REVISIONAL CRIMINAL

Before I. D. Dua, J.

MAJOR JOGINDER SINGH,—*Petitioner.*

versus

BIBI RAJ MOHINDER KAUR,—*Respondent.*

Criminal Revision No. 1254 of 1958.

1959

Sept., 25th

Code of Criminal Procedure (Act V of 1898)—Section 488(6)—Provisions of—Whether mandatory—No formal order passed dispensing with the presence of the husband—Evidence recorded in his absence but in the presence of his counsel—Proceedings—Whether invalid—Section 488—Wife not fairly advanced or westernised—Whether a justifiable ground for husband not to keep her—Quantum of maintenance—Means of the wife to maintain herself—Whether to be taken into consideration while fixing maintenance allowance—Bare subsistence allowance—Whether to be granted—Expenses on account of education of the child—When to be allowed—Offer by father to maintain the child—Whether disentitles the child to maintenance—Interpretation of Statutes—"Shall" and "May"—Use of—Whether a provision is mandatory or directory—How to be ascertained.

Held, that the provisions of Section 488(6) of the Code of Criminal Procedure are not mandatory. The person whose liability to maintain is enforced by resort to section 488 is not strictly a person accused of a crime and the considerations which apply to the construction of the provisions dealing with the trial of persons accused of crimes are hardly applicable to the interpretation of Sections 488. Keeping in view the nature of those proceedings and the object of sub-section (6) of section 488 the mere absence of a formal order dispensing with the personal attendance of the husband is not *per se* fatal to the validity of the proceedings. In order to attack the validity of such proceedings it must be shown that the husband has been prejudiced and the taking of evidence in his absence but in the presence of his counsel has in fact resulted in such failure of justice.

Held, that merely because the wife does not happen to be advanced or westernised enough is not a justifiable ground for the husband not to keep his wife with him or to refuse to properly maintain her.

Held, that it is obvious from the language of Section 488 of the Code of Criminal Procedure that in order to enable a child to claim maintenance it has to be found that the child is unable to maintain itself. No such condition has been imposed in the case of a wife. The ability of the wife to maintain herself was not intended by the legislature to deprive her of the right of maintenance conferred by this section, if she is otherwise found entitled to it. The use of the word "may" in the context does not confer an absolute discretion on the Court to refuse to the wife maintenance if she has otherwise brought her case within the purview of the Section. But even if the power conferred on the Magistrate be assumed to be discretionary, the discretion has to be exercised on sound judicial principles, considering the equities of each case. Nor is it correct to say that the rate of maintenance should be fixed so as to provide bare subsistence allowance merely to save the dependent from starvation. Had this been the intention of the Parliament, the amount premissible under Section 488 would have not been raised from Rs. 100 to Rs. 500 by the amendment effected in 1955. This amendment clearly suggetss that it is not bare subsistence allowance which alone is intended by the Parliament to be granted under this section. A deserted wife is entitled to suitable maintenance which is in accord with the status of the family, and not to bare food and clothing. It is no doubt true that the proceedings under section 488 are summary, and it may not be proper to decide the questions of the right of maintenance conferred on the deserted wife by the civil law involving, as they do, complicated questions of fact and law. But if there are no complex or complicated questions of fact and law and the status of the parties, the means of the husband and the requirements both of the husband and the dependent are either admitted or are properly and fully established on the record, there is no reason why the court dealing with the question of maintenance under Section 488 should not grant proper maintenance to the dependent and must direct the parties to protracted civil litigation. The fact that a decree granted by a civil court can be challenged in appeal whereas an order passed under section 488

can only be assailed by means of revision is a relevant consideration to be kept in view while considering the question but it does not necessarily lead to the conclusion that the criminal court is only empowered to grant bare subsistence allowance.

Held, that the expenses on account of the education should not not be granted to the child from the date of the application in the absence of the evidence showing that the child was being educated and the expenses claimed were actually being incurred on him. But expenses on account of his maintenance should be allowed from the date of the application.

Held, that where the father never cared to take any genuine and real interest in the education of the child and never sent any money for his education or maintenance, a bare verbal offer during the proceedings cannot in law constitute a valid ground for refusing maintenance to the child.

Held, that the use of the word "shall" does not always necessarily imply mandatory nature of the provision, in the sense that non-compliance with it must necessarily and by itself be fatal. The context in which the word "shall" is used and the purpose and object thereof has to be taken into account. Similarly it is not always correct to say that where the word "may" has been used, the statute is only permissible or directory in the sense that non-compliance with those provisions will not render the proceedings invalid. Whether a particular provision is mandatory or directory chiefly depends on the intention and meaning of the Legislature and not merely on the language in which the intention is clothed; the intention and meaning of the Legislature is to be ascertained from the language used, considered along with the nature and design of the provision and also by paying due regard to the consequences which would flow from construing the provision one way or the other.

