

Bhagwant Singh v. Commissioner of Income-tax Bhandari, C. J. draw a salary was made possible by the use of joint family funds which enabled him to become a partner and to claim remuneration for the services rendered by him. In other words, his right to draw salary flowed directly from the joint family funds. This is another way of saying that the income on account of salary was acquired with the aid of joint family property.

For these reasons, I would answer all the three questions propounded by the tribunal in the negative. The Department will be entitled to the costs of this Court and counsels fee which I assess at Rs. 250.

Bishan Narain,
J.

BISHAN NARAIN, J.—I agree.

B.R.T.

REVISIONAL CRIMINAL

Before R. P. Khosla, J.

DARBARA SINGH,—*Petitioner.*

versus

KARNAIL KAUR,—*Respondent.*

Criminal Revision No. 1327 of 1958.

1959
May, 29th

Code of Criminal Procedure (V of 1898)—Section 488—Jurisdiction to grant maintenance—When arises—Proviso to Section 488(3)—Second marriage by husband—Whether entitles the first wife to claim maintenance without proof of “neglect” or “refusal” on the part of the husband—“Another wife”—Meaning of—Second wife—Whether entitled to the benefit of the Proviso—Proviso—Whether retrospective.

Held, that the jurisdiction to grant maintenance under Section 488 of the Code of Criminal Procedure, 1898, arises only if the applicant wife in the first instance proves (1) that the husband has sufficient means, and (2) that despite that he has neglected or refused to maintain her.

Unless these matters are proved, the wife has no cause whatever for complaint nor is she entitled to ask for maintenance. It is after having proved these ingredients that the question arises as envisaged by clause (2) as to the period from which the maintenance had to be ordered.

Held, that the enforcement of the order of maintenance can be resisted by the husband offering to take back the wife. Second marriage entitles the wife to set up, apart from other objections the ground of second marriage as a reason entitling her to refuse to accede to the request of the husband. The order of maintenance has to be in existence before the support of the proviso to sub-section (3) of Section 488 can be invoked.

Held also, that the expression "Another wife" in the proviso to sub-section (3) of Section 488, Code of Criminal Procedure, means any other spouse and has no relation to the order in which marriages have taken place. The benefit of the proviso would accrue to the first wife if she is the applicant or to the second wife if she comes to court seeking maintenance. "Another wife" is synonymous with "discarded wife". The second wife is equally entitled to the benefit of the proviso, provided other requirements of section 488 of the Code of Criminal Procedure, clauses (1), (2) and (3) have been satisfied.

Held further, that the proviso to sub-section (3) of Section 488, Code of Criminal Procedure, being a remedial enactment would ordinarily be deemed to be retrospective. For the decision whether the proviso applied or not it will have to be found whether in point of time the proviso was in existence when the cause to the applicant arose, for if the application seeking maintenance arose after the proviso, the matter clearly would be covered by the proviso and it would be just ground for the wife's refusal to live with her husband if he has contracted marriage with another wife or taken a mistress before the enactment of the proviso.

Sm. Bela Rani Chatterjee v. Bhupul Chandra Chatterjee (1), *The State v. Mt. Anwarbi and others*, (2), *Bharat Bhushan v. Sudarshan Kumari*, (3), *Gunni v. Babu Lal*, (4), relied upon.

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- (1) A.I.R. 1956 Cal. 134
 - (2) A.I.R. 1953 Nag. 133
 - (3) 1955 P.L.R. 328
 - (4) A.I.R. 1952 M.B. 131

Mst. Dhan Devi v. Sadhu Ram, (1), and Kunti Bala Dassi v. Nabin Chandra Das, (2), not followed.

Petition under Section 435/439 Cr. P. C. for revision of the order of Sh. H. D. Loomba, Additional Sessions Judge, Hissar, dated the 17th July, 1958, affirming that of Sh. G. L. Nagpal, Magistrate Ist Class, Sirsa, dated the 24th March, 1958, ordering Darbara Singh respondent to pay to Karnail Kaur a sum of Rs. 50 per month as maintenance, from the date of the application.

