
(1975) 04 RAJ CK 0021

In the Rajasthan High Court

Case No : Criminal Reference No. 143 of 1974

Mohammed Yusuf Khan

APPELLANT

Vs

Mst. Zarina

RESPONDENT

Date of Decision : 05-04-1975

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 488(3)

Citation : (1975) RLW 222 : (1975) 8 WLN 238

Hon'ble Judges : K.D. Sharma, J

Bench : Single Bench

Judgement

K.D. Sharma, J.—This is a reference made by the learned Additional Sessions Judge No. 1, Jodhpur, with a recommendation that the order of the City Magistrate, Jodhpur, dated 3-5-1972, making an allowance of Rs. 50/- p.m. for the maintenance of Mohammed Yusuf Khan petitioner's minor son Allabeli, may be set aside and the case may be sent back to the learned City Magistrate, Jodhpur, for fresh decision in accordance with law.

2. The reference arises under the following circumstances. Mohammed Yusuf was married with Mst. Zarina at Jodhpur on 16-7-1966. After the marriage a son was born in lawful wedlock whose name is Allabeli. On 19-1-1970, Mst. Zarina was divorced by her husband Mohammed Yusuf Khan and the minor child remained with her. As Mst. Zarina had no sufficient means for the maintenance of her minor son and as Mohammed Yusuf Khan had declined to maintain the minor, she appealed to the learned City Magistrate, Jodhpur, for grant of a maintenance allowance for her son Allabeli at the rate of Rs. 60/-, p.m. Notice of this application was even to Shri Mohammed Yusuf Khan, who filed a written reply in the court of the learned City Magistrate denying his liability to pay any allowance for the maintenance of his minor son. The learned City Magistrate made an enquiry into the application and after recording evidence, led by the parties arrived as a conclusion that Allabeli minor was entitled to the minor was entitled to the grant of maintenance at the rate of Rs 50/-, p.m. with effect from

30-11-1970. Aggrieved by this order. Mohammed Yusuf Khan filed a revision petition in the court of the learned Sessions Judge, Jodhpur, from where it was transferred to the court of the Additional Sessions Judge No. 1, Jodhpur, for disposal according to law. The learned Additional Sessions Judge heard the parties and was of the view that no order for maintenance could legally be passed by the City Magistrate, Jodhpur, u/s 488 of the old Criminal Procedure Code unless neglect or refusal on the part of the father to maintain the child was proved. Upon review of the entire evidence led by the parties, the Additional Sessions Judge came to a finding that no such proof of neglect or refusal was given and that the learned City Magistrate did not consider this aspect of the case and passed the impugned order which is clearly unsustainable in the eye of law. Accordingly he has made this reference.

3. I have carefully gone through the record and heard the arguments advanced by Shri Pyare Lal Ojha appearing on behalf of Mohammed Yusuf Khan. In support of the reference it has been argued by the learned Counsel appearing on behalf of Mohammed Yusuf Khan that the impugned order directing payment of maintenance of Allabeli minor, cannot be upheld in view of the fact that no evidence in proof of neglect or refusal on the part of Mohammed Yusuf to maintain his minor son has been adduced in this case and that the City Magistrate ought to have determined this crucial question before making an allowance for the maintenance of the minor. Shri M.M. Singhvi appearing on behalf of Mst. Zarina, on the other hand, contended that it is established by sufficient evidence on the record that Mohammed Yusuf has neglected or refused to maintain his child. In support of his above contention he invited my attention to the statement of Mst. Zarina, wherein she clearly stated on oath that her husband Mohammed Yusuf Khan never paid any sum for the maintenance allowance for the child and that she requested her husband through her relatives to pay some maintenance allowance for the child but he did not give any sum. Shri M.M. Singhvi further urged that the learned City Magistrate has considered the question of refusal or neglect on the part of Mohammed Yusuf Khan to pay maintenance allowance and has arrived at the following conclusion:

xSj lk;y dk ;g mtj gS fd ;g cPps dks j[kus dks rS;kj gS blfy, lk;yk dksbZ [kpkZ ugh ik ldrh A xSj lk;y dk cPpk lk;y ds ikl gS vSkj bl ckr dk Qjhdsu ds chp es dksbZ ruktk ugh gS lk;y dk eqlfye yk gS vuqlkj cPps dks 7 lky dk tc rd u gks vius ikl j[kus dk vf/kdkj gSA

