

Supreme Court of India

Jagir Kaur & Another vs Jaswant Singh on 13 February, 1963

Equivalent citations: 1963 AIR 1521, 1964 SCR (2) 73

Author: K Subbarao

Bench: Subbarao, K.

PETITIONER:

JAGIR KAUR & ANOTHER

Vs.

RESPONDENT:

JASWANT SINGH

DATE OF JUDGMENT:

13/02/1963

BENCH:

SUBBARAO, K.

BENCH:

SUBBARAO, K.

DAYAL, RAGHUBAR

MUDHOLKAR, J.R.

CITATION:

1963 AIR 1521

1964 SCR (2) 73

CITATOR INFO :

RF 1970 SC 446 (9)

RF 1985 SC 945 (8)

ACT:

Maintenance of Wives and children--Construction of statute
--Jurisdiction of the Magistrate to entertain petition--If
a mixed question of fact and law--If can be raised for the
first time before this Court-- Code of Criminal Procedure,
1898 (Act 5 of 1898), ss. 2(1), 488(8).

HEADNOTE:

The respondent who was born in the Ludhiana District was married to the first appellant. He took up a job in Africa and after staying there for some time he came to India and stayed with his wife for 5 months, He then went to Africa and after staying there for 5 or 6 years came to India and took the appellant with him to Africa and a daughter was born to them there. The appellant was sent back with the child and she was staying in the District of Ludhiana with the child. It is admitted that the respondent had bought property worth Rs. 25,000/- in that District and that the petition for maintenance was filed by the appellant and the notice was served on him while the respondent was in that

District. The respondent filed a counter affidavit, obtained exemption from personal appearance at the time of hearing of that petition and thereafter left for Africa.

74

The 1st Class Magistrate Ludhiana held that he had jurisdiction to entertain the petition filed by the appellant under s. 488 of the Code of Criminal Procedure, 1898, as the appellant and the respondent had last resided in the District Ludhiana. He awarded for the wife's maintenance at the rate of Rs. 100/- per month and for the daughter at the rate of Rs. 50/- per month. A revision petition filed by the respondent before the Additional Sessions judge was rejected. But the High Court holding that the 1st Class Magistrate had no jurisdiction to entertain the petition allowed the revision petition filed by the respondent. The present appeal is by way of special leave granted by this Court.

The main contention on behalf of the appellants before this Court was that the respondent having last resided with his wife in the District of Ludhiana and he having been there at the time when the petition under s. 488 was presented the Magistrate had jurisdiction to entertain the petition. It was further contended that the respondent having submitted to the jurisdiction of the Magistrate could not question his jurisdiction.

Held, that Ch. XXVI of the Code of Criminal Procedure providing for maintenance of wife and children intends to serve a social purpose. Section 488 prescribes alternative forums to enable a deserted wife or a helpless child, legitimate or illegitimate to get urgent relief. Proceedings under the section can be taken against the husband or the father as the case may be, in a place where he resides permanently or temporarily, or where he last resided in any District in India or where he happens to be at the time the proceedings are initiated. The expression "resides" implied something more than a brief visit but not such continuity as to amount to domicile.

Sampoornam v. N. Sandaram, (1952) 2 M. L. J. 573, referred to.

A casual or flying visit to a place for a temporary purpose was not covered by the word residence.

Khairunnissa v. Baskir Ahmad, (1929) I.L.R. 53 Bom. 781, Flowers v. Flowers, (1910) 1. L. R. 32 All. 203 and Balakrishna v. Sakuntala Rai, A. 1. R. 1942 Mad, 666, referred to.

The sole test on the question of residence was whether a party had animus manendi or an intention to stay for an indefinite period at the place.

75

Charan Das v. Surasti Bai, A. 1. R. 1940 Lah. 449 referred to.

The appellant not having raised the plea of submission to jurisdiction either in the pleadings or in any of the courts

below will not in the absence of special circumstances be allowed to raise it before this Court.

Where a legislature has no power to make laws in respect of any territory the operation of the law made by it cannot extend to that territory.

