

REVISIONAL CRIMINAL

Before H. R. Sodhi and Man Mohan Singh Gujral, JJ.

BASANT SINGH,—Petitioner

versus

SHAM KAUR, ETC.,—Respondents.

Criminal Revision No. 16-R of 1968

October 12, 1970.

Code of Criminal Procedure Act (V of 1898)—Section 488—Proviso to sub-section (3)—Whether applicable to section 488(1) and available to the husband at the time of the decision of the petition for maintenance.

Held, that in order to succeed in her petition under sub-section (1) of Section 488 of Code of Criminal Procedure, the wife has to establish that the husband has sufficient means and that he has neglected or refused to maintain her. The neglect or refusal is to be seen with regard to the period when the application is made and is not confined to only the past conduct of the husband. It is, therefore, open to the husband to plead that he is willing to maintain his wife provided she lives with him in order to negative the wife's contention that she was being neglected or that there was a refusal on the part of the husband to maintain her. From this it would necessarily follow that the wife is also entitled to establish that the offer made by the husband is not genuine and there are good reasons for her living separately and that the conditional offer amounted to refusal to maintain. In order, therefore, to find whether there has been neglect or refusal on the part of the husband to maintain his wife the Magistrate has to go into the *bona fides* of the offer made by the husband during the proceedings under sub-section (1) in the light of the reasons given by the wife for refusing to live with him. Proceedings under section 488 of the Code are of a summary nature and provide a speedy remedy to the wife to claim food, clothing and shelter in case she is deserted by the husband. Having regard to the principle underlying this provision, any interpretation put on the first proviso to sub-section (3) which may have the effect of prolonging the proceedings and delaying the receipt of the maintenance allowance by the wife or the child who has been deserted would be contrary to the scheme of section 488 of the Code. If the husband is not allowed to show that he is ready and willing to keep his wife or the wife is not allowed to establish that the offer of the husband is not bona fide or that she has good reasons to stay away when her application for maintenance is tried and these pleas are available only when the orders are sought to be enforced it will necessarily have the effect of delaying the proceedings relating to the grant of maintenance to the wife.

Hence considering the proper scope of the expression "neglect and refusal" the proviso to sub-section (3) along with its amendment is applicable to sub-section (1) of Section 488 of the Code. (Paras 22 and 23)

Case referred by Hon'ble Mr. Justice Jindra Lal on 1st November, 1963 to a larger Bench for decision of an important question of law involved in the case. The case was finally decided by a Division Bench consisting of Hon'ble Mr. Justice H. R. Sodhi and Hon'ble Mr. Justice Man Mohan Singh Gujral, on 12th October, 1970.

Case reported under section 438, Criminal Procedure Code by Shri Diali Ram Puri, Sessions Judge, Ferozepur, with his reference No. 1687-A, dated 13th December, 1967, for revision of the order of Gurjit Singh Sandhu, Judicial Magistrate, 1st Class, Gidderbaha, dated 31st July, 1967, allowing maintenance to Sham Kaur and Chhoto in the sum of Rs. 50 and Rs. 20 per mensem respectively.

PIARA SINGH GHUMAN, ADVOCATE, FOR G. S. GREWAL, ADVOCATE, FOR THE petitioner.

MRS. SURJIT BINDRA, ADVOCATE, FOR THE respondents.

THE FACTS OF THE CASE ARE AS FOLLOWS :

(1) This is a petition for revision against the order of Shri Gurjit Singh Sandhu, Judicial Magistrate, 1st Class, Gidderbaha, under section 488 of the Criminal Procedure Code whereby Shrimati Sham Kaur was allowed a monthly Allowance of Rs. 50 and her daughter, Chhoto, a maintenance of Rs. 20 per mensem against Basant Singh, husband of the former.

