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BHAGWAN DUTT

v

KAMLA DEVI AND ANR.

October 17, 1974

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[Y. V. CHANDRACHUD, R. S. SARKARIA AND
A. C. GUPTA, JJ.]

Code of Criminal Procedure (Act 5 of 1898) s. 488—Maintenance to wife—Whether her income and means can be taken into account in fixing.

The separate income and means of the wife can be taken into account in determining the amount of maintenance payable to her under s. 488, Criminal Procedure Code, 1898. [490 D]

C

(1) (a) The section does not confer an absolute right on a neglected wife to get an order of maintenance against the husband nor does it impose an absolute liability on the husband to support her in all circumstances. The use of the word 'may' in s. 488(1) indicates that the power conferred on the Magistrate is discretionary, though the discretion must be exercised in a judicial manner consistently with the language of the statute and with due regard to other relevant circumstances of the case. [486 B-D]

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(b) The object of Ss. 488 to 490 being to prevent vagrancy and destitution, the Magistrate has to find out what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is consistent with the status of the family. Such needs and requirements of the wife can be fairly determined only if her separate income, also, is taken into account together with the earnings of the husband and his commitments. [488 D-E]

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(c) The mere fact that the language of s. 488(1) does not expressly make the inability of a wife to maintain herself a condition precedent to the *maintainability* does not imply that while determining her claim and fixing the amount of maintenance, the Magistrate is debarred from taking into consideration the wife's own separate income or means of support. There is a clear distinction between a wife's *locus standi* to file a petition under the section and her *being entitled* to a particular amount of maintenance. Even in the case of a neglected child the proof of the preliminary condition, namely, the inability to maintain itself, will only establish the child's competence to file the petition; but its entitlement to maintenance and the fixation of the amount would depend upon the discretion of the Magistrate. [485 B-D]

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(d) There is nothing in the sections to show that in determining the maintenance the Magistrate should take into account only the means of the husband and not the means of the wife. On the contrary, s. 489(1) provides that 'on proof of a change in the circumstances of any person *receiving* under s. 488 a monthly allowance, the Magistrate may make such alteration in the allowance as he thinks fit;' and 'circumstances' must include *financial* circumstances. [488 E-G]

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P. T. Ramankutty Achan v. Kalyanikutty, A.I.R. 1971 Kerala 22, approved.

Major Joginder Singh. v. Bivi Raj Mohinder Kaur, A.I.R. 1960, Punjab 249, and Nanak Chand Banarsi Das and Ors. v. Chander Kishore and Ors. A.I.R. 1969 Delhi 235, overruled.

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(2) Section 488, Cr.P.C., provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. It provides a machinery for the summary enforcement of the moral obligation of a man towards his wife and children. But s. 23 and other provisions of the Hindu Adoptions and Maintenance Act 1956, relating to fixation of the rate of allowance, provide for the enforcement of the rights of Hindu wives and dependents under their personal law. There is no inconsistency between the 1956-Act

and s. 488, Cr. P.C. Both could stand together, and hence, there is no question of s. 488 being partially repealed or modified by s. 23 of the 1956 Act. [490 A-B]

Nanak Chand v. Shri Chandra Kishore Agarwal and Ors., [1970] 1 S.C.R. 565, followed.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 228 of 1970.

Appeal by special leave from the judgment and Order dated the 30th April, 1970 of the Delhi High Court at New Delhi in Criminal Revision No. 90 of 1970.

D. N. Nijhawan, Urmila Kapoor and Kamlesh Bansal, for the appellant.

Sardar Bahadur Saharya, for the respondents.

The Judgment of the Court was delivered by

SARKARIA J. Can the income of the wife be taken into account in determining the amount of maintenance payable to her under Section 488 of the Code of Criminal Procedure, 1898? This is the principal question for determination in this appeal by special leave.

