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Court : Rajasthan

Decided On : Nov-10-1959

Reported in : AIR1960Raj255; 1960CriLJ1376

Judge : I.N. Modi, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 488

Appeal No. : Criminal Ref. No. 269 of 1959

Appellant : Mt. Bashiran and ors.

Respondent : Nathu

Disposition : Reference accepted

Judgement :
ORDER

I.N. Modi, J.

1. This is a reference by the Additional District Magistrate, Jodhpur, in a matter under Section 488, Cr. P. C., and arises under the following¹ circumstances.

2. Petitioner No. 1 Mst. Bashiran is allegedly the wife of the opposite party Nathu. The latter has had two children by Mst. Bashiran: (1) Mst. Banu a daughter aged about seven years and (2) Allahbux a boy about four years and a half, who are

petitioners Nos. 2 and 3. On 17-7-1958, Mst. Bashiran, applied to the Extra First Class Magistrate No. 3, Jodhpur City, that she and the opposite party Nathu had been married about 20 years ago but the latter had married another woman named Fatma about four years ago, and, therefore, she wanted to live separately from her husband.

It was also alleged that the opposite party did not care at all for her or for her children, and, therefore, she claimed maintenance under Section 488 Cr. P. C.

3. The opposite party Nathu resisted this application. His case was that he had divorced Mst. Bashiran on 16-4-1958, and, therefor, no marital tie subsisted between them, and, therefore, he was not bound to maintain her. He also contended that she had started living separately from him right from 1954 without any rhyme or reason and thereafter at his request came back once but again left him and completely declined to live with him. As regards the two children, his case was that he had asked his former wife to send both the children to him but she flatly refused to do so. He also submitted that he was prepared to keep the children with him and maintain them but if Mst. Bashiran would not send them to him, he was not liable to pay for their maintenance to suit her convenience.

4. The learned Magistrate found that the opposite party had divorced Mst. Bashiran in the presence of a Panchayat which had been called to settle the differences between them. The Magistrate, therefore, ordered on 27-2-1959 that she was entitled to maintenance for the period of Iddat only and not thereafter. Having regard to all the circumstances of the case, he ordered that the opposite party shall pay maintenance to Mst. Bashiran at the rate of Rs. 15/- P. M. and to her two children at the rate of Rs. 10/- P. M. for the period of Iddat and further allowed a period of 15 days for the aforesaid payment in default whereof he directed that his order shall be enforced in accordance with subsection (3) of Section 488 Cr. P. C.

5. Aggrieved by the above order, the petitioners preferred a revision to the Additional District Magistrate, Jodhpur, who has made the present reference. The only point which seems to have been pressed before the learned referring Magistrate, however, was that the trial Magistrate had fallen into error in allowing

maintenance to the minor children only up to the period of the Iddat, and that he should have passed an order for their maintenance until they were able to earn their livelihood. The recommendation of the learned Additional District Magistrate is that the two petitioners Mst. Banu, and Allahbux are entitled to maintenance allowance until they attain the age of majority.

6. The question which thus emerges for determination is whether the two children are entitled to maintenance from their father when they are living with their mother, and the latter is not prepared to send them to their father.

7. Now the object of Section 488 is to prevent vagrancy by compelling the husband or the father to support his wife or children who are unable to support themselves. It is, therefore, well-established that the powers of the criminal courts under this chapter are limited in scope and the orders passed thereunder are subject to any final adjudication which may be made by a civil court as respects the civil rights of the parties. At the same time, the right to maintenance under this section is a distinct statutory right which is capable of being enforced provided the conditions precedent laid down by Section 488 are fulfilled.

As regards the right of the children to claim maintenance from their father, it is important to remember that this right is independent of the mother's right to maintenance, and, consequently, it cannot be affected merely by reason of the fact that the mother has been divorced or that she is not of a virtuous character. The right is based on the paternity of the child.

The only question to consider, therefore, is whether an offer by the father to maintain the child or the fact that the child is not left in his custody is a valid ground for refusing maintenance. On the authorities, the answer to this question must be in the negative. The ratio decidendi of this view seems to be that what really matters is the factual custody of the child and not the right thereto. Thus it was held in *Ebrahim Mohamed v. Khurshedbai*, AIR 1941 Bom 267, that the Magistrate must take the facts as he finds them to be and that if in fact the children are living with the wife and if in fact the father is refusing or neglecting to maintain them where they may be living, the Magistrate would have jurisdiction to make an order for maintenance. It was further held that if the father's case was that the

children ought not to be living with the , wife but with him or under his direction, then the proper course for him to adopt is to resort, to requisite proceedings in a civil' court to secure the custody of the children for himself. But so long as this is not done and as long as the children are in fact residing with the wife and even so the husband is in fact declining to maintain them, the Magistrate would have jurisdiction to make an order for their maintenance under Section 488 Cr. P. C. This view has been upheld in *Muniammal v. Venkataramanachari*, AIR 1943 Mad 768, *Kochukrishnan Asan v. Rajan*, AIR 1954 Trav-Co. 225, *Mohd. Shamsuddin v. Noor Jahan Begum*, AIR 1955 Hyd 144 and *Rahimunnissa v. Mohd. Ismail*, AIR 1956 Hyd 14.

8. The question whether the father's right to the custody of his children can be a defence against a claim for separate maintenance in a civil suit where the father expresses his bona fide willingness to keep and maintain the child is an altogether different matter on which it is unnecessary to express any opinion here. But as to the position so far as the right of the child to claim separate maintenance under Section 488 Cr. P. C. goes, I have no hesitation in coming to the conclusion that there is overwhelming authority in favour of the proposition that he cannot be deprived of his right of maintenance because the mother refuses to give him under the custody of his father, and the father, therefore, cannot insist that the child should be given under his custody as a condition precedent to his liability to maintain him I hold accordingly.

9. The only other question is what should be the quantum of maintenance and from what date the same should be allowed. The Magistrate has allowed Rs. 10/- per child per mensem to the children for the period of Iddat. This quantum has not been contested before this Court on behalf of the opposite party. So far as the date of operation of this order is concerned, I think it would be proper to fix this date to be the date of the order of the trial Magistrate.

10. The result is that I accept this reference and hereby order that the opposite party Nathu shall give a sum of Rs. 10/- each for the maintenance of his children to their mother Mst. Bashiran month by month under a proper receipt until they attain majority. The opposite party is also allowed six months' time to pay up the

arrears from February up to the end of November, 1959. I may make it clear that if the case of the father is that he has a right to the custody of his children, it will be for him to take appropriate proceedings in a civil court and get the children removed from the custody of their mother, and if and when this is done, this order will cease to have any effect.

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