(2) Shrimati Sham Kaur was married to Basant Singh, petitioner, about 18 years ago, and out of this wedlock two daughters were born, one of whom Chhoto, who was about four years of age at the time of these proceedings, is alive. According to Shrimati Sham Kaur, the reason for the rupture of her relations with her husband was the frustration of his expectation to get a male child in the family. And at the occasion of the birth of the second daughter, Basant Singh is said to have betrayed his disappointment by his failure to fetch her from the house of her parents where the birth took place. After that there were proceedings for restitution of conjugal rights, which were instituted by him and eventually ended in a compromise, whereafter both of them started living together. But this is said to have been violated by her ill-treatment by Basant Singh. And only a couple

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of weeks before these proceedings were initiated, Sham Kaur and her daughter, Chhoto, were said to have been turned out of the house; the attempt of her father to persuade Basant Singh to receive them in his house and provide maintenance to them having been unsuccessful. It was under these circumstances that a consolidated amount of Rs. 100 as maintenance was sought by Sham Kaur for herself and for her minor daughter, Chhoto.

This application was opposed by Basant Singh on denial of any ill-treatment or violence against Shrimati Sham Kaur. He admitted that he had taken proceedings for restitution of conjugal rights against Shrimati Sham Kaur and on the basis of a compromise between them both lived together as husband and wife for about three months. He denied the allegation if he contemplated a second marriage and expressed his agreeableness to keep Shrimati Sham Kaur in his house and to maintain her. He also explained that it was he who had taken proceedings for restitution of conjugal rights against Shrimati Sham Kaur when the latter returned to live with the former. Once again he reiterated his desire to keep Shrimati Sham Kaur and her daughter with him.

(3) In a perfunctory order in which the only discussion of the evidence and the various legal aspects involved in such proceedings was "I do not feel inclined with the story put forth by the respondent. The evidence led by the applicant is very convincing and appealable to my mind", the trial Magistrate made a direction that the petitioner shall pay Rs. 50 per mensem as maintenance to Shrimati Sham Kaur and Rs. 20 per mensem to her daughter, Chhoto.

The proceedings are recommended to High Court on the following grounds :

4. As already indicated, the petitioner had made an offer to maintain his wife on condition of her living with him. In such a situation it was obligatory on the learned trial Magistrate to find out if Shrimati Sham Kaur was agreeable to accept this offer of return to the household of her husband. And if it was not so, what were the grounds of her refusal. The proviso appended to section 488, Clause 3 of the Criminal Procedure Code is as follows:—

"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 ground of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing."

Thus, it is obligatory in such proceedings to consider the offer of the husband to maintain his wife on condition of her living with him. And in the event of her refusal to accept this offer, the Magistrate is under an obligation to examine grounds of her refusal, though, notwithstanding such offer, he may grant maintenance. If, however, the wife refuses to live with her husband without any sufficient reason, her claim to maintenance will not be supportable. The learned trial Magistrate has not considered this aspect of the case. Nor has he given the other necessary findings regarding neglect or refusal of Basant Singh to maintain Sham Kaur and Chhoto, without which an order of maintenance could not be made. As the learned trial Magistrate has failed to apply his mind to the various legal aspects involved in these proceedings, his order regarding grant of maintenance is not legally sustainable. I, therefore, submit these proceedings to the Hon'ble High Court with the recommendation that this order may be quashed with a direction for retrial of the case by the learned Magistrate in accordance with law.

ORDER OF SINGLE BENCH

JINDRA LAL, J.—(4) This revision is reported for acceptance by the learned Sessions Judge, Ferozepur, by his order, dated the 13th of December, 1967. The reasons for the recommendation are clearly set out by the learned Sessions Judge in his order of reference. One of the points which arises in this case is whether the first part of the proviso which comes after sub-section (3) of section 488, Criminal Procedure Code, is available to the husband even under sub-section (1) at the time of the decision of the application for maintenance as well as at the time of the enforcement of the maintenance order. There are two authorities of this Court in which opposite views have been taken. Whereas Harbans Singh, J., in *Smt. Ranjit Kaur v. Dr. Avtar Singh* (1) has taken the view that the first proviso is available also under sub-section (1) of section 488, Criminal Procedure

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Code, R. P. Khosla, J., in *Dewan Singh Wasawa Singh v. Harbans Kaur Dewan Singh and another* (2) has taken the other view. R. P. Khosla, J., has held that the first proviso to section 488(3) relates to enforcement of the order for maintenance and does not govern section 488(1). R. P. Khosla, J., has relied upon *Mst. Roshan Bano v. Azim* (3), which is a Division Bench authority but Harbans Singh, J., has explained the law laid down in A.I.R. 1943, Lahore 59.

