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**Court :** Kolkata

**Decided On :** Nov-23-1949

**Reported in :** AIR1950Cal168

**Judge :** Sen, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 488 and 561A

**Appeal No. :** Criminal Revn. No. 814 of 1949

**Appellant :** Tetri

**Respondent :** Ram Newaj

**Advocate for Def. :** Debabrata Mukherjee, Adv.

**Advocate for Pet/Ap. :** Amaresh Chandra Roy and ;Bireswar Chatterji, Advs.

**Judgement :**

ORDER

**Sen, J.**

1. The petitioner has obtained this Rule and it relates to certain proceedings under Section 488, Criminal P. C.
2. The material facts which need be stated briefly are as follows: The petitioner applied for an order of maintenance under Section 488, Criminal P. C. against her

husband. The order granting maintenance was made on 23rd June 1947. There were certain proceedings thereafter which need not be considered. On 3rd November 1947, the husband made an application under Section 488, Sub-section (5), Criminal P. C., for cancellation of the order for maintenance on the ground that his wife was living in adultery. When that application came to be heard a compromise petition was put in on 2nd December 1948 which is in the following terms:

'The humble petition of the parties in this case, most respectfully sheweth: That the above matter has been compromised between the parties and the husband and wife have agreed to live together and none of the parties desires to proceed with any case against the other either civil or criminal.

That your petitioner Ram Nawaj will maintain his wife honourably and there will be no farther cause of dissatisfaction for the wife.

That your petitioner Tetri has agreed to live with her husband as a faithful wife.

In the circumstances your petitioners pray that your Honour would be pleased to treat this case as compromised and the order of maintenance may be treated as ineffective. And your petitioner, as in duty bound, shall ever pray.'

Thereafter the learned Magistrate passed an order on that very date in the following terms :

Petition filed that the matter is amicably settled. Proceedings dropped. The order of maintenance already passed becomes ineffective. Both sides present.'

On 4th December 1948 the wife came again before the Court and filed a petition stating that in pursuance of the compromise petition she went to her husband's house, that husband assaulted her and kept her under lock and key and threatened to cut off her hands and legs. It is further stated that she managed to come out of the room with some difficulty and she asked the Court to set aside the order of 2nd December 1948 and review the case and issue notice on the second party to appear before the Magistrate. The learned Magistrate held that the parties having already compromised the matter and he having passed an order upon the

compromise he could not revive the order for maintenance after the compromise had been effected and that the remedy of the wife lay in making a fresh application. In this view he refused the application. Against this order, there was a motion preferred to the Sessions Judge which was heard by the Additional Sessions Judge and he refused to refer the case to this Court. The petitioner then applied for and obtained the present rule.

3. It is argued on behalf of the petitioner that the learned Magistrate had no jurisdiction to pass the order which he did upon the compromise petition. It is said that once an order for maintenance is made it can only be cancelled or reviewed upon the conditions mentioned in Sections 488 and 489, Criminal P. C. If the conditions specified in those sections were not present the Court had no jurisdiction to cancel the order for maintenance. It is argued that the order of 2nd December 1948 being without jurisdiction, the order for maintenance still subsists. Learned advocate on behalf of the husband frankly admits that there is no specific provision in the Code which empowers a Magistrate to cancel an order for maintenance upon a compromise petition filed by the parties after the order has been made; but he contends that in the circumstances which have occurred the basis of the order for maintenance no longer exists, and that as it is an order dependent on certain continuing circumstances it has become infructuous and that this Court should not interfere with the order of the learned Magistrate refusing to accede to the prayer made in the petition of the wife. I have been taken through both Sections 488 and 489, Criminal P. C; it is clear that there is no express provision in these sections which permits a Magistrate to cancel an order for maintenance which he has already made on the ground that the parties have made up their differences and wished to have the order cancelled. On the other hand, there is no prohibition in the Code against a Magistrate acting upon a petition of compromise in proceedings under Section 488, Criminal P. C. In my opinion, if both the parties approached the Magistrate after the Magistrate made an order of maintenance and said that they did not wish this order to continue there could be no obstacle in the way of the Magistrate passing an order in terms of the compromise. On behalf of the petitioner, I was referred to two decisions, namely, *Parul Bala Debi v. Satis Chandra*, 37 C. L. J. 180: (A. I. R. (10) 1923 Cal. 456: 24 Cr. L. J. 945) and *Kanangammal v. Pandara Nadar* : AIR1927 Mad376 .

The facts in these cases are quite different. In those cases the wife after an order for maintenance had been made went to live with her husband for some time. Thereafter she left her husband and applied for recovery of maintenance in accordance with the order passed by the Magistrate. The Courts held that the mere fact that she had gone to stay with her husband did not have the effect of cancelling or nullifying the order for maintenance and that until such order of maintenance is cancelled or nullified the wife is entitled to claim maintenance in accordance with the terms of the order.

4. Learned advocate for the husband referred to a decision of the Rangoon High Court, namely, the case of *U Po Shein v. Ma Sein Mya*, 32 Cr. L. J. 114: (A. I. R. (18) 1931 Rang. 89). In that case the wife had obtained an order of maintenance against her husband. The husband brought a suit for restitution of conjugal rights and got a decree. The wife after the decree applied for payment of her maintenance. It was held that after the decree for restitution of conjugal rights had been made the very basis of the order under Section 488, Criminal P. C. had disappeared and therefore the wife was not entitled to get maintenance in accordance with the order passed under Section 488, Criminal P. C. The facts of the case also are not the same as the facts in the present one. I must, therefore, decide this point on the wording of the section and upon general principles. In my opinion an order passed under Section 488, Criminal P. C., is a continuing order and it is based upon the fact that the husband and wife are at variance and that the husband has refused to maintain his wife. In these circumstances the husband is compelled to maintain his wife by an order passed under Section 488, Criminal P. C. It is clear from the provisions of the various Sub-sections to Sections 488 and 489, Criminal P. C. that this order of maintenance is dependent upon certain circumstances continuing to exist. In altered circumstances the order may be set aside or varied. The two sections lay down certain conditions under which an order for maintenance may be set aside. It is true that the sections have not mentioned the particular circumstances of this case. I think it would be reasonable to hold that where parties have come together and have asked the Court to cancel an order for maintenance the Court has jurisdiction to cancel such order. In any event this Court by virtue of the provisions of Section 561A, Criminal P. C., has certain inherent powers and under those powers this Court can cancel the order of

maintenance in certain circumstances. In my opinion the circumstances which have occurred would justify this Court in cancelling the order of maintenance and for greater safety and I cancel that order. It is open to the wife, however, to file a fresh application for maintenance on fresh grounds.

5. The Rule is discharged.

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