

**REVISIONAL CRIMINAL.***Before Mr. Justice Zafar Ali and Mr. Justice Jai Lal.***MEHR KHAN (ACCUSED) Petitioner***versus***MST. BAKHT BHARI (COMPLAINANT)****Respondent.****Criminal Revision No. 231 of 1928.**

*Criminal Procedure Code, Act V of 1898 (as amended by Act XVIII of 1923), sections 342, 488—Examination of person proceeded against under section 488—whether necessary under section 342.*

*Held*, that a person against whom proceedings are instituted under section 488 of the Criminal Procedure Code is not an accused person, and therefore it is not incumbent on a Magistrate to examine, under section 342, the husband or the father before an order under section 488 can be made against him, to make a monthly allowance for the maintenance of his wife or his child, as the case may be.

*Ponnusamy Odayar v. Ramasamy Thathan* (1), referred to.

*Bachai Kalwar v. Jamuna Kalwarin.* (2), distinguished.

*Case reported by Khan Bahadur Munshi Rahim Baksh. Sessions Judge, Mianwali, with his No. 8-J of January 1928.*

SAIN DAS, for Petitioner.

D. R. SAWHNEY, Public Prosecutor, for Respondent.

The accused, on conviction by *Raja Ali Muhammad*, exercising the powers of a Magistrate of the 1st class in the Mianwali District, was sentenced, by order, dated 15th august 1927, under section 488 of the Criminal Procedure Code, to pay Rs. 5 *per mensem* to the respondent.

(1) (1923) I. L. R. 46 Mad. 758 (F. B.).

(2) (1924) 81 I. C. 915.

*The proceedings are forwarded for revision on the following grounds:—*

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*Mussamat Bakht Bhari* applied under section 488, Criminal Procedure Code, and her husband *Mehr Khan* was called upon to pay Rs. 5 a month by way of maintenance, who applies for revision *inter alia* on the ground that he was not examined after the close of the prosecution evidence as required by section 342, Criminal Procedure Code. *Mussamat Bakht Bhari* on the other hand asks for the revision of the order on the ground that the Magistrate has not considered her necessities of life in fixing the amount. Before this in view of *Demello v. Demello* (1) I sent up two cases to the High Court for revision. One was disposed of by the Hon'ble the Chief Justice and the omission of the Magistrate to examine the husband was held to vitiate the order granting maintenance. (*Vide* Revision case No. 390 of 1927, *Nura petitioner v. Mussamat Nuran*, decided on the 13th May 1927).

The other case came before the Hon'ble Mr. Justice Zafar Ali, who following *Ponnusamy Odayar v. Ramasamy Thathan* (2) rejected the application for revision, as it was held that section 342 was not applicable to summons cases. (*Vide* Revision case No. 317 of 1927, *Shadi Khan v. Mst. Gul Begam*, decided on the 24th February 1927). This subject has also been discussed at page 761 of *Sohoni's Code of Criminal Procedure*, 1924 edition, but as the two judgments of the High Court are at variance, I submit the records to the High Court with the request that a Ruling may be given after considering both the judgments to enable me to decide the present applications for revision.

(1) 1926 A. I. R. (Lah.) 667. (2) (1923) I. L. R. 46 Mad. 758 (F. B.).

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*The order of Sir Shadi Lal, C. J., dated 13th April 1928, referring the case to a Division Bench—*

The question, which requires determination in this case, is whether a Magistrate is bound to examine the accused in a summons case as required by section 342 of the Criminal Procedure Code. The High Courts at Calcutta, Bombay and Patna have answered the question in the affirmative—*vide Bechu Lal Kayastha v. Injured Lady* (1), *Emperor v. G. S. Fernandez* (2) and *Ghulam Rasul v. King Emperor* (3). The same view was affirmed by me in *Demello v. Demello* (4). The Madras High Court has, however, sounded a discordant note in *Ponnusamy Odeyar v. Ramasamy Thathan* (5), and that judgment has been followed by Mr. Justice Zafar Ali in *Shadi Khan v. Mt. Gul Begam* (Criminal revision No. 317 of 1927). The question is one of importance, and I accordingly refer the case to a Division Bench for an authoritative decision.

The order of the Division Bench—

JAI LAL J.

JAI LAL J.—The real question that needs decision on this reference is whether it is incumbent on a Magistrate to examine under section 342 of the Criminal Procedure Code the husband or the father, as the case may be, before an order under section 488 of the Criminal Procedure Code can be made against him to make a monthly allowance for the maintenance of his wife or his child, as the case may be.

Section 342 reads as follows :—

“(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any enquiry

(1) 1927 A. I. R. (Cal.) 259.

(3) (1919) 6 Pat. L. J. 174.

(2) (1921) I. L. R. 45 Bom. 672.

(4) 1926 A. I. R. (Lah.) 667.

(5) (1923) I. L. R. 46 Mad. 758 (F. B.).

or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. \* \* \* \* \*

\* \* \* \* \*

(4) No oath shall be administered to the accused."