(5) This matter is coming to this Court again and again and it is desirable that it be finally settled as far as this Court is concerned. I, therefore, order that the papers of this case be placed before my Lord the Chief Justice for constituting a larger Bench to hear this petition at a very early date and to refer the whole matter to the said Bench.

(6) Learned counsel for the respondent has urged that the petitioner has not paid a single penny to the respondent since July, 1967, when the order was made and that the stay order should be vacated. Learned counsel for the petitioner, however, submits that there is a patent error in the judgment of the learned Magistrate and consequently the stay order should continue but he has undertaken to make an *ex gratia* payment of Rs. 200 to the respondent within a fortnight from today. On this undertaking, the stay order already granted is to continue till the decision of this petition.

JUDGMENT OF THE DIVISION BENCH

MANMOHAN SINGH GUJRAL, J.—(7) Facts giving rise to this reference briefly stated are as follows. Sham Kaur, filed an application under section 488 of the Criminal Procedure Code, against her husband Basant Singh of village Tharjwala for the grant of maintenance allowance for herself and her daughter Chhoto on the allegation that she was married to Basant Singh some twenty years before filing the application and that two children were born out of this wedlock out of whom one daughter was alive and was aged four years. It is further stated that no child was born to Sham Kaur for a considerable time and, therefore, her husband started maltreating her and ultimately turned her out of the house. Basant Singh, however, filed a petition for restitution of conjugal rights which ended in a compromise with the result that Sham Kaur returned to the house of her husband. This amity did not last long and Basant Singh

(2) A.I.R. 1962 Pb. 247.

(3) A.I.R. 1943 Lah. 59.

again started maltreating Sham Kaur and ultimately turned her out of the house two or three months later along with her daughter Chhoto. Basant Singh resisted this application and denied the allegations that he ever ill-treated Sham Kaur or that he wanted to marry somebody else. He also added that he had taken proceedings for restitution of conjugal rights as he was desirous of Sham Kaur living with him. He again made an offer to keep Sham Kaur and her daughter with him.

(8) Both parties led evidence in support of their respective contentions. By a laconic order, dated 31st July, 1967, the learned trial Magistrate allowed the application of the wife ordering the grant of Rs. 50 to the wife and Rs. 20 to the daughter as maintenance allowance. Being aggrieved Basant Singh went up in revision to the Court of Session which was decided by order, dated 13th December, 1967, whereby a reference was made to this Court that the order of the trial Court be quashed with the direction that the case be re-tried in accordance with law.

(9) The learned Sessions Judge while making the reference observed that the trial Magistrate had not considered the offer made by the husband to maintain his wife on the condition of her living with him and that in the event of her refusal to accept his offer the Magistrate was under an obligation to examine the grounds of her refusal. Secondly, it was observed that the Magistrate had not given a finding on the neglect or refusal of Basant Singh to maintain Sham Kaur and her daughter.

(10) The first ground mentioned by the Sessions Judge raises the question whether the first part of the proviso to sub-section (3) of section 488 was available to the husband even under sub-section (1) at the time of the decision of the application for maintenance or was available only at the time of the enforcement of the maintenance order. This case first came up before Jindra Lal, J., who considering the conflict of views expressed by Harbans Singh, J. (as his lordship then was) in *Ranjit Kaur v. Dr. Avtar Singh* (1) and Khosla, J., in *Dewan Singh Wasawa Singh v. Harbans Kaur Dewan Singh and another* (2) and finding that this question was likely to come up again and again to this Court referred the question to a larger bench. It was in this manner that the case came before us.

