

FULL BENCH

Before Manmohan Singh Gujral, D. S. Tewatia and B. S. Dhillon, JJ.

BALBIR SINGH, ETC.,—Petitioners.

versus

HARDEEP SINGH,—Respondent.

Cr. Re. No. 199-R of 1970.

April 28, 1975.

Code of Criminal Procedure (Act V of 1898)—Section 488—Minor child, living with mother being its natural guardian—Father of the child—whether bound to maintain it—Child below the age of discretion in the custody of the mother while the father being a natural guardian—Obligation on the father to maintain the child—Whether subsists—Child attaining the age of discretion continuing to live with mother out of love—Whether can claim maintenance from the father.

Held, that if a minor child is living with the mother, who is its natural guardian, the father of the child is bound to maintain it. It is not open to him to impose a condition that the child must live with him.

Held, further that where the father is the natural guardian, but the child is in the custody of the mother, father's obligation to maintain the child subsists. He cannot impose a condition requiring the child to come and live with him, if the child has not attained the age of discretion or is not living with the mother of its free will or volition. In such a case, in order to escape his liability to pay maintenance allowance, the father must obtain the custody of the child from the proper court, but till the custody is obtained, the child must be maintained wherever it is.

Held, that father's liability to maintain the child does not cease merely because the child has attained the age of discretion, but is living with the mother on account of natural love and affection or attachment with her. Till the father gets the custody of the child, it can successfully claim maintenance, under section 488 of the Code of Criminal Procedure, 1898.

Case referred by Hon'ble Mr. Justice D. S. Tewatia, on 21st September, 1973 to a larger Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Mr. Justice Man Mohan Singh Gujral and Hon'ble Mr. Justice D. S. Tewatia, further referred the case on 7th October, 1974 to a Full Bench. The Full Bench consisting of Hon'ble Mr. Justice Man Mohan Singh Gujral, Hon'ble Mr. Justice D. S. Tewatia and Hon'ble Mr. Justice Bhopinder Singh Dhillon, finally decided the case on 28th April, 1975.

Case reported under section 438 of Criminal Procedure Code by Shri O. P. Aggarwal, Additional Sessions Judge, Barnala,—vide his order, dated 24th November, 1970, for revision of the order of Shri Ganpati Sharma, Judicial Magistrate 1st Class, Barnala, dated 7th August, 1969, dismissing the application of the applicants and leaving the parties to bear their own costs.

Puran Chand, Advocate, for the petitioners.

Atma Ram, Advocate, for the respondents.

JUDGMENT

GUJRAL, J.—Dalip Kaur, wife of Hardeep Singh, respondent, and their two sons, Balbir Singh and Kartar Singh, filed an application under section 488, Code of Criminal Procedure, 1898, in the Court of the Judicial Magistrate, 1st Class, Barnala, claiming maintenance on the ground that the respondent had refused to fulfil his obligation to maintain them. The application was contested by Hardeep Singh on the plea that Dalip Kaur had left his company without any justification and that he had never refused to maintain the applicants. On coming to the conclusion that the applicants had failed to establish refusal or neglect on the part of the respondent, the learned Judicial Magistrate dismissed the application by order dated August 7, 1969. Being aggrieved, the applicants filed revision petition in the Court of the Sessions Judge, which was disposed of by the Additional Sessions Judge, by order dated November 24, 1970. By this order, the learned Additional Sessions Judge has made a reference to this Court for quashing the order of the learned Judicial Magistrate so far as the two sons of the respondent are concerned and it is recommended that their application under section 488 of the Code be accepted and they be granted maintenance allowance at the rate of Rs. 50 per month each.

(2) The revision petition first came up before Tewatia, J., who finding that some of the observations in *Abnash Chander Kanshi Ram v. Shrimati Soshila Devi* (1), needed re-consideration, referred the matter to a larger Bench. The petition was then placed before a Division Bench and during arguments, it was noticed that there was serious conflict of authorities in respect of the main question that needed consideration in this case. Finding that the matter

(1) A.I.R. 1962 Pb. 274.

