second party was present in court on those days. On 26-6-72 the second party was present in court on filing hazira, and "Shri L. V. Saptarishi, Subdivisional Magistrate. Basirhot by his order passed on the same date directed that the second party shall pay a sum of Rs. 40/- per month "as maintenance allowance to the babies of the first party, Mt, Ambia"Khatun." There was a further direction about a future contingency viz., that "if this allowance is not paid regularly necessary action will be taken according to law." This is not all and to make confusion worse confounded the learned Subdivisional Magistrate proceeded to direct as follows: "As the 2nd wife. Asiva Khatun D/O Alam Bux "Sardar of Katiahath. P.S. Baduria is not willing to go and stay with him he may consider giving her talaknama." This very expansive order was impugned by the second party, forming the subject-matter of the present Rule.

3. The contentions of Mr, Sukumar Mukherjee. Advocate, who appeared in support of the Rule, are of three dimensions viz, (a) that the ultimate order passed on 26-6-72 is a laconic, almost a cryptic one, not based on any scintilla of evidence; (b) that all the orders including the one dated 26-6-72 passed in course of the proceeding, are wholly bad and repugnant being unknown to law or to any procedure established by law, proceeding to cover even matters which are not germane to the points at issue; and (c) that the ultimate order passed is against the principles of natural justice. without holding any enquiry enjoined under Chapter XXXVI Criminal Procedure Code and without even hearing the second party. Mr, Nisith Nandan Adhikari. Advocate, appearing on behalf of the wife joined issue. He submitted that the order is a laconic one but the ultimate conclusions are in order being substantially on the Talaknama; that proceedings u/s 488 are short and. summary proceedings and by and large there is a conformance to the said provisions; and that the second party had in fact appeared in the said proceedings and filed his objection.

4. There is not much difficulty in disposing of first contention, raised. The ultimate order passed on 26-6-72 is indeed a cryptic one and Mr. Adhikari, appearing on behalf of the first party opposite party did not seriously dispute the same. He only contended that the ultimate conclusions are or can be justified. It is difficult however to agree with the submissions of Mr. Adhikari. The order impugned is indeed so very laconic that one does look in vain for the steps of reasoning leading on to the ultimate conclusions. The position has not been redeemed in any way by an unfortunate reference to matters which are not even in issue. The first contention of Mr. Mukherjee accordingly succeeds.

5. There is also a considerable force behind the second branch of Mr. Mukherjee's submission. A reference to the order-sheet discloses an unfortunate state of events. It is high-lighted with action and in the first order the learned Sub-divisional Magistrate appears to have begged the issue when he straightway

directed the second party to be arrested in course of the same day. This order is an ex parte one based on an application which has not even all the trappings of a petition u/s 488 Criminal Procedure Code and proceeding broadly on the hypothesis that the second party had abandoned his wife and that he is an accused. This is not all. Expedition is writ large on the face of the orders so much so that immediately on an ex parte application for maintenance the second party was directed to be arrested and produced in course of the day. This closes the first chapter. On the next day viz. on 8-6-72, there is again undue haste and without enquiring into the averments made and contentions raised in the objection petition filed by the second party, he was immediately called upon to produce the Talaknama and other documents by 10 A. M. on the following date; and as if that was not enough, the second party, who was granted a bail of Rs. 8,000/-with a lawyer surety, was further directed not to leave the Basirhat Municipal area on the apprehended ground that there were "strong reasons to believe that the documents may be fabricated." The strength of the reason however remains undisclosed. The proceedings culminated in the order passed on 26-6-72 when, as it appears from the order itself, without hearing the respective parties and holding any enquiry under Chapter XXXVI Criminal Procedure Code, the learned Sub-divisional Magistrate proceeded to pass an order for maintenance "to the babies of Mt. Ambia Khatun." One looks in vain to the records for the talaknama or for any finding in the orders as to why no maintenance was allowed to the first party. To make confusion worse confounded, the learned Magistrate proceeded to give directions regarding a talaknama that may be given to the second wife, rounding up thereby an omnibus order. It is indeed intriguing that all these orders were passed in quick succession, on an application not even specifically stated to be one u/s 488 Criminal Procedure Code and containing no definite prayers excepting for "necessary orders".

6. The facts and circumstances referred to above bring to light an .amazing state of things and one feels like being Alice in Wonderland. In a proceeding apparently for maintenance, started at the instance of the first party and directed against the second party only, the learned Sub-divisional Magistrate went to the length of passing a direction that "as the 2nd wife, Asiya Khatun D/O Alam Bux Sardar of Katiahath. P.S. Baduria is not willing to go and stay with him he may consider giving her talaknama." The learned Sub-divisional Magistrate accordingly has travelled clearly beyond the ambit of the petition filed by "the first party on 6-6-72 as well as the bounds of Section 488 Criminal Procedure Code and the different orders passed by him are not in accordance with the procedure established by law. The said orders therefore are bad and repugnant. In the well-known case of Taylor v. Taylor, reported In (1876) 1 Ch. D 426 Jessel, M. R. observed at P. 431 that "when a statutory power is conferred for the first time upon a court, and the mode of exercising it is pointed out. it means that no other mode is to be adopted...". The said principles were approved of and applied by their Lordships of the Judicial Committee in the case of AIR 1936 253 (Privy