Case reported by Shri Sant Ram Garg, Sessions Judge, Sangrur, under section 438, Criminal Procedure Code with his reference, dated the 16th August, 1958 for revision of the order of Shri Kahan Chand, Magistrate Ist Class, Malerkotla, dated the 9th October, 1958 allowing Rs. 200 per

month as maintenance to the child and recommending Rs. 50.

H. S. GUJRAL, for Petitioner.

ATMA RAM & SATRA JIT, for Respondent.

JUDGMENT

I. D. Dua, J.

DUA, J.— This order will dispose of Criminal Revisions 1254 of 1958 and 1272 of 1958 ; the former has arisen out of a recommendation made by the learned Sessions Judge, Sangrur, that the order of the Magistrate 1st Class, Malerkotla, dated 9th of October, 1957, be modified so far as maintenance allowance of Romesh Inder minor is concerned. The Magistrate had ordered that a sum of Rs. 200 per month be paid to the minor child by way of maintenance from the date of the original application ; the learned Sessions Judge to whom a petition for revision was preferred recommends that Major Joginder Singh, the father of the minor, should be ordered to pay only a sum of Rs. 50 per month by way of maintenance to the minor child and that also from the date of the order of the Magistrate.

Criminal Revision 1272 of 1958 is directed against the order of the learned Magistrate as affirmed by the learned Sessions Judge with respect to the maintenance to Bibi Raj Mohinder Kaur, wife of Major Joginder Singh.

Major Joginder Singh, the petitioner in the two revisions before me, and Bibi Raj Mohinder Kaur were married to each other sometime in August, 1944, and Romesh Inder, nick named 'Shelly' is their child. Bibi Raj Mohinder Kaur filed an application under section 488, Code of Criminal Procedure, claiming maintenance for herself and for the minor son Romesh Inder alleging

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J.

that Major Joginder Singh had from the very beginning been extravagant, with the result that his salary and other allowances did not seem to be enough to meet his ever-growing expenses. He used to take money from his wife which her parents used to give her, and in fact she also had to borrow money from her brothers and sisters to help her husband bring a car from England. On return from abroad he actually began to avoid the petitioner's (i.e. his wife's) society and in fact requested the Government for permission to remarry. In the circumstances she was constrained even to move the military authorities requesting them not to permit her husband to re-marry and indeed to induce him to keep her and to treat her as his wife. Major Joginder Singh, however, did not improve and his behaviour went from bad to worse. She also asserted to have written to the military authorities several letters including those on 17th of October, 1953, 25th of October, 1954, and 20th of October, 1955, in this connection and even requested the authorities to see that arrangements for her maintenance and for the maintenance of the child were properly made. She further stated that the military authorities wrote back that she should get her claim for maintenance established in a Court of Law and then send that order to the army authorities for execution. It is in these circumstances that she filed the present application claiming Rs. 250 per month as maintenance for herself and a similar amount per month for her child. Major Joginder Singh admitted the applicant to be his wife and Shelly to be his son, who was born in the Lady Dufferin Hospital, Patiala, but denied the other allegations made in the petition. He pleaded that Bibi Raj Mohinder Kaur was not entitled to claim maintenance because she had not behaved well towards him and that she did not perform her marital obligations properly ; it

Major Jogindar Singh v. Bibi Raj Mohinder Kaur

I. D. Dua, J

was also alleged that she had taken to an independent life of her own accord and that she did not agree to come to live with him in spite of all possible efforts made by him and by his relatives. In so far as the maintenance for the child is concerned, he admitted his obligation to support him but he submitted that he was prepared to give the child education in a good school and that there had been no neglect or refusal on his part in this connection. Two issues arose for trial on the pleadings of the parties.

(1) Has the respondent neglected or refused to maintain the applicant and her son ?

(2) To what amounts of maintenance the applicant and her son are entitled ?

