

**Chhela Vs. Smt. Sohani**

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**Court :** Rajasthan

**Decided On :** Jan-20-1969

**Reported in :** 1969CriLJ1328; 1969()WLN15

**Judge :** C.M. Lodha, J.

**Appellant :** Chhela

**Respondent :** Smt. Sohani

**Judgement :**

ORDER

**C.M. Lodha, J.**

1. This reference has been made by the Additional Sessions Judge, No. 1 Jodhpur. It arises out of an application for grant of maintenance filed by Mat. Sohani against her husband Chhelaram under Section 488, Cri. P.C.

2. Chhelaram has three eons Pusaram aged 12 years. Hardeo aged 5 years, and Kalu aged 1 year, all of whom are living with Mst. Sohani. It has been held by both the lower Courts that Mat. Sohani had been beaten and ill-treated by her husband Chhelaram. In agreement with the trial Court the learned Additional Sessions Judge has also found that Smt. Sohani was entitled to get maintenance for herself and for her youngest son Kalu, who was one year old. But he was of the view that the learned Magistrate should not have awarded any maintenance for Pusaram

aged 12 years, and Hardeo aged 5 years, in view of the fact that Chhelaram had offered to keep them with him and to maintain them but Smt. Sobani was not prepared to hand them over to her husband. The learned Additional Sessions Judge has therefore found that there was no neglect or refusal on the part of the father to maintain these two children and therefore the wife is not entitled to get maintenance for them. He also held that according to Hindu Law the father is entitled to the custody of the minor children.

3. It may be observed that the learned Magistrate has awarded Rs. 50 per month by way of maintenance per month to Smt. Sohani and the three boys jointly. Two questions which arise for decision in this reference are.

(i) Whether any maintenance should at all have been awarded for Pusaram and Hardeo?

(ii) 'Whether a joint award of maintenance to wife and children was correct?

4. As regards the first question,; a mother who has the custody of the child and who has to maintain it is entitled to get maintenance for the child. A distinction must be made between a claim for maintenance under Section 438, Criminal P.C. and a claim for it in a civil Court. The question as to whether 'the father is or is not fit to have the custody of his child is a matter for the civil Court and not for the criminal court. Hence in a proceeding under Section 488, Criminal P. O. so far as the maintenance of a child is concerned, the criminal court is concerned only with the fact of its custody. It may be noted that the first proviso to Sub-section (3) of Section 488, Criminal Procedure Code relating to an offer to maintain referred only to the wife and not to the child and Sub-sections (4) and (5) of Section 488 disentitle only the wife to receive an allowance from her husband if she refuses to live with her husband without sufficient reason. Omission to make reference to a child in the proviso to Sub-section (3) and in Sub-section (4) and (5) suggests that it cannot be said as a matter of law that the child and the father ought to live together in the same way, as a husband and a wife. A father cannot refuse to maintain his children on the ground that they are not living with him. In these circumstances I am of the opinion that the learned Magistrate acted within his jurisdiction awarding maintenance for two boys Pusaram and Hardeo also.

5. Coming to the question of joint award of maintenance to wife and the three children, it does appear that a joint award is not within the contemplation of Section 488(1), which empowers the Magistrate to order the husband "to make a monthly allowance for the maintenance of his wife or such child at such monthly rate.' A joint award also appears to be against the scheme and intendment of Section 489, Criminal Procedure Code, which provides for an alteration in the allowance according to altered circumstances which may not always be the same; but may vary for the wife and the child. In *Hazarasingh v. Mat. Sant Kaur* AIR 1957 Pepsu 24 and *Thankappan Asari v. Pankajakshi* : AIR 1960 Ker 66 a joint award to the wife and the two children was held to be illegal: nevertheless in revision the High Court invoked its inherent power under Section 531-A, Criminal Procedure Code and apportioned the award between the wife and the children. Even otherwise in the exercise of the revisional jurisdiction itself under Section 489, Criminal P.C. I think, the necessary amendment in the order can be made and the irregularities can be removed. Even if it were necessary to apply Section 561-A, Criminal P.C. I would have no hesitation in doing so in the circumstances of the case.

6. Thus taking all the circumstances into consideration I modify the order of the trial Magistrate and hereby direct that Chhelaram shall pay Rs. 25 per mensem as maintenance to his wife Smt. Sohani, Re. 12 per mensem to his eldest son Pusaram, Rs. 8 per mensem to the second son Hardeo and Rs. 5 per mensem to the third son: Kalu. The amount of maintenance granted to the children shall also be paid to their mother Smt. Sohani, with whom they are living from the date of the application which was filed on 24-7-1961. Future maintenance shall also be awarded on the same lines subject to the provisions of Section 489, Criminal P.C.

7. The reference is decided accordingly.