Council) (2) Lord Roche, delivering the judgment of the Judicial Committee, observed at pages 381 and 382 that "the rule which applies is a different and not less well recognised rule viz.. that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." In a later decision the Supreme Court again reiterated the said principles when in the case of State of Uttar Pradesh Vs. Singhara Singh and Others, A. K. Sarkar J. (as His Lordship then was) delivering the judgment of the Court observed at p. 361 that "the rule adopted in Taylor v. Taylor (1876) 1 Ch D 426 is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power is to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted." I respectfully agree with observations made in the above-mentioned cases and I hold that the orders passed in the proceedings impugned are de hors the provisions of Chapter XXXVI, Criminal Procedure Code and in non-conformance to the procedure established by law and are accordingly found to be unwarranted and untenable. The second dimension of Mr. Mukherjee's submissions also succeeds.

7. The third and last dimension relates to a contravention of the principles of natural justice. The materials on the record clearly establish that not only no enquiry was held by the learned Subdivisional Magistrate as enjoined under Chapter XXXVI, Criminal Procedure Code but also the ultimate order of maintenance was passed without affording the second party an opportunity of being heard properly. Where an order affects the rights of an individual, rules of natural justice require that an opportunity should be given to the individual for being heard. The principle of audi alteram partem (hear the other party) is as old as hills and; as was observed by Lord Reid in the case of Ridge v, Baldwin reported in (1963) 2 All ER 66 that "The principle audi alteram partem goes back many centuries in our law and appears in a multitude of judgments of Judges of the highest authority". A distinction however was made at the-outset between an administrative action pure and simple and an administrative act, requiring the exercise of quasi-judicial discretion. It started with the decision of the Privy Council in Nakhuda Ali's case reported in 1951 AC 66 viz. that it was not necessary to give an opportunity to the aggrieved person for making a representation where the act complained of was an administrative act, Lord Reid dissented from the aforesaid decision in (1963) 2 All ER 66, Lord Upjohn also delivering the judgment of the Privy Council in the case of Durayappah v. Fernando reported in (1967) 2 All ER 152 laid down the well-known triple test for the application of the principle of audi alteram partem and in the said judgment the Privy Council itself appears to have gone back upon its decision in Nakuda Ali's case. Lord Parker C. J., again observed in the case of In Re H. K. reported in (1967) 2 WLR 962 that no distinction could be made between administrative acts on the one hand and judicial or quasi-judicial act on the other. A reference

now may be made to the well-known decision of the Supreme Court in the case of A.K. Kraipak and Others Vs. Union of India (UOI) and Others, . Mr. Justice Hegde delivering the judgment of the Supreme Court observed at p. 156 that "The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice.... In other words they do not supplant the law of the land but supplement it". The Supreme Court further referred to the wind of change in the concept of natural justice in recent years and observed that at p. 157 "Often times it is not easy to draw the line that demarcates administrative enquires from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries ..." what particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose." I respectfully agree. The backdrop of proceedings u/s 488 Criminal Procedure Code, in any event does not give any scope for any distinction between an administrative act and a quasi-judicial act. Orders passed in such proceedings are judicial orders. I accordingly hold that the orders impugned are in clear contravention of the principles of natural justice, materially prejudicing the second party-petitioner and the resultant orders, including that dated 26-6-72, cannot accordingly be upheld. The third and last dimension of the arguments advanced on behalf of the second party-petitioner accordingly succeeds.

8. On behalf of the opposite party Mr. Adlhikari ultimately submitted that the intention of the legislature as incorporated in Chapter XXXVI. of the Code of Criminal Procedure is a socio-economic one and as such, technical non-conformances should be overlooked. Mr. Adhikari's contentions are only true to a degree and it is difficult to agree with his ultimate conclusions. Mr. Justice K. Subb'a Rao (as His Lordship then was), delivering the judgment in the case of Jagir Kaur and Another Vs. Jaswant Singh, undoubtedly observed at p. 1525 that "Chapter XXXVI of the Code of Criminal Procedure providing for maintenance of wives and children intends to serve a social purpose". But such a proceeding nonetheless must be disposed of in accordance with law. Considerations to be shown to the wives and children, who are ordinarily helpless persons, do not mean that statutory considerations or the procedure established by law, should be denied to the second party. Justice is not a one-way traffic and on an overall consideration, I hold that the impugned orders should be set aside and the case should go back for a proper disposal in accordance with law.

9. In the result I make the Rule absolute; set aside all the orders from 6-6-72 onwards including the order dated 26-6-72, passed by Shri L. V. Saptarishi, Sub-divisional Magistrate. Basirhat in case No. M109 of 1972; and I direct that the case shall go back to the Court below for being disposed of in accordance with law and expeditiously. in the light of the observations made above, and from the

stage reached on 6-6-72, by some other learned Magistrate to be selected by the learned District Magistrate, 24-Parganas.

10. Let tine records go down as early as possible.