Bibi Raj Mohinder Kaur herself went into the witness-box and also produced Major Amar Singh and S. Gurnam Singh, her brothers, along with a large number of other respectable witnesses. Several letters were also produced on the record including letters written by Bibi Raj Mohinder Kaur to the Military authorities and those written by Major Joginder Singh to Major Amar Singh. The learned Magistrate, after considering the evidence, in a very well-written judgment observed that there was not an iota of evidence on the record to show that Bibi Raj Mohinder Kaur had ever refused to come to her husband or that she had ever deserted him. The circumstances brought on the file, according to the Magistrate, prove that whenever her husband visited Sherwani Kot or met her brother S. Gurnam Singh he had always gone there with the main idea that Bibi Raj Mohinder Kaur should give her consent in writing to Major Joginder Singh for marrying a second wife. With these observations the Magistrate disbelieved the evidence produced by Major Joginder Singh

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J.

rejecting it as false. On the other hand, the evidence produced by Bibi Raj Mohinder Kaur consisting, as it does, of important persons of unimpeachable veracity was believed by the Court. The statements made by the father and the brothers of the lady, in spite of their relationship, were considered to be true and trustworthy. Particularly relying on the testimony of S. Avtar Singh, S. Gurcharan Singh, Magistrate 1st Class, S. Shamshad Ali Khan, Magistrate 1st Class, and S. Gurnam Singh, the Court came to the conclusion that Major Joginder Singh never really desired to keep his wife with him and that he was always desirous of and constantly tried to secure her permission so as to enable him to re-marry. The Court also relied on the statements of Major Amar Singh, Lady Doctor Ranjit Kaur and S. Avtar Singh for the view that Major Joginder Singh's conduct towards his wife was not befitting. On this evidence the Magistrate concluded that the Major had neglected his wife and his child. The Court expressly negatived the allegation of Major Joginder Singh that his wife had joined the training classes and had taken to service of her own accord ; it observed in this connection that S. Narpinder Singh, father of Major Joginder Singh, had himself admitted in his cross-examination, that on one occasion he himself remitted to the lady a sum of Rs. 100 at Faridkot to meet her expenses for the training classes. The Magistrate then considered the income of Major Joginder Singh which, according to the Court, came to Rs. 1,070 per month in 1957 and observing that he had practically no other liabilities he awarded a sum of Rs. 150 per month to the wife and a sum of Rs. 200 per month for the maintenance of the child. The maintenance was directed to be paid from the date of the application as Major Joginder Singh did not appear to have paid anything to his wife since her marriage and to the

Major Jogindar Singh v. Bibi Raj Mohinder Kaur

I. D. Dua, J.

child ever since birth. In the words of the Magistrate this was the fittest case in which such discretion should be exercised in favour of the lady. While determining the maintenance for the child the Court took into consideration the likely expenses of his education in a good school ; indeed, the Magistrate considered that the boy must be given education in a public school and he compared the expenses which Major Amar Singh, P.W. 1, the real brother of the lady, was incurring on the education of his children in such schools. An argument was advanced before the learned Magistrate that maintenance under section 488, Code of Criminal Procedure, should be confined strictly to simple board and lodging so that the petitioner may be just saved from starvation. The Court, however, after discussing the case law cited at the bar, felt that if a man wanted to have the luxury of more wives than one, his liability to maintain the discarded wife and the children from her, could not be lessened thereby and that the rate of maintenance to be fixed under section 488, Code of Criminal Procedure, depended on the needs and requirements of the person entitled to be maintained a well as on the means and the earning capacity of the person liable to maintain. The Court referred to *B. Rajeswariamma* v. *K. M. Viswanath* (1), *Mohd Ali* alias *Barkat Ram* v. *Mt. Sakina Begum* alias *Shakuntla* (2), and *Annan Narasinha Ayyar* v. *Ranganthayammal* (3), in this connection.

Major Joginder Singh feeling aggrieved by this order preferred a revision to the Sessions Judge who affirmed the findings and conclusions of the learned Magistrate so far as the decision under issue No. 1 is concerned. Regarding issue

(1) A.I.R. 1954 Mysore 31
(2) A.I.R. 1944 Lah. 392
(3) A.I.R. 1947 Mad. 304

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J.

No. 2 the Court felt that the child should be granted maintenance only from the date of the order and not from the date of the original application as there was nothing on the record to show that he had been receiving education in a public school and that any specified amount had all along been spent on his maintenance by his guardian. Considering the expenses for the contemplated education to be an irrelevant consideration, the Court has recommended the maintenance allowance for the minor to be reduced to Rs. 50 per mensem.

