

PUNJAB AND HARYANA HIGH COURT

Ishar

Vs

Soma Devi

(Tek Chand, C.J.)

10.02.1958

ORDER

Tek Chand, C. J.

1. The additional Sessions Judge, Pati-ala, has forwarded this revision petition with a recommendation that the order of the Magistrate awarding a sum of Rs. 12/- per mensem as maintenance to Soma Devi, wife of Ishar, be dismissed.

2. Soma Devi petitioner submitted an application under Section 488 of the Code of Criminal Procedure against her husband Ishar, alleging that he married her 16 years ago and after the marriage two daughters were born, who died. She was maltreated and turned out of his house about 7 years ago and ever since she has been living with her parents. Ishar has recently taken a second wife.

3. In reply, Ishar contended that he did not maltreat her and Soma Devi left his house of her own accord.

4. In support of maltreatment Soma Devi herself appeared and alleged that she used to be threatened by her husband and her mother in law on several occasions and ultimately she was turned out of the house. She was given shelter by her parents and is now receiving a sum of Rs. 34/- per mensem by serving in the Municipality of Patiala. But the Magistrate did not accept her solitary statement to be sufficient proof of maltreatment. He, however, thought that she was entitled to maintenance on the ground that her husband had married again, and for this reason he ordered the husband to pay Rs. 12/- per mensem by way of maintenance to his wife.

5. According to the view of the Additional Sessions Judge a second marriage by the husband during the lifetime of his previous wife under Section 488 (3), Criminal Procedure Code, is a just ground for his first wife's refusal to live with him, but that, by itself, cannot be considered as a proof of the first wife having been neglected. The learned Additional Sessions Judge has sent a recommendation to the High Court that the order of the Magistrate should be set aside and the petition of Soma Devi be dismissed as he thinks that the ground on which the Magistrate has sanctioned maintenance is not sustainable.

6. This case raises an important question as to the obligation of a husband to maintain his wife after she has left him and the husband has contracted a second marriage.

7. Under Section 488 (1), Criminal procedure Code, a Magistrate may order the husband to make a monthly allowance for the maintenance of his wife in case where having sufficient means, he neglects or refuses to maintain her. According to the first proviso to Sub-section (3), if a husband offers to maintain his wife on condition of her living with him, and she refuses to do so, the Magistrate may, on being satisfied that there are just grounds for doing so, still make an order for her maintenance. If, however, a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him. It is, therefore, important to note that contracting of marriage with another woman merely furnishes a just ground for the first wife to refuse to live with her husband.

8. There is no causal connection between right of maintenance and contracting of a second marriage. The condition precedent for being entitled to an order for maintenance in the case of a wife is, that her husband having sufficient means neglects or refuses to maintain her. In the absence of sufficient means, or of proof of neglect or re-fusal to maintain his wife, or in the absence of circumstances justifying such a refusal, the mere act of contracting a second marriage will not, per se be a ground to claim maintenance, though it will furnish a just cause for refusal to live with him. The criterion for granting maintenance order is the possession of sufficient means, and neglect or refusal to maintain. Conceivably, there may be a case, where after the husband has furnished his wife with a good home, with necessary food, medical attention and clothing, she leaves the home with-put any fault of the husband and resides elsewhere. In such a case, she will not be entitled to maintenance if after several years of voluntary separation, her husband contracts a second marriage.

That circumstance by itself will not furnish to her a good ground for being maintained, if otherwise, she was not entitled to be maintained. There may again be cases, though in the present state of society, rare, where the wife neither expects nor demands support and in fact she is in a position to support her husband. Simply because husband of such a woman contracts a second marriage, her right to be maintained, which otherwise she had not, does not come into existence. If a wife chooses wilfully and without justification to live away from her husband, she cannot, so long as she continues to do so, make her husband liable for her maintenance, for the reason, that of her own free will, she had deprived herself of the opportunity of being maintained in the house. To such a woman, the contracting of a second marriage cannot furnish a ground for demanding maintenance, which otherwise she could not claim. In a Division Bench decision of Calcutta High Court in *Sm. Bela Rani v. Bhupal Chandra*¹, J. P. Mitter, J. observed :

"The mere fact of a second marriage cannot ipso facto establish 'such neglect or refusal' within the meaning of Sub-section (1) of Section 488, Criminal Procedure Code, for a man may marry a second time and still not refuse to maintain his first wife."

