

HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU

561-A Cr.P.C. No.77/2007

Date of Decision: 10.02. 2010

Vikram Jamwal

Vs

Geetanjali Rajput & anr.

Coram:

MR. JUSTICE GH. HASNAIN MASSODI, JUDGE.

APPEARING COUNSEL:

For Petitioner (s)

: MR. R. S. Thakur, Advocate.

For Respondent (s)

: Mr. L. K. Sharma, Advocate.

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| i) | Whether to be reported
in Press/Journal/Media | : | Yes/No. |
| ii) | Whether to be reported
in Digest/Journal | : | Yes/No. |

Whether father of a minor child, claiming to have no financial resources, can avoid to maintain his child living with his mother, on the ground that mother of the child is an earning hand, and thus obligated to maintain the child, is the question that calls for an answer in the present petition.

The petitioner is keen to wriggle out of his obligation to pay interim maintenance to his minor son, Master Anirudh Singh, only on the ground that the mother of the minor, with whom the minor is presently living, is a Government employee getting about Rs. 10,000/- salary per month, whereas the petitioner is unemployed, pursuing his Ph.D. in Information Technology.

The background facts are as under:-

Ms. Geetanjali Rajput-Respondent No.1 herein, on 06.10.2005 filed an application on her behalf and on behalf of her minor son Anirudh Singh against the petitioner, under Section 488 Criminal Procedure Code, in the Court of Judicial Magistrate, Ist Class (Passenger Tax, Magistrate) Jammu. The respondents' case before the Trial Magistrate was that the petitioner immediately after his marriage with the respondent No.1 solemnized on 18th February, 1999 went to Mumbai to work as a Junior Research Scientist in the National Centre for Science and Technology and has ever since refused and neglected to maintain respondent No.1 as also respondent No. 2 born out of the wedlock, on 18th September, 2000.

According to the respondent No. 1, she incurred huge expenses at the time of birth of respondent No. 2 and also on account of fee and other expenses on admission of respondent No. 2 in Little Blue Bells Nursery and K. G. Preparatory School Rani Talab, Jammu. It was pleaded that the petitioner was getting salary of more than Rs.18,000 per month and was, thus, possessed of sufficient means to maintain the respondents.

The respondents alongside the application under Section 488 Cr.P.C. also filed an application for grant of interim maintenance pending disposal of the main application.

The petitioner resisted the main application as also the interim application on the grounds that the respondent No. 1 had withdrawn from petitioner's association and left the marital home on her own and was, thus, disentitled from claiming any maintenance from the petitioner. The petitioner blaming respondent No. 1 for turbulence in the marital life insisted that the respondent No.1 was working as a Lecturer in Government Gandhi Memorial Science College, Jammu and getting a salary of Rs.8,000/- per month. It was averred that the petitioner was jobless and still pursuing his higher studies and thus, not in a position to pay any allowance to the respondents.

Learned Trial Magistrate vide Order dated 22nd November, 2006 allowed the application for grant of interim maintenance and directed the petitioner to pay an amount of Rs.1,500/- per month to the respondent No.2. The application for grant of interim maintenance as regards the respondent No.1 was deferred, to be disposed of after the parties led their evidence.

The petitioner aggrieved of the order of Learned Trial Magistrate filed a Revision before Learned Sessions Judge, Jammu. The order was impugned before Revision Court on almost the same grounds as are set out in the present petition. Learned Sessions Judge, Jammu not impressed by the grounds urged in the Revision Petition held that the order impugned did not suffer from any illegality or impropriety, so as to warrant interference under Section 435(4-a). The Revision Petition was dismissed and the order of Learned Trial Magistrate upheld.

The petitioner through the medium of instant petition under Section 561-A Code of Criminal Procedure, seeks to invoke inherent powers of this Court to ask for quashment of the order of Learned Sessions Judge dated 3rd May, 2007 and also the order of Trial Magistrate dated 22nd November, 2006.

The weft and warp of the petitioner's case is that in the changing scenario, an earning mother is equally saddled with the responsibility to maintain her minor child/children as a father, more so, when father of the child/children is without any source of income. It is pleaded that as respondent No. 1 is a Government employee having a recurring income of about Rs. 10,000/- per month, therefore, respondent No.1 is

under moral and legal obligation to maintain her minor son and can not ask the petitioner to pay any maintenance allowance to the respondent No. 2. It is further pleaded that the petitioner is himself a liability on his parents and his educational and other expenses, are at present borne by his parents and the Courts below have failed to consider the matter in its right prospective and oblivious of the case set up by the petitioner, fastened the petitioner with a duty to pay maintenance allowance, which the petitioner is not in a position to discharge. The petitioner has signified his intention to take care of his son once the petitioner completes his studies and is able to take a job and earn for himself as also for his family.