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could be properly dealt with by a larger Bench especially as the ratio of the decision in *Man Singh v. Mussammat Dharamon* (2), was under challenge, it was referred to Full Bench. It is in this manner that the case is before us for decision of the following question:—

“Whether the minors are entitled to claim maintenance from their father even if they are in custody of the mother and the father has moved the guardian Court for obtaining their custody.”

The decision of the above question calls for the interpretation of section 488, Code of Criminal Procedure, 1898, the relevant portion of which is set down below for facility of reference:—

“488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the Chief Judicial Magistrate or any other Judicial Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) * * * * *

(3) If any person so ordered 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 manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

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 of

refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

* * * * *

(3) The case of the petitioners is that the minor children are entitled to maintenance even if they reside with the mother and the fact that the father has made an offer to maintain them is of no consequence if the children are not in a position to live away from their mother of their free will and volition. The argument further proceeds that in such a situation, even if the father is the natural guardian and has obtained an order from the guardian Court for their custody, maintenance allowance cannot be denied to the children and the liability of the father under section 488 *ibid* would only cease if he in fact obtains the custody of the children.

(4) The learned counsel for the respondent, on the other hand, contends that where a father offers to maintain the children on the condition that they live with him, it cannot be held that he has refused to maintain them unless there are circumstances to show that notwithstanding such an offer the father has neglected to maintain the children.

(5) Support for both the views canvassed before us is found in the case law and there appears to be conflict of judicial decisions on this point. The question was first of all examined in *Man Singh's case* (2), (*supra*), and it was held that when the father offers to maintain the children on the condition that they live with him, the conclusion cannot be reached that he has refused to maintain them. While coming to this conclusion, it was presumed that the father was the natural guardian of the children and the reasoning adopted was that he was under no obligation to maintain them if they lived apart from him. Another argument pressed into service in that case was that whereas, under section 488 (3), Code of Criminal Procedure, notwithstanding the offer made by the husband to maintain his wife on the condition of her living with him, the wife could justify her refusal to live with the husband and claim maintenance, there was no similar provision in respect of the children. According to this

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decision, mother, in such a situation, could apply to the Court to give her the guardianship of the children and after obtaining an order in her favour, could claim maintenance on behalf of the children by pressing into service the provision of section 488 of the said Code.

(6) The view taken in *Man Singh's case* (2), (supra), was followed in *Ralla and another v. Mt. Atti* (3), and it was observed that when the father was willing to keep the child, order for the child's maintenance could not be passed. In *Sardar Muhammad v. Sur Muhammad* (4), the question was again examined in the light of the case law on the subject and the view taken in *Mi Saw v. S.* (5), and *Mi Thein v. Nga Po Nyun* (6), that the father was bound to support his children in spite of their refusal to live with him and that his remedy lay in applying to the proper Court to be appointed the guardian and to have them placed in his custody, was not accepted and it was observed as follows:—

If then a father offers to maintain his son on condition that he lives with him, it seems to me that the Magistrate should refrain from passing an order against the father, until he has had an opportunity at least of proving that his offer is made in good faith.

The fact that, in the past, he has neglected to support his son should not be considered as sufficient, by itself, to hold that the offer is not made in good faith. That I think is the true construction to be placed on *Man Singh v. Mst. Dharmon* (3), and in the face of this decision I am not prepared to follow the Burma decision quoted above.”

(7) Following *Ralla's case* (3), (supra), it was held in *Sultan v. Mehtab Bibi* (7), that as the father was ready to keep the children and there was no reason to withhold them from him, they were not entitled to maintenance. In *Jagan Nath v. Koshallia Devi* (8), Shadi Lal, C.J., accepted the view that the first proviso to clause (3)

(3) A.I.R. 1914 Lah. 41(1).

(4) A.I.R. 1917 Lah. 213.

(5) 7 I.C. 460.

(6) 23 I.C. 486.

(7) A.I.R. 1926 Lah. 536.

(8) A.I.R. 1927 Lah. 430(2).

of section 488, Code of Criminal Procedure, was limited to wives and could not be extended to children, and ruled that an order for maintenance of a child could not be passed against the father unless it was proved that he had neglected or refused to maintain the child.

