

## Sm. Sheopiari vs Devi Prasad on 23 July, 1953

**Equivalent citations: AIR1954ALL21, (1954)ILLJ277ALL, AIR 1954 ALLAHABAD 21**

ORDER

R. Singh, J.

1. This is a reference by the Sessions Judge of Lucknow recommending that the order of Sri V. N. Vidyant, Magistrate first class, refusing to entertain an application under Section 488 Cr. P. C. on behalf of Shrimati Sheopiari be set a'side and the proceedings Be transferred to some other competent Court.

2. It appears that Shrimati Sheopiari made an anplication against Devi Prasad for maintenance under Section 488, Cr. P. C. before the Additional City Magistrate, Lucknow. In the mean time one Rameshwar Dayal had sued Shrimati Sheopiari for restitution of conjugal rights in the Civil Court. An ex parte decree was passed in his favour and the Additional City Magistrate dismissed her application for maintenance on the ground that there stood a decree for restitution of conjugal rights in favour of one Rameshwar Dayal against the lady and as such she could not maintain an application for an order of maintenance under Section 488, Cr. P. C.

3. The ex parte decree passed in favour of Rameshwar Dayal was subsequently set aside and after the decree had been set aside Shrimati Sheopiari made a second application for maintenance under Section 488, Cr. P. C., which came up for hearing before Sri V. N. Vidyant, Magistrate first class. The Magistrate refused to entertain this application for maintenance on the ground that a similar application made before the Additional City Magistrate had already been dismissed. Srimati Sheopiari went in revision to the Sessions Judge. The Sessions Judge is of opinion that the mere fact that a suit for restitution of conjugal rights had been instituted by one Rameshwar Dayal should be no ground for throwing out the application for maintenance made by Shrimati Sheopiari.

4. It is not disputed on behalf of the opposite party in this Court that Shrimati Sheopiari was 'originally the wedded wife of Devi Prasad. His case was that some three years ago Shrimati Sheopiari left the protection of her husband Devi Prasad and began to live with Rameshwar Dayal as his wife and she was, therefore, not entitled to claim maintenance from him.

5. The view taken by the learned Sessions Judge appears to me to be correct. The mere institution of a suit for restitution of conjugal rights should not be enough to throw out the application of Shrimati Sheopiari. The learned Magistrate ought to have recorded a finding on evidence if Shrimati Sheopiari had been living apart by mutual consent and the remedy under Section 488, Cr. P. C. was barred to her under Section 488 (4), Cr. P. C. No Such inquiry was, however, made by the learned

Magistrate and he took the short cut of throwing out the application.

6. The reference is, therefore, accepted and the order passed by Sri V. N. Vidyant is set aside. The proceedings will be reopened at the stage at which they were dismissed and shall be transferred to some other competent Magistrate for disposal according to law.