CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Parsons.

IN RE GULA'BDA'S BHA'IDA'S.*

1891.
June 22.

Criminal Procedure Code (Act X of 1882), *Sec.* 488—*Questions to be determined under the section—Maintenance of wife—Wife's right to separate maintenance—Offer of maintenance—Cruelty.*

Before a Magistrate makes an order under section 488 of the Code of Criminal Procedure (Act X of 1882), he must find that the complainant is the wife of the person from whom she claims maintenance, and that he has either neglected or refused to maintain her.

The complainant, Bái Mani, claimed maintenance from her husband, Gulábdás Bháidás, under section 488 of the Code of Criminal Procedure. In the course of the proceedings, Gulábdás pleaded that his marriage with the complainant was not valid according to Hindu law, but offered to maintain her in his house as he had hitherto done. This offer was not accepted. The Magistrate held that the offer was not one within the meaning of section 488 of the Code of Criminal Procedure, because Gulábdás denied the validity of his marriage with the complainant, and refused to keep her with him *as his wife*.

Held, that there is no authority for the proposition that the words "as his wife" should be read into section 488 of the Code of Criminal Procedure.

Marakkal v. *Kandappa Goundan* (I. L. R., 6 Mad., 371) dissented from.

IN this case Bái Mani applied under section 488 of the Code of Criminal Procedure (X of 1882) for an order directing her husband to pay her a monthly allowance for maintenance. She alleged that she was the lawful wife of one Gulábdás Bháidás, that she had lived with him for twenty-five years, that he had recently turned her out of his house without any valid reason or excuse, and refused to maintain her.

Gulábdás replied that Bái Mani's marriage with him was not valid according to Hindu law and custom; that she had left his protection of her own accord in February, 1890; that he was willing to maintain her in his house, as he had hitherto done.

The First Class Magistrate ordered Gulábdás to pay his wife Rs. 40 per mensem for her maintenance, for the reasons stated in the following extract from his judgment:—

"The defendant does not deny his marriage with the petitioner, but merely asserts that for want of certain ceremonies according to Hindu law and custom the marriage is not valid. He ought to know that among Hindus of high caste, to

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which he belongs, it is customary to marry their daughters before they are twelve years of age, or before they reach the age of puberty, and the argument now brought forward by the defendant as to the invalidity of the marriage after keeping the petitioner with him as his wife for more than twenty-five years is absurd. Even assuming that some ceremonies were not gone through at the time of marriage, still as the defendant after the said marriage kept the petitioner with him as his wife for more than a quarter of a century without any objection, he must be presumed to have accepted the marriage as valid. However, if the defendant wishes to have his marriage with the petitioner declared null and void, it is a question which a Criminal Court has no jurisdiction to enquire into, and he should, therefore, apply to the Civil Court for it.

"The offer of the defendant to supply the petitioner with food, clothing and a separate residence, or to admit her in his own house, apparently looks well and good, but it is not within the meaning of section 488 of the Criminal Procedure Code, because (1) the defendant does not agree to keep the petitioner with him *as his wife*, and (2) he alleges that his marriage with the petitioner was not valid, and that, therefore, she is not entitled to any allowance for maintenance according to law.

"The ground of refusal on the part of the petitioner to live with the defendant on the terms offered by him is reasonable, because when the defendant does not agree to keep the petitioner with him *as his wife*, and alleges that the marriage was invalid, it is useless for the petitioner to go and live with him.

"The defendant urges in his Gujaráti petition, dated the 6th November, 1890, and which was presented to the First Class Magistrate in charge of the Chorási Division on the 12th December following that from the time the petitioner was admitted in his house, her conduct was found to be debaucherous and highly improper, but during the long period of twenty-five years she lived with him the defendant has taken no steps whatever to prosecute her seducers criminally, in order to get them punished for committing adultery with her, and, therefore, a fault of this nature which the petitioner may have committed, if any, is presumed to have been condoned by the defendant, and it cannot now be allowed to affect her claim.

"On the above grounds I find that the petitioner is entitled to maintenance. Considering the large estate possessed by the defendant, as admitted by him in paragraph 12 of his Gujaráti petition, dated the 6th November, 1890, above referred to, and also taking into consideration his extensive practice as a most successful pleader in this district, I think Rs. 40 per month would be sufficient to enable the petitioner to live comfortably and respectably according to the position of her husband. I, therefore, direct under section 488 of the Criminal Procedure Code that the defendant Gulábdás Bháidás should pay to the petitioner Bái Mani *alias* Jamna a monthly allowance of Rs. 40 for her maintenance from the date of this order."