"In our view, the mere fact that a husband has contracted marriage with another wife or keeps a mistress cannot, without more, be said to amount to neglect or refusal on the part of the husband to maintain his wife within the meaning of Subsection (1) of Section 488, Criminal Procedure Code."

*In State v. Mt. Anwarbi*², Hemeon, J. said :

"The mere fact that a husband has married again does not entitle the wife to maintenance, although, as shown it has to be regarded as just ground for her refusal to live with him. The refusal or neglect to maintain constitutes the basis for the exercise of jurisdiction by a Court under Section 488 Criminal Procedure Code, and in this case Anwarbi had undoubtedly failed to prove such refusal or neglect on her husband's part. In short, she is justified in not living with him since his remarriage; but in virtue of her failure to show that he had neglected or refused to maintain her, she was not entitled to separate maintenance."

9. The Scope of Section 488, Criminal Procedure Code, is limited. The section contemplates passing of an order for maintenance where the husband neglects or refuses to maintain his wife. The section does not purport to protect other conjugal rights. From the respondents act of taking another wife it may be possible to infer that he has no longer any intention to satisfy the expectations of the petitioner as regards her connubial or con-sortial rights. But neither denial of connubium in the sense of marital intercourse, nor refusal of consortium in the sense of avoiding society of the spouse can be considered a just ground for claiming relief under Section 488 of the Code of Criminal procedure. Such an act may be proof of husbands neglect of the first wife, but not of "neglect or refusal to maintain her." The only want, which this provision of law, purports to relieve, relates to providing of food raiment, and shelter.

10. The legislature has advisedly used two words "neglect" and "refuse." "Refuse" means a failure to maintain when asked to do so, while "neglect" means a failure on the part of the party bound to maintain, even in the absence of a demand. A husband, therefore, without refusing to maintain his wife, may still be guilty of neglecting to maintain her, When there is avoidance or disregard of duty whether from heedlessness, indifference or wilfulness, it is a case of "neglect." The term "neglect" includes disregard of duty wilfully as well as unintentionally. A person is said to "refuse" when he denies or declines to do what is asked of him. "Refusal" is always a wilful and a deliberate act. On the other hand, the word "neglect" imports an omission accompanied by some kind of culpability in the sense of a blameworthy conduct. Neglect is not always synonymous with omission. A person "neglects" who is remiss in paying attention to or in discharging duty towards another. "Neglect" is, therefore, not a mere omission without fault. It is an omission accompanied by some kind of censurable conduct on the part of the husband. But a husband cannot be said to have neglected or refused to maintain his wife who voluntarily lives apart from him.

11. I think that mere fact that the husband has contracted a second marriage or has kept a mistress, by itself, is not a valid ground for claiming maintenance, under Section 488, if the husband has not otherwise neglected or refused to maintain her.

12. The learned Counsel for Soma Devi has cited *Sm. Banarsi Bai v. Ghisoolal*³, *Smt. Maiki v. Hemraj*⁴, *Senapathi Mudaliar v. Deivanai Ammal*⁵, and *Rajeswariamma v. K. M. Viswanath*⁶, These authorities do not lay down in so many words, that the contracting of a second marriage by itself, entitles the first wife to obtain maintenance order regardless of the requirements of Section 488 (1) of the Code of Criminal Procedure.