As already stated by me in an earlier part of the judgment, two revisions have been registered in this Court against the order of the learned Sessions Judge and Mr. Harbans Singh Gujral has addressed lengthy arguments on behalf of Major Joginder Singh. I have also heard Shri Atma Ram on behalf of Bibi Raj Mohinder Kaur. Mr. Gujral has contended that the evidence was not recorded in the trial Court in the presence of the petitioner as is required by section 488(6) of the Code of Criminal Procedure. He also submits that the order of the learned Magistrate does not show that the petitioner's presence had at any stage been dispensed with. It appears that this objection was neither raised before the learned Magistrate nor before the learned Sessions Judge, nor is it included in the grounds for revision filed in this Court though the grounds are fairly detailed, elaborate and lengthy, and appear to have been drafted by Mr. Gujral himself, a senior member of the High Court Bar. The only explanation for not including this ground in the grounds of revision given by the learned counsel is that he was not properly instructed on this point because his client was not in India. Even in support of this explanation, except the bare statement of the learned counsel

Major Jogindar Singh v. Bibi Raj Mohinder Kaur

I. D. Dua, J.

at the Bar, which is quite vague and unprecise, there is no material showing as to where Major Joginder Singh was when the counsel was instructed, for how long had he been away and when did he return to this country from his visit abroad. I may mention that Major Joginder Singh himself appeared as a witness in the Court of the Magistrate and produced other witnesses in his defence. In my opinion, keeping in view the nature of these proceedings, the facts and circumstances of the present case, and the object of subsection (6) of section 488 the mere absence of a formal order dispensing with the personal attendance of the husband is not *per se* fatal to the validity of the proceedings. In order to attack the validity of such proceedings it must be shown that the husband has been prejudiced and the taking of evidence in the absence of the husband, but in the presence of his counsel, has in fact resulted in some failure of justice. Mr. Gujral could not suggest any prejudice to his client nor did he urge that there was any real failure of justice in this case; his only argument was that being a mandatory provision of law failure to take evidence in the presence of Major Joginder Singh must by itself vitiate and invalidate the proceedings. It is not possible for me to sustain this argument which must be overruled. It has repeatedly been held by the highest Court in this Republic that the use of the word "shall" does not always necessarily imply mandatory nature of the provision, in the sense that non-compliance with it must necessarily and by itself be fatal. The context in which the word "shall" is used and the purpose, and object thereof has to be taken into account. As observed by Venkatarama Ayyer, J., in *Hari Vishnu Kamath* v. *Ahmad Ishaque* (1), an enactment in form mandatory might in substance

(1) A.I.R. 1955 S.C. 233

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J.

be directory. The use of the word "shall" does not conclude the matter. These and other rules are only aids for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend on the context. Similarly Sinha, J., observed in *State of U.P.* v. *Manbodhan Lal* (1), that use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. On the other hand it is not always correct to say that where the word "may" has been used, the statute is only permissible or directory in the sense that non-compliance with those provisions will not render the proceedings invaild. Whether a particular provision is mandatory or directory chiefly depends on the intention and meaning of the Legislature and not merely on the language in which the intention is clothed: the intention and meaning of the Legislature is to be ascertained from the language used, considered along with the nature and design of the provision and also by paying due regard to the consequences which would flow from construing the provision one way or the other. Applying these tests to section 488 (6), Criminal Procedure Code, I am inclined to think that this provision is not mandatory. The person whose liability to maintain is enforced by resort to section 488 is not strictly a person accused of a crime and the considerations which apply to the construction of the provisions dealing with the trial of persons accused of crimes are hardly applicable to the interpretation of section 488. It may be stated that Mr. Gujral principally relied on the construction of section 488 on the contention that the person

(1) A.I.R. 1957 S.C. 912

proceeded against for maintenance is an accused person standing his trial for a crime committed by him. My attention has in this connection also been drawn by Shri Atma Ram to *Babu Lal Kurmi Khalasi* v. *Shanti Bai* (1), the head-note of which is in the following terms:—

> "Where on the date fixed for final hearing although the husband was absent, the evidence of the witness of the wife was recorded in the presence of the pleader who cross-examined them and there was nothing on the record to indicate that the personal attendance of the husband had been dispensed with by the Magistrate.
>
> Held, that by the failure to conform to the provisions of sub-section (6) of Section 488 no prejudice was caused to the applicant."

No decision to the contrary has been cited by Mr. Gujral. The first submission is, therefore, repelled.

Mr. Gujral next contended that the trial Court had wrongly refused to give to his client an opportunity to adduce evidence. Here again I find that no ground to this affect is specifically taken in the lengthy grounds of revision filed in this Court. On the other hand Mr. Atma Ram has drawn my attention to the proceedings of the trial Court and I find that no list of witnesses was put in by Major Joginder Singh and all the witnesses summoned by him were actually examined. There being no request to summon any more witnesses by Mr. Gujral's client in the trial Court I fail to see how it is open to him now to make a grievance of any omission on the part of the trial

(1) A.I.R. 1956 Vin. Pra. 37

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J

Magistrate to give him opportunity to produce further evidence.