Against this order Gulábdás applied to the High Court under section 435 of the Code of Criminal Procedure.

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Branson (with him *Govardhan M. Tripati*) for applicant:—There has been no inquiry into the question whether Bái Mani, the complainant, was turned out of the house of the applicant, or whether she left of her own accord. No opportunity has been given us to examine our witnesses on this point. We deny the validity of our marriage with the complainant. She is not, therefore, entitled to claim any maintenance from us. We have, however, offered to maintain her in our house, as we have hitherto done. But the offer is not accepted.

Gokaldás Kahándás Párakh for the complainant:—The complainant was justified in refusing the offer, because the husband repudiated the marriage and would not treat her as his wife. This conduct amounts to cruelty within the meaning of section 488 of Criminal Procedure Code.

[JARDINE, J.:—The case of *Márakkál* v. *Kandappa Goundan*[1] seems to support your contention.]

That case is conclusive on the present question.

Branson in reply:—The Magistrate has not found that the applicant is guilty of adultery or cruelty. The criterion of legal cruelty such as would entitle a wife to claim separate maintenance is laid down in *Yamunábái* v. *Náráyan Moreshvar Pendse*[2]. And unless the applicant's conduct amounts to legal cruelty, no order for maintenance can be passed by the Magistrate.

JARDINE, J.:—As our present decision may govern a class of cases, we have taken time to consider it, more especially as we thought it right to refer to some authorities not mentioned at the hearing. Mr. Branson has argued on behalf of the petitioner, Mr. Gulábdás, that the Magistrate's order directing him under section 488 of the Code of Criminal Procedure to pay maintenance to Bái Mani *alias* Jamna, should be quashed by this Court in the exercise of revisionary jurisdiction.

In order to adjudicate in the case, it is necessary first of all to consider what the Legislature intended to be the scope and object of chapter 36, which is entitled "Of the Maintenance of Wives and Children." Sir James Fitzstephen describes this

(1) I. L. R., 6 Mad., 371. (2) I. L. R., 1 Bom., 164.

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chapter as "a mode of preventing vagrancy, or at least of preventing its consequences" (3, History of the Criminal Law of England, 342). The English statutes and decisions, "which must have been familiar to the Indian Legislature when the Code of Criminal Procedure was passed," are recited in the judgment of West, J., *in re* the petition of *Shaik Fakrudin*[1]. The decision in *Thompson's* case[2] is also an authority for holding the scope of the chapter in question to be limited, and that the Magistrate may not, except as therein provided, usurp the jurisdiction in matrimonial disputes possessed by the Civil Courts. It was held that where a wife left her husband's house of her own accord on the ground of ill-treatment, she was not entitled to obtain from the Magistrate an order for separate maintenance. It is necessary under the words of section 488 for the wife to prove that the husband "neglects or refuses to maintain her." The case of *Thompson* is in harmony with that of *Flannagan* v. *Bishop Wearmouth*[3], decided by the Queen's Bench on the Vagrant Act V, Geo. IV, clause 83, sec. 3, where the words "wilfully refusing or neglecting" are much the same as those used in section 488. In the case stated, the Magistrate found that the husband had been guilty of ill-usage. Lord Campbell, C. J., in giving judgment, says: "The question now before us is whether upon the facts as stated, the husband, who has promised to make his wife an allowance and has broken that promise and at the same time asks her to come and live with him, which she refuses (and I will assume that he has ill-used her in such a manner that if she had sued for a separation *a mensa et thoro*, she would have succeeded, and that the husband would have been liable to a person giving her credit for necessaries), is guilty of the offence of wilfully refusing to maintain his wife. I am of opinion that he has not committed any offence and that the conviction is illegal. An Act has recently passed which contains provisions that will, when the Act is in operation, be found salutary and beneficial. By that Act, a judicial separation may be pronounced and the husband compelled to provide a pecuniary allowance and alimony for his wife: but when this conviction took place, no such thing

(1) I. L. R., 9 Bom., 40. (2) 6 N. W. P., 205.
(3) 8 E. & B., 451.

was known as a judicial separation, and until there was a legal separation *a mensa et thoro*, all the rights of the marriage-tie existed in full force. Here the justices seemed to have supposed that, because the wife might have good ground for refusing to return and live with her husband, that rendered him liable to the offence of wilfully refusing to maintain her under the Vagrant Act. But I think this is not so. No past misconduct, however gross, would justify the wife in refusing to go and live with her husband if he wished her to do so. As the law stood, although her apprehensions were well founded, it could not be said that there had been any wilful refusal of the husband to maintain his wife, and the conviction, therefore, must be quashed."

