

ONKAR NATH & ORS.

v.

THE DELHI ADMINISTRATION

February 15, 1977

[Y. V. CHANDRACHUD, P. K. GOSWAMI AND P. N. SHINGHAL, JJ.]

Defence of India Rules 1971—Rule 118(1)(a) r/w Notification dated 26-11-1973 prohibiting a strike “in connection with any industrial dispute”, ingredients of—Legal evidence must be led to prove the ingredients of an offence.

Judicial notice—Whether the courts can take judicial notice of facts namely “a railway strike was imminent” and such a strike was, in fact, launched on May 8, 1974 “in a trial for an offence of “exciting workmen to go on strike”—Section 46 and 57 of the Evidence Act (Act 1 of 1872), 1872.

In respect of an alleged speech made, on May 5, 1974, at a meeting held in Tughlakabad Railway Station Yard inciting workers to go on strike from May 8, 1974, the appellants who were leaders of the Northern Railwaymen's Union were convicted by the learned Metropolitan Magistrate under Rule 118 and 119 of the Defence of India Rules and sentenced to six months rigorous imprisonment. The order of conviction was upheld in appeal by the Sessions Court but in revision, the Delhi High Court while upholding the conviction reduced the sentence to the period already undergone.

In appeal by special leave to this Court, the appellants contended (1) There was no legal evidence to warrant the conviction; (2) The courts below were not justified in taking judicial notice of the fact that on the date when the appellants delivered their speeches a railway strike was imminent and that such a strike was, in fact, launched on May 8, 1974 and (3) The conduct attributed to the appellants does not fall within the mischief of the order because inciting other workers to go on strike is outside the definition of the word “strike” contained in rule 118(3)(b) of the Defence of India Rules, 1971.

Allowing the appeal by special leave, the court,

HELD : (1) The courts below were justified in assuming without formal evidence that the railway strike was imminent on May 5, 1974 and that a strike intended to paralyse the civic life of the nation was undertaken by a section of workers on May 8, 1974. [995A-B]

(2) The purpose of s. 57 of the Evidence Act is to provide that the court shall take judicial notice of certain facts rather than exhaust the category of facts of which the court may in appropriate cases take judicial notice. Recognition of facts without formal proof is an act of expediency. Shutting the judicial eye to the existence of such facts and matters is in a sense an insult to common-sense and would tend to reduce the judicial process to a meaningless and wasteful ritual. No court insists on a formal proof by evidence of notorious facts of history—past or present and events that have rocked the nation need no proof and are judicially noticed. Judicial notice in such matters takes place of proof and is of equal force. [994F-H, 995-A]

(3) The Government possesses the power to issue an appropriate order under rule 118(1) prohibiting the strike “in connection with any industrial dispute” even if there is no existing industrial dispute because the power can be exercised prophylactically by preventing a strike in connection with an imminent strike. [995C-D]

(4) In order to maintain a charge under rule 118(1) of the Defence of India Rules, 1971, the prosecution has to establish not only that a strike was imminent or had actually taken place of which judicial notice may be taken, but further that the strike was in connection with the industrial dispute which is a matter of evidence. [995E-F]

A (5) What is chargeable as contravening the prohibition must under the order issued by the Government of India under Rule 118(1)(a) is, in the circumstances of this case, the words used by the speakers and not the gist of the speeches made by a member of the audience. A summary of speech may broadly and generally not be inaccurate and it may not faithfully reflect what the speaker actually said and in what context. [994D-E]

B (6) Rule 118(1)(a) limits the power of the Government to issue an appropriate order, general or special, for prohibiting *inter alia*, a strike in connection with any industrial dispute. Since the rule does not empower the Government to issue an order prohibiting strikes generally, whether it is in connection with the industrial dispute or not, there can be no contravention of the order unless it is established by evidence that the strike was in connection with an industrial dispute. In the instant case, the prosecution did not lead any evidence to prove this important ingredient of the offence and the generalisation made by the witnesses in their evidence is wholly inadequate for accepting that the appellants gave incitement to a strike in connection with any industrial dispute. [995F-G]

