

# THE INDIAN LAW REPORTS

## PUNJAB SERIES

### REVISIONAL CRIMINAL

*Before Mehar Singh and I. D. Dua, JJ.*

MST. DHAN KAUR AND OTHERS,—*Petitioners.*

*versus*

NIRANJAN SINGH,—*Respondent.*

**Criminal Revision No. 438 of 1959**

*Code of Criminal Procedure (V of 1898)—Section 488—  
Neglect or refusal by the husband to maintain his wife—  
Whether necessary to be proved to claim maintenance—  
Wife living separately in pursuance of her statutory right  
because of the re-marriage of her husband—Whether entitled  
to maintenance—Neglect or refusal to maintain wife—  
Whether can be inferred from the conduct of the husband.*

1959  

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Oct., 14th

*Held*, that proof of neglect or refusal by the husband to maintain his wife is the basis of claim for maintenance by the wife under section 488 of the Code of Criminal Procedure, and without proof of that, no order of maintenance can be made in favour of the wife under that section even though she is living separate from her husband in pursuance of her statutory right to live separately from him because he has married again or has taken a mistress to himself. Of course, neglect or refusal may be express or implied and, in the circumstances of a particular case, it may be inferred by the Court from the conduct of the husband. In particular the courts will have to decide in each case, whether, when the wife is living separately from her husband because he has married again or has kept a mistress, circumstances are such that an inference of neglect or refusal by the husband to maintain his wife is or is not available. Where

such inference is available, the order will obviously be justified, but in those rare cases in which such inference is not available, order under section 488 will not be justified.

Case law discussed.

*Case reported under section 438, Criminal Procedure Code, by Shri Madan Mohan Singh, Additional District and Sessions Judge, Ferozepore, with his chalan, dated 17th March, 1959, for revision of the order of Shri Malkiat Singh, Magistrate, 1st Class, Moga, dated the 30th June, 1958, dismissing the application of Mst. Dhan Kaur and others petitioners for the grant of maintenance.*

KARTAR SINGH KWATRA, for the Petitioners.

M. S. GUJRAL, for the Respondent.

#### ORDER

Mehar Singh, J. MEHAR SINGH, J.—The question, almost an abstract question, of law that has been referred for decision, is whether a wife, having under the law a right to live separately from her husband because of his having contracted marriage with another wife, can succeed in a claim for maintenance under section 488 of the Code of Criminal Procedure without proof of neglect or refusal on the part of the husband to maintain her ?

The reference has been necessitated because of difference of judicial opinion on the question. In *Bela Rani Chatterjee v. Bhupal Chandra Chatterjee* (1), a Division Bench of the Calcutta High Court, and in *Ishar v. Soma Devi* (2), Tek Chand, J., have held that the mere fact that the husband has contracted a second marriage or has kept a mistress, *per se*, is not a valid ground for the wife to claim maintenance, under section 488, if the husband has not otherwise neglected or refused to

(1) A.I.R. 1956 Cal. 134

(2) A.I.R. 1959 Pun. 295

maintain her. This is one approach to the question. In *Banarsi Bai v. Ghisoolal* (1), Nigam, J.C., *Syed Ahmad v. Naghath Parveen Taj Begum* (2), Hedge, J., and in *Biro v. Behari Lal* (3), Murtaza Fazl Ali, J., with whom Wazir, C.J., concurred, have expressed the view that neglect or refusal or no neglect or refusal, the husband is liable to pay separate maintenance to his wife on the sole ground that he has taken a second wife. These are the two sets of cases taking directly opposing views on the question. In addition, in *Senapathi Mudaliar v. Deivanai Ammal* (4), *Gunni v. Babu Lal* (5), *Maiki v. Hemraj* (6), *Bayranna v. Devamma* (7), *Rajeswariamma v. Viswanath* (8), and *Mukand Lal v. Jyotishmati* (9), there are observations, which lend some support to the second view, but the facts of the cases show that those were really cases of neglect or refusal to maintain on the part of the husband.

