

plaintiffs; and that the latter took no action to assert their title.

The learned District Judge has upheld the plea of adverse possession, and his finding has been endorsed by a learned Judge of this Court. After hearing arguments on both sides I am not prepared to dissent from his conclusion; and would, therefore, dismiss the appeal with costs.

BROADWAY J.—I concur.

N. F. E.

1931

KIRPA RAM

v.

MUHAMMAD  
ZAHUR DIN.

SHADI LAL C.J.

BROADWAY J.

*Appeal dismissed.*

**REVISIONAL CRIMINAL.**

*Before Addison J.*

MUSSAMMAT HAKIM DEVI, Petitioner

*versus*

SHAM SINGH, Respondent.

1931

*May. 1.*

**Criminal Revision No. 49 of 1931.**

*Criminal Procedure Code, Act V of 1898, section 488.*

*Maintenance—Order on a compromise—fixing rate of maintenance—whether illegal—and whether liable to be set aside after long lapse of time.*

In 1908, the petitioner applied for maintenance under section 488 of the Criminal Procedure Code, against her husband, but during the proceedings entered into a compromise on the 29th May 1908, to the effect that the amount of maintenance would be Rs. 5 per mensem. Accordingly the Magistrate passed an order fixing the maintenance at that rate. This maintenance was collected by the petitioner, by means of the Court, up to January 1929, when she applied for enhancement of the rate of maintenance, with the result that not only was her request for enhancement disallowed but the order for maintenance made in 1908 was held to be illegal in that it was based on a compromise.

*Held*, that the Magistrate was wrong in setting aside the order for maintenance passed in 1908. The order was not illegal merely because the parties agreed as to what was the proper rate of maintenance. Such an agreement does not

1931

MUSSAMMAT  
HAKIM DEVI  
v.  
SHAM SINGH.

make section 488, Criminal Procedure Code, inapplicable, nor does it mean that it can no longer be said that the husband had neglected or refused to maintain his wife.

*Mussammat Rahim Bibi v. Khair Din*, per Plowden and Tremlett JJ. (1), distinguished.

*Mussammat Najibunnissa v. Mustafa Khan*, per Tremlett and Rattigan JJ. (2), disapproved.

*Mangayamma v. Appalaswami* (3), referred to.

*Held further*, that apart from this the Magistrate had no right to refuse the petitioner relief after the lapse of such a long period during which she had been collecting through the Magisterial Courts the arrears of maintenance; and, that the order must stand until the husband is able to get it set aside or altered under the provisions of section 489 or sub-section (5) of section 488 of the Code.

*Shivlingappa v. Gurlingava* (4), followed.

*Application for revision of the order of Rai Sahib Lala Labhu Ram, District Magistrate, Gujranwala, dated the 14th July 1930, affirming that of Lala Daulat Ram Budwar, Magistrate, 1st Class, Gujranwala, dated the 25th April 1930, dismissing petitioner's application for recovery and enhancement of maintenance.*

MANOHAR LAL SACHDEV, for Petitioner.

MOHAMMAD AMIN, for Respondent.

ADDISON J. — In the year 1908 *Mussammat Hakim Devi*, the petitioner, applied for a maintenance order under section 488, Criminal Procedure Code, against her husband Sham Singh who was neglecting and refusing to maintain her. During the proceedings before the Magistrate, 1st Class, the parties compromised on the 29th May, 1908, to the effect that the amount of maintenance would be Rs. 5

(1) 42 P. R. (Cr.) 1888.

(3) 1931 A. I. R. (Mad.) 185.

(2) P. R. (Cr.) 1888, p. 108.

(4) 1926 A. I. R. (Bom.) 103, 106.

per mensem. Accordingly the Magistrate, 1st class, passed an order fixing the maintenance at that rate. This maintenance was collected by the petitioner by means of the Court up to January 1929, when she applied for the enhancement of the rate of maintenance. Another Magistrate, 1st class, enhanced the rate to Rs. 10 *ex parte* against the husband and the District Magistrate accordingly sent that order up to this Court for cancellation on the ground that the respondent should have been heard. At the same time the District Magistrate noted that the original order of the 29th May, 1908, fixing the sum of Rs. 5 was illegal, in that the order was based on a compromise. This reference came before me and on the 28th March, 1930, I set aside the order of the Magistrate, 1st class, dated the 28th June, 1929, increasing the allowance, but I took no notice of the District Magistrate's reference to the illegality of the original order and I did not set aside the order of the 29th May, 1908, fixing the sum of Rs. 5 as maintenance. [See *Sham Singh v. Mst. Hakam Devi* (1), the head note of which is wrong].