Heard.

Learned counsel for the petitioner, while elaborating on the grounds urged in the petition insists that the mother possessed of sufficient means and financial resources is under equal duty as a father to maintain her minor child/children. It is argued that duty under Section 488 Cr.P.C. to maintain a minor child "unable to maintain itself" is cast with equal force on both the parents.

Learned counsel for the petitioner, in this behalf, refers to Section 20, Hindu Adoption and Maintenance Act whereunder “a mother is made equally liable to maintain the child.” It is insisted that the parties being governed by Hindu Law, the Magisterial Court while dealing with an application under Section 488 Cr.P.C. is to have due regard to the rights and duties of the parties under Hindu Law including Hindu Adoption and Maintenance Act. It is argued that the Court must take notice of changing trends in the society and more and more women taking up professions till recently exclusive domain of men and making a significant financial contribution to the family coffers. With new strides in the empowerment of woman, it is insisted, a woman cannot escape responsibility to maintain their children. The application for grant of interim maintenance, according to the learned counsel for the petitioner, should have met outright rejection, in as much as, there was sufficient material before the learned Trial Magistrate to conclude even at the threshold that the petitioner in the facts and circumstances of the case was under no legal obligation to pay maintenance allowance to the respondents.

It is further argued that inability to maintain himself, a condition precedent for grant of maintenance allowance, has not only reference to age of the minor child but also his or her resource and that a minor child living with a mother having sufficient recurring income cannot be said to be, “unable to maintain itself” and, thus, cannot claim maintenance from his father under Section 488 Cr.P.C.

Learned counsel for the respondents on the other hand insisted that the petitioner as father is under moral and legal duty not only to maintain his minor child but also his wife; that the Learned Trial Magistrate while impliedly declining the prayer of respondent No.1 for interim maintenance, has rightly restricted the interim relief to respondent No.2, minor son of the petitioner. It is argued that the petitioner cannot shift his responsibility to maintain his minor child/children to the respondent No.1, only on the ground that the respondent No. 1 was working lady having recurring income from her salary.

Learned counsel for the respondents defending the impugned order argued that the orders are in accordance with law and that the petitioner cannot press into service under Section 561-A Cr.P.C. to

overset the orders, in as much as, there was no abuse of process of the Court.

Section 488 Code of Criminal Procedure saddles a person with duty to maintain his legitimate or illegitimate minor child, subject to the conditions laid down therein.

The provision vests, corresponding right in the child to claim maintenance from his father, in the event, the child is unable to maintain itself. The obligation of father to maintain his child does not at any point of time shift to any other person including mother having custody of the child.

In other words, even if, the child is temporarily living with mother or in custody of any other person, the father continues to be under statutory duty to maintain the child.

The right with which the child is vested under section 488 cannot be bartered away, compromised or surrendered, even by his mother. The language of Section 488(1)(b) makes abundantly clear that the law makers under Section 488 Cr.P.C. put the duty to maintain the child on the father. It is having, this is in mind that reference to, "legitimate or illegitimate child", has been made in Section 488(1)(b)&(c). It is

true that in case of parents, both son and daughter have been held to be under duty to maintain them.

The Supreme Court in (1987) 2 SCC 278 held the expression “his father or mother” to be construed as “her father or mother” having regard to the Joint Committee Report on Code of Criminal Procedure 1973, in which the expression children “instead of son ---- ” as also Section 8 Indian Penal Code and Section 13(1) of General Clause Act. However, the expression “his legitimate or illegitimate child” in Section 488 (1) (b)&(c) cannot be construed as “her legitimate or illegitimate minor child”. Neither language of 488(1) (b)&(c) permits such construction nor is there support to such interpretation by Joint Committee Report on Cr.P.C.1973. The interpretation to make room for shifting of statutory duty to maintain the minor child from the father to the mother or the person having custody of the minor child, shall rob the provisions of purpose and object. There can be no disagreement with learned counsel for the petitioner that when the child is possessed of sufficient resources and thus, not unable to maintain itself, the father of the child is discharged from his duty to maintain the child. However, the income, if any, of mother cannot be said to make the child possessed of sufficient resources.

Reliance placed on law laid down in **AIR 1919 Madras 193**, is thus misplaced. In the said case, the child had sufficient funds available from “TAVAZHI” and the Court disallowing the application for maintenance held that “unable to maintain itself” did not merely refer to the tender age of the child but must have reference to its financial dependence. The facts of the present case are markedly different from the facts to the reported case. AIR 1919 Madras 193 thus does not extend any support to petitioner’s case.