13. My attention has also been drawn to *Mohinder Singh v. Mst. Harbhajan Kaur*⁷. This ruling

does not help the petitioner, as all that it lays down is, that if the husband contracts a second marriage it will be considered a just ground for the wife's refusal to live with him. Counsel has also referred me to an unreported decision in Criminal Revn. No. 1308 of 1956, Mst. Jasmer Kaur v. Bachan Singh, where maintenance order was made, not only because of the marriage of the husband, but also because, it was found on the facts of that case, that the husband had otherwise neglected and refused to maintain his wife.

14. It, however, appears to me that the Magistrate has not taken into consideration all the circumstances which should have been examined. He has stated, that out of the entire lot of witnesses examined by Soma Devi, she herself is the only person who has deposed, that the respondent beat her and expelled her from the house. On perusal of the record, I find that this is not so. Not only she but also A.W. 2 Manohar Lal, and A.W. 3 Raghu Nath have stated that she was beaten and turned out of the house, Raghu Nath A. W. 3 further stated, that they asked the respondent to take back Soma Devi and to let her live with him, but he declined to take her back. It is then stated that despite the efforts of the Panchayat, respondent has refused to take her home. Soma Devi stated that before his second marriage she was willing to give up her post and live with him in his village, but she is unwilling to do so now that he has contracted a second marriage. The Magistrate found that she had failed to prove that the respondent had assaulted her and expelled her from the house. Even if that be so, this finding alone is not sufficient for depriving a wife of her right of maintenance.

The Magistrate, before he was justified in rejecting her application, had to satisfy himself whether on the record, it had been proved that the respondent having sufficient means neglected or refused to maintain his wife. The Magistrate did not examine the evidence, with a view to find, if a case of neglect or refusal to maintain was made out from the record. He has lost sight of the only point, which required determination in such a case. It was no doubt within his competence not to feel satisfied with the evidence led in support of allegations of cruelty and expulsion.

But he had further to see, whether credible material had been placed on the record, regarding neglect or refusal to maintain. The Magistrate has not cared to find an answer to the real question whether on this record, proof has been furnished by the petitioner supporting the conclusion as to neglect or refusal to maintain her. There is sufficient evidence on the record to show that despite the desire of Soma Devi, to live with him, her husband has declined to keep her in his house. She was a young woman and in view of the harsh treatment of the respondent, she was compelled to seek shelter under the parental roof. She did not choose wilfully and without justification, to live away from her husband. This is not a case where a wife has, of her own free will, deprived herself of the opportunity of being maintained by the husband in the home.

15. In this case, apart from the allegation of beating and expulsion, which the Magistrate has disbelieved, there is other material to show that the respondent has neglected to maintain the petitioner.

16. A husband is relieved from the obligation to maintain his wife so long as she voluntarily remains absent or misconducts herself by committing adultery. There is no such allegation in this case. By contracting a second marriage, the relationship of husband and wife between the parties has not been dissolved, and the law imposes upon such a person an obligation to maintain his first wife. Even in those cases where a wife leaves her husband of her own free will, without any fault of the husband, the obligation on the part of the husband to maintain her, does not come to an end, but only remains suspended so long as she wilfully continues to absent herself. If during

the period of her absence she has not been guilty of any matrimonial impropriety, and desires to return to the husband, his liability to maintain her revives. After having contracted second marriage, the husband can no longer, as a condition precedent to maintaining her, impose upon her an obligation that she should live with him.

17. While agreeing with the views expressed by the Additional Sessions Judge, Patiala, on the question of law, I cannot accept his recommendation that the order of the Magistrate should be set aside, as on this record a case has been made out for grant of maintenance; though perhaps not on the alleged grounds of assault and expulsion. In the result, I agree with the order of the Magistrate awarding maintenance allowance of Rs. 12/- per mensem to Soma Devi from 3-1-1957, the date of his order, though for different reasons.

Cases Referred.

1AIR 1956 Cal 134

2AIR 1953 Nag 133

3AIR 1955 Ajmer 8 (2)

4AIR 1954 All 30

5AIR 1950 Mad 357

6AIR 1954 Mys 31

757 Punj LR 24 : ((S) AIR 1955 Punj 141)