Raj Kumari Vijh vs Dev Raj Vijh on 15 February, 1977

Equivalent citations: 1977 AIR 1101, 1977 SCR (2) 997, AIR 1977 SUPREME COURT 1101, (1977) 2 SCC 190, 1977 SC CRI R 278, (1977) 2 SCR 997, 1977 CRI APP R (SC) 210, 1977 ALLCRIC 150, 1977 SCC(CRI) 294

Author: P.N. Shingal

Bench: P.N. Shingal, P.N. Bhagwati, A.C. Gupta

PETITIONER:
RAJ KUMARI VIJH

Vs.

RESPONDENT:
DEV RAJ VIJH

DATE OF JUDGMENT15/02/1977

BENCH:
SHINGAL, P.N.
BENCH:
SHINGAL, P.N.
BHAGWATI, P.N.
GUPTA, A.C.

CITATION:
1977 AIR 1101 1977 SCR (2) 997
1977 SCC (2) 190

ACT:
Code of Criminal Procedure, 1898--Ss. 488 and 531--Scope of.

HEADNOTE:
Section 531 of the Criminal Procedure Code, 1898 provides that no finding, sentence or order of any criminal Court shall be set aside merely on the ground that the enquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, subdivision or other local area, unless it appears that such error has in Tact occasioned a failure of justice.

In her claim for maintenance from the respondent, who was her husband, the appellant filed a petition under s. 488 Cr.P.C. in the Court of a Magistrate. The respondent took objection to the Court's jurisdiction to try the case on the

ground that the parties did not reside within its jurisdiction. The Magistrate passed an order that the decision on the question of jurisdiction must await the recording of evidence on the whole case. The respondent did not challenge that order. Ultimately the Magistrate held that he had the jurisdiction to entertain the application and decided it on the merits. The Sessions Judge referred the respondent's revision application to the High Court. The High Court heard that by taking recourse to s. 531, proceedings could not be entertained in a Court which had no jurisdiction--more so when an objection had been taken against its maintainability--and that s. 531 could cure the infirmity only if the case had been fought on merits.

Allowing the appeal,

HELD: The High Court erred in taking the view that s. 531 would not be applicable to this case merely because the objection as to the jurisdiction was raised by the respondent right at the first instance. [1003 F]

1. (a) Territorial jurisdiction is provided as a matter of convenience for the Court, the accused and the witnesses. Under s. 488(8) a proceeding may be taken against any person m any district where he resides or is or where he last resided with his wife. [1001 F-G]

(b) Where a Magistrate has the power to try a particular application under s. 488 and the controversy relates solely to his territorial jurisdiction, there should, Ordinarily, be no reason why s. 531 should not be applicable to the order made by him. [1001 H]

(c) The true meaning_of s. 531 is that while it will not uphold an order passed in proceedings wilfully taken in a wrong place, or enable a Magistrate to confer jurisdiction on himself when he knows that he has no such jurisdiction, there is no reason why a Magistrate, who is otherwise duly empowered to make an order under s. 488(1), cannot proceed with an application under that subsection for the purpose of deciding whether he has the territorial jurisdiction to entertain the application and to decide the application on the merits if he fin-ds that he has the territorial jurisdiction. Section 531 cannot be said to be in-applicable to a case where there is a controversy as to the district where the proceeding should be held, the parties lead evidence in support of their respective contentions about the correct place of the proceeding, and the Magistrate finds it necessary (after taking note of the entire evidence on the controversy) to arrive at a decision on the basis of the balance of probabilities. There is no reason why, in such a case, s. 531 should not be applicable merely because the Magistrate, while considering the evidence relating to jurisdiction, unwittingly

998

makes a reference to s. 531 in passing and not for the purpose of assuming jurisdiction under it If the Magistrate in this case, had thought of assuming jurisdiction under s.

531, he would not have proceeded to record the evidence of the parties, on the question of the territorial jurisdiction, or referred to it at length in his order and arrived at the decision that he had the jurisdiction. [1002 D-G]

Purushottamdas Dalmia v. The State of West Bengal [1962] 2 S.C.R. 101 followed.

