

the observations made above. There will be no orders as to costs of this appeal. Parties are directed to appear before the Court below on 1st June, 1964, when another date would be given for further proceedings.

Kauran Devi  
v.  
Lakhmi Chand  
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Dua, J.

B.R.T.

APPELLATE CIVIL

Before Shamsher Bahadur, J.

SHIELA RANI,—Appellant.

Versus

DURGA PARSHAD,—Respondent.

F.A. No. 31-D of 1963.

*Code of Civil Procedure (Act V of 1908)—S. 60 and Order 21 Rule 32—Decree for restitution of conjugal rights passed against the wife—Maintenance allowed to her by an order under S. 488 Cr. P. Code—Whether attachable in execution of that decree.*

1964  
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May, 20th.

*Held*, that clause (n) of the proviso to sub-section (1) of section 60 of the Code of Civil Procedure exempts from attachment and sale "a right to future maintenance". The maintenance granted by the criminal Court is purely a personal right created by the order of the criminal Court and is, therefore, not liable for attachment. The arrears of such maintenance are also not liable to attachment. Where the maintenance has not been realised by the person held entitled to it, it still remains a right of future maintenance and does not become attachable merely because the arrears have not been realised. The husband, after obtaining the decree for restitution of conjugal rights, can apply to the criminal Court for relief under section 489 of the Code of Criminal Procedure but cannot ask the civil Court to attach the maintenance granted to the wife by the Criminal Court.

*Execution First Appeal from the order of Shri D. R. Khanna, Sub-Judge, Ist Class, Delhi, dated the 5th January,*

*1963, disallowing the application of the judgment-debtor and holding that the amounts are attachable.*

S. L. PANDHI, ADVOCATE, for the Petitioner.

Memo for the Respondent.

#### JUDGMENT

Shamsher  
Bahadur, J.

Shamsher Bahadur,—This is an appeal of the judgment-debtor from the order of the executing Court directing that the maintenance awarded to her under section 488 of the Code of Criminal Procedure is attachable in a decree passed against her for restitution of conjugal rights.

Shiela Rani appellant was married to the respondent Durga Parshad on 6th of May, 1956. The parties did not have a smooth married life and the wife felt obliged to make an application for maintenance under section 488 of the Code of Criminal Procedure and was granted a sum of Rs. 40 per mensem as maintenance by an order of the criminal Court passed on 17th of December, 1958. The respondent-husband in his turn filed an application for restitution of conjugal rights on 26th of March, 1959. This application was allowed and the husband was granted a decree for restitution of conjugal rights on 14th of February, 1962.

It is the execution of the decree for restitution of conjugal rights which has given rise to this appeal. Under Order 21, rule 32 of the Code of Civil Procedure, a decree for restitution of conjugal rights may be enforced against a person who has wilfully failed to obey it "by the attachment of his property." The respondent-husband applied for attachment of the amount which was lying deposited in the criminal Court as arrears of maintenance granted to the appellant on 17th of December, 1958. The wife's objections to this attachment having been disallowed by the executing Court, she has come in appeal here.

The learned counsel for the appellant relies on a Bench decision of Guha and Bartley JJ. in *Giribala Devi v. Nirmalabala Debi* (1), for the proposition that the decree-holder was seeking to attach the future right of maintenance and this is prohibited under the provisions of the Code of Civil Procedure. Under section 60, the property which is liable to attachment and sale in execution of a decree has been detailed in sub-section (1). There are provisos to this sub-section which enumerate certain items which "shall not be liable to such attachment or sale". Clause (n) of this proviso mentions as an exception "a right to future maintenance." In the Calcutta case it was held that arrears of maintenance payable under orders of a criminal Court cannot be attached if the right to receive maintenance is only a personal right created by the order. The Division Bench adopted the tests laid down earlier by Sir Ashutosh Mukherji, J., in *Tara Sundari Debi v. Saroda Charan* (2), that the maintenance would not be attachable if it is purely a personal right created by an order awarding it. Now it cannot be disputed that the maintenance granted by the criminal Court was a purely personal right created by the order of the criminal Court and is, therefore, not liable for attachment. The executing Court before whom this authority was cited distinguished it on the ground that the arrears of maintenance which are sought to be attached do not constitute a right to future maintenance. I am unable to accede to this reasoning. Where the maintenance has not been realised by the person held entitled to it, it still remains a right of future maintenance and does not become attachable merely because the arrears have not been realised. The Judge of the Calcutta High Court were also concerned with the question

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(1) A.I.R. 1935 Cal. 578.  
(2) 12 C.L.J. 146.

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of arrears of maintenance which had become payable under orders of the criminal Court, and it was never questioned there that they do not fall under clause (n) of the proviso to sub-section (i) of section 60 of the Code of Civil Procedure. Mention may also be made of a Division Bench judgment of the Saurashtra High Court (Shah C.J. and Baxi J.) in Bai Kanta Motichand v. Amratlal (3). A point was made that the civil proceedings for restitution of conjugal rights put an end to the maintenance proceedings under section 488 of the Code of Criminal Procedure. It was observed by the Saurashtra Court that it cannot be said that the wife is not entitled to have her application under section 488 considered on merits merely because the husband started civil proceedings almost simultaneously with her in another Court and obtained a decree in his favour before the Magistrate could dispose of the application before him. The two proceedings, according to the Saurashtra Court, could have continued contemporaneously. In the present case, the order for maintenance had been made by the criminal Court before the proceedings for restitution of conjugal rights were started at the instance of the husband. It cannot be said that the decree for restitution of conjugal rights put an end to the right of maintenance which had been recognised by a criminal Court in proceedings under section 488 of the Code of Criminal Procedure. Guha J. in Kunti Bala Dassi v. Nabin Chandra Das (4), also dealt with a situation where the husband had obtained a decree for restitution of conjugal rights against his wife in whose favour a prior order for maintenance had been passed under section 488 of the Code of Criminal Procedure. The wife having refused to live with the husband on the ground that he had another wife living with him, it was held that the Magistrate

(3) A.I.R. 1953 Saurashtra 42.

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

was not justified in surrendering his own discretion and cancelling the order for maintenance under section 489(2). Under sub-section (2) of section 489 of the Code of Criminal Procedure:—

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“Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly”.

Though it appears at first sight mandatory for the Magistrate to cancel an order under section 488 where a competent Civil Court has pronounced an order which runs counter to the order for maintenance, Guha J. was of the opinion that it was still discretionary with the Magistrate to cancel or vary the order of maintenance. Be that as it may, the respondent-husband did not apply to the criminal Court under sub-section (2) of section 489 of the Code of Criminal Procedure, and the executing Court had no warrant, in my opinion, to declare that the maintenance had become attachable on passing of the decree for restitution of conjugal rights.

I am, therefore, of the opinion that the order passed by the executing Court is erroneous and ought to be set aside. This appeal is accordingly allowed and the order of the executing Court holding the maintenance allowance awarded to the wife to be attachable is set aside. As there is no appearance for the respondent, I would make no order as to costs.

B.R.T.