

## REVISION CRIMINAL

Before Man Mohan Singh Gujral, J.

BALDEV RAJ,—Petitioner.

versus

PUSHPA RANI,—Respondent.

**Criminal Revision No. 175-R of 1968**

December 16, 1969

*Code of Criminal Procedure (V of 1898)—Sections 488 and 489(2)—Hindu Marriage Act (XXV of 1955)—Section 10—Order of maintenance under section 488 passed in favour of wife—Husband obtaining a decree for judicial separation—Such decree—Whether debars the wife to claim maintenance.*

*Held*, that a reading of sections 488(4) and 489(2) of the Code of Criminal Procedure shows that section 489(2) empowers the Magistrate to cancel or vary an order for maintenance in consequence of a decision of a Civil Court. This provision implies that if there is inconsistency between the decision of the criminal Court and that of the civil Court, the decision of the civil Court will prevail. Under section 489(2) of the Code all that the Magistrate has to see is as to whether any change in the order is called for in consequence of the decision of a competent civil Court and if a change is called for he shall carry out that change either by cancelling the order or by varying it in accordance with the decision of the civil Court. Under section 10 of the Hindu Marriage Act, a husband is entitled to a decree for judicial separation on the ground that the wife has deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. The expression 'desertion' has been defined to mean the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage. From this it necessarily follows that if a decree for judicial separation has been passed against the wife, it will imply that the wife has no reasonable ground for not living with the husband. In such a case, sub-section (4) of section 488 of the Code of Criminal Procedure will come into operation and the wife will not be entitled to maintenance, even if she has obtained an order of maintenance prior to the grant of decree for judicial separation. (Paras 4 and 5)

*Case reported under Section 438 of the Criminal Procedure Code, by Shri Gurcharan Singh Dhaliwal, 2nd Additional Sessions Judge, Ludhiana, for revision of the order of Shri Sukhdev Singh, Judicial Magistrate 1st Class, Ludhiana, dated 19th August, 1968, for setting aside the order of the lower court.*

BHUPINDER SINGH BINDRA, ADVOCATE, for the petitioner.

V. P. SHARDA, ADVOCATE, for the respondent.

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### JUDGMENT

Gujral, J.—This is a reference by the Second Additional Sessions Judge, Ludhiana, dated 22nd October, 1968, whereby the order passed by the Judicial Magistrate, First Class, Ludhiana, dated 19th August, 1968, was recommended to be set aside.

(2) The facts giving rise to this reference are that Pushpa Rani made an application against her husband Baldev Raj Kumar under section 488 of the Criminal Procedure Code claiming maintenance for herself and her child. Having obtained a decree for judicial separation against his wife, Baldev Raj Kumar made an application in the proceedings under section 488 of the Criminal Procedure Code initiated against him by his wife Pushpa Rani praying that the proceedings against him be dropped in view of the decree for judicial separation obtained by him from a competent civil Court. This application of the husband was dismissed by the impugned order. Being aggrieved Baldev Raj Kumar filed revision petition before the Sessions Court on the basis of which the present reference has been made to this Court recommending the quashing of the order of the learned Magistrate dated 19th August, 1968, disallowing the application of the husband in so far as the proceedings relating to the grant of maintenance to the wife are concerned.

(3) In order to examine the effect of the decree for judicial separation obtained by the petitioner, a reference will have to be made to sub-section (4) of section 488 and sub-section (2) of section 489 of the Criminal Procedure Code which are in the following terms: —

“488(4) 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 refuses to live with her husband, or if they are living separately by mutual consent.”

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“489(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.”

(4) A reading of the above provisions would show that section 489(2) empowers the Magistrate to cancel or vary an order for maintenance in consequence of a decision of a Civil Court. This provision would imply that if there is inconsistency between the decision of the criminal Court and that of the civil Court, the decision of the civil Court would prevail. Under section 489(2) all that the Magistrate has to see is as to whether any change in the order is called for in consequence of the decision of a competent civil Court and if a change is called for he shall carry out that change either by cancelling the order or by varying it in accordance with the decision of the civil Court. The legislature seems to have given more importance to the decision of the civil Court while embodying this provision. In *Jetha Singh v. Mst. Gian Kaur* (1), it was observed that if a ground exists on which the petitioner could get the maintenance order cancelled there was no reason why the order under section 488 of the Criminal Procedure Code should be made if the same ground exists.

(5) Under section 10 of the Hindu Marriage Act, the husband is entitled to a decree for judicial separation on the ground that the wife has deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition under section 10 of the Act. The expression 'desertion' has been defined to mean the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage. From this it necessarily follows that if a decree for judicial separation has been passed against the wife it would imply that the wife has no reasonable ground for not living with the husband. In such a case sub-section (4) of section 488 of the Criminal Procedure Code would come into operation and the wife would not be entitled to maintenance.

(6) On behalf of the respondent reliance was placed on *Mailappa Chettiar v. Sivagami Achi* (2), in which it was held that the mere fact that the civil Court had given an inconsistent finding is by itself not a sufficient ground to cancel the order of maintenance made by the criminal Court. The Madras case was considered by

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(1) Cr. Re. 937 of 1963 decided on 16th March, 1964.

(2) 1964 (1) CrL. L.J. 242.

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Raju, J. in *Dahyalal Amathalal Bhagat v. Bai Madhukanta*, (3), and it was observed as under: —

“With great respect, for the reasons already given, having regard to the wording of section 10(1) (a) and the Explanation to section 10(1) of the Hindu Marriage Act and having regard to the wording of sub-section (4) of section 488, Criminal Procedure Code, it is very difficult to agree with the learned Single Judge of the Madras High Court. Criminal proceedings under section 488, Criminal Procedure Code, are somewhat summary. The Legislature has, therefore, given more importance to the Civil Court decisions. If there is inconsistency between the decision of the Criminal Court and the decision of the Civil Court, in such a matter the decision of the latter prevails, although, ordinarily, the decision of the Civil Court is irrelevant in a criminal proceeding.”

I am in respectful agreement with the view taken by Raju, J., in *Dahyalal Amathalal Bhagat's* (3) case. This view also flows from the unreported ruling of Bedi, J. in *Jetha Singh's* (1) case. In *Revendra Kaur v. Achant Swarup*, (4), the view taken by the Allahabad High Court was followed in preference to the Madras view in *Mailappa Chhettiar's* (2) case and it was observed as under:—

“Learned counsel for the applicant relied on a single Judge decision of the Madras High Court in the case of *Mailappa Chhettiar v. Sivagami Achi* (2), in which it was held that the mere fact that the civil Court had given an inconsistent finding is by itself no sufficient ground to cancel the order of maintenance made by the criminal Court. With respect I differ from that view and accept the view taken by this Court in the case referred to above.’

(7) For the foregoing reasons, I accept this reference and set aside the order of the Judicial Magistrate dated 19th August, 1968, and dismiss the application of the wife for the grant of maintenance to her. The application of the respondent claiming maintenance for the minor child shall, however, proceed.

N. K. S.

(3) A.I.R. 1965 Gujrat 247.

(4) A.I.R. 1966 All. 133.