

complaint. The appeals were argued on the merits at great length. Petitioners invited the opinion of the District Magistrate and cannot complain when they have been given what they asked for. If the correct procedure under section 476 were that advocated by Mr. Jayarama Ayyar a discussion of, and decision on, the merits would be inevitable in every case. My own view is that the preliminary enquiry under that section should be of a nature merely to satisfy the Court that an offence "appears" to have been committed. Nothing more is necessary and a long discussion of a decision on the merits is as undesirable as it is unnecessary.

I see no reason to suppose that the Magistrate before whom the complaints have been presented has been influenced by the opinion of the District Magistrate. The petitions are dismissed.

DEVADOSS, J.—I agree.

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v.
KING-
EMPEROR.
—
WALLER, J.

DEVADOSS, J.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Curgenvven.

KANAGAMMAL (PETITIONER) PETITIONER,

v.

PANDARA NADAR (COUNTER-PETITIONER), RESPONDENT.*

1926
November 2.

Criminal Procedure Code (Act V of 1898), sec. 488—Maintenance Order—Duration of—Cancellation by Court—Wife returning to live with husband—if order automatically cancelled.

The general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled, is, *prima facie*, applicable to maintenance orders passed under section 488 of the Criminal Procedure Code. The husband may, on proof

* Criminal Revision Case No. 250 of 1926.

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of circumstances specified in section 488 (5) or section 499, obtain the cancellation or modification of the original order, as the case may be; and until he does that, the original order must be deemed to be still in force. The mere fact that a wife has returned to live with her husband will not bring the order to an end automatically, and on her separating from him again, she can enforce it. *Shah Abu Ilyas v. Ulfat Bibi* (1897) I.L.R., 19 All., 50 and *Parul Bala Debi v. Satish Chandra Bhattacharjee* (1923) 75 I.C., 529, referred to. *Phul Kali v. Harnam* (1888), 8 A.W.N. 210, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Subdivisional Magistrate of Tuticorin, dated 29th September 1925, in M.C. No. 26 of 1925.

P. N. Appuswami Ayyar and *P. R. Srinivasan* for petitioner.

V. Rajagopala Achari for respondent.

Public Prosecutor for the Crown.

JUDGMENT.

In 1921 the petitioner applied for and obtained an order against her husband, the counter-petitioner, under section 488, Code of Criminal Procedure, for the payment of maintenance for herself and her daughter at the rate of Rs. 10 per mensem. Subsequently, during the years 1922-23, she returned to the counter-petitioner and lived with him, bearing him another child. She then left him again and in 1924 applied to execute the maintenance order, but her petition was dismissed. Then she came up to this Court in revision (Criminal Revision Case No. 52 of 1925) and JACKSON, J., cancelled the Subdivisional Magistrate's order rejecting her application, leaving it to him either to give her arrears under the old order or, if it was found that the order was no longer in existence, to let her file a fresh application. Accordingly on 22nd August 1925 she filed a petition

for eleven months' arrears of maintenance up to that date. The learned Subdivisional Magistrate, in the order which it is now sought to revise, held that the reconciliation between husband and wife had brought the old order to an end automatically so that it lay on the petitioner to adduce further proof that she was entitled to maintenance. The point now arising for decision therefore is whether the original order granting maintenance may be deemed to be still in existence.

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It is a general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled; and *prima facie*, this rule applies to maintenance orders passed under section 488, Code of Criminal Procedure; sub-section (5) of that section provides that in certain specified circumstances, where a wife is living in adultery, where without sufficient reason she refuses to live with her husband, or where the parties are living separately by mutual consent, the Magistrate shall cancel the order. It is also open to the Court, under section 489, to make an alteration in the allowances on proof of a change in the wife's circumstances. In such cases, it will be for the counter-petitioner to obtain either the cancellation or the modification of the original order, and until he does that, the original order must be deemed to be still in force. The mere fact, for instance, that a wife is living in adultery, will not bring the order to an end automatically. If it did so there would be no need for the Court to cancel it. And similarly the mere fact that a wife has returned to live with her husband will not have this effect, although it is true that the Code makes no provision for its cancellation upon such an event occurring.

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Nor does it make any provision, to take another example, for cancelling the order upon proof that the husband has divorced his wife. A case of the latter kind came before the Allahabad High Court in *Shah Abu Ilyas v. Ulfat Bibi*(1), and it was held to be the duty of the Court, if the plea of divorce were established, to decline to enforce the order which it had discretion to do under section 490, Code of Criminal Procedure, and so, if a wife returns to live with her husband, it would be open to the Court to decline to enforce the order, whether or not it would have the power, in the absence of any statutory provision, to cancel it. The order would remain in suspense. This was the view taken in *Parul Bala Debi v. Satish Chandra Bhattacharjee* (2) where a wife had temporarily returned to her husband and had left him again.

“A mere temporary stay of this kind, though it may have suspended the operation of the order, had not the effect of cancelling it in the way that it could be cancelled under section 488 (5) of the Code.”

A contrary view seem to have been taken by STRAIGHT, J., in the case referred to by the learned Joint Magistrate *Phul Kali v. Harnam*(3), viz., that upon a wife voluntarily returning to her husband the order would permanently “become ineffectual,” notwithstanding that at the date of the subsequent proceedings, she had left him again, but I think with respect, that this is not the correct position.

It was accordingly open to the petitioner to apply for the execution of the order, as still subsisting. The counter-petitioner might then have resisted the application upon any of the grounds specified in sub-section (5). To enable this course now to be adopted, I set aside the Subdivisional Magistrate’s order, dated 29th September

(1) (1897) I.L.R., 19 All., 50.

(2) (1923) 75 I.C., 529.

(3) (1888) 8 A.W.N., 210.

1925, and direct him to restore to file the petition, dated 22nd August 1925, and to dispose of it in the light of the foregoing observations. If the counter-petitioner fails to show that the petitioner is now disentitled to maintenance under sub-section (5), it will be for the court to consider with effect from what date the payment of arrears should be enforced. Under the second proviso to section 488 (3) the court's power extends to the recovery of arrears falling due over a period of one year next before the date of application, that date being 22nd August 1925, but it does not follow that the power should be fully exercised, and I observe that the petitioner herself only asked for the recovery of eleven months' arrears.

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B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

MIR ANWARRUDIN (PETITIONER), COMPLAINANT IN BOTH CASES,

1926,
December 2.

v.

FATHIM BAI ABIDIN AND ANOTHER (ACCUSED),
RESPONDENTS.*

Indian Penal Code, sec. 499, exception 9—Statements by a lawyer acting in course of professional duties prima facie defamatory—Necessary in interests of client—Presumption of good faith—Proof of malice, overrides presumption—Absolute privilege, if available in India.

When a lawyer is acting in the course of his professional duties and is thus compelled, to put forward everything that may assist his client, good faith is to be presumed, and bad faith is not to be presumed merely because the statement is *prima facie* defamatory, but there must be some independent allegation and proof of private malice from which, in the circumstances of the case, the Court considers itself justified in

* Criminal Revision Case No. 615 of 1926 and No. 700 of 1926.