
(1959) 02 CAL CK 0008
In the Calcutta High Court
Case No : Criminal Revn. No. 40 of 1959

Sew Kumher

APPELLANT

Vs

Mongru (Mongri) Kumharin

RESPONDENT

Date of Decision : 04-02-1959

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 342, 488, 488(6)
Evidence Act, 1872 — Section 112

Citation : AIR 1959 Cal 454 : (1959) CriLJ 834 : 63 CWN 341

Hon'ble Judges : S.K. Sen, J

Bench : Single Bench

Advocate : Kanaidhon Dutt and Probodhdhon Dutt, for the Appellant; N.C. Talikdar, for the Respondent

Judgement

S.K. Sen, J.—This Rule was issued against an order of Sri A.C. Sarbajna, Magistrate, 1st Class, Sealdah for setting aside the order u/s 488 Cr. P. C. passed by him on the petitioner to pay maintenance at the rate of Rs. 50/- per month for his wife and children. The opposite party Monghri Kumharin was married to the petitioner Sew Kumher about 15 or 16 years ago and there was about five children of marriage of whom three are surviving. They are young children who were aged 7, 5 and 2 years, respectively, when the application u/s 488 Cr. P. C. was filed in December 1957. The opposite party's case was that the petitioner became unduly intimate with a woman named Lachhia and began to ill-treat her and thereafter she went away to her native village together with the three surviving children; and when she came back about 4 months before she filed an application u/s 488 Cr. P. C., she found that the husband, the petitioner, had married the woman Lachhia and was living with her. After the opposite party's return to Calcutta, the petitioner sent his second wife Lachhia to his native village, but he continued to ill-treat the opposite party and beat her from time to time and did not give sufficient money for the maintenance of herself and her children. Accordingly, the opposite party filed an application u/s 488 Cr. P. C. asking for maintenance of Rs. 50/- per month from herself and Rs. 20/- for each

of the children or Rs. 110/- in all.

2. The petitioner contested the application denying that he had married Lachhia and alleging that the application u/s 488 Cr. P. C. had been filed by the opposite party under the influence of Bhagwan Das, brother of the opposite party, who had also induced the opposite party to give away her ornaments to him. According to the petitioner there was no reason for the opposite party for filing such an application for maintenance.

3. The learned Magistrate however was satisfied from the evidence adduced before him that the petitioner had married a second wife Lachhi and was not maintaining his wife and children properly and accordingly he passed an order for maintenance of Rs. 20/- per month for the opposite party and Rs. 10/- for each of the children or Rs. 50/- in all.

4. Against that order the present revisional application has been preferred. In support of the Rule Mr. Kanaidhon Dutt appearing for the petitioner has urged three points. The first point is that the evidence of the witnesses was not taken in the presence of the petitioner as required by Section 488(6) Cr. P. C. It appears that after the hearing was twice adjourned the petitioner was still absent and so ex parte hearing was commenced, but thereafter the petitioner appeared and in his presence the witnesses were cross-examined. This was sufficient compliance with the provisions of S 488(6) Cr. P. C.

5. The second point urged by Mr. Dutt is that there was no examination of the petitioner u/s 342 Cr. P. C. There is nothing however in the Section 488 to indicate that Section 342 applies to such a case. In such a case the husband or the father against whom the maintenance is sought is not in the position of an accused, and consequently the provisions of Section 342 do not apply.

6. The 3rd point urged by Mr. Dutt that before the conclusion of the hearing the petitioner filed an application stating that the opposite party had become pregnant by cohabitation with some body else other than the petitioner himself and that a medical examination should be held to ascertain the truth of the allegation, and it is urged by Mr. Dutt that the learned Magistrate wrongly rejected the application. The learned Magistrate observed that in view of the admitted evidence that the opposite party was living with the petitioner in the same room it should be presumed that the pregnancy was due to cohabitation with her husband. In this view the Magistrate was quite right and he is supported in his view by the provisions of Section 112 of the Indian Evidence Act. Thus I find that there is no substance in any of the points urged by Mr. Dutt.

7. There is however another point on which it appears to me that the order of the learned Magistrate was not quite proper. The provisions of Section 488 Cr. P. C. were inserted in the Code in order that a Magistrate might take a summary action for preventing destitution. The provisions are really intended for ensuing some supply of food, clothes and shelter to deserted wives and children; they are not intended to be used by wives who are living with their husbands, on the plea

that the husbands are ill-treating them and not giving sufficient money for their maintenance or making their lives miserable. In such cases the wives should seek remedy by first separating and then seeking maintenance or dissolution of the marriage. In this view, I am supported by an observation of a Division Bench of the Madras High Court in the case of Musunuru Nagendramma Vs. Musunuru Ramakotayya, where their Lordships observed as follows:

"The object (of Section 488 Cr. P. C.) is to provide cheap and speedy but limited relief for deserted wives and children".

The opposite party has admittedly been living with her husband from four months before she filed the application u/s 488 Cr. P. G and there is reason to think that the parties are living together as husband and wife and the wife has become pregnant as a result of such living together. In the circumstances, the application u/s 488 Cr. P. C. appears to have been misconceived.

8. It is to be observed that the attitude of the petitioner husband does not appear to be satisfactory, because he lodged informations with the police which were recorded in the General Diary against his wife and the wife's brother, Moreover during the pendency of the case, as already stated, he alleged that his wife living with him in the same room had become pregnant due to cohabitation with another man. Therefore unless the petitioner mends his behaviour to his wife, he is likely to find himself in trouble in future. But so long as the opposite party is living with him I do not think the wife is entitled to maintenance for herself and for her children.

9. This Rule is therefore made absolute and the order passed by the learned Magistrate for main tenance is vacated.