The facts and circumstances of the case show that the respondent last resided with his wife in a place within the jurisdiction of the First Class Magistrate, Ludhiana, and that he was in a place within the jurisdiction of the Magistrate on the date when the appellant filed her application for maintenance against him.

In *re Druker* (No. 2) Basden, Ex Parte, [1902] 2 K. B. 210 referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 143 of 1961.

Appeal by special leave from the judgment and order dated May 22, 1961, of the Punjab High Court, Chandigarh in Criminal Revision No. 1448 of 1960.

S. K. Kapur, for the appellants.

Harnam Singh Chadha and Harbans Singh, for the respondent. 1963. February 13. The judgment of the Court was delivered by SUBBA RAO J.-This appeal by special leave raises the question of true construction of s. 488(8) of the Code of Criminal Procedure.

Jagir Kaur, the first wife of jaswant Singh, was married to him in 1.930. Tile said jaswant Singh was employed in the police force in Africa. The Maklawa ceremony took place about 7 years after the marriage, when the respondent was away In Africa. Thereafter, the first appellant was taken to her mother-in-law's house, and after living there for a few years she returned to her parental house. 5 or 6 years thereafter, jaswant Singh came to India on 5 months' leave and the couple lived in jaswant Singh's or his mother's house at Hans Kalan it is not clear to whom the house belongs-for a period of 5 months and thereafter jaswant Singh left for Africa. Before going to Africa, jaswant Singh married another wife and took her with him to Africa. After 5 or 6 years, he came back to India on leave and took the first appellant also to Africa. There she gave birth to a daughter the second appellant. As disputes arose between them, he sent her back to India, promising to send her money for her maintenance but did not (lo so. In the year 1960, he came back to India. It is also in evidence that he had purchased property in Ludhiana District for Rs. 25,000/-. When he was admittedly in India, the first appellant filed a petition under s. 488 of the Code of Criminal Procedure in the Court of the First Class Magistrate, Ludhiana, within whose jurisdiction the respondent was staying at that time. The petition was filed by the first appellant on behalf of herself and also as lawful guardian of the second appellant, who was a minor, claiming maintenance at Rs. 200/- per month for both of them on the ground that the respondent deserted them and did not maintain them. The respondent filed a counter-affidavit denying the allegations and pleading that the said court had no on the ground that

he never resided within its district nor did he last reside with the first appellant in any place within its jurisdiction. The learned Magistrate held that the petitioner-appellant was the wife of the respondent and that the Court had jurisdiction to entertain the petition as the husband and wife last resided together in the District of Ludhiana. On the merits, he held that the first wife and her daughter were entitled to maintenance and awarded for the wife maintenance at the rate of Rs. 100/- per month and for the daughter at the rate of Rs. 50/- per month. The respondent preferred a revision against that order to the Additional Sessions judge, Ludhiana, and the learned Additional Sessions judge, agreed with the learned Magistrate both on the question of jurisdiction and also on the right to maintenance and dismissed the revision. The husband preferred a revision to the High Court of Punjab against that order. The High Court disagreed with both the lower Courts on the question of jurisdiction. It held that the husband's permanent home was Africa and his two visits to Ludhiana for temporary periods did not make him one who resided in that district or who last resided with his wife therein. On that view, it set aside the order of the learned Additional Sessions judge and dismissed the petition. Hence the present appeal.

Mr. Kapur, learned counsel for the appellants, contended that the respondent had last resided with his wife in his house in village Hans Kalan in the District of Ludhiana and was also in the said District at the time the application under s. 488 of the Code of Criminal Procedure was filed by the first appellant and, therefore, the learned Magistrate had territorial jurisdiction to entertain the application. In any view, he argued, the respondent submitted to the jurisdiction of the Magistrate and, therefore, he could no longer question the validity of his order on the ground of want of jurisdiction. On the other hand, the learned counsel for the respondent sought to sustain the order of the High Court for the reasons mentioned therein. At the outset we must say that the first appellant did not raise the plea of submission either in the pleadings or in any of the three Courts below. The question is a mixed question of fact and law. This Court will not ordinarily allow such questions to be raised for the first time before it and we do not see in this case any exceptional circumstances to depart from that practice. We cannot therefore, permit the first appellant to raise this belated plea.

