

Sm. Chameli vs Gajraj Bahadur Gupta on 20 July, 1953

Equivalent citations: AIR1954ALL33, AIR 1954 ALLAHABAD 33

ORDER

Randhir Singh, J.

1. This is an application in revision against the order of the Sessions Judge of Hardoi dismissing an application in revision against an order passed by a Magistrate, first class Hardoi refusing to order payment of maintenance on an application made by one Smt. Chameli against her husband under Section 488, Criminal P. C.

2. Smt. Chameli who claims to be the wedded wife of the opposite party made an application to a Magistrate, first class Hardoi, asking for an order against the opposite party for maintenance as the opposite party had neglected to maintain her. The applicant was married to the opposite party more than 25 years ago, but shortly after the marriage the opposite party refused to keep the applicant in his house and agreed to pay maintenance to her. An agreement dated 19-3-1928, was executed by the applicant in favour of the opposite party relinquishing her rights against the opposite party who agreed in return to pay maintenance at the rate of Rs. 150/- per annum. This amount was paid for some time. A suit was, however, brought in 1938 for arrears of maintenance on the basis of this deed of agreement for the period from 1-3-1937, to 31-3-1938. This suit ended in a compromise decree being passed on 6-2-1939. Under the terms of the decree the opposite party agreed to pay the arrears of the maintenance and future maintenance was reduced to Rs. 115/- per annum.

Once again the applicant had to bring a suit for arrears of maintenance in 1941 when she claimed maintenance for the period from October 1938 to August 1941. In this suit also a compromise decree was passed and the opposite party agreed to pay arrears of maintenance and future maintenance at the rate of Rs. 9/9 per month. The maintenance was paid to the applicant as agreed upon till July 1951. The applicant then made an application under Section 488, Criminal P. C. on 5-11-1951, on the allegations that the opposite party had neglected to maintain her and that in these hard days it was not possible for her to eke out her existence.

3. The application made by the applicant was resisted by the opposite party. It was contended on his behalf that the parties had been living separately and that the applicant was not entitled to relief under Section 488 inasmuch as this section was inapplicable as the parties had been living separately by mutual consent. The Magistrate came to the conclusion that although the applicant needed assistance his jurisdiction to entertain the application under Section 488, Criminal P. C. was barred as the parties had been living separately by mutual consent. The applicant then went in

revision to the Sessions Judge who agreed with the view taken by the Magistrate and dismissed the application for revision. The applicant has now come up in revision to this Court.

4. It is not disputed that the applicant is the wife of the opposite party and that they have not been living together since 1928. The execution of the agreement dated 19-3-1928 is admitted although it is alleged by the applicant that it was brought about without her consent and under indifferent circumstances. The subsequent litigation between the applicant and the opposite party was borne out by copies of decrees passed in those suits and they are Exs. B and C.

5. The first point which arises for determination in this application for revision is whether it is open to the applicant to take advantage of the provisions of Section 488, Criminal P. C. after an agreement had been arrived at between the parties under which maintenance was granted to the applicant, and they were living separately. It has been argued on behalf of the applicant that the agreement to pay maintenance even though arrived at by consent of parties, does not bar the jurisdiction of a criminal Court to entertain an application under Section 488, Criminal P. C. and in support of this contention a number of rulings have been cited. Before all these authorities cited on behalf of the applicant are considered in detail, the objection taken by the opposite party may also be referred to. Learned counsel for the opposite party contends that after an agreement has been arrived at between the parties it is not open to any of them to go behind the agreement and to plead that the agreement was not the result of mutual consent. Section 488(4), Criminal P. C, lays down :

"No wife shall be 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."

A perusal of the relevant provisions of Section 488, Criminal P. C., therefore, shows that if the husband and wife have been living separate by mutual consent the wife shall not be entitled to receive an allowance from her husband under Section 488, Criminal P. C. The main point for consideration, therefore, in this application for revision is whether the parties in this case have been living separately by mutual consent. Two rulings of the Lahore High Court have been cited on behalf of the opposite party in support of the contention that the jurisdiction of the criminal Court under Section 488, Criminal P. C. is barred after an agreement for payment of maintenance has been arrived at either by agreement or by an order of the Court : vide -- 'Budhu Ram v. Khem Devi', AIR 1926 Lah 469 (A) and -- 'Sham Singh v. Mt. Hakam Devi'. AIR 1930 Lah 524 (B). In -- 'Budhu Ram v. Khem Devi (A)', Dalip Singh J. held that once a compromise was entered into for payment of maintenance there was no refusal to maintain on the part of the husband and therefore Section 488, Criminal P. C. had no longer any application and that the proper remedy was by way of a civil suit to enforce the compromise.

