The facts are taken as found by the lower appellate Court. If the single Judge deciding the question of law in second appeal feels some hesitation or doubt about his decision or is of opinion that the point is of such importance that more than one Judge should express an opinion on it he would, no doubt, grant leave to the applicant to appeal to a Bench of two or more Judges. The applicant's right to appeal to the Privy Council, should he be otherwise entitled to do so, is not affected by the amended clause 15. The amended clause is intended to weed out certain weak and futile matters from Letters Patent Appeals to a Bench of two or more Judges. It appears clearly to have been the intention of the legislature that the amended clause should operate immediately on its notification in the *Government Gazette* and that it should have retrospective effect. The amended clause, of course, will not apply to those Letters Patent Appeals which were admitted prior to the notification and are now pending in this Court. If this is to be regarded as an anomaly, as Mr. Patwardhan argued it would be, it is an anomaly which cannot be helped. A similar argument was advanced in *Framji Bomanji* v. *Hormasji Barjorji*[1] but found no favour with the Court.

Order accordingly.

J. G. R.

[1] (1866) 3 Bom. H. C. (O. C. J.) 49.

CRIMINAL REVISION.

Before Mr. Justice Fawcett and Mr. Justice Mirza.

IN RE BAI MANEK.

IN RE CHIMANLAL SOMCHAND SHAH.*

1928
April 4

Criminal Procedure Code (Act V of 1898), section 488—Offer by husband to provide separate residence for wife—Refusal of such offer how far disentitles

*Criminal Applications for Revision Nos. 51 and 67 of 1928 against an order passed by V. B. Patel, First Class Magistrate, Kaira.

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BAI MANEK, IN RE

wife to claim maintenance under section 488—Wife entitled to be kept in the house where husband lives—Power of Magistrate to award separate maintenance to minor daughters under section 488.

C the husband was willing to provide separate residence for his wife M who refused the offer and took proceedings for maintenance under section 488 of the Criminal Procedure Code.

Held, that as the husband refused to keep his wife in his own house, he was neglecting to maintain her properly and that the wife was entitled to maintenance order under section 488.

In re Gulabdas Bhaidas,[1] distinguished.

Sub-sections (4) and (5) qualify sub-section (1) of section 488 of the Criminal Procedure Code to the extent that a wife is not bound to accept an offer of her husband to provide her with separate residence. It is only in the case of a refusal to live with the husband that the wife has to show a sufficient reason for such refusal, if she wants an order for maintenance from the Magistrate. *Sakrulla Fakir* v. *Fatma*,[2] followed.

The wife is entitled to be kept in the house where the husband himself lives.

Held, also, that the minor daughters residing with the wife were entitled to separate maintenance having regard to their ages of ten and five respectively, as well as to their interest in residing with their mother.

BAI MANEK was the lawfully wedded wife of Shah Chimanlal Somchand and had two daughters aged ten and five by him. She filed a proceeding under section 488 of the Criminal Procedure Code for maintenance for herself and her two daughters on the ground that her husband had neglected to maintain her and her two minor daughters. Chimanlal, the husband, stated before the Court that he was supporting her and had given her a separate house to live in but when it fell down in the heavy rains in 1927, she went to her parents and asked for maintenance in cash, and that he had given her notice to provide a house and maintenance. The Magistrate ordered the husband to pay Rs. 8 per month as maintenance for the wife and a like sum as maintenance for the two minor daughters.

The wife applied to the High Court for increase of maintenance to Rs. 50 per month. The husband also applied to the High Court contending that the order of maintenance was wrong in view of his offer to maintain the wife and children in a separate house.

[1] (1891) 16 Bom. 269. [2] (1923) 25 Cr. L. J. 453.

H. V. Divatia, for the wife.

U. L. Shah, for the husband.

No appearance for the Crown.

FAWCETT, J. :—In this case the petitioner was willing to provide a separate residence for his wife in the neighbourhood of his own house. That offer was, however, refused by the wife, and she took proceedings for maintenance under section 488 of the Criminal Procedure Code against him. The Magistrate has held that, as the husband refused to keep his wife in his own house, he was neglecting to maintain her properly and that the wife ought to be granted a maintenance allowance under section 488. The petitioner contends that this is erroneous and that that offer is one that prevents the maintenance allowance being granted. In support of this reliance has been placed on *In re Gulabdas Bhaidas*.[1] In that case it is ruled that there is no authority for the proposition that the words "as his wife" should be read in after the words "maintain his wife" in sub-section (1) of section 488. It is pointed out, on the other hand, by Mr. Divatia that in that case the offer was to keep the wife in the husband's own house and that there was only a refusal to keep her there *as his wife*. That appears to be so. No doubt, the offer that is mentioned at page 270 covers an alternative offer of providing a separate residence, but the judgments show that the Court was considering a refusal of the offer of the husband that the wife should "live with him"; and therefore that was not a case, like the present one, of an offer that the wife should live in a separate residence. I think therefore that this is not an authority that can be said to bind us to the extent that the petitioner's pleader contends. Section 488, sub-section (1), merely uses the words "neglects

[1] (1891) 16 Bom. 269.