(11) In order to appreciate the arguments of the learned counsel for the parties it will be necessary to make a reference to sub-sections (1) to (5) of section 488 of the Criminal Procedure Code which are in the following terms:—

- “488. (1) If any person having sufficient means neglects or refuses to 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) 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 of 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 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.

(12) On behalf of the petitioner, on the basis of the observations in *Ranjit Kaur v. Dr. Avtar Singh* (1), it was contended that the first part of the proviso which comes after sub-section (3) of section 488 is available to the husband even under sub-section (1) at the time of the decision of the application for maintenance as well as at the time of the enforcement of the maintenance order. It was also canvassed before us that irrespective of the first part of proviso to sub-section (3) even otherwise it was open to the husband to offer to maintain the wife on the condition of her living with him and it was necessary for the Court to find, in case the wife refused to live with the husband, that her refusal was justified. If on inquiry it was established that the refusal of the wife to go with the husband was well-based the conditional offer of the husband would amount to refusal on his part to maintain the wife. As against these arguments, on behalf of respondent Sham Kaur it is canvassed that the first proviso to section 488(3) relates to the enforcement of the order for maintenance and does not govern section 488(1) and where, therefore, the husband made an offer in the maintenance proceedings to take the wife back it was not incumbent on the Magistrate to go into the reasons which led the wife to refuse the offer. Reliance for this view was placed on another decision of this Court in *Dewan Singh Wasawa Singh v. Harbans Kaur Dewan Singh and another* (2).

(13) While proceeding to decide *Dewan Singh Wasawa Singh's* case (2), R. P. Khosla, J., did not refer to the views expressed by Harbans Singh, J., in *Ranjit Kaur's* case (1), as it appears that this

case was not brought to the notice of R. P. Khosla, J. In *Dewan Singh Wasawa Singh's* case (2), the observations of R. P. Khosla, J., were more in the nature of obiter as it had been found as a fact that the offer made by the husband was a belated one and not *bona fide*. In view of this finding, it was not necessary to decide whether it was open to the Magistrate to enquire into the reasons for the refusal of the wife to live with the husband when offer by the husband was made in the proceedings under section 488(1). Leaving this aside, while construing the proviso to sub-section (3) in *Dewan Singh's* case (2), the effect of the expression "an order under *this section*" was not taken notice of. Not only that, the proviso to sub-section (3) was not considered in the light of the provisions of sub-sections (4) and (5) which also in a way indicate that the first proviso to sub-section (3) is in fact a proviso to sub-section (1) and not to sub-section (3). For these reasons, with utmost respect to the learned Judge who decided *Dewan Singh's* case (2) I cannot agree with the view taken therein and I find that the interpretation put on the proviso to sub-section (3) by Harbans Singh, J., in *Ranjit Kaur's* case (1) was more in accordance with the scheme of the section and the object behind the section.

(14) While deciding *Dewan Singh's* case (2), R. P. Khosla, J., found support in *Mst. Roshan Bano v. Azim* (3). No doubt, in this case some of the observations support the view that first proviso to sub-section (3) of section 488 only governs this sub-section and not sub-section (1), but these observations were again obiter and the learned Judges who decided this case were not really called upon to decide this point. The facts in that case were somewhat peculiar. In a wife's petition under section 488 the parties entered into a compromise by which it was agreed that both would live together. The husband had agreed to give the wife a house to live in and to properly feed and clothe her and in case he made a default he agreed to pay Rs. 5 per mensem as maintenance. The wife also accepted this offer and agreed to live in the house provided by the husband and, in lieu of maintenance accepted Rs. 5 per mensem. In view of this compromise the Court ordered that the husband should provide a house for the wife and further pay her Rs. 5 a month from 1st March. This order not having been carried out by the husband the wife approached the Court for the enforcement of the order which application was resisted by the husband. The Magistrate dismissed the application on the ground that the wife should follow her remedy

