

Mehrunnisa Vs. Noor Mohammad

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Court : Allahabad

Decided On : Jul-21-1970

Reported in : AIR1971All138; 1971CriLJ453

Judge : Yashoda Nandan and ;H.N. Seth, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 488, 488(1), 488(3), 488(4) and 488(5)

Appeal No. : Criminal Reference No. 568 of 1968

Appellant : Mehrunnisa

Respondent : Noor Mohammad

Advocate for Def. : N.D. Ojha and ;V.D. Ojha, Adv.

Advocate for Pet/Ap. : Bashir Ahmad, Adv.

Disposition : Reference allowed

Judgement :

Seth, J.

1. This criminal reference has come up before us on a reference made by D. D. Seth, J. as he thought that there was conflict between the opinions of Mulla, J. and Desai, J., on the point involved in this case, as expressed by them in the cases of

Ram Kishore v. Smt. Bimla Devi : AIR1957 All658 and Ramji Malviya v. Smt. Munni Devi. : AIR1959 All767 .

2. Facts giving rise to this reference are that on 21st of June, 1960. the City Magistrate Allahabad made an order under Section 488 (1), Criminal P. C. directing Noor Mohammad (hereinafter referred to as the opposite party) to pay maintenance to his wife Smt. Mehrunnisa (hereinafter referred to as the applicant) at the rate of Rs. 40/- per month. The order was made on the finding that as the applicant became incapable of bearing children, opposite party ill-treated her and turned her out of his house. The applicant had sufficient reason to live away from her husband and the opposite party had sufficient means to maintain her, but he refused and neglected to do so.

3. The opposite party filed an application in revision before the Sessions Judge, Allahabad and obtained a stay order on 16th October, 1966. The stay order was, however, vacated on 6th of May, 1967. A revision application was then filed before this Court, which was also dismissed on 8th November, 1967. In spite of the dismissal of revision applications the opposite party did not pay the maintenance allowance. The applicant therefore, moved an application dated 9th of January, 1968, under Section 488 (3) of Criminal P. C. praying that the salary of the opposite party be attached and he be arrested for recovering the arrears of maintenance due to her for the period 21st June, 1966 up to date.

4. On 20th January, 1968. the Magistrate made an order for issue of realisation warrant and notice, in respect of four months' maintenance allowance and fixed 6th February, 1968, for further orders. The record, however, shows that the notice issued to the opposite party required him to pay Rs. 240/- as arrears of maintenance for six months and it was also mentioned therein that if he failed to pay the amount necessary warrant under Section 488 (3), Criminal P. C. would be issued against him. On 6th of February, 1968, the opposite party did not appear before the Court and the Magistrate made an order directing issue of warrants to the Station Officer Tundla to attach moveable property of the opposite party worth Rs. 480 (12 months' maintenance) and in case no property was available to arrest him and produce him before the Court. The opposite party appeared before the

Court on 12th of February, 1968, and stated that the notice issued to him was served upon him on 10th February, 1968, through the Divisional Superintendent. Northern Railway, and that he was arrested on that date by a police constable saying that there was a warrant for his arrest. The opposite party contended that in case he had been arrested in connection with the payment of maintenance he would pray for sometime, so that he may arrange the money and pay the maintenance amount as he had no ready cash with him at that time. The Court thereupon directed him to pay the maintenance amount within a week and fixed 22nd February, 1968, for further hearing in the case. He was also directed to be released on his executing a personal bond for Rs. 1,000/-.

5. On 20th February, 1968, the opposite party moved another application stating that after the order dated 21st June, 1966, made by the Magistrate directing payment of maintenance, he filed a revision application against the said order before the learned Sessions Judge, Allahabad, who admitted it and stayed payment of maintenance allowance. The learned Sessions Judge, however directed the opposite party to deposit the arrears of maintenance and ordered that the application in revision would be heard only if the arrears were deposited. The opposite party had gone up in revision before the High Court, which became infructuous as the Sessions Judge himself modified that order. The opposite party made best efforts to procure the money, but he failed to do so and thus he had no sufficient means to pay the maintenance allowance. His application in revision against the order of the learned City Magistrate granting maintenance was still pending in the Court of Session and, therefore he prayed that the City Magistrate be pleased to stay the order of realisation of maintenance allowance in the interest of justice and to cancel the bail bond- On the same day the learned Magistrate made an order directing the opposite party to show cause on 22nd February, 1968, as to why he has failed to pay the amount and fix ed 29th July, 1968, for arguments as to which party should be required to adduce evidence in the case.

6. The order-sheet indicates that on 21st February, 1968, the opposite party appeared before the Court and made a statement, on which the learned Magistrate made the following order :--

'The opposite party has stated that he has no sufficient cause to pay the maintenance allowance. Let him adduce evidence on 29th February, 1968.' We feel that there is an error in recording the order. In all probability what the opposite party stated before the Court was that he had sufficient cause for not paying the maintenance allowance. In case the party had admitted that he had no sufficient cause to pay the maintenance allowance there was no point in requiring him to adduce evidence on 29th of February, 1968. Applications were also made for issuing processes to certain witnesses. The case thereafter could not be taken up for hearing up till 31st May. 1968, for one reason or the other.

7. On 31st May 1968, another application was moved on behalf of the opposite party stating that he offered to maintain his wife on condition that she lived with him. He also prayed that in case Smt. Mehrunnisa refused to live with him the maintenance order should be cancelled. The case was then fixed for 6th of June, 1968, on which date it was ordered that it should be listed on 7th June, 1968, to enable Smt. Mehrunnisa to make a statement in respect of the application dated 31st May, 1968. Smt. Mehrunnisa stated that she did not want to live with her husband as there was danger to her life. Thereafter, arguments of both the parties were heard on 27th of June, 1968.