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The sub-sections of section 488 relevant for the consideration of the question are—

[His Lordship read Section 488 and continued :]

The foundation of the order of maintenance under sub-section (1) is the proof of neglect or refusal by the husband to maintain his wife. If this basis does not exist, there is no right to a claim of maintenance under that sub-section. That being so, the question is whether there is anything in section 488, in any of its subsequent sub-sections, that gives a right to maintenance against her husband

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- (1) A.I.R. 1955 Ajmer 8
  - (2) A.I.R. 1958 Mysore 128
  - (3) A.I.R. 1958 J. & K. 47
  - (4) A.I.R. 1950 Mad. 357
  - (5) A.I.R. 1952 M. Bharat 131
  - (6) A.I.R. 1954 All. 30
  - (7) A.I.R. 1954 Madras 226
  - (8) A.I.R. 1954 Mysore 31
  - (9) A.I.R. 1958 P.L. 314

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to a wife on any other basis, and as I read the section, I find that there is no other basis provided in that section for such a claim by the wife. When sub-sections (1) to (5) of section 488 are considered together among other defences, the husband has two defences as an answer to a maintenance application against him by his wife, and those defences are—

- (a) that there has been no neglect or refusal to maintain the wife, or
- (b) that the wife refuses to live with the husband without just ground.

Of course other defences are also open to the husband according to the provisions of section 488, but for the present purpose, it is necessary to be clear that the two defences referred to above are distinct and separate defences and the husband would succeed in defeating the application of the wife if either or both of those defences are proved. The first proviso under sub-section (3) says that it is a just ground for a wife to refuse to live with her husband, if he has contracted marriage with another wife or keeps a mistress. The second defence, as given above, can obviously be taken at the trial of an application under sub-section (1), and it can subsequently also be made a ground for cancellation of an order of maintenance already made as provided in sub-section (5). Sub-sections (4) and (5) make it abundantly clear that this is a separate and distinct defence open to the husband at the trial and even in a case in which neglect or refusal has been proved and a maintenance order has been made in favour of a wife, the husband can obtain cancellation of the order on the basis of that defence. At either stage it is open to the wife in reply to establish a just ground for her refusal to live with her husband and one of such just grounds

is the statutory ground when he has contracted marriage with another wife or keeps a mistress. If the husband succeeds on first of those two defences, the question of the second will not arise but if he fails on the first and it has been proved that he has neglected or refused to maintain his wife, he may succeed even then on the second ground provided there is no just ground for the wife to refuse to live with him. It now becomes clear that answer of the wife on the basis of a just ground to the second of those defences may not necessarily and always be proof of neglect or refusal by the husband to maintain her. The proof of that is the very basis or foundation of the claim of the wife and answer by the wife to the second of those defences on a just ground may not be proof of the same, for that will quite obviously depend upon the facts and circumstances of a particular case. That is so because, as has been pointed out in *Bhikaiji Maneckji v. Maneckji Mancherji* (1), a neglect or refusal by the husband to maintain his wife may be by words or by conduct. It may be express or implied. There is, therefore, under section 488 no basis for a claim of maintenance by the wife except on the ground of neglect or refusal by the husband to maintain her, but neglect or refusal may be express or may by implications be inferred from the conduct of the husband. The question of neglect or refusal in a particular case is always a question of fact about which conclusion may be reached by the Court on evidence proving it expressly or on considerations leading to an inference of the existence of the same.

In the first and the second of the three cases, which in clearest words support the second of the two above views, there is no discussion of the

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(1) 9 Bombay L.R. 359

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matter, but in the third case, although the view expressed is obiter because in Jammu and Kashmir addition made to the first proviso under sub-section (3) by Act 9 of 1949 does not apply, there is substantial discussion of the question. The learned Judges give two reasons as the basis of their opinion. One reason is that according to section 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 (Act No. 19 of 1946), a Hindu married woman has a right to separate residence and maintenance from her husband on the ground, among others, "if he marries again". The learned Judges observe that under that provision in the case of a husband taking to himself another wife, the wife has a statutory right to live separately from him as also to have, thus living separately from him, maintenance from him. But such right by a wife under that provision can only be enforced in a civil Court and not in proceedings under section 488. It may be, and it is probable that the addition to proviso under sub-section (3) has been made in the wake of that provision, but it cannot be said that the ground for a claim of maintenance under that provision has been grafted as a ground for such a claim under section 488. This would be reading into the addition to the first proviso under sub-section (3) what the legislature itself has not chosen to enact in section 488. The nature of proceedings in a claim under the said Act is obviously different than the nature of summary proceedings in a claim under section 488. The two provisions have in this respect not been rendered by enactment at par. So that no assistance can be obtained in gleaning the meaning of the provisions of section 488 from what has been provided in section 2 of Act No. 19 of 1946. All that that provision can be looked at for is to appreciate that where the husband marries again, the wife has a statutory right to live separately from him in so far as the

proceedings under section 488 are concerned. That Mst. Dhan Kaur  
that gives her a right of action in a civil Court and others  
under that provision is not a ground to conclude v.  
that in such a case sub-section (1) of section 488 Niranjan Singh  
has for all practical purposes been amended in this Mehar Singh, J.  
manner that in an application under that section  
the wife need not prove neglect or refusal by her  
husband to maintain her.

