

REVISIONAL CRIMINAL.

Before Coldstream J.

RAM SARAN DAS (ACCUSED) Petitioner

versus

MST. DAMODRI—Respondent.

Criminal Revision No. 608 of 1934.

*Criminal Procedure Code, Act V of 1898, section 488 :
Wife's maintenance—order for—based on compromise between
parties—containing certain conditions not covered by the
section—and not embodied in the Magistrate's order—Juris-
diction of Magistrate—to pass such an order.*

In proceedings by the wife for a maintenance order under section 488 of the Code, the husband agreed to pay Rs.15 per month to his wife on certain conditions, not coming within the purview of section 488 of the Criminal Procedure Code. This being agreed to by the wife, the Magistrate passed a maintenance order for Rs.15 a month on the basis of the agreement without mentioning the conditions.

Held, that it is only where the compromise between the husband and wife does not cover matters outside the purview of section 488 of the Criminal Procedure Code that an order for maintenance can properly be passed by a Criminal Court.

And, as a judicial order on a compromise must be one giving the compromise effect as a *whole*, the order passed in the present case was one which the Magistrate could not pass.

Pal Singh v. Mst. Nihal Kaur (1), followed.

Case reported by Mr. A. C. Macnabb, District Magistrate, Attock, with his No.1162-E of 27th April, 1934.

GHULAM MOHY-UD-DIN, for Petitioner.

GANESH DATT, for Government Advocate, for Crown.

Report of the District Magistrate.

Mussammatt Damodri is the wife of *Diwan Ram Saran Das*, a Pleader of Campbellpur, and she has two minor daughters from him who are living with her.

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On 10th November, 1933, she applied in the Court of *Diwan* Hukam Chand, Magistrate, 1st class, Campbellpur, for a maintenance order under section 488, Criminal Procedure Code.

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Diwan Ram Saran Das appeared in the Court on 13th November, 1933, and since the parties wanted time to effect a compromise, the proceedings were adjourned to the next day. It, however, appears that the parties did not come to terms on 14th November, 1933, with the result that the case was adjourned to 17th November, 1933, for evidence.

On 15th November, 1933, *i.e.*, before the date fixed for evidence in the case, *Diwan* Ram Saran Das applied to the Magistrate that he was prepared to pay maintenance to his wife, that the statements of the parties may be recorded and that the case may be decided on that very day. As a result of this application, the Magistrate recorded the statements of the parties by which the husband agreed to pay Rs.15 per month as maintenance to his wife. Certain other conditions, not coming within the purview of section 488, Criminal Procedure Code, were embodied in these statements. The Magistrate, however, passed a maintenance order for Rs.15 a month on the basis of the agreement between the parties without mentioning in detail the other super-added conditions, not covered by section 488, Criminal Procedure Code.

* * * * *

The proceedings are forwarded for orders of the High Court on the following grounds:—

A good deal of discussion has taken place in various High Courts with regard to such cases, but the latest ruling will be found in *Pal Singh v. Mst. Nihal Kaur* (1), in which it was laid down that a

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Magistrate should only pass an order for maintenance in accordance with the provisions of an agreement, if in that agreement there were not super-added conditions not coming within the purview of section 488, Criminal Procedure Code. The present case is not on all fours with the case dealt with in the ruling quoted above, because in that ruling apparently the Magistrate has passed an order giving effect to the compromise and the compromise contained conditions other than a condition about the payment of maintenance. In the present case the Magistrate passed an order about maintenance in view of a compromise. The question is whether the order of the Magistrate should be taken as giving effect to the compromise. If the husband would refuse to carry out the compromise so far as the payment of maintenance is concerned what would be the result? An application might lie to a criminal Court to enforce the condition of payment and another application might lie to a civil Court to enforce the other conditions, and the result would be that two conflicting orders might be passed, the criminal Court insisting upon the payment of maintenance unconditionally and the civil Court releasing the husband from the need to pay maintenance because the other conditions of the compromise had not been fulfilled by the wife. It is clearly undesirable to create the possibility of such a conflict between two authorities, and this appears to be the underlying principle in the previous decisions such as *Mussammat Rahim Bibi v. Khair Din* (1) referred to in Volume III of the High Courts Rules and Orders, Chapter 7-A., paragraph 12, that where there was a compromise it could not be said

that there was refusal to maintain a wife and therefore a Magistrate should not pass an order under section 488, Criminal Procedure Code.