C (7) The contention of the prosecution that what is contemplated by rule 118 (1)(a) itself is a strike in connection with an industrial dispute and, therefore, it is not necessary for the prosecution to establish that the strike was in connection with any industrial dispute is neither warranted nor supported by anything contained in sub-rule (3) of rule 118 which defines expressions "industrial dispute" and "strike". [995H, 996A-B]

D [In view of the finding that the evidence led by the prosecution is insufficient to establish the charge, in the instant case, the court thought it unnecessary to consider the question whether the conduct attributed to the appellants fall within the mischief of the order dated 26-11-1973, since inciting other workers to go on strike may be outside the definition of the words "strike" contained in Rule 118(3)(b) of the Defence of India Rules, 1971." The court, however, pointed out that the appropriate provision of the Defence of India Rules under which an incitement to strike as in the instant case may be punished in Rule 36(6)(j) read with Rule 43(1)(a).]

E CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 502 of 1976.

(Appeal by Special Leave from the Judgment and Order dated 16-9-1975 of the Delhi High Court in Criminal Revision No. 139 of 1975).

F A. K. Gupta, for the appellants.

G. Das, and R. N. Sachthey, for the respondent.

The Judgment of the Court was delivered by

G CHANDRACHUD, J.—The appellants who are Railway employees, were convicted by the learned Metropolitan Magistrate, Delhi under rules 118 and 119 of the Defence of India Rules, 1971 and were sentenced to six months' rigorous imprisonment. The order of conviction was upheld in appeal by the learned Additional Sessions Judge and in revision by the Delhi High Court with the difference that whereas the former upheld the sentence too, the latter has reduced it to the period already undergone. In this appeal by special leave the H legality of conviction is questioned by the appellants.

The case of the prosecution is that the appellants are leaders of the Northern Railwaymen's Union and that on May 5, 1974 they

held a meeting in Tughlakabad Railway Yard inciting railway workers to go on strike from May 8. This is alleged to be in breach of the order passed by the Government of India under rule 118(1) of the Defence of India Rules, 1971. That rule reads thus :

“118. Avoidance of strikes and lock-outs.—(1) If in the opinion of the Central Government or the State Government it is necessary or expedient so to do for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community, notwithstanding anything contained in any other provisions of these rules, the Central Government may, by general or special order, applying generally or to any specific area and to any undertaking or class of undertakings, make provision—

(a) for prohibiting, subject to the provisions of the order, a strike or lock-out in connection with any industrial dispute;

(b) for requiring employers, workmen, or both, to observe for such period as may be specified in the order such terms and conditions of employment as may be determined in accordance with the order :

Provided that no order made under clause (b) shall require any employer to observe terms and conditions of employment less favourable to the workmen than those which were applicable to them at any time within three months preceding the date of the order.”

By sub-rule (2), if any person contravenes any order made under sub-rule (1) he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

The order issued under rule 118(1)(b) by the Government of India in its Ministry of Labour on November 26, 1973 recites that in the opinion of the Central Government it was necessary and expedient for maintaining supplies and services essential to the life of the community to prevent strikes in the Railway Services and that therefore “the Central Government hereby prohibits a strike in connection with any industrial dispute/disputes in the said Railway Services in India for a period of six months w.e.f. the 26th November, 1973.”

In support of its case the prosecution examined three witnesses called S. D. Sharma, Dilbagh Rai and Jasbir Singh. Sharma's evidence is in the nature of hearsay and indeed he admits in so many words that his knowledge regarding the incitement given by the appellants to the Railway workers to go on strike was derived solely from information received by him. The witness admits that he had no personal knowledge that the appellants had held any meeting nor had

A he heard their speeches. The second witness Dilbagh Rai was in charge of the Police Post at Tughlakabad Railway Station and was entrusted with the investigation of the case. In the nature of things he too has no personal knowledge of what the appellants did or said.

