

PUNJAB AND HARYANA HIGH COURT

Dhan Kaur

Vs

Niranjan Singh

(M Singh and I Dua, JJ.)

14.10.1959

JUDGMENT

M Singh, J.

1. FACTS Dhan Kaur was married to Niranjan Singh 17-18 years ago and a son Mehar Singh was born to them. About 10/12 years ago, a brother of Niranjan Singh died, leaving behind Bhan Kaur as widow, whom Niranjan Singh remarried in order to save the ancestral property. Thereafter Dhan Kaur continued to live with her husband and gave birth to a son, who died during infancy and also to a daughter Kelo, who is still living and is one of the applicants. After sometime at the instigation of the co-wife, Bhan Kaur, Niranjan Singh started mal-treating Dhan Kaur. It was said that education of Mehar Singh was stopped. About a month before making the application, Dhan Kaur was beaten and turned out of the house. A panchayat was taken but to no effect. Niranjan Singh respondent admitted all the facts aforesaid, but explained that there was no neglect on his part. As a matter of fact Dhan Kaur had gone to visit her parents and there she was instigated by her brothers to file an application under Section 488, Cr.P.C. The learned magistrate has accepted the version of the husband as correct and has held that Dhan Kaur's refusal to live with her husband is not justified and, accordingly, rejected the application under Section 488, Criminal Procedure Code. The petitioner went up in revision to the Court of the Additional Sessions Judge, Ferozpur who referred the matter to the High Court.

ORDER OF REFERENCE TO DIVISION BENCH J.S. Bedi, J.

(D/- 11-8-1959) The short point which requires determination in this reference is whether a wife is entitled to live separately and claim maintenance on account of remarriage of her husband. On this point there are conflicting authorities. Tek Chand J. in *Ishar v. Mst. Soma Devi*, AIR 1959 Punj 295 held 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. Contrary view has been taken by Randhir Singh J. in *Smt. Maiki v. Hemraj*, AIR 1954 All 30 wherein it has been held that no

other ground for refusal to live with the husband need be looked into if there is the good ground of husband's contracting another marriage, for the wife's refusal to live with her husband.

The fact that the wife came once or twice to live with her husband even after his remarriage does not improve matters in favour of the husband. The same view has been taken by Guha J. in *Kunti Bala Dassi v. Nabin Chandra Das*¹, (S) by J. N. Wazir C. J. and S. Murtaza Fazl Ali J. in *Mst. Biro v. Behari Lal*², and by Grover J. in *Dr. Mukand Lal v. Smt. Jyotishmati*³, This point arises almost in many cases daily. Although I agree with the authorities quoted later but this point is not free from difficulty. It may, therefore, be decided more authoritatively, by a larger Bench. I, therefore, direct that the papers be placed before my Lord the Chief Justice for orders.

JUDGMENT OF THE DIVISION BENCH Mehar Singh, J.

The question, almost an abstract question, of law that has been referred for decision, is whether a wife, having under the law a right to live separately from her husband because of his having contracted marriage with another wife, can succeed in a claim for maintenance under section 488 of the Code of Criminal Procedure without proof of neglect or refusal on the part of the husband to maintain her?

(2) The reference has been necessitated because of difference of judicial opinion on the question. In *Bela Rani v. Bhupal Chandra*⁴, a Division Bench of the Calcutta High Court, and in⁵ Tek Chand J., have held that the mere fact that the husband has contracted a second marriage or has kept a mistress, per se, is not a valid ground for the wife to claim maintenance, under section 488, if the husband has not otherwise neglected or refused to maintain her. This is one approach to the question. In *Banarsi Bai v. Ghisoolal*⁶, Nigam J. C., *Syed Ahmad v. Naghath Parveen Taj Begum*⁷, Hedge J., and in AIR 1958 J and K 47, Murtaza Fazl Ali J., with whom Wazir C. J. concurred, have expressed the view that neglect or refusal or no neglect or refusal the husband is liable to pay separate maintenance to his wife on the sole ground that he has taken a second wife. These are the two of cases taking directly opposing views on the question. In addition in *Senapathi Mudaliar v. Deivanai Ammal*⁸, *Gunni v. Babu Lal*⁹, *Bayanna v. Devamma*¹⁰, *Rajeswariamma v. Viswanath*¹¹, and 1958-60 Pun LR 314: (AIR 1958 Punj 390), there are observations, which lend some support to the second view, but the facts of the case show that those were really cases of neglect or refusal to maintain on the part of the husband.