Radharani v. Rahim Sardar. A.I.R. 1.946 Calcutta 459. Sakuntala v. Thirumalyya [1966] 2 M.L.J. 326, State v. Tavara Naika A.I.R. 1959 Mysore 193, Sultan Chand v. Yogindra Nath Baz. A.I.R. 1944. Peshawar 25 and Satwant Singh v. Smt. Jaswant Kaur, [1956] A.L.J. 134, held inapplicable.

In the instant case, the Magistrate was one of the Magistrates mentioned in s. 488(1). He had specifically rejected the respondent's application for confirming the evidence to the question of jurisdiction or to try that as a preliminary issue. It cannot therefore be said that he had given himself jurisdiction by recourse to s. 531. The Magistrate had set out the point that arose for consideration, discussed the entire evidence and taken into consideration the conduct of the respondent--all of which led to the conclusion that he had the jurisdiction to try the application. There is therefore no reason why s. 531 should not be held to be applicable to this case. [1005F-H]

(d) The High Court erred in holding that s. 531 would not be applicable because the respondent had reserved a right to file a written reply on merits after the question of jurisdiction had been decided. The Magistrate had specifically overruled the respondent's objection, and directed the parties to adduce evidence, and deferred the decision on the question of jurisdiction until after the evidence had been recorded. The respondent did not file his reply on the merits. [1003G-H]

(e) The High Court erred in holding that there was failure of justice because the respondent never led evidence. The Magistrate called upon the parties to lead evidence. While the appellant obeyed the order, the respondent persisted in thinking that the Magistrate had no jurisdiction, refused to examine his witnesses on merits, and chose to confine his evidence to the question of jurisdiction. [lOO4F-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Criminal Appeal No. 447 of 1974.

(Appeal by Special Leave from the Judgment and Order dated the 14th March 1974 of the Delhi High Court in Crimi- nal Revision Petition No. 61 of 1974.

Mrs. Urmila Kapoor and Miss Kamlesh Bansal, for the appel- lant.

V.C. Mahajan and S.L.Aneja, for respondent. The Judgment of the Court was delivered by SHINGHAL, J.--This appeal by special leave is directed against the judgment of the Delhi High Court dated March 14, 1974, allowing the revision application of. respondent Dev Raj Vijh and 'dismissing the appellant's application dated March 18, 1969, under section 488 of the Code of Criminal Procedure, 1898, hereinafter referred to as the Code. Appellant Raj Kumari Vijh was married 'to respondent Dev Raj Vijh in Delhi, in June 195'0. It is the admitted case of the parties that they were living separately from 1953. The appellant filed her first application for maintenance under section 488 of the Code, in 1955, but it was dismissed. The respondent filed an application for divorce, or judicial separation, in 1956 in Aligarh (Uttar Pradesh). It was ultimately dismissed on appeal on March 29, 1968. In the meantime the appellant filed a suit against the respondent for recovery of her "stridhen" in Delhi in 1956. It was decreed on appeal by the Delhi High Court in 1967, for Rs. 6,458/-. The appel- lant gave a notice to the respondent on June 24, 1968, claiming maintenance as a 'deserted wife. Nothing came out of it and she filed the present application under section 488 of the Code in the .Court of the Delhi Magistrate on March 18, 1969. It was stated in the application that the appellant had lived with the respondent in Delhi and Aligarh as his legally wedded wife, and thereafter at village Lampur, P.S. Narela, Delhi, towards the end of December 1968, because the respondent visited her there for a settle- ment and for non-execution of the decree which she had obtained for Rs. 6,458/- on account of her "stridhan". It was stated in the application that the parties lived at Lampur, as husband and wife and there was cohabitation. The appellant prayed for an order allowing her Rs. 450/- per month for maintenance' as the respondent had sufficient means but had neglected or refused to maintain her. The respondent filed a reply on April 29, 1969 in which, according to the Magistrate, there was no specific denial of the averment that the parties last resided together at Lampur. An objection was however taken that as the earlier application was dismissed on February 2, 1956, the second application was barred on the principle of res judicata. An objection was taken to the jurisdiction of the Delhi Court on the ground that the respondent never resided, permanently or temporarily in Delhi. We have not found it possible to go through the reply because it has been stated by counsel for the parties that the original record has been destroyed. The Magistrate passed an order for production of evidence. The respondent thereupon prayed that the question of juris- diction may be decided before recording the evidence. That was not agreed to by the magistrate. He made an order on November 19, 1969 that the question of jurisdiction must await the recording of the evidence on the whole case. The respondent did not challenge that order or apply for permis- sion to file additional reply. On the other hand, he asked for the holding of an identification parade for the purpose of showing that some of the appellant's witnesses did not even know him. Both the parties led their evidence, al- though it appears that the respondent did not like to avail of the opportunity which was given to him to lead evidence on the merits. He did not even apply for permission to file any ,additional reply when the Magistrate recorded the appellant's evidence on her application for maintenance as a whole.