P. C. PANDIT,—for Petitioner.

N. S. KEER, for Respondent.

JUDGMENT

R. P. KHOSLA, J. R. P. KHOSLA, J.—This petition in revision by husband has arisen from an order granting maintenance to the wife on an application under section 488 of the Code of Criminal Procedure.

The claim set up by the wife Karnail Kaur in her petition was that she had been married 15 years before the petition, had been maltreated, deserted and not maintained by the present petitioner. The wife pleaded that her husband was a man of substance, owned about 400 *bighas* of land and was getting his land cultivated by a tractor, and had a flour-mill. She accordingly claimed Rs. 300 a month. The petition for maintenance was to obtain the allowance for herself and two minor daughters, offsprings of the marriage. Magistrate 1st Class, Sirsa, however, granted Rs. 50 per mensem payable from the date of the application to the wife Smt. Karnail Kaur. Darbara Singh, the husband, having agreed to take back the two minor daughters, question of maintenance in their respect did not arise. From the order of the learned Magistrate granting maintenance to the wife,

(1) Cr. R. 937 of 1958
(2) A.I.R. 1955 Cal. 108

Darbara Singh, the husband, went up in revision but remained unsuccessful.

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In the present petition before me, the principal contentions raised by the learned counsel for the husband were that proviso to section 488, namely, that if a husband has contracted marriage with another wife or keeps a mistress, it shall be a just ground for the wife's refusal to live with him, was no longer alive entitling the wife to raise it as a defence. The argument on this aspect was that this proviso was added to the Code of Criminal Procedure by the amending Act (Act No. IX of 1949), and the same thereafter having been repealed by the Repealing and Amending Act, 1952 (Act No. XLVIII of 1952), was no longer operative. There is apparent fallacy in this argument, for the enactment of the Repealing and Amending Act, 1952, was not in fact to remove from the statute the proviso for, the same had meanwhile become part and parcel of the Code of Criminal Procedure. The Repealing and Amending Act was merely to remove away the amending Act (Act No. IX of 1949) which already having become part of the Code of Criminal Procedure had no separate existence. This aspect had been considered in a Single Bench decision of this Court in *Mohinder Singh v. Mst. Harbhajan Kaur* (1), Chief Justice Bhandari dealing with the Repealing and Amending Act in question observed—

“An Act of this kind may thus be regarded as a legislative scavenger. It consists usually of two parts a repealing part and an enacting part. The repealing part consists of a schedule which contains the names of Acts which are sought to be

(1) 1955 P.L.R. 24

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repealed either because they have expired or because they have become unnecessary. The enacting part consists of a number of saving clauses one of which is designed to secure that enactments in which a repealed enactment has been applied, incorporated or referred to should be unaffected by its repeal. The Repealing and Amending Act of 1952 was also designed to secure two ends, namely to repeal certain enactments and to preserve certain others. It repealed the Act of 1949 and obliterated it completely from the records of Parliament. But at the same time it declared in section 4 that :—

‘The repeal by this Act of any enactment shall not affect any other enactment in which the repealed enactment has been applied * * * *’
 The provisions of this section make it quite clear that although the Act of 1949 has been repealed, the substantive portion of the Act which was incorporated in the Code of Criminal Procedure and which became a part and parcel of it, continues to remain intact. The Act of 1952 was enacted with the sole object of getting rid of a certain quantity of obsolete matter.”

With respect, I am entirely in agreement with these observations and would conclude that proviso in question is operative having become part of section 488 of the Code of Criminal Procedure and is enuring for the benefit of the wife in the circumstances contemplated.

It was then urged on behalf of the petitioner **Darbara Singh** that the mere fact that a husband has married again did not entitle the wife to maintenance. The effect of the proviso was stated to have been that the second marriage could be set up as a reason for refusal to live with the husband not that it was a ground *per se* to ask maintenance. *Sm. Bela Rani Chatterjee v. Bhupal Chandra Chatterjee* (1), and *The State v. Mt. Anwarbi and others* (2), were cited in support of the contention. For appreciation of the argument it is necessary to recapitulate the same. The submission appears to be that the proof of second marriage by itself without proof of requirements of clause (1) of section 488 of the Code of Criminal Procedure, e.g., that the husband had neglected or refused to maintain his wife was not enough to entitle the wife to get maintenance. It was further submitted that the proviso in question figured after clause (3) which dealt with enforcement of the order of maintenance and therefore, had no relation to the main clause (1) under which the cause and basis of the claim to maintenance had to be considered.