When, however, the case went back to the District Courts, the Magistrate, 1st class, who dealt with it refused to give the petitioner any further arrears of maintenance on the ground that the District Magistrate had pointed out that the original order of 29th May 1908 was illegal. Against this order the petitioner has come up to this Court.

The authority relied upon is *Mussammat Rahim Bibi v. Khair Din* (2), a decision of a Division Bench composed of Plowden and Tremlett JJ. The judgment in that case was delivered by Plowden J. and

1931

MUSSAMMAT  
HAKIM DEVI  
v.  
SHAM SINGH.  
ADDISON J.

(1) 1930 A. I. R (Lah.) 524.

(2) 42 P. R (Cr.) 1888.

1931

MUSSAMMAT  
HAKIM DEVI  
v.  
SHAM SINGH.  
—  
ADDISON J.

it does not support the contention that an order based on a compromise is illegal, and cannot be enforced under the provisions of section 488 of the Code of Criminal Procedure. An order had been passed under section 488, Criminal Procedure Code, awarding the complainant a specified monthly maintenance from her husband. She applied subsequently for realization of arrears, whereupon the husband imputed misconduct to his wife. During these proceedings the parties entered into an agreement that for the future if the wife resided in the house provided by her husband she should get monthly maintenance, and if not, it should be stopped. An order to this effect was passed. It was held by the Chief Court when the wife again applied for arrears of maintenance that the wife should have been left to her remedy in the Civil Courts, inasmuch as the agreement which the Court had previously recorded, and which was an agreement to live separately by mutual consent, had the effect of superseding the previous order of maintenance, and whatever rights it might give rise to in a Civil Court, it could not be enforced summarily under section 488, Criminal Procedure Code. Now, on the finding that the agreement in question was an agreement to live separately by mutual consent there is no question of the correctness of the order of the Chief Court by reason of subsection (5) of section 488, Criminal Procedure Code, to the effect that the Magistrate shall cancel the original order on proof that the husband and wife are living separately by mutual consent. There is nothing, therefore, in the main judgment in *Mussammat Rahim Bibi v. Khair Din* (1), to the effect that

if the parties agreed before a Magistrate as to what the amount of the maintenance shall be, the Magistrate cannot accept that agreement and embody it in his order under section 488, Criminal Procedure Code.

Appended, however, to *Mussammatt Rahim Bibi v. Khair Din* (1), is another judgment by Tremlett and Rattigan JJ. *Mussammatt Najib-ul-Nissa v. Mustafa Khan* (2), which does appear to bear this interpretation. As to why that judgment was appended to a judgment with which it had no analogy, I do not know. In my judgment, the fact that the parties agreed as to what was the proper rate of maintenance, does not bring it about that section 488, Criminal Procedure Code, is no longer applicable; nor does it mean that it can no longer be said that the husband had neglected or refused to maintain his wife. The subsequent rulings, therefore, which appear to me to be based on a misunderstanding as to what was laid down in *Mussammatt Rahim Bibi v. Khair Din* (1) by Plowden J. do not have the same force as otherwise they would have. These rulings were doubted in *Mangayamma v. Appalawami* (3), and in fact have not been followed by any other Court.

Apart, however, from the above considerations I consider this is a case where the Magistrate had no right to refuse the petitioner relief after such a long period. She has been collecting through the Magisterial Courts arrears of maintenance since 1908 and the Courts cannot now be allowed to say that the order of 1908 is wrong. It was laid down in *Shivlingappa v. Gurlingava* (4) that it was the duty of

1931

MUSSAMMAT  
HAKIM DEVI

v.

SHAM SINGH.

ADDISON J.

(1) 42 P. R. (Cr.) 1888.

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(2) P. R. (Cr.) 1888, p. 108. (4) 1926 A. I. R. (Bom.) 103, 103.

1931

MUSSAMMAT  
HAKIM DEVI  
v.  
SHAM SINGH.  
ADDISON J.

the husband to have moved the Court at the time the order was passed to have it set aside if he objected to it. As he had not done so in 1919 the Bombay High Court refused to do so in 1926 without regard to the question whether the order was legal or illegal. Similarly in the present case, after all these years, the order must stand until, of course, the husband is able to get it set aside or altered under the provisions of section 489 or sub-section (5) of section 488, Criminal Procedure Code. Until this is done the original order of the 29th May 1908 must stand.

I accordingly set aside the order of the Magistrate refusing arrears of maintenance and remand the proceedings to him with the direction that he should proceed in the manner indicated in this order.

*N. F. E.*

*Revision accepted.*

*Case remanded.*

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