8. The opposite party contended before the Magistrate that if the grounds of refusal by the applicant to live with him were not just, the opposite party could not be asked to pay maintenance allowance. He relied upon the case of Kamla Sundari v. Nilmony Das : AIR1953 Cal343 , wherein it had been held that in an application moved under Section 488 (3) a Magistrate should hold an enquiry on the objections filed by the husband and must satisfy himself as to the sufficiency of cause before issuing distress warrant. On behalf of the applicant two arguments were raised: (1) that even if the wife was prepared to go and live with the husband she was entitled to maintenance for the period during which there was no offer by the husband to maintain her and she had lived separately, and (2) that the wife had sufficient reason not to live with her husband because of cruelty, which fact had already been decided by the Court at the time of making an order of maintenance under Section 488 (1), Criminal P C. In the circumstances the offer made by the husband on 31st May. 1968, was meaningless and could not be

considered.

9. The learned Magistrate held that even if this point had been decided earlier by the Court while making the order for payment of maintenance allowance, it could again be raked up in proceedings under Section 488 (3), Criminal P. C. He was of opinion that if it was not so there was hardly any point in introducing Sub-clause (iii) to Section 488. The legislature did not make any exception in the case to the effect that where this point had already been decided it cannot be raised subsequently. He, therefore, ordered that the applicant should produce evidence to satisfy the Court that there was just ground for her refusal to live with her husband and directed the case to be listed for adducing evidence on 9th of July, 1968.

10. Being aggrieved by the order dated 27th of June, 1968. the applicant filed a revision before the Sessions Judge, Allahabad. Learned Sessions Judge held that the proviso added below Sub-section (3) of section 488. Cr. P.. C. did not mean that it applied only to that Sub-section. According to him the entire scheme of the section had to be considered, which showed that if the court considered a point while making an order of payment of maintenance allowance, the same point could not be agitated over again in an application moved under section 488 (3). In this case, the point that the wife had sufficient reason to live away from her husband had already been considered at the time of making an order under section 488 (1), and, therefore, the same point could not be tried over again while dealing with application under section 488 (3) of the Cr. P C. He accordingly recommended to the High Court that the revision application filed by the applicant against the order dated 27th of June. 1968, be allowed and the direction made by the City Magistrate that the applicant should adduce evidence to justify her refusal to live with her husband, be quashed.

11. When the reference came up for hearing before a learned Single Judge of this Court, it was contended on behalf of the applicant that the finding recorded by the Magistrate while making an order under Section 488 (1) of the Criminal P. C. to the effect that there was sufficient cause for the wife to live separately from her husband would operate as res judicata and it is not open to the opposite party to

raise the question again by making an offer to maintain the wife on condition that she lives with him, in enforcement proceedings under Section 488 (3). For this purpose, amongst other cases, reliance was placed on the case of : AIR1957 All658 wherein Mulla. J. held as follows:--

'The principle of res judicata applies as proceedings under Section 488 are of quasi civil nature. In any cause that existed at the time when the order was passed, it is riot open to the husband to have the same reason considered by the Court again, under Sub-section (3).'

12. Learned counsel for the opposite party argued that in accordance with the views expressed by Desai, J. in the case of : AIR1959 All767 , he could make a fresh offer during proceedings under Section 488 (3) and if the wife refused to live with him without any sufficient cause the order of maintenance could not be enforced and as such the order made by the Magistrate that the applicant should adduce the evidence to justify her refusal to live with him was correct and the reference made by the Sessions Judge deserves to be rejected. The learned Single Judge was of opinion that the observations made in the two cases cannot be reconciled and, therefore he made the present reference to a Division Bench.

13. Before us, learned counsel appearing for the parties took up two extreme positions. Counsel for the applicant argued that proviso added to Section 488 (3) which runs as follows:--

'Provided that, if such person offers to maintain his 'wife on condition of her living with him and she refuses to live with him, such Magistrate may consider any grounds for refusal stated by her, and may make an order under this section notwithstanding such an offer, if he is satisfied that there is just around for so doing.'

is in fact a proviso to Section 488 (1) and has nothing to do with the enforcement of the order under Section 488 (3). According to him the legislature did not intend that after an order has been made under Section 488 (1) after full enquiry, a second opportunity should be given to the husband for getting a detailed enquiry held to enable him to go behind the order made under Section 488 (1), Criminal P.

C. He contended that so long as the order under Section 488 (1) stood and is not cancelled under Section 488 (5) it has got to be enforced and there is no scope for a fresh offer being made by the husband to maintain the wife on condition that she lives with him.

14. Learned counsel for the opposite party, however, argued that proviso to Section 488 (3) was in fact meant to be a proviso to that sub-section and the legislature did intend to give a second opportunity to the husband to make an offer to maintain his wife on condition that she lives with him. He had a right to make that offer at any stage and if the offer is turned down by the wife without any cause the order of maintenance could not be enforced against him. Refusal of the wife to live with the husband in such circumstances will constitute sufficient cause for not paying the maintenance allowance, within the meaning of Section 488 (1), Criminal P. C. and that it is not necessary for the husband to get the order cancelled before resisting its enforcement.