in a Civil Court. On revision the Sessions Judge forwarded the proceedings to the High Court holding that the Magistrate had legally erred in refusing to enforce the order of maintenance passed by his predecessor. When the matter came up before the High Court it was found that the Magistrate was not empowered to order the husband to provide a house for his wife as that order could not be made under section 488. The order of the Magistrate was therefore, considered to be in excess of jurisdiction and no question, therefore, properly arose about the applicability of the first proviso to sub-section (3) of section 488. Moreover, considering the undertaking given by the husband to provide a residence for the wife and to pay Rs. 5 per mensem in case he did not properly maintain or feed her it could not be said that the husband was neglecting or refusing to maintain the wife. When the petition of the wife for the grant of maintenance came up for decision it was impliedly accepted that it was open to the husband to make such an offer and for the wife to accept or refuse it. From this it necessarily follows that the Magistrate even at the stage of granting the maintenance could determine whether the offer was *bona fide* or not.

(15) On behalf of the wife reference was lastly made to *Ramji Malviya v. Smt. Munni Devi Malviya* (4) In this case it was found as a fact that the allegations of cruelty and beating by the husband to the wife had not been established. It was further found that it was the wife who had deserted the husband in 1951 and it was thereafter in 1955 that the husband remarried. In spite of these findings the Magistrate ordered the husband to pay Rs. 40 per mensem as maintenance. When the matter came up before the High Court the question that really arose for determination was whether the benefit of the amendment to the first proviso to sub-section (3) was available to the wife in proceedings under sub-section (1) of section 488. Admittedly, the husband had remarried after five years of the desertion by the wife and taking advantage of this remarriage the wife wanted to claim maintenance on the basis of the amendment to the first proviso to sub-section (3). While interpreting the first proviso to sub-section (3) M. C. Desai, J., observed as under :—

“The proviso that if the husband offers to maintain the wife on condition of her living with him and she refuses to live with him on the ground that he has contracted marriage

(4) A.I.R. 1959 All. 767.

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with another woman, the Magistrate will hold that she had a just ground for her refusal and will reject the offer, is a part of sub-section (3), which deals only with the enforcement of a maintenance order. The proviso is a part of the first sentence of sub-section (3) the sentence ends with a colon, not with a full stop, and, therefore, must be read with it only and not with any other sub-section, such as sub-section (1).

It is true that the words used in the proviso are "make an order under this section" and that sub-section (3) does not expressly provide for making any "order" but the context in which the proviso is placed leaves no room for doubt that it governs the provision of sub-section (3) only and not that of sub-section (1) in addition. It may be that the legislature meant issuing a warrant for levying the amount due, to be an "order" on the wife's application for enforcement of the maintenance order passed under sub-section (1). It is difficult to understand why the legislature used the word "section" instead of "sub-section". The second proviso is undoubtedly a proviso to sub-section (3); it has nothing to do with the contents of sub-section (1).

If the second proviso applies only to sub-section (3) the first proviso also must apply only to sub-section (3). Sub-section (4) governs the whole section including sub-section (1); no maintenance can be granted to a wife under sub-section (1) if she is living in adultery, or if without any sufficient reason she refuses to live with her husband, or if she and her husband are living separately by mutual consent. In the face of sub-section (4) it was unnecessary for the legislature to apply the first proviso to sub-section (1), also. The proviso seems to have been enacted in order to give the husband one more opportunity of offering to maintain the wife on condition of her living with him. He might not have made such an offer while the application for maintenance under sub-section (1) was pending against him; he might have thought that the wife would not succeed in proving a sufficient reason for her living separately from him.

So the legislature might have enacted the proviso to give him the right to make such an offer when an order made against him under sub-section (1) was sought to be enforced through issue of a warrant. He might also feel aggrieved by the heavy amount of maintenance ordered to be paid by him and might think it better to keep her with him and maintain her than to pay such a heavy amount to her. There is thus sufficient explanation for the enactment of the proviso to govern sub-section (3), even though there is sub-section (4) which governs sub-section (1)."

From the above observations it clearly emerges that the learned Judge was not clear as to why the legislature had used the word "section" in the proviso instead of the word "sub-section" and without trying to overcome this difficulty came to the conclusion that this proviso only governed sub-section (3). Interpretation of the proviso without explanation of the word "section" instead of "sub-section" would, therefore, have to proceed on the assumption that the legislature had made mistake in using the word "section" even though the intention was to limit the proviso to sub-section (3).