B Jasbir Singh who was in charge of the Diesel Shed at Tughlakabad is in the circumstances the only witness whose evidence could, if at all, help the prosecution to establish the charge that the appellants had contravened the order issued by the Government of India under r. 118(1)(a) of the Defence of India Rules, 1971. But even that evidence, in our opinion, is inadequate for proving the charge levelled against the appellants. Jasbir Singh claims to have attended a meeting addressed by the appellants but he has not stated as to what exactly the appellants said in the meeting. He has given his own gist or summary of what the appellants meant to convey to the audience stating that they incited the workers to go on strike and threatened them with dire consequences if they did not respond to the call. Such a broad resume is not safe to rely upon for holding the charge proved. In view of the total absence of evidence showing what the appellants in fact said in the meeting, the summary coined by Jasbir Singh of the happenings in the meeting cannot form the basis of conviction. What is chargeable as contravening the prohibition imposed under the order issued by the Government of India under r. 118(1)(a) is in the circumstances of this case the words used by the speakers and not the gist of the speeches made by a member of the audience. A summary of a speech may broadly and generally not be inaccurate and yet it may not faithfully reflect what the speaker actually said and in what context. Therefore, we would prefer not to rely on the gist given by the witness without knowing the data on the basis of which the gist was given. The charge must therefore fail.

E One of the points urged before us is whether the courts below were justified in taking judicial notice of the fact that on the date when the appellants delivered their speeches a railway strike was imminent and that such a strike was in fact launched on May 8, 1974. Section 56 of the Evidence Act provides that no fact of which the Court will take judicial notice need be proved. Section 57 enumerates facts of which the Court "shall" take judicial notice and states that on all matters of public history, literature, science or art the Court may resort for its aid to appropriate books or documents of reference. The list of facts mentioned in section 57 of which the Court can take judicial notice is not exhaustive and indeed the purpose of the section is to provide that the Court *shall* take judicial notice of certain facts rather than exhaust the category of facts of which the Court may in appropriate cases take judicial notice. Recognition of facts without formal proof is a matter of expediency and no one has ever questioned the need and wisdom of accepting the existence of matters which are unquestionably within public knowledge. (see Taylor 11th edn. pp 3-12; Wigmore sec 2571 foot-note; Stephen's Digest, notes to Art. 58; Whitley Stokes' Anglo-Indian Codes Vol. II p. 887). Shutting the judicial eye to the

existence of such facts and matters is in a sense an insult to commonsense and would tend to reduce the judicial process to a meaningless and wasteful ritual. No Court therefore insists on formal proof, by evidence, of notorious facts of history, past or present. The date of poll, the passing away of a man of eminence and events that have rocked the nation need no proof and are judicially noticed. Judicial notice, in such matters, takes the place of proof and is of equal force. In fact, as a means of establishing notorious and widely known facts it is superior to formal means of proof. Accordingly, the Courts below were justified in assuming, without formal evidence, that the Railway strike was imminent on May 5, 1974 and that a strike intended to paralyse the civic life of the Nation was undertaken by a section of workers on May 8, 1974.

But the matter does not rest there. Rule 118(1)(a) empowers the Government to issue an order prohibiting a strike "in connection with any industrial dispute". The Order issued by the Government on November 26, 1973 recites, as required by the Rule, that the Central Government prohibits a strike "in connection with any industrial dispute" in the Railway Services in India for a period of six months. Rule 118(2) prescribes punishment for a person who contravenes any order made under the Rule. We have no doubt that the Government possesses the power to issue an appropriate order under Rule 118(1) even if there is no existing industrial dispute because the power can be exercised prophylactically for preventing a strike in connection with an imminent industrial dispute. But the prosecution must establish, in order that the conduct charged as penal may fall within the mischief of the Order, that the strike in regard to which the incitement was given was in connection with an industrial dispute. Unless that is established, there can be no contravention of the order issued by the Government, because the contravention consists in doing what is prohibited by the order. And what is prohibited by the order is a strike in connection with an industrial dispute. Thus, the prosecution has to establish not only that a strike was imminent or had actually taken place, of which judicial notice may be taken, but further that the strike was in connection with an industrial dispute, which is a matter of evidence. Rule 118(1)(a) limits the power of the Government to issue an appropriate order, general or special, for prohibiting *inter alia* a strike in connection with any industrial dispute. Since the rule does not empower the Government to issue an order prohibiting strikes generally, whether they bear any connection with an industrial dispute or not, there can be no contravention of the order unless it is established by evidence that the strike was in connection with an industrial dispute. The prosecution did not lead any evidence to prove this important ingredient of the offence and the generalisation made by the witnesses in their evidence is wholly inadequate for accepting that the appellants gave incitement to a strike in connection with any industrial dispute.