Ultimately the Magistrate made his final order on May 21, 1973. He took the view that there was no specific denial of the appellant's allegation that the parties last resided together, as husband and wife, in village Lampur, in Delhi, towards the end of December in 1968.

He took notice of the fact that the plea of bar against the maintainability of the second application because of the dismissal of the first application, was not pressed by the respondent and after

referring to the entire evidence in details, he reached the conclusion that he had the jurisdic- tion to entertain the application, and granted maintenance allowance at the rate of Rs. 125/- per month, with effect from March 18, 1969, along with an order regarding the mode of payment of the arrears. The respondent applied for a revision of that order, and the Additional Sessions Judge referred the case, to the High Court on November 30, 1973, for dismissal of the application (under section 488 of the Code) on the ground that the Delhi Magistrate had no juris- diction to entertain it. As the High Court has allowed the reference, and dismissed the revision application which was filed by the appellant for an increase in the mainte- nance allowance, the appellant has come up to this Court by special leave.

In its impugned judgment dated March 14, 1974, the High Court has recorded the finding that the parties did not reside together at village Lampur, and for that reason it took the view that the Delhi Court had no jurisdiction to entertain the appellant's application under section 488 of the .Code. Counsel for the appellant has vehemently urged that the finding of the High Court is incorrect, but as it is a finding of fact, we shall proceed on the assumption that does not call for interference in this appeal. The question however remains whether section 531 of the Code would be applicable to the case? The High Court has held that the section would not be applicable, and that is why it has passed the impugned order for the dismissal of the application of the appellant under section 488 of the Code. The High Court has taken that view for the following reasons ,--

(i) The objection as to jurisdiction was raised "right at the first instance by the husband".

(ii) The respondent "specifically reserved his right to file a written reply on merits after the question of jurisdiction was decid- ed".

(iii) As the respondent had "reserved his right to lead evidence on merits, it is not a case where the husband deliberately gave up his right to lead evidence on merits .....

"

(iv) There was "obvious prejudice and failure of justice" the respondent as he never led evidence on the merits.

(v) It was necessary for the appellant to.

prove that the respondent had refused and neglected to maintain her, and that "obviously requires an opportunity to be given to the husband to prove his case,, if it be one, that he has not refused or refuses or neglected to maintain his wife or what his income and means is".

(vi) "Before a decision on merits can be given the husband has the undoubted request (sic) to lead evidence on merits".

(vii) A proceeding cannot be entertained in a court which has jurisdiction by simply taking recourse to section 531 of the Code, when an objection has been taken against main- tainability, for otherwise

the provision relating to jurisdiction would become nuga- tory. Section 531 "can cure the infirmity after the case has been fought on merits."

We have examined these grounds, but we are constrained to say that they are not tenable in the facts and circumstances of this case. Section 531 of the Code reads an follows,--

> "531. No finding, sentence or order of any Criminal Court shah be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice."