Respondent No. 1, Kamla Devi was married to the appellant Bhagwan Dutt on January 22, 1957 according to Hindu rites. Out of this wedlock a daughter, Respondent No. 2, was born on November 22, 1957. On October 18, 1966, Respondent No. 1 filed a petition against the appellant for judicial separation on the ground of desertion and cruelty. During the pendency of that petition, she filed an application under s. 488 of the Code of Criminal Procedure, 1898, in the court of the Magistrate, 1st Class, Delhi, claiming maintenance for herself and for her minor daughter, on the ground that the appellant had neglected and refused to maintain them. At the date of the application Respondent No. 1 was employed as a stenographer on a monthly salary of Rs. 600/-. The appellant was at that time earning about Rs. 800/- per month. However, later on when the case was in the Sessions Court in revision, the monthly income of each of them had increased by Rs. 150/-, approximately.

By his order dated June 6, 1969 the Magistrate directed the husband to pay Rs. 250/- per month i.e. Rs. 175/- for the wife and Rs. 75/- for the child for their maintenance. While fixing the amount of maintenance for the wife, the Magistrate did not take into consideration her own independent income.

Against the order of the Magistrate, the husband went in revision to the Court of Session. The Additional Sessions Judge was of the view that since the income of the wife was "substantial" and enough to maintain herself, she was not entitled to any maintenance. He was further of the opinion that Rs. 75/- p.m. allowed to the child being inadequate, it deserved to be raised to Rs. 125/- p.m. for the period of the pendency of the application in the trial court and thereafter to Rs. 150/- p.m. He referred the case to the High Court under s. 438 of the Code with a recommendation that the order of the Magistrate to the extent it allowed maintenance to the wife, be quashed, but the allowance of the child be enhanced as aforesaid.

A A learned single Judge of the High Court who heard the reference held that in "making an order for maintenance in favour of a wife under s. 488 of the Code of Criminal Procedure the court has not to take into consideration the personal income of the wife as section 488 does not contemplate such a thing". He therefore declined the reference *pro-tanto*, but accepted the same in regard to the enhancement of the allowance of the child.

B Aggrieved by the judgment of the High Court, the husband has now come in appeal before us.

The material part of Section 488 of the Criminal Procedure Code is in these terms :

C "(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 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.

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(2) to (5)"

The corresponding part of Section 125 in the new Criminal Procedure Code, 1973, which came into force on 1st April 1974, reads:

E "125. (1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

F (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself.

G a Magistrate of the first class may, upon proof of a such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife, such child, father or mother, 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 may from time to time direct...."

H A comparative study of the provisions set out above would show that while in Section 488 the condition "unable to maintain itself"

apparently attached only to the child and not to the wife, in Section 125, this condition has been expressly made applicable to the case of wife. Does this recasting of the old provision signify any fundamental change in the law? Or, has this been done merely to clarify and make explicit what was formerly implicit?

Section 488 does not confer an absolute right on a neglected wife to get an order of maintenance against the husband nor does it impose an absolute liability on the husband to support her in all circumstances. The use of the word "may" in Section 488(1) indicates that the power conferred on the Magistrate is discretionary. A neglected wife, therefore, cannot, under this Section, claim, as of right, an order of maintenance against the husband. Of course, the Magistrate has to exercise his discretion in a judicial manner consistently with the language of the statute with the regard to other relevant circumstances of the case. Nevertheless, the Magistrate has to exercise his discretion primarily towards the end which the Legislature had in view in enacting the provision.

Sections, 488, 489 and 490 constitute one family. They have been grouped together in Ch. XXXVI of the Code of 1898 under the caption, "Of the maintenance of wives and children". This Chapter, in the words of Sir James Fitzstephen, provides "a mode of preventing vagrancy, or at least of preventing its consequences". These provisions are intended to fulfil a social purpose. Their object is to compel a man to perform the moral obligation which he owes to society in respect of his wife and children. By providing a simple, speedy but limited relief, they seek to ensure that the neglected wife and children are not left beggared and destituted on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. Thus, Section 488 is not intended to provide for a full and final determination of the status and personal rights of the parties. The jurisdiction conferred by the Section on the Magistrate is more in the nature of a preventive, rather than a remedial jurisdiction; it is certainly not punitive. As pointed out in *Thompson's case*(1) "the scope of the Chapter XXXVI is limited and the Magistrate cannot, except as thereunder provide, usurp the jurisdiction in matrimonial disputes possessed by the Civil Courts". Sub-section (2) of s. 489 expressly makes orders passed under Chapter XXXVI of the Code subject to any final adjudication that may be made by a civil Court between the parties regarding their status and civil rights.

