

CRIMINAL REVISION.

*Before Mr Justice Mosely.*MA KHIN YI *v.* EDWARD KHIN MAUNG.*

1939

June 5.

Maintenance—Compromise application by parties—Jurisdiction of criminal Court to entertain—Terms and conditions, how far enforceable—Criminal Procedure Code, s. 488.

An order for monthly maintenance alone on an application of compromise filed by the parties is not illegal and can be enforced under s. 488 of the Criminal Procedure Code.

Rangammal's Case, (1905) II Weir 629, followed.

Budhu Ram v. Khem Devi, 95 I.C. 315, dissented from.

Where, however, the compromise not merely relates to the amount of monthly maintenance, but embodies other consideration or terms or conditions, then the order based on the compromise goes beyond the scope allowed by s. 488 of the Code and a criminal Court has no jurisdiction either to pass or enforce it.

Najibunnissa v. Mustafa Khan, (1888) Pun. Rec. 108; *Rahim Bibi v. Khair Din*, (1888) Pun. Rec. 107; *Viramma v. Narayya*, I.L.R. 6 Mad. 283, referred to.

Eunoose for the applicant.

Twa Aung for the respondent.

MOSELY, J.—This is an application in revision against an order passed under section 488, sub-section (3), Criminal Procedure Code, refusing to enforce a previous order for maintenance. Two grounds were given for this refusal, (1) that the order was passed on a compromise, and was only enforceable by civil proceedings, and (2) that the order for maintenance prescribed a certain amount for the maintenance of the applicant and her children, and that as two of the children were still with the respondent, the husband, the order could not be partially enforced by making an allotment for the applicant and one child only.

* Criminal Revision No. 128B of 1939 from the order in review of the 6th Additional Magistrate of Bassein in Criminal Misc. No. 20 of 1938.

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 MA KHIN YI and *Budhu Ram v. Khem Devi* (2) were quoted.
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 EDWARD Earlier rulings which were mentioned before the
 KHIN MAUNG. Magistrate were evidently not available, and will be
 MOSELY, J. cited here.

It is desirable to dispel the misconception that a criminal Court has no power to enforce an order of maintenance based upon any kind of petition of compromise between the parties.

In the present case both parties filed a joint petition for a consent order, which was headed "Compromise petition." Orders were accordingly passed in terms of the petition, and it was directed that the respondent keep his three children with the petitioner from the date of the application for maintenance; that the petitioner educate, feed and clothe the children properly; and that the respondent pay the petitioner Rs. 20 a month from the date of the application and Rs. 25 a month from a date a year from that for the maintenance of his wife and children.

The first case quoted [*Viramma v. Narayya* (1)] merely laid down that an agreement by a husband to maintain his wife by giving her certain property and by delivering to her annually grain and money could not be enforced under the Criminal Code which empowered a Magistrate only to direct payment of the monthly maintenance.

The earliest case in point is *Mussammatt Rahim Bibi v. Khair Din* (3). In that case an order for maintenance was made in favour of the wife at the rate of Rs. 5 a month. Subsequently she applied for realization of arrears of maintenance; the husband imputed misconduct, but eventually no enquiry was made, the parties coming to an agreement that for the

(1) (1883) I.L.R. 6 Mad. 283.

(2) 95 I.C. 315.

(3) (1888) P.R. 107.

future, if the wife resided in a house provided by the husband, she should get her maintenance of Rs. 5 a month, and if not, it should be stopped. Over a year later the wife applied for arrears of maintenance.

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It was held that at the first application for arrears the order of maintenance ought to have been cancelled. It was clear that the parties entered then into a new agreement which the Court recorded, and which was an agreement to live separately by mutual consent. That agreement had the effect of superseding the previous order, and neither the agreement nor the order could be enforced summarily under the Criminal Code.

Another similar case was *Mt. Najibunnissa v. Mustafa Khan* (1). The only difference was that here the agreement was entered into in the original proceedings for maintenance, and the maintenance was awarded on condition that the wife should live with the husband.

It was similarly held that as the parties had come to an amicable arrangement that the husband was to pay the wife a monthly sum on certain conditions, the Magistrate's duty was at an end, and the application should have been dismissed and the wife told that her remedy would be by a civil suit should her husband not fulfil his agreement.

I would agree, with respect, with both these decisions, which are to the effect that where the parties have come to an agreement, not merely as to the amount of maintenance, but that the maintenance should only be paid on certain conditions, the agreement to pay maintenance and the conditions should not be recorded in an order by the Magistrate, but he should dismiss the application, whether it be for maintenance or for the enforcement thereof.