In **AIR 1956 Madras 154**, application by mother for maintenance of children was resisted on the grounds that the mother was possessed of sufficient means and as she was the natural guardian and charged with the custody of the wards she must maintain them out of her own income. The Court rejecting the plea observed that the duty of maintaining the child is cast upon the father, and whatever may be the civil law, the provisions of S. 488, Criminal P.C. are quite “equal to the office of enforcing the duties of the father” which is to maintain the child, legitimate or illegitimate. No such duty is cast on the mother, either under the Code or any other law. Under the Criminal Procedure Code, it is clear that it is the father who has got to maintain the child and

therefore the court is entitled to order a certain amount to be paid to the guardian of the minor children towards the maintenance of the children.

The obligation of the mother under Section 20 Hindu Adoption and Maintenance Act to maintain the child does not in any manner dilute the statutory duty of the father under section 488 Cr. P.C to maintain the child. The duty to maintain the child under Section 488 Criminal Procedure Code remains to be that of the father and in the event, the father is of the belief that any other person including the mother, independent of Section 488 Cr.P.C is under duty to maintain or contribute to maintenance of the child, it is for him to bring appropriate action against such person. But in no case can father washes hands of the duty cast upon him under Section 488 Cr.P.C. to maintain his minor child.

The object and purpose of Section 488 Cr.P.C., it has been pointed out time and again, is to save wives, children and parents from destitution and vagrancy. The obligation to maintain wife, minor children and parents unable to maintain themselves though essentially civil in nature has been made part of the Code of Criminal Procedure, so as to inculcate a sense of urgency in the matters regarding maintenance and

ensure that such matters are speedily dealt with, unhampered by procedural wrangles as are come cross in civil proceedings.

A person from the very moment, he takes the marital vow, makes himself duty bound to maintain his wife and after he is blessed with child/children to maintain the child/children. A person cannot escape his moral and legal obligation to maintain his wife or minor child/children, unable to maintain herself/itself on the ground that he is following higher academic pursuits and thus, does not intend to presently take up a job. A person cannot plead penury to avoid his statutory duty to maintain his child, unable to maintain itself. It is to emphasise nature of duty cast on a person to maintain his wife, child/children and parents that "Sufficient means" has been interpreted to include "capacity to earn". It has been held that as long as a person is able bodied with capacity earn, he cannot escape his legal duty to maintain his wife, children and parents unable to maintain themselves, on the ground that he does not actually have any income. Once a person enters into wedlock and decides to raise a family he cannot turn around and say that he is not ready to perform his moral and legal obligation flowing out of the wedlock, as he is in no

mood to earn a livelihood. It is for the person to decide to marry or not to marry but once a person decides to marry, he is duty bound to perform all the duties and discharge all the obligations that the society and law expect and require him to discharge.

The contention of the petitioner that the petitioner is pursuing Ph.D. Programme and has no income if accepted still the petitioner cannot be held exempted from discharging his marital obligations including an obligation to maintain his wife and minor child. It is for the petitioner, after having contracted the marriage and decided to start a family, to find ways and means, to maintain his wife and child/children.

Even if, respondent No.1 on ethical and moral grounds is held to be expected to chip in her resources for maintenance of her child, yet the petitioner cannot escape the responsibility to contribute towards the maintenance of his minor child, as the duty to maintain respondent No.2 primarily remains that of the petitioner.

In the case in hand, the Learned Magistrate while awarding interim maintenance allowance of Rs.1500/- per month in favour of respondent No.2, appears to have taken note of the income of respondent No.1 as

has been pointed out by the learned Sessions Judge in order dated 22nd November, 2006.

It is a fact of common knowledge that an amount much more than the amount of maintenance granted by the Court below is required to meet expenses of school going child like the respondent No.2, even at Pre-nursery stage, on his food, clothes, books, school fee, health care etc. Learned Magistrate has asked the petitioner to pay an amount of Rs.1500/- per month to respondent No.2, which represents only part of the expenses that must be incurred by respondent No.1 on maintenance of respondent No.2.

This apart the order under challenge is a threshold order. The Trial Court has yet to record evidence likely to be adduced by the parties. The respondents' case before the Trial Court was that the petitioner was drawing salary of Rs.18,000/- per month from his employer. The petitioner has controverted the averments. It is for the Trial Court to decide after an objective appraisal of the evidence brought on the file by the parties, whether the petitioner is possessed of sufficient means and whether the respondents are unable to maintain themselves.

The order impugned is temporary in nature subject to final outcome of the application. The

grounds urged in the petition are factual in character and can be dealt with only after the parties adduce evidence in support of their stands.

The order impugned in the present petition does not amount to abuse of process of the Court and exercise of inherent powers under Section 561-A Cr.P.C. is not called for.

Resultantly, the petition being meritless is hereby dismissed. The record be send down. The parties shall cause their appearance before the Trial Court on 25.02.2010

Massodi)

Jammu
10th February, 2010.
Ram Murti

(Gh. Hasnain

Judge