In *Thomas* v. *Alsop*[1], where the Justices found that it was dangerous for the health of the wife to return to the cohabitation offered her by the husband, whom she had left on account of violence and ill-usage, the Court of Queen's Bench refused to interfere with the order requiring him to make her a weekly allowance. The case was under 31 and 32 Vict., c. 122, s. 33, and was distinguished from *Flannagan* v. *Overseers of Bishop Wearmouth*[2] on the ground that the later enactment was altogether different in scope and effect and expressed in very different language. As the former Act of Parliament comes close to section 488 in its language, and the latter Act does not, I think we should be guided by *Flannagan* v. *Overseers of Bishop Wearmouth*[2], notwithstanding the fact, but rather *á fortiori*, that the proviso in section 488 requires the Magistrate to consider whether the wife, who refuses the offer of the husband that she should live with him, has sufficient grounds for refusing the offer. The Magistrate has to "consider any grounds of refusal stated by her, and may make an order, notwithstanding such offer, if he is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty." This provision obviates the hardships alluded to by Lord Campbell in *Flannagan* v. *Bishop Wearmouth*.

In the case before us there is no allegation against the husband of adultery or habitual cruelty. The question remains whether,

(1) L. R., 5 Q. B., 151. (2) 8 E. & B., 451.

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in the absence of such conduct, an order may be made against him, *i.e.*, whether, on the Magistrate finding that there is other sufficient reason for the wife's refusal of the offer, he has jurisdiction to make the order. But assuming without deciding that the jurisdiction exists, I am of opinion that in his construction of the words of section 488 relating to the offer of the husband, and also in his finding that the complainant, a Hindu, alleging herself to be Gulábdás's wife, is entitled on the facts to a separate maintenance, the Magistrate has committed two errors of law which should induce us to quash his order and refuse Bái Mani the relief she has sought. It is admitted by her that she lived with Gulábdás for twenty-five years till a few months ago, when she began to live separately and demand maintenance. The parties are at issue whether Gulábdás turned her out of the house, as she says, or whether, as he says, she left of her own accord. The failure of the Magistrate to determine this question is equivalent to an omission to determine whether Gulábdás neglected or refused to maintain her—*In re Thompson*[1] already quoted. On this ground alone we might require the case to be re-opened, as Gulábdás is not chargeable, unless neglect or refusal is proved. It further appears from the proceedings that his offer made in the Magistrate's Court was to maintain Bái Mani under his own roof in happiness and comfort. I will now quote the Magistrate's finding about the offer and refusal. He writes: "The offer of the defendant to supply her with food, clothing, and a separate residence, or to admit her into his own house, apparently looks well and good, but it is not within the meaning of section 488 of the Criminal Procedure Code, because, first, the defendant does not agree to keep the petitioner with him *as his wife;* and second, he alleges that his marriage with the petitioner was not valid, and that she is not entitled to any maintenance according to law. The ground of refusal on the part of the petitioner to live with the defendant on the terms offered by him is reasonable, because when the defendant does not agree to keep the petitioner with him *as his wife* and alleges that the marriage was invalid, it is useless for the petitioner to go to live with him." No authority is given for the proposition that the words

[1] 6 N. W. P., 205.

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"as his wife" must be read into section 488, and none was shown us. We have referred to *Marakkal* v. *Kandappa Gonudan* [1], which appears to support the Magistrate's view, but which, however, contained special facts, and to which with all respect for the learned Judges who decided it, I have difficulty in extending a general application. I do not think the Courts have any efficient machinery to direct the domestic arrangements, or control the domestic rules, of the *pater familias*. The Madras judgment seems to me to conflict, in principle, with the rules of Hindu law as discussed in the well-considered judgment of the Court composed of Melvill and West, JJ., in *Yamunabái* v. *Náraydn Moreshwar Pendse* [2]. The object of section 488 is, in my opinion, to provide maintenance, and not to enforce conjugal duties. If the Legislature had meant that the offer was to be one to live with the woman as wife, it would, I think, have used those words. There are many conceivable cases where it would be unjust to require a husband to concede conjugal rights, as where, for example, his doing so would allow the wife to get *separate* maintenance by application to a Magistrate, merely because the husband declines to compromise himself by conduct or words in matters where he thinks he has a case for civil relief. If the Magistrate's law is sound, the jurisdiction of the Civil Courts will be to a great extent ousted, and questions of a delicate sort will be tried by less suitable procedure in the Magistrate's Courts, which cannot have been the intention of the law-makers.