In the circumstances I consider that it is advisable to obtain the orders of the High Court on the general principle involved and also with regard to this particular case.

Order of the High Court.

COLDSTREAM J.—The case for consideration is set forth clearly in the referring order of the learned District Magistrate, Attock. For the petitioner Mr. Ghulam Mohy-ud-Din admits that his client has effected a compromise which either party can seek to enforce in a civil Court. I am bound by the Division Bench judgment in *Pal Singh v. Mst. Nihal Kaur* (1). In that case the Magistrate had passed an order embodying a number of conditions agreed upon between husband and wife relating to matters which did not come within the purview of section 488 of the Code of Criminal Procedure. But the judgment appears to me to lay it down clearly that it is only where the compromise between the husband and wife does not cover matters outside the purview of section 488, that an order for maintenance can properly be passed by a criminal Court. It is true that in the present case the Magistrate's order incorporates only the agreement as to the amount of maintenance. But the order purports to be based on a compromise and it is obvious that it could not justly be enforced separately from and without regard to the other conditions agreed upon by the parties, which conditions a criminal Court has no jurisdiction to enforce. A judicial order based on a compromise must be one giving the compromise

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1934 effect as a whole. Such an order in the present case
 the Magistrate could not pass.
 RAM SARAN DAS v. Applying therefore the principle laid down in the
 Mst. DAMODRI. ruling cited I accept the petition and setting aside the
 COLDSTREAM J. Magistrate's order dismiss *Mussammatt* Damodri's ap-
 plication under section 488 of the Code of Criminal
 Procedure.

A. N. C.

Revision accepted.

The order of Addison and Dalip Singh JJ., dated 12th February, 1932, in Criminal Rev. 993 of 1931 (Pal Singh v. Mst. Nihal Kaur), referred to in the above judgment :—

ADDISON J. — On the 6th April, 1929, *Mussammatt* Nihal Kaur applied under the provisions of section 488 of the Criminal Procedure Code, for a maintenance order amounting to Rs.60 per mensem against her husband Pal Singh. He appeared on the 6th May, 1929, and put in an application to the effect that he had not refused to maintain his wife nor had he turned her out of his house. He was willing to maintain her if she resided with him. The case was then adjourned for evidence to the 25th June, 1929, and on that date *Mussammatt* Nihal Kaur and her husband made statements, amounting to a compromise in which several conditions were embodied. The compromise was that she would receive as maintenance Rs.200 per annum as well as a separate residence in her husband's village in which she and her daughter would reside. If she did not live in this house in the village it was stated that she would not be entitled to any maintenance. She was permitted, however, to leave the village on the usual festive occasions and on occasions of mourning with her husband's permission.

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She was also allowed to visit her relations with similar permission. It was further agreed that the maintenance would be reduced to Rs.10 a month after her daughter was married. Thereupon, the Magistrate made an order embodying all the above conditions. The sum fixed as maintenance was paid for three months. Thereafter the husband refused to pay it and *Mussammatt* Nihal Kaur applied to enforce the order. The Magistrate of the first class issued a warrant for the collection of the arrears and the husband moved the Sessions Judge to have this order set aside. The Sessions Judge has forwarded the proceedings to this Court with the recommendation that the order of the Magistrate for the recovery of the maintenance by attachment and sale of the property of Pal Singh should be set aside and the respondent be directed to a civil Court for redress on the ground that a criminal Court could not pass an order for maintenance on the basis of a compromise but should have directed the parties to a civil Court and dismissed the application for maintenance.