The section therefore relates to a defect of jurisdiction. As has been stated by this Court in Purushottamdas Dalmia v. The State of West Bengal(1) those are two types of jurisdic- tion of a criminal court, namely, (1) the jurisdiction with respect to the power of the court to try particular kinds of offences, and (2) its territorial jurisdiction. While the former goes to the root of the matter and any transgression of it makes the entire trial voild, the latter is not of a peremptory character and is curable under section 531 of the Code. Territorial jurisdiction is provided "just as a matter of convenience, keeping in mind the administrative point of view with respect to the work of a particular court, the convenience of the accused who will have to meet the charge levelled against him and the convenience of the witnesses who have to appear before the Court'. Sub-section (8) of section 488 in fact provides that proceedings under the section "may be taken against any person in any district where he resides or is, or where he last resided with his wife or, as the case may be, the mother of the illegitimate child." This therefore is ordinarily the requirement as to the fling of an application under section 488 within the limits of the jurisdiction of the magistrate concerned. So where a magistrate has the "power' to try a particu- lar. application under section 488, and the controversy relates solely to his territorial jurisdiction, there should, ordinarily, be no reason why section 5 31 of the Code should not be applicable to the order made by him. It has therefore to be examined whether there were any such circumstances in this case for which the High Court could justifiably refuse to apply the provisions of section 531. (1) [1962] 2 SCR. 101.

The first reason why the High Court .has not given the benefit of section 531 to the appellant is that an objection as to the jurisdiction of the Delhi Court was raised by the respondent "right at the first instance." Counsel for the respondent has strenuously argued that such. a benefit will not be available in a case where the magistrate knew that he had no jurisdiction, and persisted in proceeding with the trial under the, impression that section 531 of the Code, would, at any rate, validate his order. That, according to the counsel, amounted to an order by the magistrate giving the jurisdiction to himself by virtue of section 531. Reliance in this connection has been placed on Radharani v. Rahim Sardar(1), Sakuntala v. Thirumalayya(2), State v. Tavara Naika(3), Sultan Chand v. Yogindra Nath Bar (4), and Satwant Singh v. Smt. jaswant Kaur (5).

As is apparent, section 531 does not entitle a magis- trate, who is not a magistrate of the class referred to in sub-section (1) of section 488, to proceed with an applica- tion for maintenance. In fact even a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class will not

be entitled to proceed with such an application if he knows that the proceedings do not fall within his juris- diction under sub-section (8) of section 488. The true meaning of section 531 is that while it will not uphold an order passed in proceedings wilfully taken in a wrong place, or enable a magistrate to confer jurisdiction on himself when he knows that he has no such jurisdiction, there is no reason why a magistrate, who is otherwise duly empowered to make an order under sub-section (1) of section 488 of the Code, cannot proceed with an application under that subsec- tion for the purpose of deciding whether he has the territo- rial jurisdiction to entertain the application and to decide the application on the merits if he finds that he has the territorial jurisdiction. Section 531 cannot thus be said to be inapplicable to a case where there is a controversy as to the district where the proceeding should be held, the parties lead evidence in support of their respective contention about the correct place of the pro- ceeding, and the magistrate finds it necessary (after taking note of the entire evidence on the controversy) to arrive at a decision on the basis of the balance of probabilities. In other words, there is no reason why, in such a case, section 531 should not be applicable merely because the magistrate, while considering the evidence relating to jurisdiction, unwittingly makes a reference to section 531 in passing and not for the purpose of assuming jurisdiction under it. If the magistrate,in this case, had thought of assuming juris- diction under section 531, he would not have proceeded to record the evidence of the parties, on the question of the territorial jurisdiction, or referred to it at length in his order and arrived at the decision that he had the jurisdic- tion.

We have gone through the cases which have been cited by the counsel for the respondent. Radharani and another v. Rahim Sardar (supra) was a case where the magistrate pro- ceeded with the trial (1) A.I.R. 1946 Calcutta 459. (2) (1966) 2 M.L.J. 326. (3) A.I.R. 1959 Mysore 193. (4) A.I.R. 1944 Peshawar 25.