(1) (1888) P.R. 108.

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In this second case, however, there is a remark by the learned Judge which, as I consider, gave rise to misconception. He said that section 488, Criminal Procedure Code, only gives the Magistrate authority when the husband, having means, "neglects or refuses" to maintain his wife. All that was meant in the context, I think, by this remark was that the parties, having come to an amicable settlement on certain conditions and on these conditions the wife having waived the previous refusal to maintain her, the Magistrate could not pass an order for maintenance which could be enforced by the summary process of a criminal Court.

The principle involved, if I may say so with respect, was overlooked in *Rahim Ali v. Fateh Bibi* (1). This was a case where the wife applied for maintenance, and during the pendency of the case the parties compromised, and the Court passed an order in the terms of the compromise that the husband should give his wife half his land and a house to reside in, or, in case of default, Rs. 9 a month. On a subsequent application for enforcement the Magistrate ordered that the woman should receive arrears of payment.

The proceedings were forwarded in revision by the District Magistrate on the ground that in accordance with the principle laid down in *Mussammat Rahim Bibi's* case (2) when a compromise had been arranged between the parties the enforcement of that compromise came within the jurisdiction of a civil and not of a criminal Court, because the husband no longer neglected or refused to maintain his wife. The order of the Court was a short one upholding the view taken by the District Magistrate, and gave no grounds for its decision.

It appears to me to be impossible to say generally in all cases, merely because a compromise petition

(1) (1905) 40 P.R. (Judicial) 79.

(2) (1898) P.R. 107.

between the parties has been filed, that there is no longer a refusal or neglect by the husband to maintain his wife and that the jurisdiction of the Court is ousted by the application for compromise. Such an application may merely mean that the parties have come to an agreement as to what is the proper amount of maintenance to be paid, and in such a case the mere fact that both parties have signed the petition to the Court is immaterial, except in so far as it obviates the necessity for the Court to take evidence from which to assess the amount of maintenance. If the argument were extended a little further, it would lead to the obviously untenable conclusion that a petition signed by the husband alone or an admission given by the husband in evidence would show that he no longer refuses to maintain his wife. It would be absurd to hold in such cases that the husband by so doing could force the wife to have recourse to a suit in a civil Court. The refusal or neglect in question is refusal made or neglect committed before the proceedings commenced, and not a refusal or neglect that arose after the initiation of the proceedings.

I note that exactly the same view was taken in the case of *Rangammal* (1), a Madras case. There the order for maintenance was passed in accordance with the terms of a joint application put in by the parties. It was contended that that order was illegal, being based on a compromise. It was held that the order, which was one directing payment monthly of a fixed sum of money, was one which in itself was in accordance with the Code, and was not rendered illegal because it was made on consent of parties which dispensed with the necessity of taking evidence.

In *Budhu Ram's* case (2), a judgment of the Lahore High Court, it was, however, held that any

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order for maintenance based on a compromise application is without jurisdiction and cannot be enforced by a criminal Court. The learned Judge purported to follow *Rahim Bibi's* case (1) and *Rahim Ali's* case (2). In my opinion, *Rahim Bibi's* case is no authority for this proposition, and, as I have pointed out, in *Rahim Ali's* case (2) quite a different kind of compromise was entered into, and that case is no authority for the general proposition laid down in *Budhu Ram's* case (3).

Both according to law, then, and common sense alike an order for monthly maintenance alone based on an application of compromise is not illegal. Where, however, the compromise not merely relates to the amount of monthly maintenance but embodies other consideration or terms or conditions, then the order based on the compromise goes beyond the scope allowed to a criminal Court, and a criminal Court has no jurisdiction either to pass or enforce it.

In the present case the application for compromise and the order based thereon clearly contained terms and conditions which were not within the jurisdiction of the criminal Court to order or enforce.

As to the second ground on which the learned Magistrate based his order there is nothing to be said. The ruling quoted by him [*Ma Lone v. A. Thumbuswamy Pillay* (4)] is clear authority for the proposition that the order had become of no effect in that it could not be partially enforced, and that the applicant's remedy is to make a fresh application for maintenance.

This application in revision will therefore be dismissed.

(1) (1888) P.R. 107.

(3) 95 I.C. 315.

(2) (1905) 40 P.R. (Judicial) 79.

(4) 9 L.B.R. 49.