(8) From the discussion of the above authorities, it would emerge that in all the subsequent cases which were decided by the Lahore High Court till 1927, the ratio of the decision in *Man Singh's case* (2), (supra), was accepted as laying down the correct law and the reasons which were the basis of that decision were adopted in the subsequent cases. This view was, however, not accepted in the subsequent decisions of the Lahore High Court and by the High Courts of Allahabad, Bombay, Rajasthan, Nagpur, Madras and Hyderabad. Even the High Court of Punjab and Haryana did not accept the interpretation placed on section 488 of the Code of Criminal Procedure in the case of *Man Singh* (2).

(9) The discordant note was first of all sounded by Jai Lal, J., in *Mt. Sarfraz Begam v. Miran Bakhsh* (9), who distinguished *Man Singh's case* (2), on the ground that in that case probably the father was the legal guardian and the Judges while deciding that case were influenced by this fact. Ignoring the ratio of the decision in *Man Singh's case* (2), on this ground, Jai Lal, J., held that if a minor was living with the legally constituted guardian, other than the father, then the order of maintenance under section 488, Code of Criminal Procedure, could not be refused merely on the ground that the offer of the father to maintain the child, in case the latter lived with him, was not accepted. Again, in *Mt. Zauhra Bi v. Muhammad Yusaf* (10), Jai Lal, J., reiterated this view and made the following observations:—

“In the case of a minor who is living with its legal guardian, e.g., a Mahomedan boy aged 3 with his mother, the condition imposed by the father that he would maintain it only if the child went to reside with him is tantamount to a refusal to maintain the child.”

(9) A.I.R. 1928 Lah. 543.

(10) A.I.R. 1930 Lah. 1043.

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(10) The ratio of the decisions in *Mt. Sarfraz Begam's case* (9), and *Mt. Zauhra Bi's case* (10), (supra), was accepted by the Division Bench in *Allah Rakhi and another v. Karam Illahi* (11). This was again a case where the children on whose behalf the maintenance was claimed were in the custody of the mother who was their lawful guardian. On these facts it was ruled as under:—

“Where the minor daughters of a Mahomedan are in the custody of their mother who is the lawful guardian though divorced, the offer of the father to maintain the children on condition that they are entrusted to his custody amounts to a refusal within the meaning of section 488 and the father is bound to maintain them.

Though it is not the function of a criminal Court to decide questions as regards the right to guardianship of children, there is no reason why it should not take notice of the fact that the mother is (as in this case) their lawful guardian under the personal law and that the father is not *prima facie* entitled to demand their custody.”

(11) In *Mt. Akhtari Begum v. Abdul Rashid* (12), maintenance was claimed on behalf of two minor children of a Mahomedan and it was contended that the son who was aged 4 years was not entitled to maintenance while living with the mother as the father was the lawful guardian. While repelling this contention it was held.—

“That an enquiry into Mahomedan law on point of proper custody of a minor child was not made necessary by the Statute law (Code of Criminal Procedure) which governed these proceedings, the mother was the proper person to have the custody of her son also, and the father was bound to maintain such son. The refusal of the order of maintenance by the trial Court was, therefore, wrong.”

(12) In *Ebrahim Mahomed Mukri v. Khurshedbai Ebrahim Mukri* (13), the minor children were living with their mother and on behalf of the father it was contended that they were not entitled to maintenance as he was ready to maintain them provided they

(11) A.I.R. 1933 Lah. 369.

(12) A.I.R. 1937 Lah. 236.

