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We are clearly of opinion that article 141 is applicable and that article 143 has been wrongly applied by the lower appellate court. The result is that this appeal is allowed, the decree of the lower appellate court is set aside and that of the court of first instance is restored.

REVISIONAL CRIMINAL

Before Mr. Justice Allsop

1936
 November, 6

RAM SARAN DAS v. MST. RAM PIARI*

Criminal Procedure Code, section 488(4)—Wife's petition for maintenance—Compromise that husband would pay a certain sum monthly on condition that the wife did not go into service—Order accordingly—Validity—"Living separately by mutual consent".

Upon a wife's petition under section 488 of the Criminal Procedure Code for maintenance there was a compromise between the parties that the husband would pay Rs.4 monthly for her maintenance, on condition that she did not go into the service of any other person, and the Magistrate passed an order accordingly:

Held, that the order was a valid order under section 488 and could be enforced. The case was not one which came within the words, "living separately by mutual consent", in section 488(4). The "mutual consent" in sub-section (4) means a consent on the part of the husband and wife to live apart no matter what the circumstances may be; where a wife refuses to live with her husband on some specific ground like cruelty or the husband's keeping a mistress in the house, it can not be said that the husband and wife are living apart by mutual consent if the husband does not insist that the wife should live with him. Such an interpretation would defeat the very purpose of the section.

Further, the order was not invalid by reason of its being a conditional order. There is no reason why the parties to a case under section 488 should not come to terms on conditions arranged by themselves and why the Magistrate should not then pass an order for maintenance accordingly. If in future the conditions are broken, it will be for the Magistrate to inquire into the circumstances of the case and then to enforce or refuse to enforce the order previously passed.

*Criminal Reference No. 705 of 1936.

Mr. *Vishwa Mitra*, for the applicant.

Mr. *Baleshwari Prasad*, for the opposite party.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

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ALLSOP, J.:—This is a reference by the learned Sessions Judge of Bijnor. He has recommended that an order passed by a Magistrate under section 488 of the Code of Criminal Procedure to enforce the payment of maintenance by Ram Saran Das to his wife Mst. Ram Piari should be set aside. He has relied upon the cases of *Pal Singh v. Mst. Nihal Kaur* (1) and *Ram Saran Das v. Mst. Damodri* (2) for the proposition that an order for maintenance passed upon a compromise between the husband and wife, where it is agreed that maintenance shall be paid on certain conditions, is an order which cannot be enforced in a criminal court. There is certainly support for this proposition in the two cases upon which the learned Judge has relied, but I regret to say that I am unable to see any sufficient reason for thinking that the order of the Magistrate was illegal in the present case.

Mst. Ram Piari made an application in the year 1931 that her husband Ram Saran Das should be directed to pay her maintenance. Thereafter on the 16th of May, 1931, the husband and wife made a joint application to the court in which they said that they were agreed that Ram Saran Das should pay Mst. Ram Piari a sum of Rs.4 a month for her support, provided that she did not go into the service of any other person and provided that she did not go to any other person's house to cook for him. I am told that that order has been enforced on several occasions by the Magistrate. Finally in February, 1936, Mst. Ram Piari made the application which has given rise to these proceedings. She said that Ram Saran Das had not paid her anything since May, 1935, and she asked the Magistrate to take action against him to force him to make the monthly payments which were

(1) A.I.R., 1932, Lah., 349.

(2) A.I.R., 1934 Lah., 864.

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in arrears. The Magistrate passed the order which was required of him and Ram Saran Das then made an application in revision in the court of the Sessions Judge saying that the criminal court had no jurisdiction to enforce an order of maintenance in the circumstances of this case.