The learned counsel appearing for the wife brought to my notice a Single Bench decision of this Court, *Mst. Dhan Devi v. Sadhu Ram* (3), Harbans Singh, J., while distinguishing *Sm. Bela Rani's case* (1), seems to have taken the view that the proviso apart from being an answer to the offer of the husband to take back the wife was effective as a proof for the main requirements of clause (1) of section 488 of the Code of Criminal Procedure, for presence of another wife inherently amounted to mental cruelty. In *Kunti Bala Dassi v. Nabin Chandra Das* (4), Guha, J., came to similar conclusion. I would, however, prefer to follow the

(1) A.I.R. 1956 Cal. 134
(2) A.I.R. 1953 Nag. 133
(3) Cr. R. 937 of 1958
(4) A.I.R. 1955 Cal. 108

Darbara Singh cases cited by the learned counsel for the petitioner
 v. and that for the reason that the jurisdiction to
 Karnail Kaur grant maintenance arises only if the applicant wife
 R. P. Khosla, J. had in the first instance proved (1) that the hus-
 band had sufficient means, (2) that despite that, he
 neglected or refused to maintain her. Unless these
 matters were proved the wife had no cause what-
 ever for complaint or could be entitled to ask main-
 tenance. It is after having proved these ingre-
 dients that the question arises as envisaged by
 clause (2) as to the period from which the main-
 tenance had to be ordered. Clause (3) deals with
 the enforcement of that order. The enforcement
 of the order as language of clause (3) appears to
 suggest could be resisted by the husband offering
 to take back the wife. Proviso in that section
 reads :—

“Provided that, if such person offers to
 maintain his wife on condition of her
 living with him * * * * *
 * * * * *”

The Magistrate thereafter had to consider whether her refusal to live with him (husband) was justified. Second marriage entitles the wife to set up, apart from other objections the ground of second marriage as reason entitling her to refuse to accede to the request of the husband. In this view, therefore, the order of maintenance has to be in existence before the support of proviso in question could be invoked. In this view, in the instant case, therefore, it would be necessary to find first that the husband had neglected the wife. I would deal with this aspect after disposing of two other matters, which have been raised by the learned counsel for the petitioner husband.

It was urged that in any event the proviso to clause (3) of section 488 of the Code of Criminal

Procedure did not entitle a second wife as the ap- Darbara Singh
plicant for its benefit, for when she married she v.
was aware of the existence of the first marriage. Karnail Kaur
The words in the proviso "marriage with another R. P. Khosla, J.
wife", were stated to connote that the applicant
has to be wife from the first marriage and that the
benefit could not accrue to a wife from the second
marriage, unless the applicant was the wife from
the second marriage in a case where the husband
had married for the third time. The proposition
and the construction put on the proviso appear to
be somewhat novel. "Another wife" apparently
means "any other spouse" and has no relation to
the order in which the marriages had taken place.
I am of the view that the benefit would accrue to
first wife if she is the applicant or to the second
wife if she comes to Court seeking maintenance.
In *Bharat Bhushan v. Sudarshan Kumari* (1),
Kapur, J., seems to have construed the word "an-
other wife" as being synonymous of a "discarded
wife". *Kunti Bala Dassi's case* (2) also appears to
make no distinction in this respect. It would ac-
cordingly have to be held that the applicant se-
cond wife was equally entitled to the benefit of
the proviso provided other requirements of section
488 of the Code of Criminal Procedure, clauses (1)
(2) and (3) had been satisfied.