The authorities I have quoted show that in dealing with the question whether a wife is justified in living apart, we must consider the civil law applicable, which in the present case is that of the Hindus. Whether the facts found are sufficient, in Hindu law, to entitle Bái Mani to a separate maintenance, is undoubtedly a question of law and a ground in a civil suit for a second appeal. It may, therefore, under our practice, be decided in our revisionary jurisdiction. The grounds on which she may demand separate maintenance are stated in Mayne's Hindu Law, s. 414, (4th edition), and in West and Bühler, 425, 592, 593, where the authorities are collected. The Magistrate does

(1) I. L. R., 6 Mad., 371. (2) I. L. R., 1 Bom., 164.

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not state, and it has not been argued here, nor does the record disclose any cause entitling the complainant at Hindu law. As the Magistrate has not found a neglect or refusal on Gulábdás's part, it is for Bái Mani to establish a justifying cause for her living apart—*Sidlingápa* v. *Sidáva*[1]. As stated by West, J., in *Shaik Fakrudin's case* [2], "it is the duty of a woman to reside with her husband, and it is her co-relative right to be maintained by him under his roof." There is little need to consider extraordinary cases, as where a husband suffering from leprosy and syphilis insists on conjugal rights, as in *Bái Premkuvar* v. *Bhika Kallidánji*[3]. It is probable that the Magistrates will have no great difficulty in dealing with such circumstances justly when they occur. But they must not treat as legal cruelty what the Courts hold not to be such; and in considering under what circumstances a wife may lawfully desert her husband, they will derive guidance from the decision of Melvill in *Yamunábái* v. *Náráyan Moreshwar Pendse*[4].

Lastly, I would observe that the questions which must be decided in the affirmative in the present case, before Bái Mani can be held entitled to a Magistrate's order, are, whether Bái Mani is validly married to Gulábdás, and whether she is justified in living apart from him. It has been urged that the Magistrate's finding on the first point is defective, and based on inadmissible evidence and without hearing all Gulábdás's evidence. It is unnecessary to determine whether this was so or not. Bái Mani can get all due relief, and have these and other similar questions determined in the proper form in the Civil Court, if she sues there. She ought, in my opinion, to have gone there in the first instance, and has no reason to be aggrieved at the order which we now make quashing that made by the Magistrate.

PARSONS, J.:—I concur in reversing the order. The Magistrate has not found that the applicant either neglected or refused to maintain the complainant, nor has he found that the complainant is the wife of the applicant. In the course of the

(1) I. L. R. 2 Bom., 624.
(2) I. L. R. 9 Bom., at p. 45.
(3) 5 Bom. H. C. Rep., 209, A. C. J.
(4) I. L. R., 1 Bom., 164.

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case the applicant offered to maintain the complainant on condition that she lived with him. She refused that offer, because in the present proceedings the applicant denied the validity of the marriage ceremony that took place between him and the complainant twenty-five years ago. Such a ground of refusal is not, in my opinion, sufficient to justify the Magistrate in making an order under section 488 notwithstanding the offer.

Order quashed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1891.
July 6.

THE FIRST ASSISTANT COLLECTOR OF P'RA'NT BASSEIN, APPELLANT, *v.* ARDESIR FRA'MJI MOOS, RESPONDENT.*

Jurisdiction—Cases referred by District Judge to Assistant Judge for trial—The Bombay Civil Courts' Act (XIV of 1869), Sec. 16—"Miscellaneous applications"—Land Acquisition Act (X of 1870)—Reference to District Court by the Collector—Act VII of 1889—Act VIII of 1890—Applications under special Acts.

Although the expression "miscellaneous applications" in section 16 of the Bombay Civil Courts' Act (XIV of 1869) may be large enough to include references by the Collector under the Land Acquisition Act (X of 1870), the latter part of section 16, as it stood before that section was amended by Acts VII of 1889 and VIII of 1890, indicates that it was not the intention of the Legislature to empower a District Judge to refer to an Assistant Judge applications under special Acts for disposal.

THIS was a reference made by C. E. G. Crawford, District Judge of Thána, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The circumstances under which the reference was made were as follows:—

The Municipality of Bombay being in need of certain land situate at the village of Páspoli and forming part of the Pavai estate in Sálsette in the Thána District, the First Assistant Collector of Bassein instituted proceedings under the Land Acquisition Act (X of 1870) to acquire the land for the Municipality. In the course of such proceedings he made a reference to the District

* Civil Reference, No. 5 of 1891.