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or refuses to maintain his wife," and if those words had remained without any other qualification, then there would, I think, be clear ground for saying that an offer of maintenance in a separate residence, provided that the residence was one befitting the status of the wife, might be a sufficient offer. But, on the other hand, there would be obvious objections to allowing a husband in effect to expel his wife from his house and at the same time deprive her of the summary remedy provided under section 488; and sub-sections (4) and (5), in our opinion, qualify the wide words of sub-section (1) to this extent that a wife is not bound to accept an offer of her husband to provide her with a separate residence. She can, of course, agree to it, and if by mutual agreement the husband and the wife are living separately, or have been living separately up to the time of the application, there would, of course, be a clear ground for a Magistrate refusing to pass an order for a maintenance allowance. It is only in the case of a refusal to live with the husband that the wife has to show a sufficient reason for such refusal, if she wants to obtain an order for maintenance from a Magistrate. On the principle of *expressio unius est exclusio alterius*, I think, this plainly shows that it is not necessary for her to show such sufficient reason in the case of a refusal to accept an offer which is not one of her living with the husband, but of living separately. Therefore, in my opinion, there is no legal error in the conclusion that the Magistrate came to. This view is in accordance with that arrived at by the Judicial Commissioner's Court at Nagpur in *Sakrulla Fakir* v. *Fatma.*[1]

In the present case, no doubt, the wife had for some time been living in a separate residence provided by the husband; that house was apparently swept away in

[1] (1923) 25 Cr. L. J. 453.

the floods, and she then went to her father's house, and the husband might legitimately therefore make an offer to provide a separate residence as before. But, in our opinion, the wife was not bound to accept the offer. She is entitled to be kept in the house where the husband himself lives, that being also in accordance with the rule of Hindu law referred to in *In re the Petition of Shaik Fakrudin,*[1] that it is the duty of a woman to reside with her husband and it is her correlative right to be maintained by him under his roof.

The second point is whether the Magistrate was justified in passing an order not only granting maintenance for the wife, but also for her two daughters. No doubt, the petitioner, as the father, has certain *prima facie* rights in regard to the custody of the children; but it had been clearly laid down by this Court in *Emperor* v. *Sassoon*[2] that a Magistrate is entitled to consider the circumstances in which the father's offer to maintain his children is made, and whether it is right and proper that the children, if not in the custody of the father, should be handed over to him. That must be accepted in preference to other rulings that may have been made in other High Courts; and I think it is a common sense view that should be adopted in such cases. Here the ages of the two daughters are ten and five respectively, and obviously it is in their interests that they should remain with their mother. I think, therefore, that if a maintenance allowance is awardable to the mother, it is a case where a separate maintenance allowance can also be made to the girls. It might have been different, if they had been boys.

In our opinion there is no sufficient reason to interfere with the Magistrate's order on the particular grounds

[1] (1884) 9 Bom. 40 at p. 45. [2] (1925) 49 Bom. 562.

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urged by the petitioner's pleader and we would therefore dismiss the application.

As regards the connected application by the wife for enhancement of the amount of maintenance, we are not disposed to interfere with the discretion exercised by the Magistrate. At the same time we must not be taken to lay down that the ordinary standard of maintenance for a Jain woman is Rs. 8 a month. We go simply on the circumstances of the present case.

No order as to costs in application No. 51 of 1928, but the opponent Bai Manek should get her costs from the petitioner in Application No. 67 of 1928.

MIRZA, J. :—I agree.

Rule discharged.

B. G. R.

CRIMINAL REVISION.

Before Mr. Justice Fawcett and Mr. Justice Mirza.

1928
April 4

VITHALDAS BHURABHAI (ORIGINAL OPPONENT), PETITIONER *v.* BAI KASHI (ORIGINAL APPLICANT), OPPONENT.*

Criminal Procedure Code (Act V of 1898), sections 342, 488—Proceedings for maintenance—Examination of accused.

Section 342 of the Criminal Procedure Code, 1898, does not apply to proceedings under section 488 of the Code.

Bachai Kalwar v. *Jamuna Kalwarin*,[1] relied on.

CRIMINAL Revisional application against the order of the Sub-Divisional Magistrate, First Class, Godhra.

One Bai Kashi filed a complaint under section 488 of the Criminal Procedure Code, 1898, claiming maintenance for herself and her daughter alleging cruelty on the part of her husband Vithaldas Bhurabhai.

The allegation regarding cruelty was denied by the husband and he pleaded that he was willing to keep his wife and daughter with him. At the commencement,

*Criminal Revision Application No. 72 of 1928.

[1] (1924) 25 Cr. L. J. 1091.