(16) There seems to be no basis for this assumption especially when we consider that the amendment to the proviso was introduced much later and by that time the interpretation put on the proviso by the various High Courts had come to the notice of the legislature. By the time the amendment to the proviso was introduced, in a long string of decisions it had been held that the proviso was available at the stage of making of the order for maintenance and if the intention was to limit this proviso to only sub-section (3) the legislature would have introduced the necessary amendment to the proviso also. In interpreting that the first proviso was only limited in its applicability to sub-section (3), in the main, three reasons have been advanced by the learned Judge, in the above observations. Firstly, it was observed that the context in which the proviso occurs leaves no room for doubt that it governs the provision of sub-section (3) only. The second reason is that the second proviso applies only to sub-section (3). Thirdly, it was stated that in the face of sub-section (4) it was unnecessary for the legislature to apply the first proviso to sub-section (1) also. On a careful analysis of these reasons it would appear that none of these reasons is sufficient to compel this interpretation in the face of the word "section" used in the proviso.

No doubt, the proviso appears after sub-section (3) but besides that there is nothing else to suggest that it had a limited applicability even though the legislature had intentionally used the word "section" instead of "sub-section". Considering the second reason that because the second proviso applies only to sub-section (3) the first proviso must also apply to sub-section (3) as in both these provisos the word "section" has been used instead of the word "sub-section", it may be stated that in a way it can be said that the second proviso also refers to sub-section (1). This proviso lays down that no warrant shall be issued for the recovery of any amount due under this section unless application is made within one year from the date the amount becomes due. The amount can only become due after an order under sub-section (1) has been passed and, therefore, in this proviso the word "section" seems to have been intentionally used to cover the order passed under sub-section (1). The amount is not really due under sub-section (3) but is due only by virtue of an order passed under sub-section (1) and, therefore, the legislature was right in using the word "this section" in the second proviso also. This argument is, therefore, not available that as the second proviso only applies to sub-section (3) the first proviso be so limited in its application.

(17) While advancing the third reason it was observed by the learned Judge deciding *Ramji Malviya's* case (4) that the proviso seems to have been enacted in order to give the husband one more opportunity to maintain the wife on the condition of her living with him. From this it follows that the husband had an earlier opportunity to make the offer and that opportunity could only be at the stage of the trial of the petition for the grant of maintenance under section 488(1). According to the reasoning in *Ramji Malviya's* case (4), this opportunity seems to have been provided by sub-section (4) and not by proviso to sub-section (3). Firstly, if that interpretation is accepted the whole controversy would become futile. It would be immaterial whether the husband will be allowed to make the offer under sub-section (4) or under proviso to sub-section (3) as the effect will be the same. In either case it will be open to the husband to make a conditional offer and the wife would only be able to succeed in obtaining maintenance if she could show that she had sufficient cause for refusing to live with the husband. Secondly, from the language of sub-section (4) and especially the expression "no wife shall be entitled to receive an allowance" it appears that this sub-section would more appropriately come into play after the amount

has been fixed under sub-section (1) of section 488 and not at the stage when the maintenance allowance is yet to be fixed.

(18) For all these reasons indicated above, with all respect I am unable to agree with the view taken by Desai, J., in *Ramji Malviya's* case (4).

(19) Before considering the decision in *Ranjit Kaur's* case a reference need be made to some of the authorities in which a similar view has been taken. In *Sultan v. Mahtab Bibi* (5), it was observed by Campbell, J., that where the husband is ready to keep the wife and children, the Court must enquire from the wife why she is unwilling to go and live with her husband and then decide the case according to law. In this case the wife had stated that the husband used to maltreat her and she had been turned out of the house but at the trial the husband had offered to keep her. As without making any enquiry from the wife as to why she was not willing to go and live with her husband when the latter was ready to receive her the order of maintenance was passed, it was held that the omission of this enquiry on the part of the trial Court had vitiated the proceedings. No doubt, in this case no direct reference was made to the proviso to sub-section (3) but the decision proceeded on the assumption that even before the passing of the order granting maintenance under sub-section (1) it was necessary to find whether the offer of the husband to maintain the wife in case she lived with him was *bona fide* or there was sufficient ground for the wife to refuse to live with him. Similarly, in *Bhanwarlal v. Gita bai*, (6), the case was decided on the assumption that the first proviso and its amendment could be pressed into service by the husband in reply to a petition under section 488 of the Criminal Procedure Code though this argument was not specifically raised and it was held as under :—