15. Section 488 provides a swift and cheap remedy against any person who despite means neglects or refuses to maintain his wife. This section has been divided into eight sub-sections. Sub-section (1) provides that certain Magistrates may, upon proof of neglect or refusal to maintain his wife, by a person having sufficient means to do so, may make an order directing such person to make a monthly allowance for the maintenance of wife, at such rate, not exceeding Rs. 500/- in the whole. Sub-section (2) provides the date from which the maintenance allowance directed to be paid under sub-section (1) becomes payable. Sub-section (3) provides for the enforcement of the order. In Sub-section (4) a provision has been made that in three conditions, viz. (1) where the wife is living in adultery, (2) where without any sufficient reason she refuses to live with her husband and (3) where they are living separately by mutual consent she would not be entitled to receive any maintenance. Sub-section (5) makes a provision for cancellation of the order of maintenance made under Section 488 (1) on the same grounds on which she becomes disentitled to receive any maintenance allowance. Sub-sections (6) to (8) concern the procedure to be adopted in dealing with the application, power of the Court to award costs and the place where the proceedings can be taken.

16. A perusal of the provisions of Section 488 indicates that before an order under Section 488 (1) is made a full enquiry is held and an order of maintenance is made provided it is established to the satisfaction of the Court that the husband having sufficient means has neglected or refused to maintain the wife. In view of Sub-section (4), which provides that no wife shall be entitled to receive an allowance from her husband under- Section 488 if she is living in adultery or if without any sufficient reason she refused to live with her husband or if they are living separately by mutual consent, no order under Section 488 (1) will be made even though it may be established that the husband has refused or neglected to maintain her. On proof of the fact that the husband has necessary means to maintain his wife and has neglected or refused to maintain her, it would not be proper for a Magistrate to refuse a prayer for maintenance on grounds other than mentioned in Sub-section (4) of Section 488. After an order has been made under Section 488 (1) it has got to be enforced under Section 488 (3), but the legislature was conscious of the fact that after making the order under Section 488 (1) certain change in the situation of husband and wife may take place because of which the husband may be justified in not paying the maintenance allowance and it may become inexpedient and improper to enforce the order made under Section 488 (1), and, therefore, it made a provision that if a person ordered to pay maintenance fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines and may also sentence such person, for the whole or any part of the each month's allowance remaining unpaid after execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made. A perusal of this Sub-section shows that in a case where an order has been made directing payment of a monthly allowance the legislature considered the non-payment of allowance for each month as an independent and separate breach of the order and in such a case the person concerned has to show to the satisfaction of the Court that there is sufficient cause for each of such breaches separately. In other words, he will absolved of his liability in respect of only such breaches for which there is sufficient cause for non-payment and not in respect of other breaches for which there is no sufficient cause for non-payment. This clearly indicates that the facts to be considered under this Sub-section are

those which must have come into existence after making the order under Section 488 (1).

17. Legislature also wanted to safeguard that an order made under Section 488 (1) should not stand in the way of reconciliation between husband and wife and that as far as possible the wife should be maintained by the husband while living with him. Keeping this end in view it provided in Sub-section (4) that a wife would not be entitled to receive any maintenance allowance if she is living separately from her husband without any sufficient cause. Once it is held that the, wife had sufficient cause for living separately from her husband she becomes entitled to receive maintenance allowance on proof of the fact that the husband had sufficient means to maintain her and he neglected or refused to do so, but as the legislature did not intend a permanent estrangement of relationship between husband and wife it left it open to the husband to make an offer to the wife to maintain her on condition that she lives with him even after an order under Section 488 (1) has been made. If this offer is found to be genuine and the wife still refuses to live with him she becomes disentitled to receive maintenance from her husband under Sub-section (4) of Section 488. That is why a provision has been added in sub section (3) to the effect that if such a person offers to maintain his wife on condition of her living with him and she refuses to live with him such Magistrate may consider any grounds of refusal stated by her and must make an order under this section notwithstanding such offer if he is satisfied that there is just ground for so doing. So long as, after making an order under Section 488 (1), an offer is not made by the husband to keep the wife with him, no question of considering whether there is a just cause for the wife to live separately from the husband and of not enforcing the order under Section 488 (1) would arise. An offer made to maintain a wife on condition of her living with the husband does not operate retrospectively so as to provide a justification for the earlier breaches of the order made under Section 488 (1). It may be that if a genuine offer is made by the husband to maintain his wife on condition that she lives with him and if there is no sufficient reason for the wife to remain away from her husband, it may provide a sufficient reason for the husband not to comply with the order made under Section 488 (1) and the breaches subsequent to the offer made may stand condoned, but it will not provide a justification for earlier breaches and the order in respect of breaches committed

prior to the offer will have to be enforced in accordance with Section 488 (3). A perusal of subsection (5) also indicates that if since after making the order a change in the situation has taken place and the wife has started living in adultery or without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent the Magistrate shall cancel the order made under Sub-section (1). Neither this Sub-section nor Sub-section (4) were intended to give a power to the Magistrate to question the correctness of the order already made under Section 488 (1). In Sub-section (3) a provision has been made to enable the husband to show cause why the order be not enforced and not for enabling him to show that the order itself should not have been passed. In our opinion, the husband can resist enforcement of the order in respect of such breaches which are covered by Section 488 (4) and also take steps for getting the order made under Section 488 (1) cancelled. This, however, does not mean that so long as the order made under Section 488 (1) is not cancelled, its enforcement cannot be resisted even if it be shown that there was sufficient cause for not complying with the order.