The stage is now set for appreciating the contentions canvassed by the learned Counsel for the parties.

Mr. Nijhawan, learned Counsel for the appellant contends that if s. 488(1) is construed in the light of its primary object and the nature of the jurisdiction conferred by it, together with s. 489(1), it would be amply clear that in determining the wife's claim to maintenance and its quantum, her independent income is a relevant consideration. In support of this contention, Counsel has referred to *Mohd. Ali v. Mt.*

(1) 6 N.W.P. 205.

- A *Sakina Begum*(1) *Narasimha Ayyar v. Rangathayammal*(2); *Poonnabalam v. Saraswathi*(3); *Ahmed Ali Saheb v. Sarfarajulinisa Begum* (4) and *P. T. Ramankutty Achan v. Kalyanikutty*(5).

B As against the above, Mr. Sardar Bahadur Saharya maintains that the very fact that the Section does not make the inability of a wife to maintain herself, a condition precedent to the grant of maintenance—as it does in the case of child—shows that the intention of the Legislature was that the wife's own income or means should not be taken into account either for determining her right to maintenance or for fixing its amount. It is further urged that the language of s. 489 cannot be called in aid to construe s. 488 (1). Reliance for the main argument has been placed on *Major Joginder Singh v. Bibi Raj Mohinder Kaur*.(6)

C In *Major Joginder Singh's case* (supra), the wife had claimed maintenance under s. 488, Cr. P. C. both for herself and her minor son. The husband was a Major in the army, getting Rs. 1070/- p.m. It is not very clear from the Report as to whether the wife was having any substantial income of her own. However, an argument was raised that she had her own means of support which should be taken into account for determining her right to maintenance.

D The learned Judge who decided the case, negatived the contention, thus :

E “It is obvious from the language of the section that in order to enable a child to claim maintenance it has to be proved that the child ‘is unable to maintain itself’. No such condition has been imposed in the case of a wife. Cases in which maintenance was refused to the wife merely on the ground that she was in a position to maintain herself have, in my view, omitted to consider the implication of this distinction while construing the scope and effect of s. 488. In my opinion, the ability of the wife to maintain herself was not intended by the legislature to deprive her of the right of maintenance conferred by this section, if she is otherwise found entitled to it..”

F Commenting on the cases cited before him, the learned Judge further observed :

G “But if those authorities intend to lay down any rigid rule of law that the only right which a wife possesses under s. 488, Cr.P.C., is to claim just subsistence allowance which should merely provide bare food, residence and raiment and that also only if she has no other means or source, then I must with respect, record my emphatic dissent.”

It may be noted that the above principle spelled out from the interpretation of s. 488(1) in *Major Joginder Singh's case* (supra),

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(1) A.I.R. 1944 Lah. 394.
(3) A.I.R. 1957 Mad. 693.
(5) A.I.R. 1971 Kerala 22.

(2) A.I.R. 1947 Mad. 204.
(4) A.I.R. 1952 Hyd. 76.
(6) A.I.R. 1960 Punjab 249.

was carried a step further by the Division Bench in *Nanak Chand Banarsi Dass and ors. v. Chander Kishore and Ors.*⁽¹⁾ to deduce the proposition that the wife's right to receive maintenance under s. 488, Criminal Procedure Code is an absolute right.

In our opinion, one wrong assumption has led to another false deduction. The mere fact that the language of s. 488(1) does not expressly make the inability of a wife to maintain herself a condition precedent to the *maintainability* of her petition, does not imply that while determining her claim and fixing the amount of maintenance, the Magistrate is debarred from taking into consideration the wife's own separate income or means of support. There is a clear distinction between a wife's *locus standi*, to file a petition under s. 488 and her *being entitled*, on merits, to a particular amount of maintenance thereunder. This distinction appears to have been overlooked in *Major Joginder Singh's case* (supra). Proof of the preliminary condition attached to a neglected child will establish only his *competence* to file the petition but his *entitlement* to maintenance, particularly the fixation of its amount, will still depend upon the discretion of the Magistrate. As the Magistrate is required to exercise that discretion in a just manner, the income of the wife, also, must be put in the scales of justice as against the means of the husband.

The object of those provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments.