The only question in the appeal is whether the Magistrate of Ludhiana had jurisdiction to entertain the petition filed under s. 488 of the Code of Criminal Procedure. The question turns upon the interpretation of the relevant provisions of s. 488(8) of the Code, which demarcates the jurisdictional limits of a Court to entertain a petition under the said section. Section 488 (8) of the Code reads : "Proceedings under this 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."

The crucial words of the sub-section are, "resides", "is" and "where he last resided with his wife". Under the Code of 1882 the Magistrate of the District where the husband or father, as the case may be, resided only had jurisdiction. Now the jurisdiction is wider. It gives three alternative forums. This, in our view, has been designedly done by the Legislature to enable a discarded wife or a helpless child to get the much needed and urgent relief in one or other of the three forums convenient to them. The proceedings under this section are in the nature of civil proceedings. the remedy is a summary one and the person seeking that remedy, as we have pointed out, is ordinarily

a helpless person. So, the words should be liberally construed' without doing any violence to the language.

The first word is "resides". A wife can file a petition against her husband for maintenance in a Court in the District where he resides. The said word has been subject to conflicting judicial opinion. In the Oxford Dictionary it is defined as : "dwell permanently or for a considerable time; to have one's settled or usual abode ; to live in or at a particular place". The said meaning, therefore, takes in both a permanent dwelling as well as a temporary living in a place. It is, therefore, capable of different meanings, including domicile in the strictest and the most technical sense and a temporary residence. Whichever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in, or a flying visit to, a particular place. In short, the meaning of the word would, in the ultimate analysis, depend upon the context and the purpose of a particular statute. In this case the context and purpose of the present statute certainly do not compel the importation of the concept of domicile in its technical sense. The purpose of the statute would be better served if the word "resides" was understood to include temporary residence. The juxtaposition of the words "is" and "last resided" in the sub-Section also throws light on the meaning of the word "resides". The word "is", as we shall explain later, confers jurisdiction on a Court on the basis of a casual visit and the expression "last resided", about which also we have something to say, indicates that the Legislature could not have intended to use the word "resides" in the technical sense of domicile. The word "resides" cannot be given a meaning different from the word "resided" in the expression "last resided" and, therefore, the wider meaning fits in the setting in which the word "resides" appears. A few of the decisions cited at the Bar may be useful in this context.

In *Santpoornam v. N. Sundaregan* (1), it was held that the word "resides" implied something more than (1) (1952) 2 M.L.J 573, a brief visit. but not such continuity as to amount to a domicile. In *Khairunissa v. Bashir Ahmed* (1), on a consideration of the relevant authorities it was pointed out that a casual or a flying visit to a place was excluded from the scope of the word "resides". A full Bench of the Allahabad High Court, in *Flowers v. Flowers* (2), expressed the view that a mere casual residence in a place for a temporary purpose with no intention of remaining was not covered by the word "resides". In *Balakrishna v. Sakuntala Bai* (3) it was held that the expression "reside" implied something more than "stay" and implied some intention to remain at a place and not merely to pay it a casual visit. In *Charan Das v. Surasti Bai* (2), it was held that the sole test on the question of residence was whether a party had animus manendi, or an intention to stay for an indefinite period, at one place; and if he had such an intention, then alone could he be said to "reside" there.

The decisions on the subject are legion and it would be futile to survey the entire field. Generally stated no decision goes so far as to hold that "resides" in the sub-section means only domicile in the technical sense of that word. There is also a broad unanimity that it means something more than a flying visit to or a casual stay in a particular place. They agree that there shall be animus manendi or an intention to stay for a period, the length of the period depending upon the circumstances of each case. Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon, we would define the word "resides" thus : a person resides in a place if he through choice makes it his abode permanently or even temporarily ; whether a person has chosen to make a particular place his abode depends upon the facts of each case. Some

illustrations may make our meaning clear : (i) A, living in (1) (1929) I.L.R. 53 Bom. 781. (2) (1910) I.L.R. 32 All.