On merits, the counsel has contended that his client had never neglected or refused to maintain his wife or his child and that the conclusions of the two Courts below are wrong. The Counsel submits that it was the wife who did not want to come and live with Major Joginder Singh and that she merely wrote to the military authorities for putting undue pressure on him. The learned Counsel has completely failed to substantiate his submission on the existing record. In a letter written by Major Jooginder Singh from Agra on 18th of September, 1951, to his father he expressly states that with respect to Raj she would perhaps never be able to come to him. He also stated that he had heard that Raj had joined some school and that he had received a letter for money but he gave no reply because in fact nobody had discussed the matter with him. A little lower down in this letter he suggests that his child would in these circumstances also remain rustic and it would not be possible for him even to take that child with him in society. This letter clearly suggests that he did not want his wife to come and stay with him; the suggested inference apparently being that she was not advanced or westernised enough. The reference to his not being able to take the child with him in society in the context, is not without significance. That Bibi Raj Mohinder Kaur had always been anxious to come and stay with her husband and to abide by his wish and desire is clear from the letters she wrote to the military authorities, particularly those dated 17th of October, 1953, Exhibit P.7/A 25th of October, 1954, Exhibit P.6/A, and 20th of October, 1955, Exhibit P.5/A. It is also amply established on the record that Major Joginder Singh never

Major Jogindar Singh
v.
Bibi Rai Mohinder Kaur

I. D. Dua, J.

cared to send any money for the maintenance of his wife or for the child. It has to be borne in mind that merely because the wife does not happen to be advanced or westernised enough is not, according to the law of our Republic, a justifiable ground for the husband not to keep his wife with him or to refuse to properly maintain her. Nothing has been said at the Bar to suggest that law, as in force in this country, was ever different. I have, therefore, no hesitation in affirming the findings and conclusions of the two Courts below on issue No. 1.

With respect to the quantum of maintenance Mr. Gujral has repeated the contention advanced on behalf of his client in the Courts below, that it is only bare subsistence allowance which can be allowed under section 488, Code of Criminal Procedure, because the Parliament intended this summary proceedings to be utilised merely for saving the dependents from starvation. He has drawn my attention to *Dr. Mukandlal* v. *Smt. Jyotishmati* (1), where a learned Single Judge of this Court reduced the amount of maintenance from Rs. 300 to Rs. 200 per month. I fail to see how this decision supports the petitioner's contention because in this case the paying capacity of the husband was actually examined and in view of such capacity the amount was determined. The next authority on which Mr. Gujral has relied is *Karnail Singh* v. *Mst. Bachan Kaur* (2), where Rs. 30 per month were not considered to be excessive in view of the income of the husband which was Rs. 1,500 per year which comes to Rs. 125 per month. Mr. Gujral has also cited the following decisions in support of his contention ; *Mohd Ali* alias *Barkat Ram* v. *Mst. Sakina* alias *Shankuntla* (3) ; *Ahmad*

(1) 1958 P.L.R. 314
(2) A.I.R. 1955 Punj. 26
(3) A.I.R. 1944 Lah. 392

Major Jogindar Singh v. Bibi Raj Mohinder Kaur

I. D. Dua, J.

Ali Sahib v. *Sarfarajulnisa Begum* (1); *Aruna Chala Asani* v. *Anandayammal* (2); *Annan Narasinha Ayyar* v. *Ranganthayammal* (3); *M. Ponnamhalam* v. *Sareswathir* (4); and *H. Syed Ahmed* v. *Nagnath Parveen Taj Begum* (5). In *Mohd Ali* alias *Barkat Ram* v. *Mt. Sakina* alias *Shakuntla* (6); Blacker, J., observed that proceedings under section 488, Criminal Procedure Code, being summary proceedings were meant to provide a speedy remedy against starvation for a deserted wife or child and a Magistrate goes out of his province on somewhat lightly deciding a question of the personal law of the parties and whatever may be the wife's rights under the civil law, she is not entitled to a maintenance allowance under this summary procedure greater than her bare needs for food, clothing and lodging. The learned Judge also observed that where the wife had a private income of her own, which, though not princely, was sufficient to keep her from starvation, an order under section 488 was bad. In the reported case the facts appearing from the record were that the husband, who was not a young man and had also another wife, had been discharged from service by a municipal committee on account of ill-health; his income was not considered to be more than Rs. 15 to Rs. 20 per month and his expenditure was shown to be between Rs. 40 and Rs. 50 per month, with the result that he was supposed to be living on his capital. In these circumstances maintenance at the rate of Rs. 38 per month in favour of the wife who had a private income of Rs. 18 per month, was set aside. In fact the learned Judge in that case considered the "means" of the husband not to be sufficient to