“When a husband effects a second marriage, it is open for the first wife to refuse to live with her husband and that will be considered to be a just ground for her refusal. The proviso to sub-section (3) of section 488 entitles the Magistrate to consider the grounds put forward by the wife claiming maintenance for her refusal to stay with her

(5) A.I.R. 1926 Lah. 536.

(6) A.I.R. 1957 M.P. 221.

husband in spite of an offer to that effect and to pass order awarding maintenance to her, if such grounds are considered by him to be just. The amendment to the proviso puts down the fact of second marriage by the husband as a just ground for her refusal.

Therefore, even if there be an offer by the husband, to maintain his wife on condition for her living with him, the Magistrate is entitled to pass an order of maintenance, if that offer be under the circumstance that the husband has contracted a second marriage and his second wife is living with him.

The same view was taken in *Rehman Mir v. Mst. Sara Begum* (8) though no direct reference was made to the first proviso to sub-section (3).

(20) In the above cases though the decision proceeded on the basis that it was open to the husband to offer to maintain the wife on the condition of her living with him during the trial of the petition under section 488 for the grant of maintenance allowance, the question whether the first proviso to sub-section (3), was in terms applicable to sub-section (1) also, was not directly considered. However, the question was considered in *Ranjit Kaur's* case, (1) by Harbans Singh, J. (as he then was) and it was observed that the first part of the proviso which comes after sub-section (3) of section 488 is available to the husband even under sub-section (1), at the time of the decision of the application for maintenance as well as at the time of the enforcement of the maintenance order. While considering this matter it was further observed by Harbans Singh, J., as follows :—

“There can be no manner of doubt that under sub-section (1), before a Magistrate can pass an order, he must be satisfied with regard to two matters, namely, that the husband has sufficient means and that he has neglected or refused to maintain his wife or child. There is, however, nothing to indicate how neglect or refusal is to be established. Where the husband offers to maintain his wife only on the condition of her living with him and if the Court finds that refusal by the wife to go and live with her husband

is justified, such a conditional offer by itself would really amount to refusal on the part of the husband to maintain his wife if she continued to live away from him. Thus, where the husband has taken a second wife and he refuses to maintain his first wife unless the latter is agreeable to go and live with him, this circumstance by itself will be sufficient to establish refusal of the husband, and thus, in practice, the existence of a second wife or the keeping of a mistress would, unless there is something else proved against the wife, result in the acceptance of the petition of the wife for the grant of the maintenance."

(21) In *Ranjit Kaur's* case (1), reference was also made to *H. Syed Ahmad v. Naghhath Parveen Taj Begum* (8), K. S. Hegde, J. (as his lordship then was) repelled the contention that the proviso to sub-section (3) and its amendment could only come into play during the course of the enforcement of the order made under sub-section (1) of section 488 and it has nothing to do with the order to be made under sub-section (1). While rejecting the above argument Hegde, J., observed that "this would make the whole section look ridiculous and that Courts have uniformly accepted the view that a husband could in an application under section 488 take the plea that he is willing to maintain his wife if she lives with him.