One reason why it was held in the Lahore cases to which I have referred that a criminal court could not enforce an order of this kind is that sub-section (4) of section 488 contains the provision that no wife shall be entitled to receive an allowance from her husband if they are living separately by mutual consent, and if there is a compromise in which it is agreed that the woman shall live apart from the man then it may be said that they are living apart by mutual consent. I do not think that the expression "mutual consent" is capable of being interpreted in this way. I think the "mutual consent" as used in sub-section (4) of section 488 means a consent on the part of the husband and wife to live apart no matter what the circumstances may be. Where a wife refuses to live with her husband on some specific ground such as cruelty or the fact that he is keeping another woman, I do not think that it can be said that the husband and wife are living apart by mutual consent if the husband does not insist that the wife should live with him. If that expression had this meaning, a husband could, I imagine, defeat almost any conceivable application for maintenance under section 488 of the Code of Criminal Procedure. These applications are made for the most part if not always by women who are living apart from their husbands and who for some reason are unable to live with their husbands. The husband in the first instance may attempt to defeat the claim saying that he is willing to support his wife if she will live with him, but if it is found that she has good reason for not living with him he can then turn round and defeat the claim by saying that he does not want her and it might then perhaps be said that there was mutual

consent to a separation because she did not want to live with her husband and he did not want her to live with him. I do not think that the expression "mutual consent" can be interpreted in this way.

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Another reason for holding that the criminal court had no jurisdiction was that it could not pass a conditional order. Again I do not see that there is any force in this objection. A Magistrate can make an order for maintenance which can be opposed upon the ground that the woman should live with the husband if there is a controversy between the parties upon that point. I can see no reason why the parties should not come to terms on conditions arranged by themselves and why the Magistrate should not then pass an order for maintenance. When the Magistrate comes to enforce the order it will again be open to the husband to show cause why the payment should not be made.

Sub-section (3) of section 488 begins with the words "If any person so ordered fails without sufficient cause to comply with the order". It is obviously intended that the husband may, when the Magistrate proposes to enforce payment, raise any points which might have been open to him at the time when the original order was made. I think if the husband agreed to pay maintenance on certain conditions and afterwards found that those conditions were not satisfied, that in itself might be a sufficient cause for non-payment on his part and that the Magistrate for that reason might refuse to enforce his original order.

I can see nothing in the provisions of section 488 which would lead to the conclusion that an order for maintenance passed by a Magistrate with the consent of a husband and wife cannot afterwards be enforced. Whether it is or is not to be enforced depends upon the circumstances of the case, into which the Magistrate has power to make an inquiry. In the present case the husband promised to pay Rs.4 a month and it has been found as a fact that the conditions which he laid down,

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viz. that his wife should not go into service or cook for other people, have been obeyed.

It has been suggested that on two occasions the husband had said in writing that he was prepared to support his wife if she lived with him and it is argued that the Magistrate has not gone into this question. The Magistrate, however, in his order has said that the wife was refusing to live with her husband because he had a mistress staying in the house. That would surely be a sufficient reason for the wife to refuse to live with him.

In my opinion there is no ground for interference in revision with the order of the Magistrate and I reject the reference.

APPELLATE CIVIL

Before Mr. Justice Thom and Mr. Justice Rachpal Singh

1936
 November, 23

MUNICIPAL BOARD OF SHAHJAHANPUR (DEFENDANT)
 v. SUKHA SINGH (PLAINTIFF)*

Master and servant—Secretary of Municipal Board—Tenure of office—Dispensing with services at pleasure—Cause of action—Right of suit—Breach of regulations in passing resolution of dispensing with services—Remedy—Civil servant—Whether municipal employee stands on same footing as a civil servant.

The plaintiff had been appointed as Secretary to a Municipal Board. After several years the Municipal Board decided to appoint and did appoint an Executive Officer; and a few months later, by a special resolution passed at a meeting convened for the purpose, the Board abolished the Secretary's post and dispensed with his services. It was not a dismissal and his conduct was never in question. According to the Rules and Regulations of the municipality three days' notice had to be given to the members of the meeting, and in the case of three of the members this was not complied with; but those members were present at the meeting and made no complaint of the shortness of notice. The plaintiff appealed to the Commissioner against the resolution, but was unsuccessful. He then brought a suit against the Municipal Board for a

*First Appeal No. 183 of 1935, from a decree of Bishun Narain Tankha, Subordinate Judge of Shahjahanpur, dated the 31st of January, 1935.