

CRIMINAL REFERENCE.

Before Mr. Justice Ghose and Mr. Justice Wilkins.

G. BENBOW (COMPLAINANT) v. W. BENBOW (DEFENDANT).³

1897
May 10.

Maintenance, Order of Criminal Court as to—Criminal Procedure Code (Act X of 1852), sections 488 and 177—Complaint by a wife against her husband for maintenance—Issue of summons—Jurisdiction of Presidency Magistrate.

If a person neglects or refuses to maintain his wife, the proper Court to take cognizance of the complaint of the wife is the Court within the jurisdiction of which the husband resides.

REFERENCE by the Chief Presidency Magistrate of Calcutta under section 432 of the Criminal Procedure Code. The facts of the case and the question referred for the opinion of the High Court appear from the following letter of reference :—

“In this case the husband is living at Assansol and the wife in Calcutta,

“The question for determination is whether I can issue a summons calling upon the husband to attend in my Court and shew cause why he should not maintain his wife. It is a question of jurisdiction.

“The Legislature does not contemplate an exercise of jurisdiction by a Magistrate outside the area to which he is appointed by the Government, and the Code, by section 177, lays down a fundamental principle that the competency of a forum to take cognizance of an enquiry into an ‘offence,’ as defined by section 4 of the Code, is determined by the place in which the offence may have been committed.

“It is doubtful if the failure to maintain can strictly be called an ‘offence,’ as defined by section 4, in cases where there is no order for maintenance in existence, inasmuch as there is no penalty attaching to the breach of duty, the penalty only arising under section 488 if a husband refuses to maintain after an order is passed for him to do so. It is an offence to disobey a Magistrate's order for maintenance, but there is no penalty attaching to the refusal to maintain in the first instance. Such a refusal is a breach of duty which gives the wife a right to a summons. It is the duty of a wife to reside with her husband, and her co-relative right to be maintained by him under his roof. The first process calling on the husband to maintain his wife should therefore be sought in the district in which the obligation is *prima facie* to be fulfilled, *i.e.*, in the district in which the husband resides.

³ Criminal Reference No. 1 of 1897 made by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 4th of May 1897.

I do not think that such duty and co-relative right can be altered by anything stated *ex-parte* by the wife when applying for a summons.

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"There are cases bearing on the question, one, *In re the Petition of Fakrudin* (1) decided by the Bombay High Court by two learned Judges, which lays down that the application for a summons for maintenance should be made in the district in which the husband resides, the learned Judges remarking that the words of section 488 point to it being only the Magistrate in whose jurisdiction the person against whom complaint is made resides who has jurisdiction; and they further support their view by arguments of convenience.

"On the other hand, there is a decision of the Allahabad High Court, *In re the Petition of Decastro* (2), which takes a different view, but it is a decision of a single Judge. It will be noticed that the application in the present case is drawn up so as to fall within the facts of the Allahabad case above referred to, and in the Allahabad case the learned Judge, Mr. Justice Knox, decided that under the circumstances of that case the wife had a right to choose her own residence, and to apply for a summons in the Court in whose jurisdiction she resided, and the learned Judge cited the case of *In re Todd* (3) as supporting that view. The ruling in *In re Todd* is not a very satisfactory authority, as no arguments are given in the report, and the matters mentioned by the Bombay High Court case above referred to do not appear to have been raised.

"I am inclined to follow (as has always been the practice in such application in the Presidency Magistrate's Courts) the view taken by the learned Judges of the Bombay High Court in preference to the ruling of the single learned Judge in the Allahabad case, but as the matter is one of some difficulty, and one as to which a definite ruling for the Presidency is required, there being, so far as I am aware, no decision on the point by the Calcutta High Court, I refer for the opinion of the learned Judges of the High Court the question, whether this Court or the Assansol Court is the proper Court from which the summons asked for should be issued."

The judgment of the High Court (GHOSH and WILKINS, JJ.) was as follows :—

We think that the Presidency Magistrate has taken a right view in the matter. "It is the duty of the woman," as observed by West, J., in *In re the Petition of Fakrudin* (1), "to reside with her husband, and it is her co-relative right to be maintained by him under his roof." And when the husband fails in his duty, the proper Court to take cognizance of the com-

(1) I. L. R., 9 Bom., 40.

(2) I. L. R., 13 All., 348.

(3) 5 N. W. P., H. C., 237.

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plaint of the wife is the Court within the jurisdiction of which he may reside. The language of section 488 of the Code of Criminal Procedure itself favours this view ; and it seems to us that, if the principle which underlies section 177 of the Code may be applied to this case, the complaint should be enquired into by the Court within the local limits of whose jurisdiction the husband neglected or refused to maintain his wife. Let the record be sent back with this expression of our opinion.

S. C. B.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Hill.

1897
 May 28
 June 28.

GRISH CHUNDER SASMAL (DEFENDANT) v. DWARKA NATH DINDA
 AND OTHERS (PLAINTIFFS.)^a

*Parties—Adding Parties to Suit—Civil Procedure Code (Act XIV of 1882),
 section 32—Court adding a defendant—Limitation.*

No question of limitation arises where a Court, of its own motion, under section 32 of the Civil Procedure Code, adds a party defendant to a suit. *Oriental Bank Corporation v. Charriol* (1), followed.

THIS suit was brought to recover money due on a mortgage bond, dated the 12th Jaista 1288 (24th May 1881). On the 25th Baisack 1294 (7th May 1887) the appellant, defendant No. 7, took a usufructuary mortgage of the equity of redemption in the mortgaged lands and of certain other properties. When the suit was instituted he was not made a party ; but he was added by the order of the Court under section 32 of the Civil Procedure Code. He put in a written statement, pleading that the suit was barred by limitation. The Munsif allowed the plea, and dismissed the suit as against that defendant, and the defendant No. 6, who had improperly been made a party to the suit, but decreed it as against the other defendants. On appeal to the

^a Appeal from Appellate Decree No. 1645 of 1895, against the decision of Babu Rajendro Kumar Bose, Subordinate Judge of Midnapur, dated the 31st July 1895, reversing the decision of Babu Debendro Mohun Sen, Munsif of Contai, dated the 18th February 1895.