(5) (1956) A.L.J. 134.

in the wrong local area with his eyes open to the fact that he had no territorial jurisdiction, and the Calcutta High Court had to observe that the section does not confer any jurisdiction. This is however not so in the present case, because the Magistrate recorded the evidence on the question of territorial jurisdiction, and he went to the extent of making 'a reference to the entire evidence which was led on the point. Moreover he took note of the fact that the re- spondent had not specifically dened that he lived at village Lampur with the appellant. This is therefore not a case where the Magistrate proceeded with the application even though he had the knowledge that it did not fail within his jurisdiction. The same is the position in regard to Sakunlala v. Thirumalayya (supra) and it also cannot avail the respondent. We have gone through State v. Tavara Naika (supra). It was not a case under section 488 of the Code. What has been said there is that the curative provisions of section 531 should not be an excuse for overlooking a mate- rial irregularity pertaining to jurisdiction when it is brought to the notice of the Court before the commencement of the trial. It does not therefore lay down anything different from what has been stated in Radharani v. Rahim Sardar (supra). It was a case where the accused was commit- ted to a wrong sessions division, and the mistake was cor- rected because the trial had not commenced. Sultan Chand & another v. Yogindra Nath Baz (supra) was also not a case under section 488 of the Code. It has been held in that case that when the question of jurisdiction has been raised before the trial magistrate, it is his

duty to determine the point, otherwise the provisions 'as regards jurisdiction would never be enforced and that section 531 cannot be applied to such a case. As has been stated, the Magistrate in the present case addressed himself to the question of jurisdiction, recorded detailed evidence on it, considered the evidence in his order and reached the conclusion that the application was maintainable in his court. This is therefore a different case. Satwant Singh v. Smt. Jaswant Kaur (supra) was a case under section 488 of the Code. It has been held there that where the question of jurisdiction had been raised before the trial magistrate, it wa.s his duty to determine the point, and that he cannot proceed with the trial in a wrong local area with his eyes open to the fact that he has no territorial jurisdiction. As has been shown, this was not so in the present case. It would thus appear that the High Court erred in taking the view that section 531 would not be applicable to this case merely because an objection as to jurisdiction was raised by the respondent "right at the first instance."

The second ground mentioned by the High Court is that section 531 would not be applicable because the respondent had specifically reserved his right to file a written reply on merits after the question of jurisdiction had been decid- ed,. We find that this is clearly a misstatement of the facts, for counsel for the respondent was not able to refer to anything on the record to show that the respondent re- served any such right to file a written reply on the merits at a later stage, after the question of jurisdiction was decided against him. On the other hand, we find that the Magistrate specifically overruled the objection of the respondent, and made an order directing the parties adduce their evidence on the whole case and specifically rejected 16--206SCI/77 the respondent's application for deciding the question of jurisdiction in the first instance. The Magistrate has clearly stated that an order was made. by him for the pro- duction of evidence "in the case", and that he decided to defer a decision of the question of jurisdiction until after the evidence had been recorded as a whole. The Magis- trate has further stated that the respondent did not file his further or additional reply even then. The High Court therefore undoubtedly erred in thinking that the respondent specifically reserved his right to file a written reply on the merits later on. As has been shown, no such reservation was permitted by the magistrate, and counsel for the re- spondent was not able to show how the respondent could unilaterally make such a reservation for himself. It may be that, in a given case, it may be advisable for a magistrate to confine the evidence of the parties, in the first in- stance, to any preliminary objection relating to jurisdic- tion, and to decide the controversy on the merits thereaf- ter, but as this was not so in the present case, we arc unable to find any justification for the second ground mentioned. by the High Court.