(3) The sub-sections of section 488 relevant for the consideration of the question are--
"488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate, a Presidency Magistrate, a Sub-Divisional magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of such month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made; Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing: If 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. Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order." The foundation of the order of maintenance under sub-section (1) is the proof of neglect or refusal by the husband to maintain his wife. If this basis does not exist, there is no right to a claim of maintenance under that sub-section. That being so, the question is whether there is anything in section 488, in any of its subsequent sub-sections, that gives a right to maintenance against her husband to a wife on any other basis and as I read the section, I find that there is no other basis provided in that section for such a claim by the wife. When sub-sections (1) to (5) of section 488 are considered together among other defences, the husband has two defences as an answer to a maintenance application against him by his wife, and those defences are—

(a) that there has been no neglect or refusal to maintain the wife, or

(b) that the wife refuses to live with the husband without just ground. Of course other defences are also open to the husband according to the provisions of section 488, but for the present purpose, it is necessary to be clear that the two defences referred to above are distinct and separate defences and the husband would succeed in defeating the application of the wife if either or both of those defences are proved. The first proviso under sub-section (3) says that it is a just ground for a wife to refuse to live with her husband, if he has contracted marriage with another

wife or keeps a mistress. The second defence, as given above, can obviously be taken at the trial of an application under sub-section (1), and it can subsequently also be made a ground for cancellation of an order of maintenance already made as provided in sub-section (5).

Sub-sections (4) and (5) make it abundantly clear that this is a separate and distinct defence open to the husband at the trial and even in a case in which neglect or refusal has been proved and a maintenance order has been made in favour of a wife the husband can obtain cancellation of the order on the basis of that defence. At either stage it is open to the wife in reply to establish a just ground for her refusal to live with her husband and one of such just grounds is the statutory ground when he has contracted marriage with another wife or keeps a mistress. If the husband succeeds on first of those two defences, the question of the second will not arise but if he fails on the first and it has been proved that he has neglected or refusal to maintain his wife, he may succeed even then on the second ground provided there is no just ground for the wife to refuse to live with him. It now becomes clear that answer of the wife on the basis of a just ground to the second of those defences may not necessarily and always be proof of neglect or refusal by the husband to maintain her. The proof of that is the very basis or foundation of the claim of the wife and answer by the wife to the second of those defences on a just ground may not be proof of the same, for that will quite obviously depend upon the facts and circumstances of a particular case.

This is so because, as has been pointed out in *Bhikaji Maneckji v. Maneckji Mancherji*, 9 Bom LR 359, a neglect or refusal by the husband to maintain his wife may be by words or by conduct. It may be express or implied. There is, therefore, under section 488 no basis for a claim of maintenance by the wife except on the ground of neglect or refusal by the husband to maintain her, but neglect or refusal may be express or may by implications be inferred from the conduct of the husband. The question of neglect or refusal in a particular case is always a question of fact about which conclusion may be reached by the Court on evidence proving it expressly or on considerations leading to an inference of the existence of the same.

(4) In the first and the second of the three cases, which in clearest words support the second of the two above views, there is no discussion of the matter, but in the third case, although the view expressed is obiter because in Jammu and Kashmir addition made to the first proviso under sub-section (3) by Act 9 of 1949 does not apply, there is substantial discussion of the question. The learned Judges give two reasons as the basis of their opinion. One reason is that according to section 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 (Act No. 19 of 1946), a Hindu married woman has a right to separate residence and maintenance from her husband on the ground, amount others, "if he marries again". The learned Judges observe that under that provision in the case of a husband taking to himself another wife, the wife has a statutory right to live separately from him as also to have, thus living separately from him as also to have, thus living separately from him, maintenance from him. But such right by a wife under that provision can only be enforced in a civil Court and not in proceedings under section 488. It may be, and it is probable that the addition to proviso under sub-section (3) has been made in the wake of that provision, but it cannot be said that the ground for a claim of maintenance under that provision has been grafted as a ground for such a claim under section

488. This would be reading into the addition to the first proviso under sub-section (3) what the legislature itself has not chosen to enact in section 488. The nature of proceedings in a claim under the said Act is obviously different than the nature of summary proceedings in a claim under section 488. The two provisions have in this respect not been rendered by enactment at par. So that no assistance can be obtained in gleaning the meaning of the provision of section 488 from what has been provided in section 2 of Act No. 19 of 1946. All that that provision can be looked at for is to appreciate that where the husband marries again, the wife has a statutory right to live separately from him in so far as the proceedings under section 488 are concerned. That that gives her a right of action in a civil Court under that provision is not a ground to conclude that in such a case sub-section (1) of section 488 has for all practical purposes been amended in this manner that in an application under that section the wife need not prove neglect or refusal by her husband to maintain her.

(5) The second reason given by the learned Judges is that the first proviso under sub-section (3) of section 488 is in the nature of an exception to sub-section (1) and this approach, if I may say so with respect, by the learned Judges is both correct and sound, but where I find it difficult to agree with them is the scope of that exception to sub-section (1). The learned Judges seem to be of the opinion that that exception obviates the necessity for the wife to prove neglect or refusal to maintain her under sub-section (1) once she has given a just ground for her refusal to live with her husband because he has contracted marriage with another wife or keeps a mistress: in other words, the learned Judges are of the opinion that once the wife gives a just ground for refusal to live with her husband on account of his having married again that defeats not only the second, but both the defences, stated above, open to him.

