

ALLAHABAD HIGH COURT

Ramji Malviya

Vs.

Munni Devi Malviya

Criminal Revn. No. 1523 of 1957, against order of Addl. S.J. Allahabad,

(M.C. Desai, J.)

31.08.1957. 20.03.1959

ORDER

M.C. Desai, J.

1. This is an application by a husband who has been ordered under Section 488 Criminal Procedure Code, by a Magistrate to pay to his wife maintenance at the rate of Rs. 40/- per month. The marriage is admitted and it is also admitted that the wife has been living with her parents since 1951. There were two issues of the union, a son and a daughter; the wife left the matrimonial home in 1950-51 or earlier with the son, leaving the daughter with the husband. The son died while in her custody and the daughter is being brought up by the husband. The wife complained that she was beaten and turned out by the husband in 1951 because she was ugly; to prove this she examined only her brother, who, however, could not give any evidence as an eye-witness because he was not present at the time when the wife left the husband's home. The wife did not care to come into the witness-box to depose about the circumstances in which she left her husband. The husband came into the witness-box and deposed that the wife herself deserted him because he was suffering from pulmonary tuberculosis and was greatly indebted. He further stated that he tried to bring her back but she refused to live with him. His statement remained unchallenged. It must, therefore, be held that it was the wife who deserted the husband in 1950-51. It is admitted that in 1955 the husband remarried. He had to bring up the minor daughter and the wife refused to live with him; so he was obliged to remarry.

2. That husband's reply to the wife's claim for maintenance is that on account of her desertion she was not entitled to any maintenance and that still he was prepared to pay her Rs. 10/- per month on account of his moral obligation, but nothing more. The Magistrate ordered him to pay her Rs. 40/- per month.

3. If a husband "neglects or refuses to maintain his wife", he may be ordered to pay monthly allowance to her; see Section 488(1) Criminal Procedure Code. If the husband fails without

sufficient cause to comply with the maintenance order, the Magistrate may issue a warrant for levying the amount due and may sentence him to imprisonment in default; see Sub-Section (3). If the husband offers to maintain his wife on condition of her living with him and she refuses to live with him, the Magistrate should consider any grounds of refusal stated by her and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing."

If he has contracted marriage with another wife, it is to be considered just ground for the wife's refusal to live with him; this is one proviso. The other proviso is that no warrant shall be issued for the recovery of "any amount due under this section" unless an application is made to the court to levy it within a period of one year from the day on which it became due. Then comes Sub-Section (4), which is to the effect that no wife shall be entitled to receive an allowance from her husband "under this section if, without any sufficient reason, she refuses to live with her husband."

4. The right given, by Section 488 to a wife to claim maintenance from her husband is a statutory right which is independent of the personal law of the parties and is not affected or governed by it; see *Luddun Sahiba v. Mirza Kamar Kudar*¹, *Mohammad Azizullah v. Abdul Halim*², and *U. Thin v. Ma Pwa Yi*³. In order to entitle a wife to claim maintenance from her husband all that she has to prove is that he has sufficient means and that he has neglected or refused to maintain her. If she is living separately from her husband and without any sufficient reason refuses to live with him the right to claim maintenance from him is barred by Sub-Section (4). Here the wife is living separately from her husband and according to the evidence she refused to live with him even though he pressed her to do so. There is no evidence that the husband was guilty of cruelty towards her and if he never has been cruel to her she cannot have any apprehension of cruelty and would not, therefore, be justified in refusing to live with him. If she was turned out by him from the matrimonial home, she would be justified in living with her parents, but if he offered to take her back subsequently, she would not be justified in refusing the offer unless she had a reasonable apprehension of cruelty at his hands. There is no evidence of the husbands' acting cruelly towards her while she was cohabitating with him or of her having a reasonable apprehension of being treated cruelly if she resumed cohabitation. No other justification has been pleaded and therefore, she was not entitled to any maintenance allowance. In *Tekait Mon Mohini Jamadai v. Basanta Kumar Singh*⁴, it was held that it is a rule of Hindu Law that the wife must reside with her husband wherever he may choose to reside and in the latter case reliance was placed upon the observation in Mayne on Hindu Law, Chapter XIV, paragraph 456, to the effect that a Hindu wife is not justified in leaving the husband's home except on the ground of violence which renders it unsafe for her to continue there or of continued ill-usage which amounts to cruelty according to the English law. As I pointed out earlier, in a case governed by Section 488 it is irrelevant to consider the personal law of the parties. A husband, who neglects or refuses to maintain his wife, is liable to pay her maintenance; it is immaterial where the wife is residing. Even if she is residing separately from him, if he refuses to maintain her, he is liable to be ordered to pay her maintenance. If her residing separately from him is without sufficient cause,

then Sub-Section (4) protects him and it is unnecessary for him to rely upon the personal law under which he may not be bound to maintain her, if living separately from him.