It is urged by the learned counsel appearing for the Delhi Administration, who are respondents to the appeal, that what is contemplated by rule 118(1)(a) itself is a strike in connection with

A early stage might well have sorted out the dispute, bettered their relations and pre-empted this cock-fight. Doing justice is a noble behest which blesses all; deciding the *lis* within a judicative pyramid, provocative of appeals and revisions, bleeds both and unwittingly incites the bitter persistence in the struggle to win (and lose !). We are courts of justice guided by law and the signature tune of the indicature is *Fiat Justitia*. We gently suggested, in this spirit, whether the parties
B would be disposed to compose their quarrel. Counsel as often happens, constructively helped, but the purchase of peace at this late stage was difficult and we gave up. Of course, adjudication on the law and the facts cannot and shall not be influenced by this extra-curial excursion.

C We pick up the story of the suit where we left it. In the dog-fight that followed, a question of court-fee was raised and decided. That was taken up to the High Court and returned. A preliminary decree for accounts of the Bombay khata was passed and that too leapt to the High Court resulting in a remand, fresh issues and so on. Then a decree was passed and both sides challenged it in appeal and cross-objections and the last lap of the tiring race is this court where the vanquished plaintiff is the appellant. We proceed to decode the justice and the law of the cause.

D We may state that the plaintiff's obstinate attitude in treating the Bombay shop and Khamgaon shop as two different persons each being entitled to sue the defendant without reference to the amounts due to the latter from the former in inter-connected business dealings is a legal fallacy and cute perversity. However we may repeat that the defendant also proceeded on that 'shop autonomy' theory but only
E urged that the silver bars were wrongfully omitted from the Khamgaon khata. Shops are not persons although suits may be filed in trade names. The trial court took a commonsense view in commingling the business account of the same parties. This was good law. A plurality of shops owned by the same person does not proliferate into many shop-persons. At an intermediate stage of the many involved inter-locutory skirmishes, the plaintiff did allege :
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G "The alleged silver bars were sold by the defendant Suwalal through the said Bombay shop and naturally the sale proceeds of that quantity of silver are credited in the defendant's Khata in the Bombay shop. The plaintiff, therefore in reply to the defendant's claim of Rs. 17000/- has to file the extracts of accounts of the Bombay shop to put the full picture of transactions before the court. As the Bombay shop shows the balance of Rs. 4535-12-0 as due to the defendants, the said fact has been so mentioned by the plaintiff in his statement."

H In passing, we may mention that the counter-claim led to a demand for court-fee and the High Court affirmed this order but reduced the sum on which such fee was payable. Later, issues were framed by the trial Court which reflected the integrated nature of the dealings between the two parties in the shops at Khamgaon and Bombay. The

learned District Judge, not obsessed by the wrong-headed pleadings, took the view that the shops, though located at different places, were owned by the same family and the claims were so inter-connected that, in equity and law, set off was permissible and the net sum due to the plaintiff—less than what he had sued for—should be decreed. We may mention the relevant issues framed at the first round even here since we may have to refer to them later when dealing with a supportive submission of Shri Phadke for the defendant. Issues 5 and 7 may be reproduced here :

- "5. Whether the Bombay & Khamgaon shops owned by plaintiff's partners are so connected with each other that a composite account of the entries in the two shops can be made by the Defendants ?

* * * *

7. Whether on making an account of the two shops of the Plaintiff of Bombay and Khamgaon, the Defendants are entitled to a set-off thereafter to a sum of :—

(a) Rs. 17,000/- as claimed by the Defendants or to a set-off.

(b) Rs. 4,535-12-0 as stated by the Plaintiff ?"

Later, amended pleadings led to amended issues of which issues 4 to 6 are meaningful and are set out below with the findings thereon;

- "4. Whether the Bombay and Khamgaon shops owned by plaintiff's partners are so connected with each other that a composite account of the entries in two shops can be made by the defendants ? —Yes

5. (a) Whether a sum of Rs. 44,697/10 is debited to the defendants in the account of the Bombay shop ?—Yes .

(b) Are these entries proper and correct ? —Yes.

(c) And in time ? —Yes.