18. We are unable to accept the argument advanced on behalf of the applicant that proviso to Sub-section (3) which enables a husband to make an offer to maintain his wife on condition that she lives with him is not a proviso to Sub-section (3) but it is a proviso to subsection (1) of Section 488. As stated earlier Section 488 (1) concerns itself with making an order of maintenance, whereas Section 488 (3) deals with enforcement of that order. The proviso indicates one of the circumstances in which the order made under Section 488 (1) need not be enforced. The setting of this proviso also indicates that it was meant to govern Section 488 (3). The other proviso to Sub-section (3) is clearly a proviso which is meant to govern Sub-section (3), and if this be so there is no reason to think that the earlier proviso was not meant to apply and to govern the provisions of Sub-section (3). By holding that the proviso in question governs Sub-section (3) we would be advancing the purpose of the legislature in the manner already explained. In the circumstances we see no reason for not giving effect to the provision in a normal and natural manner and to hold that it does not govern Sub-section (3) under which it has been added. Case law on the subject indicates that there is some divergence in judicial opinion on the question whether this proviso

also governs the Section 488 (1). One view as expressed by Hegde, J. in (Syed Ahmad v. N. P. Taj Begum), AIR 1958 Mys 128, is that this proviso has got to be taken into consideration while making an order under Section 488(1). A contrary view has been expressed by Prasad, J. in the case of Subhagidevi v. Murli Pradhan, AIR 1968 Pat 139, in which he held that Sub-section (3) Including its two provisos have no application at a time when Magistrate is called upon to pass an order under Section 488 (1). Both the points of view, however, recognise that the two provisos added to Sub-section (3) of Section 488, govern it. No case has been cited to show that the provisos added under Sub-section (3) to Section 488, Criminal P. C. were not meant to govern that Sub-section. In the circumstances, we see no reason for not giving effect to this proviso in a normal and natural manner and to hold that it does not govern Sub-section (3) to Section 488 under which it has been added. In the case before us we are not concerned with the question whether these provisos also govern Section 488 (1). We accordingly reject the argument raised on behalf of the applicant that the first proviso under Section 488 (1) was meant to govern only Section 488 (1) and not Section 488 (3) and so long as the order of maintenance passed under Section 488 (1) is not cancelled, the husband cannot make an offer to maintain his wife on condition that she lives with him, and to put up an unjustified refusal on the part of wife as a cause for not complying with the order made under Section 488 (1), Criminal P. C.

19. In : AIR1957 All658 decided by Mulla, J. Smt. Bimla Devi obtained an order under Section 488 (1), Criminal P. C. against her husband Ram Kishore. When an application for enforcement of that order was made Ram Kishore filed an objection saying that Bimla Devi was refusing to live with him without sufficient reason and was living in adultery. It was contended that in the circumstances Bimla Devi's prayer for enforcement of the order should be refused. A perusal of the report shows that the two pleas were based on certain facts which existed prior to the order made under Section 488 (1), Criminal P. C. and could be raised when that order was made. After considering the case law on the subject Mulla, J. arrived at the following conclusions :--

(1) Only that type of causes can be urged under Section 488 (3) which do not challenge or contest the order passed under Sub-sections (1) and (2) of Section

488. If a plea which was open to the husband at the time when he contested the claim of his wife but was not raised by him is advanced at the time when she applies for a warrant of execution it cannot be considered under Sub-section (3). This conclusion is based on the ground that principles of res judicata apply to proceedings under Section 488, Criminal P. C. as they are quasi civil in nature. In support of this principle, the learned Judge relied upon a decision of Mahmood, J. in the case of Laraiti v. Ram Dial, (1882) ILR 5 All 224, wherein it was observed as follows :--

'In dealing with the main question raised by this reference, I am of the opinion that the order of the District Magistrate, dated the 2-3-1880, must be taken to have adjudicated upon all the facts antecedent thereto and connected with the objection of Ram Dial as to his wife's leading an adulterous life. Upon the general principles of the rule of res judicata I am of opinion that the Deputy Magistrate was wrong in law in reopening matters already adjudicated upon and his order directing the discontinuance of maintenance on the ground of facts antecedent to the District Magistrate's order must be held to be illegal.' (2) Sub-section (3) to Section 488, Criminal P. C. is not to be read with subsection (4) of that section and if an application about the wife contracting adulterous relationship subsequent to the passing of the maintenance order is passed he will continue to be entitled to receive maintenance until the order is cancelled under Sub-section (5). The learned Judge was of opinion that that legislature has broadly mentioned three causes in Sub-sec. (4) on the basis of which a husband could not be compelled to maintain his wife. If any of these causes arose after the maintenance order was passed in favour of the wife, the only course open to the husband is to apply for the cancellation of the maintenance order under Sub-section (5).

(3) The words 'fails for sufficient cause to comply' cannot be stretched to include contentious pleas. Only such circumstances which show that the order has exhausted itself can be placed before the Court, such as where the wife has ceased to be a wife or the child has become major and is able to maintain itself or a reconciliation had taken place between a husband and wife and she is living with her husband. Where the order is evaded on the allegation that the wife is living in adultery it amounts to challenging the order of maintenance and is a refusal and

not a failure to comply. Such a plea cannot be raised under subsection (3) although the husband may move an application for cancellation of the order under Sub-section (5) of Section 488, and

(4) The plea that the applicant was willing to maintain his wife if she lived with him was also not open to him in the circumstances of the case as the maintenance order was passed in favour of the wife not only on the allegation of cruelty but also because she proved that the applicant had married another woman. Under proviso to Sub-sec. (3), that by itself was a just ground for the wife to refuse to live with the husband. The finding arrived at by the court below was that the offer made by the husband was mala fide.

20. It will thus be seen that conclusion No. (4) was based on the peculiar facts of the case before Mulla, J. and we are required to examine the correctness of the first three conclusions only.