There is nothing in these provisions to show that in determining the maintenance and its rate, the Magistrate has to inquire into the means of the husband alone, and exclude the means of the wife altogether from consideration. Rather, there is a definite indication in the language of the associate s. 489(1) that the financial resources of the wife are also a relevant consideration in making such a determination. Section 489(1) provides *inter alia*, that "on proof of a change in the circumstances of any person receiving under s. 488 a monthly allowance, the Magistrate, may make such alteration in the allowance as he thinks fit". The "circumstances" contemplated by s. 489(1) must include *financial* circumstances and in that view, the inquiry as to the change in the circumstances must extend to a change in the financial circumstances of the wife.

Keeping in view the object, scheme, setting and the language of these associate provisions in Chapter XXXVI, it seems to us clear that in determining the amount of maintenance under s. 488(1), the Magistrate is competent to take into consideration the separate income and means of the wife.

(1) A.I.R. 1969 Delhi 235.

A We do not wish to burden this judgment with discussion of all the decisions that have been cited at the Bar. It will suffice to notice one of them rendered by the Kerala High Court in which *Major Joginder Singh's* case (supra) was explained and distinguished. That case in *P. T. Ramankutty v. Kalyankutty* (supra) therein, the husband was getting a net salary of Rs. 240/-, while the monthly salary of the wife was (after deductions) Rs. 210/-. The question, was whether the wife in such a financial position had a right to claim maintenance under s.488, Criminal Procedure Code. after referring to the observations of Dua, J. in *Major Joginder Singh's* case (supra) and surveying the case law on the subject, the learned single Judge of the Kerala High Court correctly summed up the position thus ;

C "To take the view that in granting maintenance under Section 488 to a wife her personal income also can be considered may *prima facie* appear to be against the language of the section because the condition "unable to maintain itself" appearing therein attaches itself only to child and not to wife. But that condition has application only in considering the maintainability of a petition filed under s.488. A wife can file a petition under that section irrespective of the question whether she is able or unable to maintain herself. But on her application at the time of the granting of monthly allowance to her there is nothing prohibiting the Court from considering whether she can maintain herself with her own income and if she can, granting her nothing by way of allowance."

E Any other construction would be subversive of the primary purpose of the section and encourage vindictive wives having ample income and means of their own, to misuse the section as a punitive weapon against their husbands.

F It is next contended on behalf of the appellant that s. 488 must be deemed to have been partially repealed and modified by s. 23 of the Hindu Adoptions and Maintenance Act, 1956 (for short, called the Act) which provides that in determining the amount of maintenance, the Court shall have, *inter alia*, regard "to the value of the wife's property and any income derived from such property or from the claimant's own earning or from other sources".

Clause (b) of s.4 of that Act provides :

"Save as otherwise expressly provided in this Act —

- (a) X X X
- G (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

H The question therefore resolves itself into the issue : whether there is anything in s. 488 which is inconsistent with s.23 or any other provisions of the Act. This matter is no longer *res integra*. In *Nanak Chand v. Shri Chandra Kishore Agarwala and Ors.*⁽¹⁾ this Court held that there is no inconsistency between Act 78 of 1956 and s. 488, Criminal Procedure

(1) [1970] 1 S.C.R. 565.

Code. Both could stand together. The Act of 1956 is an Act to amend and codify the law relating to adoption and maintenance among Hindus. The law was substantially similar before when it was never suggested that there was any inconsistency with s. 488, Cr. P. C. The scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties.

We have said and it needs to be said again, that s. 488 is intended to serve a social purpose. It provides a machinery for summary enforcement of the moral obligations of a man towards his wife and children so that they may not, out of sheer destitution become a hazard to the well-being of orderly society. As against this, s. 23 and other provisions of the Act relating to fixation of the rate of allowance, provide for the enforcement of the rights of Hindu wives or dependents under their personal law. This contention therefore is meritless and we negative the same.

For the reasons aforesaid, we allow the appeal, set aside the judgment of the High Court and send the case back to the trial Magistrate to refix the amounts of maintenance. In the case of the wife, he shall together with other relevant circumstances, take into account her income also. In the case of the daughter, he shall afford opportunity to the parties to lead fresh evidence and then refix her allowance.

V.P.S.

Appeal allowed.