The third ground of the High Court is also untenable, for it has refused to apply section 531 on the ground of prejudice for the reason that the respondent had reserved his right to lead evidence on the merits and did not delib- erately give up that right. 'Here again, counsel for the respondent was unable to show how it could be said that the respondent made any such reservation, or was entitled to it when, as has been stated, the Magistrate had rejected his application for deciding the question of jurisdiction as a preliminary question and had passed an ,order for the pro- duction of all the evidence in the case. If therefore the respondent persisted in refusing to produce his evidence in spite of that order of the Magistrate, he alone was to blame for it, and the High Court erred in taking the view that he had reserved the right to lead evidence at a later stage. The High Court has taken the view that this is a case where there was obvious prejudice to the respondent and a failure of

justice as he never led evidence on the merits. But the High Court failed to appreciate that the respondent had to thank himself for that predicament. He knew that the Magistrate had passed an order refusing to try the question of jurisdiction in the first instance and had rejected his application to that effect. He also knew that the Magis- trate had called upon the parties to lead all their evidence. The appellant obeyed that order and examined her witnesses. The respondent persisted in thinking that the Magistrate had no jurisdiction, and he refused to examine the witnesses on the merits and thought it sufficient to confine his evidence to the question of jurisdiction. So. if he deliberately refrained from producing his evidence on the merits, there can be no justification for him to raise the question of prejudice or failure of justice. As it is, Counsel for the respondent has not been able to refer to any application of the respondent. whether oral or documentary, expressing a desire to lead his evidence on the merits. The fact of the matter therefore is that the respondent had decided that he would not lead any evidence on the merits, and confined his evidence to the question of jurisdiction. It may be that, as has been argued by the Counsel for the appellant, he did so because he realised that he had no defence to make on the merits of the claim for maintenance.

The fifth ground mentioned by the High Court is that before an order could be passed under section 488(1) it was necessary to prove that the husband had refused or neglected to maintain his wife, and that required an oppor- tunity to be given to the husband to prove, his case. But the argument is futile because the respondent did not set up any defence on the merits. On the other hand, the Magis- trate. found that there was no controversy about the facts that the appellant was the lawfully wedded wife of the respondent and that she had been living separately for the last many years and was entitled to maintenance as the respondent had neglected her or had refused to maintain her. In its sixth ground the High Court has stated that before a decision could be given on the merits, the husband could make a request for permission to lead evidence on merits. It would be sufficient to say that Counsel for the respondent was unable to point out when and how any such request was made but was refused by the Magistrate. Lastly, the High Court has taken the view that a pro- ceeding cannot be maintained by a court which has no juris- diction by simply taking recourse to section 531 of the Code when an objection has been taken against its maintenance, for otherwise the provision relating to jurisdiction would become nugatory. This point has already been considered earlier and need not be re-examined.

It is thus quite clear that the High Court committed a serious error of law in refusing to. invoke section 531 in the facts and circumstances of this case. It is not in controversy that the Magistrate who took the proceedings, on the appellant's application under subsection (1) of section 488, was one of the magistrates mentioned in that sub-sec- tion. The respondent raised a controversy as to his local jurisdiction, and the Magistrate ordered the parties to lead all their evidence. He specifically rejected the applica- tion for confining the evidence to the question of jurisdic- tion, or to try that as a preliminary issue. It is there- fore futile to contend that the Magistrate gave himself jurisdiction by recourse to section 531 of the Code. On the other hand in his final order, he set out the points which arose for consideration on the question of jurisdic- tion, made a mention, at length, of the entire evidence on that question and took into consideration the conduct of the respondent and the ease law as well as the respondent's reply. All that led him to the conclusion that he had jurisdiction to try the application. There is therefore no reason why section 531 should not be held to be applicable to this case. As has been shown, it is futile for Counsel for the respondent to raise the question of

prejudice, or to say that there was a failure of justice, because the respondent did not lend his evidence on the merits. As we have pointed out, he did So deliberately and in defiance of the order of the Magistrate calling upon him to lead his evidence on the whole case. The respondent cannot in fact be heard to raise the question of prejudice when on the uncontroverted and well established facts the Magistrate found that the respondent was a person who had sufficient means and had neglected to maintain his wife, and made an order that he shall make a monthly allowance of Rs. 125/- per mensem for her maintenance.

The appeal is allowed and the impugned order of the High Court dated March 14, 1974, is set aside, with costs.

P.B.R. Appeal allowed.