4. Principles of Mohammedan Law by D.F. Mulla 15th Edn.

The mother is entitled to the custody (Hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of child.

xSj lk;y dk cPpk vHkh dsoy 2 1@2 lky dh mej dk gS vkSj dkuwu ds vuqlkj lk;yk dh fgQktru es gS vkSj oks gh ijofj"k djrh gS A

xSj lk;y dk mijksDr mtj dkuwu ds vuqlkj dksbZ out ugh j[krk gS vkSj blfy, es ;g

gksYM djrk gwa A fd xSj lk;y dks vius cPps dh ijofj''k ds fy, [kpkZ nsuk ykteh gSA

5. I have given my anxious consideration to the rival contentions. It is undoubtedly true that before an order for maintenance can be passed u/s 488 of the old Code of Criminal Procedure, there must be neglect or refusal on the part of the husband or the father, as the case may be, to maintain his wife or child. The mere fact that Mohammed Yusuf Khan divorced his wife, Mst. Zarina and the minor child is living with her is not enough to entitle the child to maintenance unless refusal or neglect to maintain him is established. Hence it is necessary to find out whether in this case there is neglect or refusal on the part of Mohammed Yusuf to maintain Allabeli. Mst. Zarina petitioner has appeared the witness box. She did not examine any other witness. From her evidence it is established that Mohammed Yusuf did not pay any allowance for the maintenance of his son Allabeli. She clearly stated on oath in her deposition that she made a request to her husband through her son but he refused to pay any sum and so she had no option but to rush to the court for relief. Curiously enough, Mst. Zarina was not cross examined on this point by Mohammed Yusuf or his learned Counsel. Consequently, I see absolutely no reason to disbelieve her statement. Mohamed Yusuf also examined himself and produced no other witness. His evidence is that neither Mst. Zarina, nor did any of her relative ever ask him to pay maintenance allowance to his son Allabeli. He, however, stated in his deposition that he is prepared to keep Allabeli and his mother with him. The statement of Mohammed Yusuf is not worthy of credence, because he did not pay any sum for the maintenance of his child upto this day. There is no evidence or the record from his side that he at any time made efforts to bring his wife and his child to his house or offered money for the maintenance of his child. He admitted in his cross-examination that a suit for divorce is pending in the court of the Munsiff and that in that suit it has been alleged by Smt. Zarina that she was devoured by her husband. He further admitted that he did not give any notice to Mst. Zarina that she may come along with her child and live with him. These facts are sufficient to show that there is neglect on the part of Mohammed Yusuf to maintain his child in these days when prices of essential commodities have considerably gone up. Hence I am unable to hold upon evidence that there is no proof of neglect or refusal on the part of Mohammed Yusuf to maintain the child.

6. The next question that arises for determination in this reference is whether the learned City Magistrate has considered the question of neglect or refusal on the part of Mohammed Yusuf Khan to maintain the minor child.

7. I have already quoted the relevant portion of the order of the City Magistrate in extenso. In the present case the parties are governed by Mahammedan Law under which a mother is entitled to the custody of her miner child upto the age of 7 years Mst. Zarina is the legal guardian of Allabeli under the Muhammedan Law until the minor attains the age of 7 years. The minor, therefore, cannot be compelled to live separately from his mother. It is undoubtedly true that where a wife deserts her husband without any reasonable excuse, although the husband

is willing to maintain her, she is not entitled to claim any maintenance but the minor child being in her custody has a right to be maintained by his or her father. Apart from this, I have already held above that there is no material on the record to show that Mohammed Yusuf ever made sincere efforts to bring the child to his house. Under these circumstance, he cannot be permitted to take up the stand that he would pay maintenance to Ailabeli only in the latter lives with him. The learned by Magistrate has clearly given a finding that the father is not relieved of his duty to maintain his child merely because the child is in the custody of the mother. Hence, it is not necessary to send back this case to the lower court for fresh decision on the point whether there is neglect or refusal on the part of Mohammed Yusuf to maintain his child Allabeli.