It was next urged by Mr. P.C.Pandit, learned
counsel for the petitioner, that the proviso was
not retrospective in effect. The contention was
that since both of the marriages in the instant case
took place on a date before 1949, the respondent
wife even if she was held entitled to the benefit
under the said proviso could not invoke its help.
It is indeed clear and had been admitted that both
of the marriages in the instant case took place long

(1) 1955 P.L.R. 328

(2) A.I.R. 1955 Cal. 108

Darbara Singh before 1948. Question for determination, therefore, would be whether the proviso is retrospective in effect. I am of the view that the proviso being a remedial enactment would ordinarily be deemed to be retrospective. For the decision whether the proviso applied or not it will have to be found whether in point of time the proviso was in existence when the cause to the applicant arose, for if the application seeking maintenance arose after the proviso the matter clearly would be covered by the proviso. On this aspect Dixit, J., in *Gunni v. Babu Lal* (1), expressed himself in the following language :—

“There is nothing in the Criminal Procedure (Amendment Act) 1949, to show that it would not be a just ground for the wife’s refusal to live with her husband if the husband has contracted marriage with another wife or taken a mistress before the amendment made in section 488.”

I am, therefore, of the view that the proviso to clause (3) was retrospective in effect and operative to the instant matter.

In view of my findings on the second point urged by the learned counsel for the husband, e.g., that the second marriage by itself without the proof of requirements of clause (1) of section 488, Criminal Procedure Code, did not entitle the wife to maintenance, it remains now to determine whether or not the petitioner husband had neglected or refused to maintain the respondent. In this behalf, the learned counsel for the respondent wife had pointed out that the Courts below found it as a fact that the husband had neglected so to maintain, whereas contention of the learned counsel for

(1) A.I.R.. 1952 M.B. 131

the petitioner husband was that there had been no such finding. I was taken through the findings of the Courts below on this aspect and also examined the relevant material. After hearing counsel, I have no hesitation in holding that the Courts below did come to a conclusion that the husband had neglected the applicant wife. The finding appears to spread all over the judgment and overlap and had not been categorically given under respective issues. The perusal of para 8 of the judgment of first Court clearly shows that the learned Magistrate found that the husband had neglected or refused to maintain the wife. The relevant portion is worded as follows :—

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“In the present case, however, it has been contended that Darbara Singh, refused to take her back inspite of repeated requests. Even though, I have held above that the evidence of cruelty led by the applicant is not sufficient to give a finding in her favour, it cannot be said that Darbara Singh has not neglected or refused to maintain her.”

For the findings and relevant material, it is abundantly clear that the husband had neglected to maintain the respondent wife. In this view and for the conclusion that the respondent wife was entitled to the benefit under proviso to clause (3) she had a complete defence to resist going back to the husband in view of the other subsisting marriage.

For all these considerations, I have no hesitation in holding that the wife respondent had been rightly held entitled to maintenance.

As regards the quantum of maintenance, in the circumstances of this case, payment of Rs. 50

Darbara Singh per mensem, if at all, errs on the side of leniency.
 v.
 Karnail Kaur There is proof on the record that the husband is
 a man of substantial means.

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In the result, therefore, while upholding the order and judgment of the Courts below, I would dismiss this petition.

K.S.K.

CIVIL WRIT

Before I. D. Dua, J. ...

LACHHMAN SINGH AND ANOTHER,—Petitioners.

versus

THE STATE OF PUNJAB AND OTHERS,—Respondents....

Civil Writ No. 212 of 1959.

Punjab Municipal Act (III of 1911)—Section 240—Rules framed under—Rules 6 and 8—“Roll”—Meaning of—Rules, whether contemplate the preparation of a distinct roll for each Constituency—Electoral right—Nature of—Creation of Constituencies—Purpose and procedure of—Electoral roll of State Legislature—Whether can form the basis of Municipal elections.

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Held, that the word “roll” mentioned in the Rules framed under Section 240 of the Punjab Municipal Act clearly means the roll of persons entitled to vote at an election held under these Rules.

Held, that Rule 8 contemplates the preparation of a distinct roll for each Constituency of a Municipal Committee and construing the provisions of Rules 6 and 8 together, it means that a separate and distinct roll of each Constituency of a Municipality must be prepared before a valid election can be held. The Courts would be disinclined to uphold an election obviously held on the basis of an imperfect, illegal and defective roll which has not been prepared in accordance with the provisions of law.

Held, that electoral right is not a fundamental or an inherent right, It is a political and statutory right conferred by a statute and therefore if a statute does not require a separate and distinct roll to be prepared for each