APPELLATE CRIMINAL.

Before Mr. Justice May Oung.

1924

Oct. 7.

BARAN SHANTA
v.
MA CHAN THA MAY.*

Criminal Procedure Code (V of 1898), section 488—Referring Court to hear both parties before making any recommendations for reduction of maintenance—"Unable to maintain itself," defined—The ability of a child to earn something whether to be considered in fixing maintenance—Child labour not countenanced by public policy—"Child," Definition of.

Held, that the words "Unable to maintain itself" in section 488, Criminal Procedure Code, mean inability to earn a complete livelihood such as an adult person might earn without depending on any other person.

Held, that a father being bound to maintain his child who is under the age of majority, in fixing the sum payable the Court should pay no regard to the fact that the child is able to contribute towards its support by means of its own labour or work of any kind.

Held further, that it would be contrary to public policy to encourage child labour by holding that a boy of eleven years should contribute towards his own support when he should be in school.

Held also, that it is desirable for a referring Court before recommending any reduction of maintenance to hear both the parties.

A. Krishnaswami Ayyar v. *Chandravadana*, 37 Mad., 565 ; *Ma Hnin Byu* v *Maung Myat Pu*, 8 B.L.R., 96—*followed.*

MAY OUNG, J.—The petitioner was ordered by the Subdivisional Magistrate of Buthidaung to pay a monthly sum of Rs. 5 for the maintenance of his son, aged eleven years. He applied in revision to the Court of Session, which, without issuing notice to the opposite party, submitted the proceedings to this Court with the recommendation that the allowance be reduced from Rs. 5 to Rs. 3, the reason stated being that the boy "is old enough to make about Rs. 2 a month by coolie labour." There was

* Criminal Revision No. 806B of 1924 from the order of the Subdivisional Magistrate of Buthidaung in Criminal Miscellaneous Trial No. 12 of 1924.

evidence to show that the boy had occasionally been employed to tend cattle, earning, once Rs. 5 for a period of five months' work, and, at another time, Rs. 12 for a similar period. From this the conclusion was drawn that his earning capacity is about Rs. 2 a month.

I must first note that the boy's mother, in whose favour the order of maintenance was passed, should have been heard in answer to the petition. In all such cases it is desirable that the referring Court should itself hear both parties before making any recommendation. Otherwise, in most cases, it would be necessary for the High Court, if it proposed to act on such recommendation, to issue notice to the opposite party, who, it is more than probable, would not possess the means to appear, but who, if summoned before a local Court, would find it much easier to defend his or her cause. The procedure indicated above is, I have noticed, very often adopted by Courts of Session, and I can see no reason why it should not invariably be followed.

As to the recommendation in the present matter, a principle of some importance seems to be involved. It may be stated thus :—In fixing the sum payable as maintenance for a child, is it permissible in law to take into consideration the fact that the child is able to earn something towards its own support?

In *A. Krishnaswami Ayyr* v. *Chandravadana* (1), wherein the "child" was a daughter said to be seventeen years' old, Sankaran Nair, J., said :—"The word 'child' has not been defined in the Criminal Procedure Code. In England it has got apparently various statutory definitions. But in the absence of any definition or anything to the contrary in an Act,

(1) (1914) I.L.R., 37 Mad., 565.

1924

BARAN SHANTA v. MA CHAN THA MAY.

MAY OUNG, J.

I am of opinion that a 'child' is a person who has not reached full age. It is only then that she becomes competent to enter into any contract or enforce her claims; as this daughter has not attained the age of majority, *i.e.* eighteen, I think she is a 'child' within the section."

In that case, it was urged that the child was able to maintain herself, inasmuch as she could exercise the calling of her mother and ancestors, *viz.* dancing and prostitution, but it was held that it is against public policy to treat prostitution as a profession.

Similarly, in my view, it would be contrary to public policy to encourage child labour by holding that a boy of eleven years should contribute towards his own support by work as a coolie when he should be in school. That he belongs to the labouring class is no argument, since, in these days, every child has a right to at least a primary education, especially if his father has the means to give him one.

Apart from this, moreover, the words "unable to maintain itself" in section 488, seem to me to mean "unable to earn a livelihood for itself,"—that is to say, a complete livelihood, such as an adult person might earn, without depending on any other person.

In *Ma Hnin Byu* v. *Maung Myat Pu* (2), it was laid down that section 488 of the Criminal Procedure Code is based upon the proposition that there is a continuing obligation upon a father who has sufficient means to maintain his child, that he cannot contract himself out of that obligation, and that the fact that the child is not in a starving condition cannot be set up as an answer to an application.

The essential point is that a man is bound to feed and clothe his minor off-spring, and he cannot

(2) (1902) 8 Bur. L.R., 96.

be heard to say that the latter should help him to fulfil his obligation. The sum he should be ordered to pay is fixed according to his means, the status of the parties and the age of the child. No other consideration should come in. Were it otherwise, the Courts would in most cases be obliged to enter upon calculations of some nicety as to the proportion of the expense which the child itself should bear. Every able-bodied boy or girl over ten years of age is a potential wage-earner. For instance, a town-bred boy of twelve or fourteen, even if attending school, might easily, in his spare time, earn an anna or two every day by hawking newspapers, but it does not follow that this should be taken into consideration in fixing the sum which his father should be ordered to pay for his maintenance.

My conclusion is that a father who has sufficient means is bound to maintain his child who is under the age of majority; and, in fixing the sum payable, no regard should be paid to the fact that the child is able to contribute towards its own support by means of labour or work of any kind.

I therefore see no reason to interfere.