21. As discussed above, we are in full agreement with Mulla, J. in so far as conclusion No. 1 arrived at by him, is concerned, viz., that in reply to an application under Sub-section (3) to Section 488 only such causes can be urged which were not the subject-matter of challenge or contest when the order under Sub-sections (1) and (2) was made and that if on facts a plea which was open to the husband at the time when he contested the claim of his wife but was not so raised by him, is advanced at the time when she applies for a warrant of execution, it cannot be considered under subsection (3), As stated earlier normally an order made under Section 488 (1) has got to be complied with by the husband unless certain changes in the situation of husband and wife takes place after making of the order which may be classed as sufficient cause for his failing to comply with the order and which make it inexpedient to enforce it against the husband,

22. On behalf of the opposite party reliance was placed on the case of Sangavva Gulappa v. Gulappa Kariyappa, AIR 1942 Bom 258, in which it was observed as follows :--

'It is necessary to examine the language of the various provisions of Section 488, Clauses (1) and (2) which deal with the making of orders for maintenance to wives and children. Clause (3) says that if any person so ordered fails without sufficient cause to comply with the order, the Magistrate may enforce the order in the manner there provided. It is clear from this that the order cannot be enforced in the manner provided, if sufficient cause for non-payment is shown, and that must apply to arrears of maintenance due under an order. Clause (4) says that no wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery. The general language here employed seems to make this clause applicable to any sum receivable by a wife by way of maintenance including arrears of maintenance. So that the effect of clauses (3) and (4) together is that on proof that the wife is living in adultery the Magistrate will be justified in refusing and indeed bound to refuse to execute an order for maintenance, quite apart from the question whether the order has been cancelled or set aside.'

23. The case of : AIR1953 Cal343 , was also relied upon in that case in which the learned Judge of the Calcutta High Court observed as follows:--

'The failure of the husband to obtain a cancellation of the order for maintenance under Sub-section (5) of Section 483 does not stand in the way of his filing an objection under Sub-sec. (3) of Section 488. If as a matter of fact, the husband is able to prove the allegations which he has made in his objection the Magistrate will not only refuse to issue a 'distress warrant' under Sub-section (3) of Section 488, but he should also cancel the order for maintenance under Sub-section (5). It is quite clear from the words used by the legislature in Sub-section (3) that the Magistrate must hold an inquiry as to the sufficiency of the cause shown by the husband and he cannot order the issue of a distress warrant without satisfying himself as to the sufficiency of the cause shown.'

Similar observations were made in the case of Hari Narain v. Rani Devi, AIR 1952 Madh Bha 53, wherein it was held that Section 488 (3) affords an opportunity to the husband to show cause why the order made under Section 488 (1) be not enforced.

24. In the case of : AIR1959 All767 , Mr. Justice Desai observed as follows:--

' 'The proviso that if the husband offers to maintain the wife on condition of her living with him and she refuses to live with him on the ground that he has contracted marriage with another woman, the Magistrate will hold that she had a just ground for her refusal and will reject the offer, is a part of Sub-section (3), which deals only with the enforcement of a maintenance order..... It is true that the words used in the proviso are 'make an order under this section' and that Sub-section (3) does not expressly provide for making any 'order' but the context in which the proviso is placed leaves no room for doubt that it governs the provision of Sub-section (3) only and not that of Sub-section (1) in addition..... The proviso seems to have been enacted in order to give the husband one more opportunity of offering to maintain the wife on condition of her living with him.'

25. Relying on the observations made in these cases it was contended that under the law it was not necessary for the husband to have obtained cancellation of the order under Section 488 (1) before resisting its enforcement. Irrespective of what had been held while making an order under Section 488 (1), Sub-section (3) provides that the husband can plead any cause which may justify his non-complying with the order under Section 488 (1) including the cause which had accrued prior to making of the order under Section 488 (1). We do not find anything in the aforesaid decisions to support such an argument. It is true that the cases of AIR 1942 Bom 258 (supra) : AIR1953 Cal343 and AIR 1952 Madh Bha 53 (supra) lay down that for the purpose of resisting enforcement of an order made under Section 488 (1), it is not necessary to obtain cancellation of that order. The decision of Desai J. in : AIR1959 All767 , is to the effect that proviso to Sub-section (3) seems to have been enacted in order to give the husband one more opportunity of offering to maintain the wife on condition of her living with him, but none of these decisions goes to the extent that the correctness of the order made under Section 488 (1) can be challenged in proceedings under Section 488 (3), Criminal P. C. and that the points based upon facts which were raised and could be raised when the order under Section 488 (1), Criminal P. C. was made can be raised over again while dealing with an application under Section 488 (3). We do not find anything in these decisions which runs counter to the first conclusion arrived at by Mulla, J. with which we fully agree.

26. We, however, express our inability to agree with Mulla, J. when he holds that Sub-section (4) of Section 488, Criminal P. C. is to be read with Sub-section (5) or Sub-section (1) but not with Sub-section (3) of Section 488, Criminal P. C. As a result of this finding Mr. Justice Mulla came to the conclusion that if the cause mentioned in Sub-section (4) arises after making of the order under Sub-section (1) it could provide a basis for the cancellation of the order under Sub-section (5), but could not provide a reason for not complying with the order made under that Sub-section. In support of this conclusion reliance was placed on the case of Bhag Sultan v. Mohd. Akbar Khan, AIR 1930 Lah 99 (1), in which it was observed as follows:--

'The fact that a wife is living in adultery does not automatically deprive her of the maintenance, for the order of maintenance once passed stands good until it has been cancelled.'

