

CHAPTER 7

Maintenance Cases.

PART A.—PROCEEDINGS UNDER SECTION 488,
CRIMINAL PROCEDURE CODE.

Proceedings under section 488 of the Code of Criminal Procedure are of a criminal character, and its provisions must be strictly followed. The section is not intended to provide for all possible cases in which a wife may be entitled to receive separate maintenance from her husband and it in no way overrides the Civil law or excludes the jurisdiction of the Civil Courts. A Magistrate exercising jurisdiction under this section is bound to exercise it in accordance with its terms and not otherwise: and especially not to deviate from them into orders which may appear to him to be better adapted to secure a fitting support to the wife, but are not warranted by the section.

Application of Section 488, Cr.P.C.

2. When a husband appears in obedience to a summons issued on the application of a wife for a maintenance order the complaint and statements of the wife in her examination should be read and explained to him, and he should be called on to answer the claim.

Complaint to be explained to husband.

3. Before a maintenance order in favour of the wife can be made, it must be made to appear, first that the applicant is the wife of the husband at the time when the order is made secondly that the husband has sufficient means to maintain her, and, thirdly, that he refuses or neglects to maintain her.

Points to be proved.

4. If the marriage is denied, the question must be inquired into and decided by the Magistrate.

Proof of marriage.

5. An order of maintenance must be refused, if it appears either:-

Ground on which order may be refused.

- (1) that the wife is living in adultery; or
- (2) that without any sufficient reasons she refused to live with her husband; or

(3) that she and her husband are living apart by mutual consent [sub-section (4) of Section 488]

With regard to clause (2) above, attention is drawn to a proviso added to sub-section (3) of section 488 by Act IX of 1949, which provides that 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. Act IX of 1949 has been repealed by Act XLVIII of 1952 but in view of Section 4 of the Repealing Act the substantive portions incorporated in the Code became a part and parcel of the Code and are not affected by the Repealing Act (*vide* A.I.R. 1955 Punjab 141). Attention may also be drawn here to Section 18(2) of the Hindu Adoptions and Maintenance Act, 1956 (No. 78 of 1956), which makes special provision for the right to separate residence and maintenance under certain circumstances in the case of Hindu married women.

Ordinarily, it will not be necessary to enter into any of these matters unless an objection is taken on one of the above grounds by the husband.

Maintenance order to be refused in certain cases.

6. It follows, that if it should appear that the petitioner never was the wife, or has ceased to be the wife of the respondent, as, for instance, that she had only lived with the respondent as his mistress; or that the husband has validly divorced her before an order of maintenance is made, the application must be dismissed.

Means of husband to be considered.

7. If the magistrate is satisfied that the wife is entitled to an order for maintenance, he should further satisfy himself before making the order: what the actual means of the husband are and what other persons, if any, are lawfully dependent upon him.

The word 'means' in section 488 includes earning capacity. Hence when a man is healthy and able bodied he should be taken to have the means to support his wife.

(*Vide A.I.R. 1955 All. 320, A.I.R. 1944, Lahore 392, A.I.R. 1939 Lahore 24*).

8. In fixing the allowance payable by the husband, regard must be had to all these matters as well as to the needs and the social position of the wife.

Needs and social position of wife to be considered.

9. An order for maintenance must be for a sum of money, payable as a monthly allowance, from the date of the order or from the date of the application for maintenance. The maximum limit has been raised from rupees one hundred per month to rupees five hundred per month by Act No. 26 of 1955. The allowance should be made payable to the wife or to such other person on her behalf as the Magistrate may in his order direct. Under ordinary circumstances it should be made payable to the wife herself.

Order must be for a cash monthly allowance not exceeding Rs. 500 a month.

As it is found that irregularities are frequently committed in making this order, a form of order of maintenance has been prescribed by the High Court (Form No. 65 in Part B-I of Volume VI. High Court Rules and Orders). This form should be used in all ordinary cases.

Form of order.

10. The law does not warrant an order that the allowance be paid wholly or partly in grain either monthly or annually; nor that clothing be allowed, nor that the husband provide a house in addition to the allowance; nor an order conditional on the wife living in a house provided by her husband, or in any particular place, not an order for payment of cash as an alternative for payment in some other manner.

Maintenance order should be unconditional and for cash allowance only: Other conditions cannot be imputed even by consent of parties.

(*Vide 13 P. R. 1876, 3 P.R. 1887, 31 P.R. 1887, A.I.R. 1943 Lahore 59*).

There can be no objection to the parties compromising before a Magistrate in a proceeding under section 488 by agreeing between themselves as to what is the proper rate of maintenance. This agreement may in itself be sufficient proof of neglect or refusal to

maintain on the part of the husband. Where however, the compromise is with respect to other matters as well which do not come within the purview of Section 488 or where the compromise amounts to an agreement to live separately by mutual consent then the compromise cannot be given effect to in a Criminal Court. But if a husband and wife agree to the rate of maintenance without adding conditions which cannot form a part of the order under section 488 the Magistrate, may award a monthly allowance in terms of the compromise; but no other order for maintenance can be made by the Magistrate on the ground that the parties consent to it (*vide A.I.R. 1932 Lahore 349(2)*).

Security from husband cannot be taken even by agreement.

11. Similarly, if the wife, as sometimes happens, either of her own accord or upon her husband's offer to maintain her, agrees to live with him, provided, that he gives security for her good treatment. The Magistrate has no authority under this section either to require security from the husband or to accept it if offered by him. The wife must be referred to a separate proceedings under section 107 of the Code of Criminal Procedure if she desires security to be taken from him for keeping the peace.

Order permissible.

12. In short, the only final order a Magistrate can properly make on an application by the wife for maintenance is (1) an order granting a monthly cash allowance unconditionally, or (2) an order either dismissing the application or, for sufficient cause, permitting the wife to withdraw her application, which would have the same effect as an order of dismissal.

Ex parte trial procedure.

13. As to procedure, the Magistrate should ordinarily insist upon the personal attendance of both the wife and the husband at one of the preliminary hearings and should examine them fully in order to ascertain the true facts, but if the Magistrate is satisfied that the husband is wilfully avoiding service or wilfully neglects to attend the Court, he may proceed to hear and determine the case *ex-parte*.

The evidence taken should be recorded in the manner prescribed in section 355 of the Code of Criminal Procedure for summons-cases, that is, by the

Magistrate making a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(Sub-section (6) of Section 488).

14. At the close of the proceedings, a judgment should be written in the language of the Court or in English, which should state briefly the points for decision, the decision thereon and the reason for the decision. When the application for maintenance is granted, the form prescribed should be filled up and attached to the judgment as the formal 'order of maintenance'.

Contents of
Judgment.

15. In view of Section 490 of the Code a copy of the said order shall be given without payment to the person whose favour the order is made or to his guardian, if any, or to the person to whom the allowance is to be paid. Such order can be enforced by any magistrate in any place where the person against whom it is made may be after the magistrate has satisfied himself about the identity of parties and the nonpayment of the allowance.

Enforcement of
order.

16. No warrant can issue for the recovery of any amount due as maintenance under Section 488 unless application is made to the Court within a period of one year from the date on which the amount became due.

Enforcement of
order.

[Second proviso to sub-section (3) of Section 488]

17. The mode of enforcement of an order of maintenance is provided in sub-section (3) of section 488 of the Code of Criminal Procedure. If the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, the magistrate may consider any grounds of refusal stated by her and enforce the maintenance order notwithstanding such offer if he is satisfied that there is just ground for so doing.

Ditto