The law on the subject is contained in sections 488 and 489 of the Criminal Procedure Code. Upon proof of neglect or refusal by a husband to maintain his wife a Magistrate of the first class may order the husband to make a monthly allowance for his wife's maintenance. It is clear, however, that this must be an absolute order without conditions, that is, the order must fix a certain sum to be paid per mensem for the maintenance of the wife upon proof of the husband's neglect or refusal to maintain her. Such proof of course need not be the evidence of witnesses but the admission of the husband that he had been neglecting or refusing to maintain her would be sufficient. If at the hearing the husband at once

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stated that he was willing to pay a specified sum that also might amount to an implied admission that he had been neglecting or refusing to maintain his wife. If, however, the husband offers to maintain his wife on condition that she should live with him the Magistrate may consider any ground of refusal stated by the wife for not doing so and may still make an order for maintenance if he is satisfied that there is just ground for so doing. But no wife is entitled to receive an allowance from her husband under this section if she is living in adultery or if without any sufficient reason she refuses to live with her husband or if they are living separately by mutual consent and on proof of any of these three facts the Magistrate must cancel any order already made. Again, under section 489 the Magistrate may vary the amount fixed on proof of change of circumstances while he may also cancel or vary a previous order when it appears to him that this should be done in consequence of any decision of a competent civil Court.

This being the law, there can be no objection to the parties compromising before a Magistrate by agreeing between themselves as to what is the proper rate of maintenance. This agreement may in itself be sufficient proof that the husband has been neglecting or refusing to maintain his wife or there may be evidence to that effect or an express admission by the husband to the same effect. Where, however, the compromise is with respect to other matters as well which do not come within the purview of section 488, Criminal Procedure Code, or where the compromise amounts to an agreement to live separately by mutual consent it seems to me that that compromise cannot be given effect to in a criminal Court, for all that it can do is to make an absolute order fixing a monthly allow-

ance in the circumstances already stated. In such a case it will be the duty of the Magistrate to dismiss the petition under section 488 of the Criminal Procedure Code, and to refer the wife to a civil Court to enforce the agreement. I wish, however, again to emphasize that there is no objection to the husband and wife merely agreeing as to the proper rate of maintenance to be awarded to the wife.

There has been some confusion in the reports on this subject and for this reason it is necessary to refer to some of the authorities. The question was first discussed in *Mussammat Rahim Bibi v. Khair Din* (1). An order had been made in that case under section 488, Criminal Procedure Code, awarding the complainant a specified monthly maintenance from her husband. The complainant applied subsequently for realization of the arrears of the maintenance. At this stage the husband imputed misconduct to his wife, which could be done under sub-section (4). Eventually no enquiry was made into this charge and the parties came to an agreement that for the future, if the wife resided in a house provided by the husband she should get a monthly allowance and if not it should be stopped. An order was made by the Magistrate to this effect and the wife again applied for arrears of maintenance. On this occasion the husband alleged that the wife did not reside in the house as agreed. Finally the Magistrate found against the wife and rejected her application for arrears. It was held by the Punjab Chief Court that the Magistrate was right in rejecting the last application 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 first

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

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order as to maintenance. It was further said that whatever rights the settlement might give rise to in a civil Court neither the agreement nor the order incorporating the agreement was one which could be enforced summarily under section 488 of the Criminal Procedure Code. *Mst. Rahim Bibi v. Khair Din* (1) thus does not lay down the general principle that no compromise can be enforced by a Magistrate acting under section 488 of the Criminal Procedure Code, and there is nothing in it to the effect that if the parties agree before a Magistrate as to what the amount of the maintenance shall be, the Magistrate cannot accept that agreement. The ruling in question is based on sub-section (4) to the effect that no wife shall be entitled to receive an allowance from her husband if they agree to live separately by mutual consent.

Appended to the above ruling is another ruling *Mst. Najibunnissa v. Mustafa Khan* (2). There the Magistrate passed an order, also on compromise, to the effect that the complainant would get Rs.6 per mensem provided she lived under the protection of her husband. It was held that if the parties came 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. This also seems to be sound as there is no provision for a conditional order under section 488 of the Criminal Procedure Code, the only order possible under that section being one for the payment of a specified monthly sum on proof of the husband's neglect or refusal to maintain his wife, subject to the other conditions of the section.