203. (3) A.I.R. 1942 Mad. 666. (4) A.I.R. 1940 Lah. 449, a village, goes to a nearby town B to attend a marriage or to make purchases and stays there in a hotel for a day or two. (2) A, a tourist, goes from place to place during his peregrinations and stays for a few days in each of the places he visits, A, a resident of a village, who is suffering from a chronic disease, goes along with his wife to a town for medical treatment, takes a house and lives there for about 6 months. (4) A, a permanent resident of a town, goes to a city for higher education, takes a house and lives there, alone or with his wife, to complete his studies. In the first two cases, A makes only a flying visit and he has no intention to live either permanently or temporarily in the places he visits. It cannot, therefore, be said that he "resides" in the places he visits. In the last two illustrations, though A has a permanent house elsewhere, he has a clear intention or animus manendi to make the places where he has gone for medical relief in one and studies in the other, his temporary abode or residence. In the last two cases it can be said that though he is not a domicile of those places, he "resides" in those places. The cognate expression "last resided" takes colour from the word "resides" used earlier in the sub-section. The same meaning should be given to the word "resides" and the word "resided", that is to say, if the word "resides" includes temporary residence, the expression "last resided" means the place where the person had his last temporary residence. But it is said that even on that assumption, the expression can only denote the last residence of the person with his wife in any part of the world and that it is not confined to his last residence in any part of India. If the words "where he last resided with his wife" are construed in vacuum, the construction suggested by the learned counsel for the respondent may be correct; but by giving such a wide meaning to the said expression we would be giving extra territorial operation to the Code of Criminal Procedure. Section 2 (1) of the Code extends the operation of the Code to the whole of India except the States of Jammu & Kashmir; that is to say, the provisions of the Code, including s. 488 (8) thereof, have operation only throughout the territory of India, except the States of Jammu & Kashmir. If so, when sub-s. (8) of s. 488 of the Code, prescribing the limits of Jurisdiction, speaks of the last residence of a person with his wife, it can only mean his last residence with his wife in the territories of India. It cannot obviously mean his residing with her in a foreign country, for an Act cannot confer jurisdiction on a foreign court. It would, therefore, be a legitimate construction of the said expression if we held that the district where he last resided with his wife must be a district in India. In *In re Drucker* (No. 2) Basden, Ex Parte the words "or in any other place out of England," in sub-s. (6) of s. 27 of the Bankruptcy Act, 1883, fell to be construed. The words were wide enough to enable a Court in England to order that any person who, if in England, would be liable to be brought before it under the section, shall be examined in any place out of England, including a place not within the jurisdiction of the British Crown. The Court held that the words must be read with some limitation and the jurisdiction conferred by that section does not extend to places abroad which are not within the jurisdiction of the British Crown. Wright, J., rejecting the wider construction sought to be placed on the said words, observed at p. 211 : "It seems to me that that restriction in prima facie necessary. It is impossible to suppose that the Legislature intended to empower the Court to order the examination of persons in (1) [1902] 2 K.B. 210.

foreign countries ; for instance, in France or Germany." In Halsbury's Laws of England, Vol. 36, 3rd edn., at p. 429, it is stated :

"..... the presumption is said to be that Parliament is concerned with all conduct taking place within the territory or territories for which it is legislating in the particular instance, and with no other conduct. In other words, the extent of a statute, and the limits of its application, are *prima facie* the same."

It may be mentioned that the said observations are made in the context of Parliament making a law in respect of a part of the territory under its legislative jurisdiction. If it has no power at all to make a law in respect of any foreign territory, the operation of the law made by it cannot obviously extend to a country over which it has no legislative control. It is, therefore, clear that s. 488(8) of the Code, when it speaks of a district where a person last resided with his wife, can only mean "where he last resided with his wife in any district in India other than Jammu & Kashmir."

