

## CRIMINAL REFERENCE.

Before Mitter J.

SARASWATI DEBEE

v.

NARAYANDAS CHATTERJI.\*

1932

Feb. 15.

*Maintenance—Jurisdiction of criminal courts, when ousted—Code of Criminal Procedure (Act V of 1898), s. 488.*

An agreement between the husband and the wife enforceable in a civil court, by which the husband agrees to pay the wife a specified sum per month, does not oust the jurisdiction of the criminal court under section 488 of the Code of Criminal Procedure. Anything short of a decree entitling the wife to maintenance is not sufficient to oust such jurisdiction.

*Kent v. Kent* (1) followed.

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In this case one Saraswati Debee made an application to the Suburban Police Magistrate, Alipore, under section 488 of the Code of Criminal Procedure, for an order against the husband to pay her a suitable maintenance. For several years, the husband, who had married a second time, had neglected to maintain the wife. The wife made an application in the civil court to be permitted to bring a suit in *forma pauperis* against the husband for maintenance. During the pendency of that proceeding, the husband executed a registered agreement, by which he agreed to pay a sum of Rs. 7 per month to the wife. The proceeding was, thereupon, dropped. No maintenance was paid and, some time afterwards, the wife sued for the arrears of maintenance already accrued and obtained a decree for the same, but, as she could not pay the requisite court-fees, she could not get a perpetual decree for

\*Criminal Reference, No. 2 of 1932, made by Kshirodelal Mukherji, Addl. District Magistrate of 24-Parganas, dated Dec. 29, 1931.

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maintenance. She, then, made the present application. The magistrate dismissed the application on the ground that, in view of the agreement arrived at between the parties, the criminal court had no jurisdiction to entertain such an application. The wife moved the District Magistrate of 24-Parganas, who referred the case to the High Court, recommending that the said order of dismissal be set aside and the application be entertained on the merits.

*Debendranarayan Bhattacharya* (with him *Anil-chandra Ray Chaudhuri*) in support of the Reference. The order of the police magistrate was passed under a misapprehension of the scope of section 488 of the Code of Criminal Procedure. The right under section 488 is a statutory right independent of her rights under the civil law and arises on the mere proof that the husband has neglected to maintain the wife. The agreement is immaterial and cannot oust the jurisdiction of the criminal court, specially when the agreement was never acted upon. A promise to maintain a wife is not the same thing as maintaining the wife and he must still be considered to be neglecting to maintain her. Even an order for maintenance does not oust the court's jurisdiction. *Kent v. Kent* (1).

In the case of *John Meiselback* (2), the court entertained such application, even when the civil court refused to enforce an agreement for maintaining the wife. If there were a perpetual decree for maintenance, the jurisdiction might have been ousted, but the decree obtained by the wife in this case was not of that character. It was merely a money decree for arrears of maintenance; the Reference should, therefore, be accepted.

*Santoshkumar Basu* (with him *Harideb Chatterji*). The order under section 488 of the Code of Criminal Procedure can be passed only when the husband neglects or refuses to maintain his wife; when the husband enters into an agreement with the wife to give

(1) (1925) I. L. R. 49 Mad. 891.

(2) (1872) 17 W. R. Cr. 49.

her maintenance, he can no longer be supposed to neglect or refuse to maintain the wife. The case of *Kent v. Kent* (1) is clearly distinguishable. In that case the order was unenforceable. In this case, all that the wife has to do is to bring a suit to realise her maintenance. She actually obtained a decree once. If she does not choose that course, it is her own fault. The matter has been finally settled in the civil court and the criminal court can have no jurisdiction. Having elected to go to the civil court, she cannot be permitted to make a fresh application to the criminal court. The present attempt is merely to avoid the agreement, by which the wife bound herself to take Rs. 7 per month and to get an increased amount in its stead. The order passed by the police magistrate was the proper order and the Reference should be rejected or an order directing the husband to pay Rs. 7 per month be made by this Court. *Deraje Malinga Naika v. Marati Kaveri* (2), *Veeran v. Ayyammah* (3).

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MITTER J. The facts which have given rise to this Reference are stated with sufficient fullness in the letter of reference by the Additional District Magistrate of 24-Parganas. The District Magistrate has asked this Court to set aside the order refusing to entertain proceedings under section 488 of the Code of Criminal Procedure at the instance of Saraswati Debee. I have heard Mr. Basu against the Reference and Mr. Bhattacharya in support of the Reference. Mr. Basu contends that, having regard to the fact that there is an agreement between the husband and the wife that the amount of maintenance should be Rs. 7 per month, the agreement is enforceable in the civil court and the jurisdiction of the criminal courts is ousted, and he has referred to a number of rulings in support of his contention. I have examined those decisions and I do not think that the states of facts in those decisions resemble the facts in the present case.

(1) (1925) I. L. R. 49 Mad. 891. (2) (1907) I. L. R. 30 Mad. 400.

(3) (1889) 2 Weir 615.

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It has been held that, where there is a decree declaring the wife entitled to maintenance as against the husband, the jurisdiction of the criminal court is ousted for the simple reason that the relief can be obtained by the wife against the husband by executing the decree for maintenance. As has been pointed out by the learned Judges in the case of *Kent v. Kent* (1) "The existence of the order 'directing payment of 'maintenance' is not sufficient to oust the jurisdiction "of the magistrate, for a mere order of maintenance "is not equivalent to maintaining the wife; and the "order whatever may be its force, or nature, cannot "take away the magistrate's jurisdiction so long as "the husband neglects or refuses to maintain the wife." In the Madras case, there was an offer on the part of the husband to maintain the wife, and it was held that the mere offer to maintain was not sufficient. It appears that notwithstanding this agreement, arrears of maintenance for one year accrued and it appears that the agreement is not being acted upon in that sense, and I am disposed to think that anything short of a decree entitling the wife to maintenance is not sufficient to take away the jurisdiction of the magistrate.

The result is that the Reference is accepted and the magistrate is directed to entertain the application under section 488 of the Code of Criminal Procedure and proceed to deal with the same in accordance with law. The application will be heard by a magistrate other than the magistrate before whom the application was made.

*Reference accepted.*

A. C. R. C.

(1) (1925) I. L. R. 49 Mad. 891, 898.