This matter has also been discussed by me in *Mst. Hakam Devi v. Sham Singh* (1). All I did in that case was to point out what exactly was decided in *Mst. Rahim Bibi v. Khair Din* (2). I have nothing to add to what I said in that judgment, which is not at variance with my previous judgment in *Sham Singh v. Mst. Hakam Devi* (3), though the headnote is wrong in the latter, except that on further consideration I now see no reason to doubt the correctness of the judgment appended to *Mussammatt Rahim Bibi v. Khair Din* (2).

It seems to me, however, that my learned brother Dalip Singh went too far in *Budhu Ram v. Mst. Khem Devi* (4). He said: "it is clear that once a compromise is entered into to pay maintenance there is no refusal to pay maintenance on the part of the husband and therefore section 488 has no longer any application: an order regarding such a compromise is, therefore, passed without jurisdiction under that section." It seems to me that these words possibly did not convey what the learned Judge wished to say. The fact that the parties compromise as to the proper rate of maintenance cannot mean that at the time the petition was brought there was not neglect or refusal by the husband to maintain his wife and that is the only condition precedent to the petition being brought. If that circumstance is established or admitted either expressly or impliedly there can be no objection to a compromise in the proceedings as to the amount of maintenance to be paid.

This question also arose before a Judge of the Madras High Court in (*Chukkala*) *Mangayamma v.*

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(1) 1931 A. I. R. (Lah.) 574. (3) 1930 A. I. R. (Lah.) 524.
(2) 42 P. R. (Cr.) 1888, p. 108. (4) 1926 A. I. R. (Lah.) 469.

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(*Chukkala*) *Appalaswami* (1). There the Magistrate refused to enforce an order of maintenance passed under section 488 of the Criminal Procedure Code on the ground that the original order was based on a compromise. It was said in the judgment that if the parties had settled the dispute by themselves without any reference to the Court there would have been no order under section 488 of the Criminal Procedure Code, but such settlement was evidently not what they contemplated. The husband was prepared to consent to judgment without giving the petitioner any further trouble so long as her claim for maintenance was reasonable and therefore the Magistrate passed orders in the terms of this agreement or compromise. This was characterised as being a very sensible arrangement which did not in any way detract from the force of the order. With this view I am in agreement, as will be apparent from what I have said above, provided always that there are not super-added conditions not coming within the purview of section 488 of the Criminal Procedure Code. It follows from the Madras ruling that if a husband and wife agree at once as to the rate of maintenance without adding conditions which cannot form part of the order passed under section 488, Criminal Procedure Code, the matter can be ended at once by the Magistrate passing an order in terms of the compromise to the effect that he awards a monthly allowance of such and such an amount, as the compromise by itself will be sufficient evidence of the condition precedent to the application being lodged.

My view of the law being as stated above it follows that in the case before us the Magistrate was not entitled to pass an order in terms of the compro-

mise, which not only amounted to an agreement to live apart by mutual consent but contained conditions which could not be enforced or embodied in an order under section 488 of the Criminal Procedure Code.

For the reasons I have given I would set aside the order of the Magistrate for the recovery of the maintenance by attachment and sale of the property of Pal Singh and would refer *Mussammât* Nihal Kaur to a civil Court for the enforcement of the compromise entered into by her and her husband.

It would be much better if in future Magistrates refrained from passing orders under this section which cannot be enforced, because they amount to agreements to live apart by mutual consent or contain conditions which cannot be embodied in such orders. In such a case the application should be dismissed and the wife told that, if the agreement arrived at is not acted upon, she can only enforce it in the civil Courts. It would also seem to be proper that the wife should be informed that the effect of coming to such an agreement as is indicated above is that she loses her cheap and speedy remedy in the criminal Courts.

DALIP SINGH J.—I agree.

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Revision accepted.

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