A more or less similar view was taken by another single Judge in -- 'Sham Singh v. Hakam Devi', (B). The view taken by the Lahore High Court was accepted by the Calcutta High Court in -- 'S. W. Colbert v. Mrs. H. Colbert', AIR 1933 Cal. 776 (2) (C). The learned Counsel for the applicant has cited -- 'Taralakshmi Manu Prasad In re', AIR 1938 Bom 499 (D), in which the view taken by the Calcutta High Court was also discussed. The Division Bench of the Bombay High Court in the

reported case, however, came to the conclusion that the mere existence of a decree of a civil Court directing a certain sum to be paid for maintenance did not oust the jurisdiction of a Magistrate in a proper case to make an order under Section 488, Criminal P. C. This view was in substance at variance with the view taken by the Lahore High Court which held that an order embodying an agreement to pay maintenance passed by a civil or criminal Court would subsequently bar the jurisdiction of a Magistrate to entertain an application under Section 488. The interpretation of the words "mutual consent" has been the subject of a decision in a ruling of this Court in -- 'Ram Saran Das v. Mt. Ram Piari', AIR 1937 All. 115 (E). In this reported case an application had been made by one Mst. Ram Piari that her husband should be directed to pay her maintenance. During the pendency of the application, the husband and wife made a joint application to the Court in which they said that they were agreed that Ram Saran Das should pay Mst. Ram Piari a sum of Rs. 4/- for her support on certain conditions. This order was enforced by the Magistrate on some occasions. Subsequently in February 1936, Mst. Ram Piari made a fresh application under Section 488, Criminal P. C. for an order for maintenance and it was pleaded on behalf of the husband that the criminal Court had no jurisdiction to pass an order for maintenance in view of the agreement arrived at by the parties in the earlier case. The view held by the Lahore High Court was placed before the learned Judge who heard the application for revision. He did not agree with the interpretation put by the learned Judges of the Lahore High Court and came to the conclusion that the words "mutual consent" meant the consent on the part of the husband and wife to live apart. The observations of Allsop J. may be quoted with advantage: "Where a wife refuses to live with her husband on some specific ground such as cruelty or the fact that he is keeping another woman, I do not think that it can be said that the husband and wife are living apart by mutual consent if the husband does not insist that the wife should live with him. If that expression had this meaning, a husband could, I imagine, defeat almost any conceivable application for maintenance under Section 488, Criminal P. C." The words "mutual consent" imply that the desire to live apart should emanate from both parties and that none of them should be forced to take recourse to separate living and ultimately to submit to it only as a result of circumstances brought about by one of the parties. If a husband is unwilling to allow his wife to live with him, or has taken a second wife, the only course open to such a wife would be to live apart and if she, under those circumstances, agreed to accept maintenance and live separate, such a separate living would not be deemed to be the result of mutual consent. The test, therefore, should be to find out if the agreement for separate living and payment of maintenance was the outcome of the desire of both parties, independently reached by each of them, or if one of the parties was forced to submit by circumstances to agree to separate living and payment of maintenance. The view taken by Allsop J. in -- 'AIR 1937 All 115 (E)', appears, if I may say so with great respect, to be the correct view, and I find myself in complete agreement with it.

6. The applicant in the present case entered the witness-box and narrated her tale of woe and stated that she had been maltreated and turned out of the house, her husband had taken a second wife and she was thus driven by force of circumstances to separate living and had to accept maintenance given to her by her husband. The opposite party did not choose to enter the witness-box to controvert the statement made by the applicant. Besides the applicant there were three other witnesses who supported the applicant. The applicant was admittedly driven to take recourse to Courts of law on three different occasions in spite of the agreement, registered and unregistered,

executed by the opposite party. No maintenance was paid to her for more than a year when she had to file a suit in 1938 and again in 1941. No doubt the pittance granted to her under the decree passed in 1941 has been paid by the opposite party except perhaps for a few months when the application, which has given rise to this revision, was made by the applicant.

If a party executes an agreement but does not pay maintenance or drives the wife to the necessity of filing a suit for recovery of maintenance from time to time and then takes protection under the provisions of Section 488 (4). Criminal P. C. for pleading a bar to the grant of relief to the wife, it would be difficult for a woman entitled to maintenance to get an effective remedy in Courts of law. Section 488, Criminal P. C. has been enacted only to meet such contingencies and to save a party entitled to maintenance from a prolonged litigation and to get an effective remedy speedily and without much expense from a criminal Court.

7. It appears, therefore, that the view taken by the learned Magistrate and by the Sessions Judge does not appear to me to be correct. The words "mutual consent" mentioned in Section 488 (4), Criminal P. C. would apply to separate living if such separate living was the result of a desire of both parties and mere agreement to pay maintenance or to live separate would not bar an application under Section 488, Criminal P. C. The applicant is, therefore, entitled to an order of maintenance against the opposite party.

8. It remains to be seen what should be the proper amount which the opposite party should be ordered to pay to the applicant by way of maintenance, In fixing the maintenance the Court has to take into consideration not only the needs of the applicant but also the paying capacity and circumstances of the person liable to Pay maintenance. In the present case the applicant has stated on oath that the opposite party is a vakil of standing and is possessed of considerable immoveable property in the shape of sir and khudkasht and houses and that the applicant should be paid a sum of Rs. 100/- per mensem as maintenance. The applicant has also produced a witness Gajodhar who supports her and states that the income of the opposite party is Rs. 1000/- per mensem. No particulars of the property have, however, been given by this witness.

As remarked above, the opposite party has not entered the witness-box to controvert the evidence adduced on behalf of the applicant. He has been content with producing a witness Mahanidhi. He states that the opposite party resides in a rented house paying Rs. 10/- per mensem and that his income does not exceed Rs. 100/- or Rs. 125/- per mensem. In a matter like this both parties are apt to exaggerate or minimise the circumstances and the financial position of the party liable to pay. The opposite party has to maintain his second wife and some children and taking all the circumstances into consideration it appears to me that a sum of Rs. 20/- per mensem should be paid to the applicant as maintenance.

9. The order passed by the Magistrate is, therefore, set aside and the opposite party is ordered to pay Rs. 20/- per mensem to the applicant as maintenance with effect from the date of her application.