8. The learned Counsel appearing on behalf of Mohammed Yusuf Khan vehemently contented before me that Mst. Zarina having the custody of Ailabeli is not entitled to claim maintenance for the child because Mohammed Yusuf is prepared to keep the child with him. In support of his above contention, he cited an authority of this Court in Smt. Gurdeo Kaur v. Balveer Singh ILR (1960) Raj. 1931 wherein his Lordship Jagat Narayan, J. (as he then was) observed as follows:

Coming now to the question whether Smt. Gurdeo Kaur is entitled to claim maintenance for her daughter the contention on behalf of the applicant is that the Magistrate was not justified in refusing to grant maintenance for the child on the ground that Smt. Gurdeo Kaur was not willing to deliver her in the custody of her husband who was willing to keep her with himself and to maintain her. Reliance was placed on a Single Judge decision of the Hyderabad High Court in Rahimussissa v. Mohd. Ismail AIR 1956 Hyd. 14. It was held that a child does not stay away by his own choice and he cannot be deprived of his right of maintenance because his mother refuses to give him in his father's custody. This case is distinguishable as the parties to it were Mohammedans under whose personal law the mother is entitled to the custody of children. In the present case the parties are governed by the Hindu Law under which the father is entitled to the custody of his minor children. Apart from any consideration of persons law a right to maintenance u/s 488. Cr.P.C. only accrues upon proof of neglect or refusal to maintain. Where the father is willing to keep his child with himself and to maintain him it cannot be said that there is any neglect or refusal to maintain the child and the person having the custody of the child is not entitled to claim maintenance for him. I am fortified in this view by a Division Bench decision in Man Singh v. Dharmun 1894 PR (Cr). No. 18 at page 64 which was followed by the Lahore High Court in Ralla v. Mt. Atti AIR 1914 Lah 417 (1), and Stutan v. Mahtab Bibi AIR 1926 Lah 536.

I have carefully perused the authorities quoted in the judgment of Hon'ble Jagat Narayan J., (As the than was). With great respect to the learned Judge, I am unable to subscribe to view taken by him Under the proviso to Sub-section (3) of Section 488, Cr.P.C. a wife is not entitled to refuse an offer by the husband to

allow her to live with him. The husband is permitted to take a position that he would maintain his wife on condition of her living with him and that if she refused to live with him without any just ground, she cannot claim separate maintenance but the case of a child stands on a different footing, because considerations which would disentitle the mother to claim maintenance would not deprive the child of his right to ask and receive it under the provisions of Section 488 of the old C.P.C. In this present case the child parents of the are governed by Mohammedan law and the father is not entitled to demand custody of a child of less than seven years as a condition precedent for maintaining him. Reference in support of my above view may be made to the State v. Anwarbai AIR 1953 Nag. 133, Akthari Begum v. Abdul Rashid AIR 1937 Lah 236, and Mohideen Bibi v. Bashu Sahab AIR 1937 Mad. 809 , Even in cases where the father has a right to obtain custody of the child the wife can claim maintenance for the child so long as the child lives with her provided it is proved that there is neglect or refusal on the part of the father to maintain the child. It has been observed in Abnash Chander Kanshi Ram Vs. Soshila Devi, that maintenance cannot be refused to a child merely because he is kept in custody by the mother and the mother had been refusing to hand him over to the father. The father is not released from his liability to maintain the child if the child prefers to live with the mother on account of love and affection or attachment for her. The relevant observations made by Hon'ble Gurdav Singh J. in the referred to-above authority of the Punjab High Court are quoted below in extensor:

The position of a child who has not attained the age of discretion or who is not of its own free will or volition living away from the father is peculiar. If such a child is kept in custody by the mother and is prevented from returning to the father, it cannot be said that the child is at fault and that its conduct has disentitled it to maintenance. Even if a child prefers to live with the mother due to natural affection or attachment for her, that would not affect the liability of the father to maintain the child In such circumstances, where the father objects to the custody of the child and asserts his own legal right, the proper course for the father would be to apply for its custody, but so long as the custody of the child remains with the mother, he cannot refuse to pay maintenance for the child irrespective of the fact whether or not the mother has a right to be maintained by him.

I am, therefore, of the opinion that the liability of the father to maintain the child in this case is not affected by the fact that the child is not living with him and is kept out of his custody by the mother.

9. As regards the quantum of maintenance, it may be observed that a sum of Rs. 50/-, awarded to Allabeli by the City Magistrate is not excessive in these days, especially when the prices of essential commodities have gone high after the date of filing of the application for maintenance.

10. The result of the above discussion is that this reference has no force and is hereby rejected.