(1) A.I.R. 1952 Hyd. 76
(2) A.I.R. 1933 Mad. 688(1)
(3) A.I.R. 1947 Mad. 304
(4) A.I.R. 1957 Mad. 693
(5) A.I.R. 1958 Mys. 128
(6) A.I.R. 1944, Lh. 392

Major Jogindar Singh v. Bibi Raj Mohinder Kaur

I. D. Dua, J.

justify the maintenance order, which was considered to be discretionary and not of course. In view of the peculiar facts and circumstances of that case the general observations of the learned Judge lose much of their importance and binding value. In *Ahmad Ali Sahib* v. *Sarfarajulnisa Begum* (1), Shripat Rao, J., laid down that the Magistrate's power to make an order under section 488, Criminal Procedure Code, is discretionary and where the evidence in a case shows that the wife has a private income of her own which is sufficient to keep her from starvation, an order granting her maintenance is bad. In this case the wife was earning Rs. 148 per month as a school mistress and on this ground the learned Judge quashed the order granting her maintenance at the rate of Rs. 50 per month. The dictum of Blacker, J., in *Mohd Ali* alias *Barkat Ram* v. *Mst. Sakina* alias *Shankuntla* (2), was approved and applied *Arunachata Asani* v. *Anandayammal* (3), decided by Burn, J., has been cited as an authority for the proposition that a wife cannot claim under section 488, Criminal Procedure Code, to be treated as a wife ; she can only claim to be maintained on the scale appropriate to her station in life. Maintenance, according to the learned Judge, does not include anything more than appropriate food, clothing and lodging. On the facts of this case, however, it was found that the husband had actually offered to give his wife maintenance in his house but she had refused his offer without sufficient grounds. This finding, in my view, was sufficient in law to disallow the petition of maintenance. In *Annam Narasinha Ayyar* v. *Ranganathayammal* (4), after considering the facts and circumstances of the case, a learned Single Judge

(1) A.I.R. 1952 Hyd. 76
(2) A.I.R. 1944 Lah. 392
(3) A.I.R. 1933 Mad. 688(1)
(4) A.I.R. 1947 Mad. 304

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J.

fixed the rate of maintenance after taking into account what the wife herself was earning. In *M. Ponnamhalam* v. *Saraswati* (1), Ramaswami, J., confirmed the allowance of Rs. 25 per month granted to the wife out of the income of Rs. 90 per month, considering it to be just the amount as would support the wife not in any comfort but would merely enable to keep her body and soul together. In the course of the judgment the learned Judge also observed that the question of quantum of maintenance is a matter for the discretion of the trial Magistrate because he has to take into consideration several factors, like the status of the family, the earnings and the commitments, and what is required by the wife to maintain herself. While determining the requirement of the wife, the learned Judge was against giving her maintenance which would keep her in luxury and would make judicial separation profitable and also impede any future reconciliation. He was equally opposed to the other extreme view of adopting the scale as would be fitting only in the case of unchaste Hindu widows. *H. Syed Ahmad* v. *Nagnath Parveen Taj Begum* (2), has also been cited for the proposition that in awarding maintenance the Court should see that the rate is not such as would tempt the wife to permanently live separately from her husband. I have given my most anxious thought to the authorities cited by Mr. Gujral but I find myself unable to agree with all that has been stated in them. It would be helpful at this stage to reproduce section 488 of the Criminal Procedure Code :—

> "488. *Order for maintenance of wives and children.*—(1) if any person having sufficient means neglects or refuses to

(1) A.I.R. 1957 Mad. 693
(2) A.I.R. 1958 Mys. 128

maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a 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) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) *Enforcement of order.*—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

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J.

notwithstanding such offer, if he is satisfied that there is just ground for so doing :

If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him:

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(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.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases:

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or

wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex-parte*. Any orders so made may be set aside for good cause shown in an application made within three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or as the case may be, the mother of the illegitimate child."