The question then is if the person concerned comes within the definition of the "accused." Ordinarily this expression is used in respect of a person who is being tried for an offence, which term is defined in section 4 (o) of the Criminal Procedure Code to mean any act or omission made punishable by any law for the time being in force and also to include any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act of 1851. It would thus appear that an application under section 488, Criminal Procedure Code, is not a complaint of "an offence" as the neglect or refusal to maintain the wife or the child does not involve the question of any punishment to be awarded under that section. That section is merely intended to enforce the legal obligation in a summary manner of the husband or the father with regard to his wife or child, respectively. *Prima facie*, therefore, section 342, Criminal Procedure Code, does not apply to proceedings under section 488, Criminal Procedure Code.

This view receives support from an examination of the various provisions of section 488, Criminal Procedure Code. Sub-section 6 of that section provides that all evidence in the proceedings shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and *shall be recorded in*

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the manner prescribed in the case of summons cases, a proviso however is added that under certain contingencies the Magistrate may determine the case *ex-parte* and that any order so made may be set aside for good cause shown on an application made within three months from the date of the order. Now, in the first instance, this sub-section does not provide that all the proceedings will be held as in the trial of summons cases. It only provides that the evidence shall be recorded in the manner prescribed in the case of summons cases. So far as the rest of the procedure is concerned, it need not follow that prescribed for summons cases. Then the provision that the Magistrate may determine the case *ex-parte* clearly implies that the examination of the person against whom the proceedings are taken is not legally necessary for an order under section 488, Criminal Procedure Code.

Sub-section 7 of section 488 of the Criminal Procedure Code of 1898 has been repealed recently, but sub-section 2 of section 340 has been enacted in its place. To this I would presently advert.

Sub-section 9, as it originally existed, provided that the "accused may be proceeded against in any district where he resides \* \* \* \*", whereas by means of the recent amendment these words have been substituted by "proceedings under this section may be taken against any person in any district, etc." There has therefore been a deliberate change in the language of the section by the removal therefrom of the word "accused," showing a clear intention of the Legislature that the person against whom action is taken under section 488 does not fall in the category of the "accused."

Now, adverting to section 340, it is to be noted that sub-section 2 thereof provides that any person against whom proceedings are instituted in any such court *inter alia* under Chapter XXXVI (section 488 is the first section of that Chapter) may offer himself as a witness in such proceedings. Now, the court is bound to administer oath to a witness, while section 342 provides that no oath shall be administered to an accused person. It is, therefore, clear that section 342 has no application to the person against whom proceedings are taken under section 488, Criminal Procedure Code. Incidentally, it may be remarked that sub-section 7 of section 488 which has recently been repealed used the word "accused" and in sub-section 340 (2) the word "accused" is not used.

A consideration of the three sections mentioned above clearly shows that the proceedings under section 488, Criminal Procedure Code, are not strictly speaking criminal proceedings, except in the sense that they are taken under the provisions of the Criminal Procedure Code; they are, if I may use that term, *quasi* criminal proceedings partaking more of civil than of criminal character as they are intended to enforce a civil liability of the husband or the father.

The authorities cited at the Bar that it is incumbent on the Magistrate to examine the accused in a summons case under section 342 of the Criminal Procedure Code have in my opinion no bearing on the present question, because I hold that the proceedings under section 488 Criminal Procedure Code do not constitute a summons case. The Legislature has merely provided that the procedure for recording evidence in summons cases should be followed in recording evidence in such cases and no more. I am aware that a Full Bench of the Madras High Court has held

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in *Ponnusamy Odayar v. Ramasamy Thathan* (1) that it is not necessary for the Magistrate to examine the accused in a summons case. This view is opposed to a mass of judicial authorities in which the contrary view has been taken. The point is not really before me, but speaking for myself I am inclined as at present advised respectfully to differ from the view taken by the Madras High Court and consequently do not wish to support my conclusion by reference to that case. I am also of opinion that a judgment of this court which was cited at the Bar and in which it was held that section 342 of the Criminal Procedure Code governs the proceedings under section 488 does not really decide the question now referred to us because it was assumed in it, without an actual decision of the point, that proceedings under section 488 are a summons case, which, as I have stated above, is not correct, though I am in agreement with it in so far as it was held that section 342 is applicable to a summons case.

*Bachai Kalwar v. Jamuna Kalwarin* (2) was cited by the respondent's counsel in support of his contention that it was necessary for the Magistrate to examine his client under section 342, Criminal Procedure Code. That case, however, is no authority for the proposition propounded by the learned counsel, as the learned Judges seemed to be inclined to the view that "the opposite party in proceedings under section 488 should no longer be looked upon as an accused person." They, however, did not decide this point finally and it appears that their attention was not drawn to section 340 (2) of the Criminal Procedure Code. They finally held that as the person

(1) (1923) I. L. R. 46 Mad. 758 (F. B.). (2) (1924) 81 I. C. 915.

concerned had given evidence on his own behalf, it was not necessary to examine him. It appears, therefore, that the learned Judges did not decide the point now before us one way or the other.

I hold that the question whether section 342, Criminal Procedure Code, governs cases under section 488, Criminal Procedure Code, must be answered in the negative, and that it is not necessary for the purposes of this reference to decide whether it governs a summons case.

ZAFAR ALI J.—I agree that a husband or father against whom proceedings are instituted under section 488 of the Criminal Procedure Code is not an “accused person.” Consequently section 342 of that Code is not applicable in his case. This becomes clear from the alterations made in sections 340 and 488 by the amending Acts of 1923.

A. N. C.

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