6. Whether on making an account of the two shops of the plaintiff of Bombay and Khamgaon the defendants are entitled to a set-off and thereafter to a sum of—

(a) Rs. 17,000/- as claimed by the defendants or to a set off —No.

(b) Rs. 4,535/12/- as stated by the plaintiff ?—Yes.

The plain fact emerges that the two parties were having dealings with each other, that the dealings in Khamgaon and Bombay were inter-related and not totally different transactions, dissociated in nature and divorced in period. The trial judge treated the totality of transactions as a composite account and the suit as one on accounts. He granted a decree on these terms

- A 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.

- B *Radharani v. Rahim Sardar*, A.I.R. 1946 Calcutta 459, *Sakuntala v. Thirumalya* [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.

- C 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 confining 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 (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 (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. [1004F-H]

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

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

Mrs. Urmila Kapoor and *Miss Kamlesh Bansal*, for the appellant.

V. C. Mahajan and *S. L. Aneja*, for respondent.

- G 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 Vijn 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.

- H Appellant Raj Kumari Vijn was married to respondent Dev Raj Vijn in Delhi, in June 1950. 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 appellant 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 settlement 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.

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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 jurisdiction 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 permission to file an 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, although 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.

- A 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 jurisdiction 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 jurisdiction 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 maintenance allowance, the appellant has come up to this Court by special leave.

D 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 it 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".
- F (ii) The respondent "specifically reserved his right to file a written reply on merits after the question of jurisdiction was decided".
- (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....."
- G (iv) There was "obvious prejudice and failure of justice" to 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".
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- (vi) "Before a decision on merits can be given the husband has the undoubted request (sic) to lead evidence on merits". A
- (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 its maintainability, for otherwise the provision relating to jurisdiction would become nugatory. Section 531 "can cure the infirmity after the case has been fought on merits." B

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 as follows,— C

"531. No finding, sentence or order of any Criminal Court shall 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." D

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 jurisdiction 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 void, 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 filing of an application under section 488 within the limits of the jurisdiction of the magistrate concerned. E F G

So where a magistrate has the "power" to try a particular application under section 488, and the controversy relates solely to his territorial jurisdiction, there should, ordinarily, be no reason why section 531 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. H

(1) [1962] 2 SCR. 101.

A 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. Tavera Naika*⁽³⁾, *Sultan Chand v. Yogindra Nath Baz*⁽⁴⁾, and *Satwant Singh v. Smt. Jaswant Kaur*⁽⁵⁾.

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C As is apparent, section 531 does not entitle a magistrate, who is not a magistrate of the class referred to in sub-section (1) of section 488, to proceed with an application 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 jurisdiction 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 sub-section 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 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 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. 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 jurisdiction 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 jurisdiction.

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H 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 proceeded with the trial

(1) A.I.R. 1946 Calcutta 459.

(3) A.I.R. 1959 Mysore 193.

(2) (1966) 2 M.L.J. 326.

(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 respondent had not specifically denied 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 fall within his jurisdiction. The same is the position in regard to *Sakuntala 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 material 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 committed to a wrong sessions division, and the mistake was corrected 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 was 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 decided. 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 reserved 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 to adduce their evidence on the whole case and specifically rejected

- A 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 production 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 Magistrate has further stated that the respondent did not file his further or additional reply even then. The High Court therefore undoubtedly
- B 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 respondent 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 instance, to any preliminary objection
- C relating to jurisdiction, and to decide the controversy on the merits thereafter, but as this was not so in the present case, we are 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
- D that the respondent had reserved his right to lead evidence on the merits and did not deliberately 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 production of all the evidence in the
- E 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
- F 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 Magistrate had called upon the parties to lead all their evidence. The appellant obeyed that order and examined her witnesses. The respondent
- G 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
- H 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 opportunity 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 Magistrate 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 proceeding cannot be maintained by a court which has no jurisdiction 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 sub-section (1) of section 488, was one of the magistrates mentioned in that sub-section. 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 application for confining the evidence to the question of jurisdiction, or to try that as a preliminary issue. It is therefore 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 jurisdiction, made a mention, at length, of the entire evidence on that question and took into consideration the conduct of the respondent and the case 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

A 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.

B 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.