It is obvious from the language of the section that in order to enable a child to claim maintenance it has to be proved that the child is unable to maintain itself. No such condition has been imposed in the case of a wife. Cases in which maintenance was refused to the wife merely on the ground that she was in a position to maintain herself have, in my view, omitted to consider the implication of this distinction while construing the scope and effect of section 488. In my opinion the ability of the wife to maintain herself was not intended by the legislature to deprive her of the right of maintenance conferred by this section, if she is otherwise found entitled to it. The use of the word "may" in the context does not, in my view, confer an absolute discretion on the Court to refuse to the wife maintenance if she has otherwise brought her case within the purview of the section. But even if the power conferred

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J.

on the Magistrate be assumed to be discretionary, the discretion has, in my view; to be exercised on sound judicial principles, considering the equitits of each case. The contention of Mr. Gujral with respect to the quantum of maintenance appears also to be unsound on the ground that had the Parliament intended the rate of maintenance to be the bare subsistence allowance merely to save the dependent from starvation, the amount permissible under section 488 would not have been raised to Rs 500 by the amendment effected in 1955. This amendment clearly suggests that it is not bare subsistence allowance which alone is intended by the Parliament to be grantable under this section. Some of the cases cited by Mr. Gujral do contain observations which apparently go to support the Counsel but on considering the actual facts and circumstances of those cases the final conclusions and decisions in most of them would be found supportable independently of those observations. But if those authorities intend to lay down any rigid rule of law that the only right which a wife possesses under section 488, Criminal Procedure Code, is to claim just subsistence allowance which should merely provide bare food, residence and raimant and that also only if she has no other means or source then I must, with respect, record my emphatic dissent. The language of the section does not clearly and unequivocally support this view and on general principles I find it difficult to endorse it. It is also not possible for me to ignore the drastic changes which the social conditions in this country have recently undergone, particularly with respect to the rights of women. The old view, therefore, which treated women as inferior members of the family can no longer hold good. This change in the social trend is discernible in other civilised countries as well; for example in

Major Jogindar Singh v. Bibi Raj Mohinder Kaur

I. D. Dua, J.

England recently marked development has taken place about the position of married women and also of wives who have been deserted by their husbands. Law there has kept pace with the changing social conditions. In my view, therefore, a deserted wife must, according to the law of the Indian Republic, be held entitled to suitable maintenance which is in accord with the status of the family, and not to bare food and clothing as some learned Judges have observed in some of the decided cases. It has been contended that proceedings under sectin 488 being summary proceedings the question of the right of maintenance conferred on the deserted wife by the Civil Law involving, as they do, complicated questions of fact and law should not be decided in these proceedings. There is certainly support for this proposition in some decided cases but if there are no comlex or complicated questions of fact and law and the status of the parties, the means of the husband and the requirements both of the husband and the dependent are either admitted or are properly and fully established on the record, I fail to see why the Court dealing with the question of maintenance under section 488 should not grant proper maintenance to the dependent and must direct the parties to protracted civil litigation. I am not unmindful of the fact that a decree granted by a civil Court can be Challenged in appeal whereas an order passed under section 488 can only be assailed by means of a revision. This is certainly a relevant consideration to be kept in view while considering the question but it does not necessarily lead to the conclusion that the Criminal Court is only empowered to grant bare subsistence allowance. I have thus no hesitation in overruling the contention put forward by Mr. Gujral. But this apart, Rs. 150 per month allowed by the Court can by no means be considered in this case

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J.

to be excessive or luxurious. Keeping in view the present high cost of living and the status both of the husband and of the wife's parents and brothers as also the complete absence of other liabilities on the husband's income, I think this amount would be just enough for the wife in the instant case to maintain herself in a reasonable way. This amount was considered reasonable both by the learned Magistrate and the learned Sessions Judge. Nothing substantial has been suggested by Mr. Gujral justifying interference by this Court on revision.

Coming now to the maintenance of the child, I quite see that the expenses on account of education should not have been granted from the date of the petition, in the absence of the evidence showing that the child was being educated and the expenses claimed were actually being incurred on him. But I do not see why the expenses on account of his maintenance should not be allowed from the date of the application. In so for as the expenses for education are concerned, I also agree with the learned Sessions Judge that a sum of Rs. 200 per month is perhaps a little excessive, particularly on the evidence actually produced on the present record. I would, therefore, keeping in view all the circumstances of the case, direct that a sum of Rs. 50 for the child should be paid from the date of the application and a sum of Rs. 100 should be paid for his maintenance from the date of the final order by the Magistrate as in view of the minor's age provision for his education must be made. I am informed by Mr. Gujral that his client is willing to defray the expenses of the child's education in a public school provided the child is handed over to the father. Mr. Atma Ram for the respondent states that at one stage Major Joginder