(13) A.I.R. 1941 Bom. 267.

lived with him or with somebody of whom he approved. The plea of the father was rejected with the following observations:—

“The learned Magistrate raised the question whether in those circumstances the Court under section 488 can make an order for maintenance of the children. In my opinion, the Court can make an order under circumstances. Powers under section 488 are limited. The object of the section, no doubt, is to avoid vagrancy by providing that a Magistrate may up to a limited extent see that a wife and children are maintained by a husband or father able to maintain them. But I think that the Magistrate must take the facts as he finds them to be. 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 are living, I think that the Magistrate has jurisdiction to make an order. If the father’s case is that the children ought not to be living with the wife, but ought to be living with him or under his direction, then he must take proper proceedings in a civil Court to get the children removed from the custody of the mother. No doubt, such proceedings may sometimes involve expense, which a father is unable or unwilling to bear, but that cannot deprive the Magistrate of the right to exercise his powers under section 488. If the civil Court makes an order under which the children cease to reside with the mother, and if the father is then willing to provide for their maintenance, he can, of course, apply to the Magistrate under section 489 to modify his previous order. But, in my opinion, as long the children are in fact residing with the wife, and the husband is in fact declining to maintain them, the Magistrate can make an order for their maintenance under section 488. We are, therefore, not prepared to differ from the order which the learned Magistrate made.”

(13) The same interpretation was placed on section 488 by the Madras High Court in *Kuppala Krishtappa v. Premaleelamani* (14), with the following observations:—

“As long as a child is with the mother, the mother must be given sufficient to maintain the child. If the father has a

(14) A.I.R. 1942 Mad. 705.

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right to the custody of the child, he can at any time institute proceedings for that purpose. An adult can be coerced into coming into proper custody by refusing maintenance, but a child has no such choice; it must remain with whosoever takes it. So that it would be improper for the Court to refuse maintenance for the child merely because it was of opinion that the mother had no right to the custody of the child."

(14) The above observations were relied upon in *The State v. Mt. Anwarbi and others* (15), wherein it was further held that even if the mother is not the proper person to retain the custody of the child, the child is entitled to maintenance from the father and the latter cannot impose a condition that the child must live with him. It was, however, added that it would be open to the father, in such a situation, to move the competent Court and obtain the custody of the child.

(15) The Hyderabad High Court in *Mohd. Shamsuddin v. Noor Jahan Begum* (16), accepted the view of the Madras High Court and held that even in a case where the guardianship of the mother had been judicially terminated by a decree in favour of the father, the child would be entitled to maintenance till the decree is executed.

(16) In *Rahimunnissa and others v. Mohd. Ismail* (17), the view in *Ralla's case* (3), (supra), was not accepted as the correct interpretation of section 488, Code of Criminal Procedure, and following *Kuppala Krishtappa's case* (14), and *Mt. Aktari Begum's case* (12), it was held as follows:—

"A child does not stay away by his own choice; he cannot be deprived of his right of maintenance because mother refuses to give him in his father's custody. The father cannot, under section 488, insist that the children should be given in his custody as a condition precedent for maintaining them."

(15) A.I.R. 1953 Nagpur 133.

(16) A.I.R. 1955 Hyderabad 144.

(17) A.I.R. 1956 Hyderabad 14.

In arriving at the above conclusion reference was also made to the Division Bench decision of the Bombay High Court in *Dinsab Kasimsab v. Mahamad Hussen Dinsab and another* (18), wherein it was emphasised that in proceedings under section 488, so far as the maintenance of a child was concerned, the criminal Court was only concerned with the fact of its custody and not with the propriety of that custody.

(17) Relying on the two Hyderabad rulings referred to above and the decision of the Bombay High Court in *Ebrahim Mohamed v. Khurshedbai* (13), it was held in *Mt. Bashiran and others v. Nathu* (19), that an offer by the father to maintain the child on the condition that the child lived with him was not a valid ground for refusing maintenance.

(18) So far as the Punjab and Haryana High Court was concerned, the matter was considered in detail in *Abnash Chander Kanshi Ram v. Smt. Soshila Devi* (1), and on a review of the entire case law, it was observed by Gurdev Singh, J., that consensus of opinion was in favour of the view that maintenance cannot be refused to minors merely because they were living with the mother or the mother had been refusing to hand them back to their father who may be their natural guardian according to personal law of the parties. The reasoning that proviso to sub-section (3) of section 488 supported the contrary view was reported in these words and the position of law was summarised thus:—

“Under sub-section (3) of section 488 of the Code of Criminal Procedure, a wife is entitled to an order of maintenance despite the offer made by her husband to maintain her on the condition of her living with him provided there is just ground for her refusal to live with him. Conversely, if there is no reason for the refusal of the wife to live with her husband she would not be awarded maintenance. This provision does not refer to the children whose statutory right to be maintained by the father is recognized under sub-section (1) of section 488 of the Code of Criminal Procedure. It, however, does not mean that where a child quits the house of the father and refuses to live with him, he would be entitled to claim maintenance.