27. In a decision of the Madras High Court, in the case of Kanagammal v. Pandara Nadar : AIR1927 Mad376 , it was observed that if a wife returns to the husband, it will not have the effect of bringing the order of maintenance to an end automatically, but it will remain in force until it is cancelled.

28. Mr. Justice Mulla was further of opinion that if it is accepted that subsection (4) governs Sub-section (3) it would enable an unscrupulous husband to again and again raise a plea of his wife's living in adultery and the Court would be compelled to enquire into this plea again and again, entailing considerable delay and thus defeating the very purpose of Section 488. Criminal P. C. which had been enacted to secure a speedy remedy for those neglected wives and children who were unable to maintain themselves.

29. Section 488 (4) provides that 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 refused to live with her husband or if they are living separately by mutual consent. This sub-section clearly applies to a case where an allowance has been fixed and thereafter the wife starts living in adultery or if without any sufficient reason she refuses to live with her husband or if they start living separately by mutual consent. We do not agree that by interpreting Sub-

section (4) in this manner the very object of Section 488, Criminal P. C. will be frustrated. The intention of the legislature is clear that a husband is not to be compelled to maintain a wife who becomes unvirtuous or who is so unreasonable as not to live with him and perform her wifely functions. The legislature also protected the wife by providing that she may refuse to live with the husband and perform her conjugal functions, if there is sufficient reason for the same. We do not see why if after making of the order under Section 488 (1) the wife contracts adulterous relations or becomes unreasonable and refuses to live with her husband, the husband should not be permitted to raise that plea when an application under Sub-section (3) of Section 488 is made by the wife and full effect should not be given to the wordings of Sub-section (4) which provides that no wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery etc. After all an application moved under Sub-section (3) is an application made by the wife to receive an allowance. The mere fact, that if an allegation is made by the husband to the effect that the wife is living in adultery etc. will entail holding of an inquiry resulting in some delay, is no reason why effect should not be given to the provisions of Sub-section (4). We would be defeating the very object of the legislature, viz. that no allowance is receivable by a wife living in adultery etc. if we hold that the husband should not be permitted to raise such pleas when an application under Section 488 (3) is moved by the wife. It is obvious that if no allowance is receivable by wife on the ground mentioned in Sub-section (4) the Court should not pass an order under Sub-section (1) either, if those grounds exist at the time of considering the application for maintenance under Section 488 (1) and in that sense even Sub-section (1) of Section 488 is to be read with Sub-section (40).

30. It was urged that Sub-section (4) states three reasons for which maintenance allowance is not to be received by the wife, viz. if the wife is living in adultery, or (2) if without sufficient reason she refused to live with the husband and (3) if they are living separately by mutual consent. A perusal of Sub-section (3), however, shows that out of the three conditions mentioned in Sub-section (4) only one condition has been specifically mentioned as a ground for resisting enforcement of maintenance order in Sub-section (3) and that ground is that if a wife refuses to live with the husband without there being a just ground for doing so. This shows

that at least the other two conditions mentioned in Sub-section (4) were not intended to be grounds for resisting enforcement of the order of maintenance, and as such enforcement of order made under Section 488 (1) cannot be resisted on the grounds mentioned in Sub-section (4).

31. We are unable to agree with this argument. Sub-section (3) provides that if any person so ordered fails without sufficient cause to comply with the order of maintenance the Magistrate may recover the maintenance amount as provided in that section. The legislature has not defined as to what that sufficient cause for failure to comply with the order would be, and has left it to the Court to decide this on the facts of each individual case. Sub-section (4) mentions three causes in which maintenance allowance is not receivable by a wife. A fortiori existence of the grounds mentioned in Sub-section (4) on which the maintenance is not receivable by a wife would be sufficient ground for the husband for not paying the maintenance amount and as such if he does not comply with the order, he can put up these grounds as sufficient cause for not complying with it.

32. We have already held that correctness of an order made under Section 488 (1) cannot be challenged in proceedings under Section 488 (3). It was to clarify, that even after an order under Section 488 (1), Criminal P. C. has been made, it is open to a husband to make a bona fide offer to maintain the wife on condition that she lives with him even after an order under Section 488 (1), Criminal P. C. has been made that the proviso to Sub-section (3) was added. No such clarification was necessary in respect of the other two conditions mentioned in Sub-section (4). We are, therefore, of opinion that addition of a proviso to subsection (3) which provides that if the husband offers to maintain his wife on condition of her living with him and she refuses to live with him the Magistrate can proceed under that section if he is satisfied that there is just ground for his doing so, does not show that Sub-section (4) was not intended to be read with subsection (3).

33. Aforesaid discussion also leads us to the conclusion that Mulla, J. was not right in holding that only such circumstances which show that the order has exhausted itself can be pleaded before the Court as sufficient cause for not complying with the order made under Section 488 (1), Criminal P. C. while agreeing

with him that if the monthly allowance is not paid and an application under Section 488 (3) is moved, it would be open to the husband to plead facts showing that the order has exhausted itself as a plea showing sufficient cause for not complying with the order, there is no justification to confine the expression 'fails for sufficient cause to comply' to only such pleas.

34. In this connection it was observed by the learned Judge as follows :--

'In my opinion the phrase which should have been interpreted was not merely 'fails without sufficient cause', but 'fails without sufficient cause to comply'. 'Comply' means to yield to submit or to carry out. The word 'fails' also cannot connote the meaning of voluntary refusal. 'Failure to comply' can, in my opinion, include only such grounds which show that for some reason the person against whom the order was passed was not able to carry it out. These words do not give a discretion or right to the person against whom the order is passed to decide whether the original order was justifiable or not. An order passed by a competent Court can be contested or challenged.'