(22) The proviso to sub-section (3), as amended was added for the protection of the wife and not in the interest of the husband. The idea behind this proviso seems to be to prevent a Court from readily accepting the view that if a husband makes an offer to maintain his wife on the condition of his wife living with him he ceases to neglect or to refuse to maintain his wife within the meaning of sub-section (1) of section 488. To say that in a claim by the wife for the grant of maintenance allowance the husband cannot make an offer to maintain the wife on the condition of her living with him or the wife cannot be allowed to show that the offer of the husband is not *bona fide* and that she has good reasons to stay away, would defeat the object for which section 488 was enacted. Proceedings under section 488 are of a summary nature and provide a speedy remedy to the wife to claim food, clothing and shelter in case she is deserted by the husband. Having regard to the

(8) A.I.R. 1958 Mys. 128.

principles underlying this provision it may be concluded that any interpretation put on the first proviso to sub-section (3), which may have the effect of prolonging the proceedings and delaying the receipt of the maintenance allowance by the wife or the child who has been deserted would be contrary to the scheme of section 488. If the husband is not allowed to show that he is ready and willing to keep his wife or the wife is not allowed to establish that the offer of the husband was not *bona fide* or that she has good reasons to stay away when her application for maintenance is tried and these pleas are available only when the orders are sought to be enforced it will necessarily have the effect of delaying the proceedings relating to the grant of maintenance to the wife. The expression "fails without sufficient cause" occurring in sub-section (3) does not include pleas which can and ought to have been raised during the trial of the application under sub-section (1) of section 488. Any cause that existed at the time the order was sought to be passed should be considered at the stage and it is not open to the husband to have the same reason considered by the Court under sub-section (3). In *Ram Kishore v. Bimla Devi* (9), the view taken was that proviso to sub-section (3) is not at all applicable to that sub-section and is only proviso to sub-section (1). It is however, not necessary in the present case to consider this argument as we are only concerned whether this proviso is available at the stage of sub-section (1) of section 488 and it is not for consideration whether this proviso is available at the time of the enforcement of the order.

(23) In order to succeed in her petition under sub-section (1) of section 488 the wife has to establish that the husband has sufficient means and that he has neglected or refused to maintain her. The neglect or refusal is to be seen with regard to the period when the application is made and is not confined to only the past conduct of the husband. It is, therefore, open to the husband to plead that he was willing to maintain his wife provided she lived with him in order to negative the wife's contention that she was being neglected or that there was a refusal on the part of the husband to maintain her. From this it would necessarily follow that the wife is also entitled to establish that the offer made by the husband was not genuine and there were good reasons for her living separately and that the conditional offer amounted to refusal to maintain. In order, therefore, to find whether there has been neglect or refusal on the

(9) A.I.R. 1957 All. 658.

part of the husband to maintain his wife the Magistrate has to go into the *bona fides* of the offer made by the husband during the proceedings under sub-section (1), in the light of the reasons given by the wife for refusing to live with him. Considering, therefore, the proper scope of the expression "neglect or refusal" I am clearly of the view that proviso to sub-section (3) along with its amendment is applicable to sub-section (1) of section 488.

(24) For the foregoing reasons I find that the trial Magistrate had erred in not considering the offer made by the husband to maintain his wife on the condition of her living with him, and in the event of her refusal to accept the offer, in not examining the grounds of her refusal. The reference is, therefore, accepted and the order of the trial Magistrate dated 31st July, 1967, is set aside and the case is remanded for decision in accordance with law.

H. R. SODHI, J.—I agree.

N.K.S.

INCOME TAX REFERENCE.

Before Prem Chand Pandit and S. S. Sandhawalia, JJ.

M/S R. B. JODHAMAL KUTHIALA,—Applicant

versus

THE COMMISSIONER OF INCOME-TAX,—Respondent.

Income Tax Reference No. 43 of 1966

October 14, 1970.

Income Tax Act (XI of 1922)—Sections 10 and 12—Excess Profits Tax Act (XV of 1940)—Section 14-A (1)—Amount refundable under—Nature and character of—Such amount along with interest—Whether to be assessed as "other sources" under section 12 or as "business profits" under section 10—Interest paid on the refundable amount—Whether forms integral part of the amount.

Held, that in determining as to what is the character of the payment originally made as excess profit tax and also of the amounts refunded subsequently under section 14-A(7) of the Excess Profits Tax Act, the origin and the ancestry of the principal amount to which statutory accretions are made under sub-section (7) cannot possibly be lost sight of. Undoubtedly when