But it is not easy to see where a husband proves absence of neglect or refusal to maintain the wife, how an order of maintenance can be made against him, even when the wife lives separately from him in exercise of her statutory right because of his having married again in so far as an application under section 488 is concerned. On course, she may succeed in her claim to maintenance in such circumstances under section 2 of Act No. 19 of 1946, she cannot succeed in a claim of maintenance in such circumstances under section 488. So that I agree with the learned Judges that the first proviso under sub-section (3) is an exception to sub-section (1) of section 488, but I cannot find my way to agree in their opinion as to the scope of the exception. The exception only concerns second of the two defences as given above and does not touch the first defence. It is, however, open to the Court to infer neglect or refusal by the husband to maintain his wife from the facts and circumstances of a particular case, and it may be that in a particular case where the wife is living separate from her husband in exercise of her statutory right on account of the husband having married again, circumstances may turn out to be such so as to enable the Court to infer neglect or refusal to maintain his wife on the part of the husband.

(6) The answer to the question in this reference then is that proof of neglect or refusal by the husband to maintain his wife is the basis of a claim for maintenance by the wife under section 488 and without proof of that, no order of maintenance can be made in favour of the wife under

that section even though she is living separate from her husband in pursuance of her statutory right to live separately from him because he has married again or has taken a mistress to himself. Of course, neglect or refusal may be express or implied and, in the circumstances of a particular case, it may be inferred by the Court from the conduct of the husband. In practice in many such cases the difference of judicial opinion, which has necessitated this reference, will resolve into nothing more than consideration by the Court whether, when the wife is living separately from her husband because he has married again or has kept a mistress circumstances are such that an inference of neglect or refusal by the husband to maintain his wife is or is not available. Where such inference is available, the order would obviously be justified, but in those rare cases in which such inference is not available, in my opinion, order under section 488 will not be justified.

I.D. Dua, J.

(7) I agree.

ORDER OF THE HIGH COURT J.S. Bedi, J.

(8-10) (After stating the facts, the circumstances which led to the Reference and the decision of the Division Bench, the order continues as under:) The learned counsel for the petitioner submitted that the Additional Sessions Judge in this case has given a finding that the respondent had neglected and refused to maintain the petitioner and that this finding is based on the statement of the petitioner herself. The respondent's counsel on the other hand submitted that the trial Court had given a contrary finding on this point and that the learned Additional Sessions Judge was not competent to alter that finding of fact, given by the trial Court, in revision. This argument of the respondent's counsel, however, does not appeal to me because the provisions of section 435 of the Code of Criminal Procedure are quite clear. The revisional Court can go into the question whether the finding given by an inferior Court is correct, legal or otherwise proper. Apart from that we find that there is not only the statement of the petitioner that she was maltreated, beaten and turned out by her husband, but she was also supported on that point by three other witnesses, namely, Nachhittar Singh, Kesar Singh and Bhajan Singh. The learned trial Court gave the finding on this point only taking into consideration some circumstances. It, however, did not discuss the evidence in detail. Apart from the evidence of these witnesses, another circumstance which clearly goes in favour of the petitioner is that although she lived with the respondent after his second marriage for a number of years and produced a couple of children during that period, but some untoward incident must have happened which made the petitioner leave her husband's house. Surely, the second marriage could not be the only reason. If that was so, she would have left the house of her husband long ago. Therefore, I am of the view that there is sufficient material on the record on the basis of which we can safely come to the conclusion that the respondent did refuse to maintain the petitioner and neglected her.

(11) After coming to the above finding the next question which requires determination is as to

what should be the quantum of maintenance. Unfortunately there is no definite finding either by the trial Court or by the revisional Court on this point. The trial Court has held that the respondent is not a well-to-do man which the finding of the learned Additional Sessions Judge is equally vague. Under the circumstances, it is difficult, if not impossible, to fix the quantum of maintenance. I, therefore, accept this revision and send the case back to the Sessions Judge, Ferozepore, for entrusting it to some other competent Magistrate for recording the evidence of the parties, if any, and then give a finding as to what is the income of the respondent and also fix the quantum of maintenance not only for the petitioner but also for her children, namely, Mehar Singh and Kelo. The parties are directed to appear in the Court of the Sessions Judge on the 15th February, 1960.

Order accordingly.

Cases Referred.

- 1AIR 1955 Cal 108
- 2AIR 1958 J and K 47
- 31958-60 Pun LR 314: (AIR 1958 Punj 390)
- 4AIR 1956 Cal 134
- 5AIR 1959 Punj 295
- 6AIR 1955 Ajmer 8(2)
- 7AIR 1958 Mys 128
- 8AIR 1950 Mad 357
- 9AIR 1952 Madh B 131; AIR 1954 All 30
- 10AIR 1954 Mad 226
- 11AIR 1954 Mys 31