35. With great respect we are unable to confine the meaning of the words 'fails without sufficient cause to comply' in the manner as has been done by the learned Judge. A person who has not paid the maintenance allowance for any reason whatsoever has undoubtedly failed to comply with the order. If the reason for not complying with the order is one which is countenanced by law as sufficient reason it could be said that the failure to comply is for a sufficient reason. If, therefore, the husband is able to show that after making the order the wife is living in adultery or that he has made a bona fide offer to maintain her on condition that she lives with him and she has refused to do so, and therefore, he did not pay the maintenance allowance it would be a failure on his part to comply with the order to maintenance, but this failure would be for a reason which law recognises as sufficient reason.

36. We are accordingly of opinion that the scheme of Section 488 shows that after an order under Section 488 (1) has been made, the grounds on which it was made cannot be considered over again while considering an application for enforcement of the order. Non-payment of monthly allowance constitutes an independent breach of the order every month during which the allowance is not paid. If the

husband raises a plea that there was sufficient cause for his not complying with the order, the cause must have come into existence before the breach occurred. A subsequent cause will not have the effect of doing away with an earlier breach. A person who has been directed to make payment of allowance to his wife, who is living separately from him, can make a genuine offer to maintain his wife on condition of her living with him and if she refuses to live with him without any just ground, the wife may cease to be entitled to receive further maintenance and it may constitute sufficient cause for not complying with the order after the offer is made.

37. It is in the light of the aforesaid discussion and the scope of various provisions of Section 488 as explained by us, that we will consider the propriety of the order made by the learned Magistrate in this case. The order of maintenance under Section 488 (1) was made by the Magistrate on 21st of June, 1966. The opposite party had to pay maintenance to the applicant at the rate of Rs. 40/- p.m. from that date. He did not comply with the order of the Magistrate. As stated earlier, a fresh breach of the order took place every month when the amount was not paid by him. An application to recover the amount of arrears of maintenance was made on 20th January, 1968. The opposite party appeared before the Court for the first time on 12th of February, 1968 and then moved an application praying for some time, so that he may arrange for the money and pay the arrears of maintenance. On that date he did not take up the plea that he wanted to justify his failure to comply with the order made under Section 488 (1) as being for some sufficient cause. The opposite party did not pay the amount on 20th of February, 1968, made an application praying that the Court be pleased to stay the order of realisation of maintenance amount. In this application it was mentioned that he made his best efforts in procure the money but he failed to do so and had no sufficient means to pay the maintenance allowance. The matter remained pending and it was on 31st of May, 1968, that he made an application offering to maintain his wife on condition that she lived with him for the first time. It is, therefore, clear that there was absolutely no offer made by the opposite party to maintain his wife on the condition that she lived with him at any time during the period for which an application for the enforcement of the order under Section 488 (1) was moved. The offer made by the opposite party in his application dated 31st of May, 1968,

could not be considered to be a sufficient reason for not complying with that order for the period for which it was sought to be enforced for a simple reason that till that time the offer did not exist and it could not be said that the non-payment of maintenance for that period was for the reason that the opposite party had offered to maintain the wife and she had refused to live with him without any sufficient reason. The offer made by the opposite party in his application dated 31st of July, 1968, has nothing to do with the breaches already committed by him and as such it cannot provide a justification for those breaches. We are, therefore, of opinion that the proposed inquiry about the bona fides of the offer made by the opposite party asking the applicant to live with him, has absolutely no connection with the application for enforcement of the order for a period prior to that offer and as such the learned Magistrate was not right in holding over the enforcement proceedings and requiring the applicant to produce evidence for justifying her refusal to live with her husband.

38. Learned counsel for the opposite party then argued that in any case since the prayer by his client in his application dated 31st of July, 1968 was for the cancellation of the order under Section 488(1), in case the wife did not accept the offer made by him, the enforcement proceedings under Section 488(3) should remain stayed. He contended that in case he succeeds in getting the order under Section 488(1) cancelled on this ground and the wife is found to be unreasonable in refusing to live with him he would not be liable even for the arrears of maintenance and therefore, the procedure adopted by the Magistrate was apt and does not require any interference. In this connection, learned counsel relied upon the observations made by Dixit, J. in the case of AIR 1952 Madh Bha 53 (supra), while dealing with this question the learned Judge observed as follows :--

'As regards the question whether if the order of maintenance is cancelled under Section 488 (5) the cancellation order can affect the arrears due up to the date of the order, it seems to me from the language used in sub-sections (3) and (4) that if sufficient cause for non-payment is shown and the Magistrate is satisfied that the wife, without sufficient reason refuses to live with her husband the order of maintenance cannot be enforced in the manner provided in Sub-section (3) and the wife is not entitled to receive the amount of maintenance allowance; and that

must apply to arrears of maintenance due under an order. It is true that Sub-section (5) does not deal with the question of execution of the order for maintenance but provides for cancellation of the original order for payment of maintenance and the use of the word 'cancel' does not necessarily import that the cancellation order has retrospective effect. But if an order for payment of maintenance which is cancelled under Sub-section (5) on proof that the wife, without sufficient reason refuses to live with her husband, is also incapable of execution on same ground under Sub-section (3) it seems to me difficult to hold that the arrears of maintenance allowance due upto the date of the cancellation order can be recovered.' The learned Judge relied upon the decision of the Bombay High Court in AIR 1942 Bom 258 (supra) and disagreed with the decision of the Lahore High Court in the case of AIR 1930 Lah 99(1) (supra),, followed by the Calcutta High Court in the case of Tari Bala v. Kibal Ram : AIR1938 Cal144 , wherein it had been held that the order of cancellation has no retrospective effect so as to disallow the prior allowed maintenance and that the maintenance order stands good until it is cancelled.