The second reason given by the learned Judges is that the first proviso under sub-section (3) of section 488 is in the nature of an exception to sub-section (1) and this approach, if I may say so with respect, by the learned Judges is both correct and sound, but where I find it difficult to agree with them is the scope of that exception to sub-section (1). The learned Judges seem to be of the opinion that that exception obviates the necessity for the wife to prove neglect or refusal to maintain her under sub-section (1) once she has given a just ground for her refusal to live with her husband because he has contracted marriage with another wife or keeps a mistress : in other words, the learned Judges are of the opinion that once the wife gives a just ground for refusal to live with her husband on account of his having married again that defeats not only the second, but both the defences, stated above, open to him. But it is not easy to see where a husband proves absence of neglect or refusal to maintain the wife, how an order of maintenance can be made against him, even when the wife lives separately from him in exercise of her statutory right because of his having married again in so far as an application under section 488 is concerned. Of course, she may succeed in her claim to maintenance in such circumstances under section 2 of Act No. 19 of 1946, she cannot succeed in a claim of maintenance in such circumstances under section 488. So that I agree

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with the learned Judges that the first proviso under sub-section (3) is an exception to sub-section (1) of section 488, but I cannot find my way to agree in their opinion as to the scope of the exception. The exception only concerns second of the two defences as given above and does not touch the first defence. It is, however, open to the Court to infer neglect or refusal by the husband to maintain his wife from the facts and circumstances of a particular case, and it may be that in a particular case where the wife is living separate from her husband in exercise of her statutory right on account of the husband having married again, circumstances may turn out to be such so as to enable the Court to infer neglect or refusal to maintain his wife on the part of the husband.

The answer to the question in this reference then is that proof of neglect or refusal by the husband to maintain his wife is the basis of a claim for maintenance by the wife under section 488 and without proof of that, no order of maintenance can be made in favour of the wife under that section even though she is living separate from her husband in pursuance of her statutory right to live separately from him because he has married again or has taken a mistress to himself. Of course, neglect or refusal may be express or implied and, in the circumstances of a particular case, it may be inferred by the Court from the conduct of the husband. In practice in many such cases the difference of judicial opinion, which has necessitated this reference, will resolve into nothing more than consideration by the Court whether, when the wife is living separately from her husband because he has married again or has kept a mistress, circumstances are such that an inference of neglect or refusal by the husband to maintain his wife is or is not available. Where such inference is available, the order would obviously be justified, but in



those rare cases in which such inference is not available, in my opinion, order under section 488 will not be justified.

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DUA, J.—I agree.

Mehar Singh, J.  
Dua, J.

K.S.K.

CIVIL MISCELLANEOUS

Before G. L. Chopra, J.

THE NATIONAL SECURITY ASSURANCE CO., LTD.,—  
Appellant.

versus

NEHAL SINGH AND ANOTHER,—Respondent.

First Appeal from Order No. 58-D of 1958.

*Displaced Persons (Debts Adjustment) Act (LXX of 1951)—Sections 18 and 40—Report submitted by Tribunal to the Insurance Board—Whether amounts to a decree or final order—Appeal against such a report—Whether competent.*

1959

Dec., 16th

Held, that the report of the Tribunal submitted to the Insurance Board under sub-section (2) of section 18 of the Displaced Persons (Debts Adjustment) Act, 1951, cannot be regarded either as a decree or a final order, open to an appeal under section 40 of the Act. The matter has yet to be considered by the Insurance Board and a decree, if any, is to follow on the case coming back to the Tribunal and on the basis of the proposal made by the Board.

*F.A.O. from the order of Shri Brij Lal, Mage, Sub-Judge, 1st Class, Delhi, dated the 5th November, 1957; passing decree with proportionate costs for Rs. 33,724-8-0.*

R. L. BAGAI, for the Appellant.

R. S. NARULA and NAUBAT RAM SURI, for the Respondents.