Major Jogindar Singh v. Bibi Raj Mohinder Kaur

I. D. Dua, J.

Singh in his anxiety to avoid payment of maintenance even expressed doubt with respect to the legitimacy of the child and therefore the child should not be handed over to him. In my opinion, it is not necessary at this stage and on this record to go into this matter because the question of guardianship should best be decided if and when it is raised in appropriate proceedings before a competent Court. It is necesary to observe that keeping in view the status of both the parties if and when the child is actually put in a public school it would be open to the lady to apply to the Court in accordance with law for enhancement of maintenance. Mr. Gujral has in his final reply to the arguments of the respondent also drawn my attention to certain authorities which lay down that if a father is willing to keep the child with him then no maintenance need be granted by the Court. Mr. Atma Ram was given a further opportunity to reply and he has similarly drawn my attention to some other authorities holding to the contrary. On the facts of the present case, however, the father having never cared to take any genuine and real interest in the education of the child and having never sent any money for his education or even for his maintenance, I do not think, a bare verbal offer during the proceedings would or even can in law constitute a valid ground for refusing maintenance to the child. This child has all along lived with his mother and on the existing record I can hardly see any justification for refusing maintenance for the child on this ground and thereby forcing the custody of the child to be taken away from the mother and to be given to the father, who for all practical purposes has kept himself as a stranger to the child. On the existing record and as at present advised the welfare of the child seems to me to demand that he should remain

Major Jogindar Singh
v.
Bibi Raj Mohinder Kaur

I. D. Dua, J.

with the mother. It may not be out of place to mention that Major Joginder Singh had also applied under section 10 of the Hindu Marriage Act, 1955, for judicial separation from the wife. This petition was disallowed by the Subordinate Judge, 1st Class, Barnala, and an appeal was preferred in this Court. On account of this appeal the present criminal revisions were got adjourned by Mr. Gujral on 20th May, 1959, on the ground that the decision in the said appeal would automatically affect the present revisions and also that Major Joginder Singh wanted to be present at the hearing; later again attempts were made to get the final disposal of these revision petitions postponed. The appeal arising out of the proceedings for judicial separation was dismissed by a learned Single Judge of this Court on 13th August, 1959, (F.A.O. 18 of 1957), but in spite of the dismissal of the appeal the present revisions were argued at great length and all conceivable grounds were urged before me.

Before concluding, I cannot help expressing my regret that the parties to this litigation who belong to very respectable families should have created the present unfortuante situation for themselves. I hope and believe that better sense would still prevail, and both parties would soon see the error of their ways, and make serious and genuine efforts to reconcile themselves, if not for any other reason, at least for the sake of the future of the innocent child in whom both the parents must be feeling very vitally interested..

For the reasons given above, the revision with respect to the maintenance allowance granted to Bibi Raj Mohinder Kaur is dismissed and the order of the learned Magistrate and of the learned Sessions Judge confirmed; with respect to the

maintenance allowance granted to Romesh Inder, however, the same is modified as stated above. Hoping that the parties would still make a genuine effort to reconcile themselves and that all the members of the family would begin to live happily, I would make no order as to costs in these proceedings.

Major Jogindar Singh v. Bibi Rai Mohinder Kaur

I. D. Dua, J.

B.R.T.

CIVIL WRIT

Before Bishan Narain, J.

RALLU,—*Petitioner.*

versus

THE ADDITIONAL FINANCIAL COMMISSIONER, ETC.,—*Respondents.*

Civil Writ No. 1037 of 1958.

1959

Sept., 28th

Punjab Security of Land Tenures Act (X of 1953) as amended by Act XI of 1955—Sections 9, 10(3), 14-A and 24—Effect of—Whether bar the suit for eviction of a tenant under the Punjab Tenancy Act (XVI of 1887)—Protection afforded by Section 9—Whether available in proceedings under both the Acts.

Held, that if a landlord makes an application under Section 14-A of the Punjab Security of Land Tenures Act, an information will be sent to the authority under the Punjab Tenancy Act to stay further proceedings. Filing of a petition under Section 14-A does not result in automatic abatement of the previous proceedings taken under the Punjab Tenancy Act. It is open to the landlord to take proceedings either under the Punjab Tenancy Act or under the Punjab Security of Land Tenures Act. The remedies available to him are parallel and it is open to him to avail of either remedy. There is nothing in Section 14-A or other provisions of the Punjab Security of Land Tenures Act which can lead one to infer that the Legislature intended impliedly to bar the landlord's remedy to seek eviction of his tenant under the Punjab Tenancy Act.