39. A perusal of the reasoning adopted by Dixit, J. shows that he was of opinion that in case it is found that the husband makes an offer to maintain his wife on condition that she lives with him and the wife refused to do so without sufficient reason she would not be able to recover even the arrears of maintenance as the order under Section 488 (1) would itself become unenforceable. If this is the position then if an order is cancelled under Sub-section (5) the same result should follow. Therefore, it could be held that once an order is cancelled on this ground the wife should not be able to recover even the arrears. It was not brought to the notice of the learned Judge that non-payment of monthly allowance constitutes a fresh breach every month and the husband has to justify each of such breaches. He cannot justify the earlier breaches on the ground that subsequently he made an offer to maintain the wife on condition that she lives with him. If this fact had been noticed by the learned Judge, we are very doubtful if he would have come to the conclusion that a refusal by the wife to accept the offer made by the husband to maintain her on condition of her living with him without any sufficient cause would make the order under Section 488 (3) unenforceable even for breaches of order committed prior to the period of that offer.

40. In the case of Smt. Kalyani Devi v. Nirmal Kumar Panda : AIR1957 Cal115 , it was held as follows:--

'Where an order of maintenance is cancelled, it must mean that though the order of maintenance was never made and where such is the position, there is no question of any order of maintenance being enforced, for there is really nothing to enforce after the order has been cancelled.'

41. We are unable to agree with this line of reasoning. An order under under Section 488 (1) is cancelled under Sub-section (5) for the reasons mentioned in that section, in case those reasons have come into existence after the order under Section 488 (1) is made. The order is not cancelled on the ground that it was erroneous or without jurisdiction. We fail to see why the effect of such cancellation should be as if the order never existed. The order exists till such time as it is not cancelled. In the case of Phulbasi v. State, 1968 All LJ 1099, a Division Bench of this Court held that an order made under Section 488 (1) continues to be effective unless it is cancelled under Section 488 (5) or modified under Section 489 (2). This shows that the order made under Section 488 (1) is meant to be effective till it is cancelled. The view taken by the Calcutta High Court will lead us to startling result. Take a case where an order is made against the husband under Section 488 (1) and the husband goes on paying maintenance to the wife month by month for several years. After doing so for about 4 or 5 years he makes an offer to the wife to maintain her on condition that she lives with him. For some reason the wife refuses and the husband moves an application under Section 488 (5) for cancellation of the order under Section 488 (1). In these proceedings refusal of the wife is found to be unjustified and the order under Section 488 (1) is cancelled. If the reasoning of the Calcutta High Court is accepted it will mean that the order under Section 488 (1) never existed and all the payments made by the husband to his wife were not supported by any order and the husband may lay a claim for the refund of that amount already paid. We do not think that such a position was ever contemplated by the legislature.

42. Similar view was taken by Sharfuddin Ahmad, J. in the case of B. Rukmini Bai v. B. B. Surai Bhan Singh : AIR 1963 AP407 . The learned Judge disposed of this

question by making the following observations :--

'The last point raised by the learned counsel for the petitioner is that a wife was entitled to get maintenance at least till the date of the cancellation of the order. This view seems to have found favour with some High Courts, but I see no justification for the view as, in my opinion, it would amount to condonation of the conduct of the wife in part while finding it objectionable subsequent to the date of cancellation.'

In our opinion, the question of such a condonation does not arise. There is no reason to deprive the wife of maintenance when the husband neglected and refused to maintain her without any justification till such time as she was leading a virtuous life. We are, therefore, of opinion that the argument that once the order under Section 488 (1) is cancelled it would not be enforceable even for the period prior to that when such a change in situation took place which led to the cancellation of the order under Section 488 (5), is not correct. We have already quoted a passage from the decision of Dixit, J. in the case of AIR 1952 Madh Bha 53, which shows that the learned Judge agreed that the use of the word 'cancel' does not necessarily import that the cancellation order has retrospective operation.

43. In the present case, even if it is held that the offer made by the husband in his application dated 31st of May, 1968, is genuine (about which considering the previous history of the litigation between husband and wife we entertain strong doubts) and the refusal by the wife to live with the husband is not reasonable and the order under Section 488 (1) is cancelled on that ground, it would not affect the proceedings for enforcement of the order prior to the date of the offer. The order is being enforced for a period prior to 31st May, 1968 and we are not concerned as to what will happen when the applicant moves another application for enforcement of order for the period subsequent to 31st May, 1968. In any case, the order has not been cancelled so far and no provision has been brought to our notice which requires that proceedings for enforcement of the order should be stayed till it is cancelled. Further, there are no equities in favour of the husband which would justify staying enforcement proceedings by the Court in exercise of its normal jurisdiction to enable him to obtain any technical advantage.

In the circumstances, we do not find any force in the argument raised by the learned counsel for the opposite party that consideration of the application moved by the wife for enforcement of the order made under Section 488 (1) should remain stayed till the application of the opposite party for cancellation of that order is decided.

44. In the result, we accept the reference made by the learned Sessions Judge and direct the learned Magistrate to enforce the order made under Section 488 (1) in accordance with law inasmuch as the opposite party has not shown any cause for its non-compliance for the period for which the enforcement is sought. The application made by the opposite party dated 31st May, 1968 for cancellation of the order would be dealt with separately. The learned Magistrate should not await the decision of the opposite party's application for cancellation of the order under Section 488 (1) for the purpose of enforcing the order for a period prior to the date of that application.

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