5. The proviso that if the husband offers to maintain the wife on condition of her living with him and she refuses to live with him on the ground that he has contracted marriage with another woman, the Magistrate will hold that she had a just ground for her refusal

¹ ILR 8 Cal 736

³24 Cri LJ 368 : (AIR 1923 Ran 131)

²1935 Oudh WN 292: (AIR 1935 Oudh 285) ⁴ ILR 28 Cal 751 and *Tota v. Durgi*, 30 Cd LJ 861 (Lah)

and will reject the offer, is a part of Sub-Section (3), which deals only with the enforcement of a maintenance order. The proviso is a part of the first sentence of Sub-Section (3) (the sentence ends with a colon, not with a full stop), and, I therefore, must be read with it only and not with any other Sub-Section, such as Sub-Section (1). It is true that the words used in the proviso are "make an order under this section" and that Sub-Section (3) does not expressly provide for making any "order" but the context in which the proviso is placed leaves no room for doubt that it governs the provision of Sub-Section (3) only and not that or Sub-Section (1) in addition. It may be that the legislature meant issuing a warrant for levying the amount due to be an "order" on the wife's application for enforcement of the maintenance order passed under Sub-Section (1). It is difficult to understand why the legislature used the word "section" instead of "Sub-Section". The second proviso is undoubtedly a proviso to Sub-Section (3); it has nothing to do with the contents of Sub-Section (1). If the second proviso applies only to Sub-Section (3), the first proviso also must apply only to Sub-Section (3). Sub-Section (4) governs the whole section including Sub-Section (1); no maintenance can be granted to a wife under Sub-Section (1) if she is living in adultery, or if without any sufficient reason she refuses to live with her husband, or if she and her husband are living separately by mutual consent. In the face of Sub-Section (4) it was unnecessary for the legislature to apply the first proviso to Sub-Section (1), also. The proviso seems to have been enacted in order to give the husband one more opportunity of offering to maintain the wife on condition of her having with him. He might not have made such an offer while the application for maintenance under Sub-Section (1), was pending against him; he might have thought that the wife would not succeed in proving a sufficient reason for her living separately from him. So the legislature might have enacted the proviso to give him the right to make such an offer, when an order made against him under Sub-Section (1); was sought to be enforced through issue of a warrant. He might also feel aggrieved by the heavy amount of maintenance ordered to be paid by him and might think it better to keep her with him and maintain her than to pay such a heavy amount to her. There is thus sufficient explanation for the enactment of the proviso to govern Sub-Section (3), even though there is Sub-Section (4) which governs Sub-Section (1). In *Mt. Roshan Buno v. Azim*⁵, Din Mohammad, J., with the concurrence of Biacker, J., stated that the proviso does not govern Sub-Section (1). In the case of *Ram Khelawan v. State*⁶, Bind Basni Prasad, J., assumed that Sub-Section (1) also is governed by the proviso; he did not discuss the matter at all. Though the proviso governs only Sub-Section (3), the provision that remarriage by the husband is a just ground for the wife's refusal to live with him lays down a general principle, which must be borne in mind when it is to be considered whether the wife's refusal to live with her husband is without any sufficient reason within the

meaning of Sub-Section (4). A just ground for refusal to live with the husband must necessarily be a sufficient reason. A sufficient reason may not be a just ground, but a just ground must always be a sufficient reason. In *Maiki v. Hemraj*⁷, Randhii Singh, J., held that remarriage of the husband is a sufficient cause for the wife's refusal to live with him. A wife who refuses to live with her husband on account of his remarriage is, therefore, not prevented by Sub-Section (4) from claiming maintenance allowance under Sub-Section (1). Whether she should get it or not is an entirely different question, vide *State v. Anwarbi*⁸,

⁵ AIR 1943 Lah 59 ⁷ AIR 1954 All 30

⁶ AIR 1952 All 958 ⁸ AIR 1953 Nag133

6. The wife deserted the husband first and after the desertion had continued for 4-5 years, the husband remarried. At the time of the desertion the wife had no sufficient reason for refusing to live with the husband and consequently she was not entitled to receive any maintenance from him. The desertion continued in spite of the husband's remarriage and, therefore, the disqualification of the wife to receive maintenance also continued in spite of the remarriage. If the husband was not liable to pay maintenance under Sub-Section (1) in 1950-51, he did not become liable later in 1955 merely because of his remarriage.

There was no change in the neglect or refusal to maintain the wife by his remarriage; if the neglect or refusal prior to the remarriage was not such as to saddle him with the liability to pay her maintenance, it did not become such merely on account of the remarriage. The remarriage was a natural consequence of the desertion by the wife herself; the husband needed company and some one to look after the minor daughter and the home. He was obliged to remarry because the wife refused to live with him. Ordinarily remarriage is a sufficient ground for refusing to live with the husband, but not if it is the natural and direct consequence of her prior refusal, without any sufficient reason, to live with him. She cannot take advantage of her own wrong; she cannot equip herself with a sufficient reason by refusing to live with the husband without any sufficient reason, and thereby compelling him to remarry.

7. In *Pullamma v. Thatalingam*⁹, AIR 1953 Nagpur 133, the wife deserted the husband, the husband then remarried and it was held that the wife was not entitled to maintenance.

8. The Magistrate ordered the husband to pay maintenance allowance to the wife simply because he admitted his remarriage; he failed to apply the correct law in the case. The wife became disentitled to any maintenance from the husband when she deserted him and the husband's remarriage did not restore her to the right she had prior to the desertion.

The amount fixed by the Magistrate also is quite improper. The gross income of the husband, is Rs. 136/- per month, but the net income is Rs. 108/- per month. He has also to maintain the daughter. The wife should not have been given maintenance allowance of more than Rs. 20/- per month. I allow this application and set aside the order passed by the Magistrate and dismiss the application of the opposite party for maintenance.

Application dismissed.

948 Cri LJ 248 : (AIR 1945 Mad 44)