(18) A.I.R. 1945 Bom. 390.

(19) A.I.R. 1960 Raj. 255.

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The position of a child who has not attained the age of discretion or who is not of its own free will or volition living away from the father is peculiar. If such a child is kept in custody by the mother and is prevented from returning to the father, it cannot be said that the child is at fault and that its conduct has disentitled it to maintenance. Even if a child prefers to live with the mother due to natural affection or attachment for her, that would not affect the liability of the father to maintain the child. In such circumstances, where the father objects to the custody of the child and asserts his own legal right, the proper course for the father would be to apply for its custody, but so long as the custody of the child remains with the mother, he cannot refuse to pay maintenance for the child irrespective of the fact whether or not the mother has a right to be maintained by him."

(19) The above discussion would clearly bring out that the preponderance of the judicial opinion is in favour of the view that a child is entitled to the maintenance even if it lives with the mother and that it is not open to the father to impose a condition that the child must live with him before it could be maintained.

(20) It would be appropriate at this stage to analyse the reasons for the contrary view so as to determine as to which interpretation of section 488, Code of Criminal Procedure, would be warranted by the language of this provision. In order to succeed in getting maintenance, it has to be shown,—

- (a) that the child is unable to maintain itself;
- (b) that the father has sufficient means to maintain the child;
and
- (c) that the father has neglected or refused to maintain the child.

(21) In the case of wife, the husband can show that her refusal to live with him was unjustified and can thereby get rid of his liability to maintain her. In the case of a child, however, no such course is open to the father. The Legislature must have been aware of the impracticability of forcing the child to live with the father if the mother was living separately and that is why the husband was only

granted the right, to make an offer to maintain to the wife, and not to the child. The only natural inference of this would be that it was intended that the child be maintained wherever it is, as in a large number of cases, it may not be possible for the child to comply with the desire of the father to come and live with him. The argument that was adopted in *Man Singh's case* (2), (supra), based on proviso to sub-section (3) of section 488, Code of Criminal Procedure, is consequently unacceptable and is not warranted by this provision. The second part of the argument that the father being the natural guardian of the children was under no obligation to maintain them unless they lived with him is equally without substance. Under sub-section (1) of section 488 *ibid.*, the responsibility to maintain the child is placed on the father and not on the guardian. It is, therefore, of no consequence whether he is or not the natural guardian of the child claiming maintenance.

(22) Having regard to the provisions of section 488, Code of Criminal Procedure, and the ratio of the decision to which reference has already been made, the position of law may be summarised as follows:—

- (1) If the child was living with the mother who was its natural guardian, the father is bound to maintain it and it is not open to him to impose a condition that the child must live with him.
- (2) Even in a case where the father is the natural guardian, but the child is in the custody of the mother, father's obligation to maintain the child subsists and he cannot impose a condition requiring the child to come and live with him in case the child has not attained the age of discretion or is not living with the mother of its free will or volition.
- (3) In such a case, in order to escape his liability to pay maintenance allowance, the father must obtain the custody of the child from the proper Courts, but till the custody is obtained, the child must be maintained wherever it is.
- (4) Father's liability to maintain the child does not cease merely because the child has attained the age of discretion but is living with the mother on account of natural love and affection or attachment with her. Till the father gets the custody of the child it can successfully claim maintenance.

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(23) For the reasons indicated above, I find that the minors in this case are entitled to claim maintenance from their father even if their custody is with the mother, as the father had failed to obtain their custody from the guardian Court. The reference is consequently accepted and the children are granted maintenance allowance at the rate of Rs. 50 each per mensem from the date of the application.

Tewatia, J.—I agree.

Dhillon, J.—I also agree.