The third expression is the word "is". It is inserted between the words "resides" and "last resided". The word, therefore, cannot be given the same meaning as the word "resides" or the expression "last resided" bears. The meaning of the word is apparent if the relevant part of the subsection is read. It reads : "Proceedings under this section may be taken against any person in any district where he..... is....." The verb "is" connotes in the context the presence or the existence of the person in the district when the proceedings are taken. It is much wider than the word "resides": it is not limited by the *animus manendi* of the person or the duration or the nature of his stay. What matters is his physical presence at a particular point of time. This meaning accords with the object of the chapter wherein the concerned section appears. It is intended to reach a person, Who deserts a wife or child leaving her or it or both of them helpless in any particular district and goes to a distant place or even to a foreign country, but returns to that district or a neighbouring one on a casual or a flying visit. The wife can take advantage of his visit and file a petition in the district where he is during his stay. So too, if the husband who deserts his wife, has no permanent residence, but is always on the move, the wife can catch him at a convenient place and file a petition under s. 488 of the Code. She may accidentally meet him in a place where he happens to come by coincidence and take action against him before he leaves the said place. This is a salutary provision intended to provide for such abnormal cases. Many illustrations can be visualized where the utility of that provision can easily be demonstrated.

To summarize : Chapter XXXVI of the Code of Criminal Procedure providing for maintenance of wives and children intends to serve a social purpose. Section 488 prescribes alternative forums to enable a deserted wife or a helpless child, legitimate or illegitimate, to get urgent relief. Proceedings under the section can be taken against the husband or the father, as the case may be, in a place where he resides, permanently or temporarily, or where he last resided in any district in India or where he happens to be at the time the proceedings are initiated. Let us now apply the said principles to the instant case. To recapitulate the relevant facts : the respondent was born in India in Ludhiana District; he was married to the first appellant in the year 1930; he migrated to Africa and took up a job there as a police officer; he came back to India in or about 1943 and lived with the first appellant in a house at Hans Kalan for about 5 months and thereafter he left again for Africa; 5 or 6

years thereafter, he again came to India on leave and took her to Africa where she gave birth to a daughter; the appellant was sent back to India and she was staying in Ludhiana District with the child; the respondent's mother is staying in the aforesaid village in the same district and it is also not disputed that the respondent has purchased property worth Rs. 25,000/- in Ludhiana District in the name of his minor children by his second wife; when the petition was filed he was admittedly in the district of Ludhiana---indeed, notice was served on him in that district, he filed a counter affidavit, obtained exemption from personal appearance at the time of hearing and thereafter left for Africa. It is not necessary in this case to express our opinion on the question whether on the said facts the respondent "resides" in India; but we have no doubt that he "last resided" in India,. We have held that temporary residence with animus manendi will amount to residence within the meaning of the provisions of the sub- section. When the respondent came to India and lived with his wife in his or in his mother's house in village Hans Kalan, he had a clear intention to temporarily reside with his wife in that place. He did not go to that place as a casual visitor in the course of his peregrinations. He came there with the definite purpose of living with his wife in his native place and he lived there for about 6 months with her. The second visit appears to be only a flying visit to take her to Africa. In the circumstances we must hold that he last resided with her in a place within the jurisdiction of the First Class Magistrate, Ludhiana. That apart, it is admitted that he was in a place within the jurisdiction of the said Magistrate on the date when the appellant filed her application for maintenance against him. Thee said Magistrate had jurisdiction to entertain the petition, as the said proceedings can be taken against any person in any district where he "is". We, therefore-, hold that the First Class Magistrate, Ludhiana, had jurisdiction to entertain the petition under s. 488 (8) of the Code.

The next question relates to the quantum of maintenance to be awarded to the appellants. The Magistrate, on a consideration of the entire evidence, having regard to the salary of the respondent, and the value of the property he purchased awarded maintenance to the wife at the rate of Rs. 100/- per month for herself and at the rate of Rs. 50/- per month for the maintenance of her minor child. The Additional Sessions judge, on a reconsideration of the evidence, accepted the finding of the learned Magistrate and confirmed the quantum of maintenance awarded by him. The finding is a concurrent finding of fact the correctness whereof cannot ordinarily be questioned in a revision petition in the High Court. that is why the only question argued before the High Court was that of jurisdiction. As we have held that the view accepted by the High Court was wrong, we set aside the order of the High Court and restore that of the Magistrate First Class, Ludhiana. In the result the appeal is allowed.

Appeal allowed.