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**(1968) 07 RAJ CK 0010**

**Rajasthan High Court**

**Case No:** Criminal Ref. No. 212 of 1967

Jhanwarlal

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

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**Date of Decision:** July 10, 1968

**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 488, 489(2)

**Citation:** AIR 1969 Raj 29 : (1969) CriLJ 306 : (1969) RLW 4

**Hon'ble Judges:** L.S. Mehta, J

**Bench:** Single Bench

**Advocate:** Babulal, for the Appellant; M.M. Tiwari, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

L.S. Mehta, J.

This is a reference submitted by Shri Roshanlal Sharma, Sessions Judge, Bikaner, recommending that the order of Sub-Divisional Magistrate, Bikaner, (City), dated October, 11, 19.66, allowing maintenance allowance of Rs. 60, to Smt. Bhanwari, may be set aside.

2. The facts of this case are short and simple. Smt. Bhanwari is admittedly the legally married wife of Jhanwarlal. After the marriage Smt. Bhanwari lived with her husband amicably for some time. It is alleged that some time later Jhanwarlal's father Chhaganlal desired to satisfy his sexual lust with Smt. Bhanwari and for that purpose he made an, indecent assault on her. Smt. Bhanwari brought this fact to the notice of both her husband and her mother-in-law, but instead of their coming to her rescue, she was beaten by them and turned out of the house. Consequently she withdrew from the residence of Jhanwarlal and started residing with her father. Later on, she made an application in the court of learned Sub-Divisional Magistrate, Bikaner, u/s 488, Cr. P. C., for grant of alimony. The said Magistrate, after necessary inquiry, made an order, on October 11, 1966, allowing maintenance allowance of Rs.

60 to Smt. Bhanwari. Prior to this Jhanwarlal also filed an application for restitution of conjugal rights in the court of District Judge, Bikaner, on January 18, 1966, u/s 9 of the Hindu Marriage Act, 1955. That application was decreed in favour of the petitioner on November 1, 1966, on the ground that Smt. Bhanwari had no reason to withdraw herself from the society of her husband.

On an application filed by Jhanwarlal in revision against the order of Sub-Divisional Magistrate, Bikaner, dated October 11, 1966, learned Sessions Judge, Bikaner, heard the parties and expressed the view that when a decree for restitution of conjugal rights was passed subsequent to the order of awarding maintenance, that decree has to be respected and should be treated as a sufficient cause for not giving effect to the order for maintenance. He relied upon certain authorities, reported in *Khan Bahadur Nawabi v. Ml Ilahi Noor* AIR 1945 Pesh 53 and *Tarak Nath Dhar v. Sneharani Dhar* AIR 1949 Cal 87 and submitted a reference to this Court, with the request that the maintenance order passed by Sub-Divisional Magistrate, Bikaner, be quashed.

3. The proposition laid down by learned Sessions Judge is one that is open to considerable doubt. From a reading of Sub-section (2) to Section 489, Cr. P. C. it seems to me to follow that the judgment of a competent Civil Court does not of itself cancel the maintenance order and that in considering any such application as the present, the Magistrate is not necessarily bound to follow the order of the Civil Court, but must consider it, along with any other circumstance, if any, which may be brought to his notice. Section 489(1), Cr. P. C. enables a Magistrate on a change in the circumstances of the party receiving an allowance u/s 488, Cr. P. C., to modify or vary the order. This sub-section contemplates a change in the circumstances as would lead to a reduction or the increase in the allowance. Cancellation of order is specifically provided for under Sub-section (5) to Section 488, and Sub-section (2) to Section 489, Cr. P. C. Under Sub-section (5) to Section 488, maintenance order may be cancelled on proof that wife is living in adultery, or that, without sufficient reasons, she declines to live with her husband, or that they are living separately by mutual consent. The terms of reference are not covered by this provision.

Sub-sec. (2) to Section 489 reads as following:--

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

Under the above sub-section, the Magistrate is empowered to consider whether in consequence of the civil court's finding he has to cancel or modify the order. Where a civil court has made a decree for restitution of conjugal rights, the criminal court has to decide, on the materials before it, whether the wife ought to have returned to the husband and if that is so, and if she is in default in not returning, obviously the order made u/s 488, Cr. P. C., ought to be cancelled. The Magistrate's discretion under that section must, no doubt, be exercised judiciously.

I think the recommendation of the learned Sessions Judge, Bikaner, is going too far in suggesting that the Magistrate, without expressing his own discretion, is bound to cancel the order, simply on the ground that a Civil Court has given a judgment for restitution of conjugal rights. The Magistrate is entitled to satisfy himself that the husband is prepared to implement the order of the Civil Court and that he is willing to take back his wife. The mere fact that the Civil Court has given a particular finding does not justify the Magistrate in surrendering his own discretion. In this connection a reference is made to [Fakruddin Shamsuddin Saiyed Vs. Bai Jenab](#), In that case, Beaumont C. J. observed that the Magistrate is entitled and is indeed bound to satisfy himself that the husband is bona fide prepared to implement the order of the Civil Court. The learned Judge has further pointed out that the mere fact that a Civil Court has passed a decree does not justify the Magistrate in not exercising his own discretion. In proper case a Magistrate is within his right to decline to revoke the maintenance order u/s 488, Cr. P. C.

A like case came up for consideration before the Madras High Court in [Ramaswami alias Duraiyya Sembimutharasu and Others Vs. Emperor](#), There Phillips, J., observed that it is competent for a Magistrate to cancel or vary an order for maintenance if he thinks that it should be cancelled or varied in consequence of any decision of a competent Civil Court. If a Civil Court had given to the husband a decree for restitution of conjugal rights and the husband bona fide wished to execute that decree and the wife refused, that would be a good ground for cancelling the order for maintenance u/s 488, Cr. P. C. But where the husband is not willing to take back his wife and his object in obtaining the decree for restitution of conjugal rights is merely to get "the maintenance order cancelled, it will be wrong to cancel the order for maintenance u/s 489(2), Cr. P. C. Thus, according to the Madras view also the discretion whether the order for maintenance should be revoked or not lies with the Magistrate even though a decree for restitution of conjugal rights has been passed by a competent Civil Court. In a recent decision reported in [Shiela Rani Vs. Durga Pershad](#), it was held by the Punjab High Court that a decree for restitution of conjugal rights obtained by husband subsequent to the order for maintenance does not ipso facto end the right of maintenance.

4. Learned Sessions Judge referred to a decision of the Calcutta High Court reported in AIR 1949 Cal 87 , wherein Lodge J., held that a decision in a suit against a wife for restitution of conjugal rights is a binding decision to the effect that the wife had no sufficient ground to refuse to live with the husband and, therefore, the previous order for maintenance must be cancelled. But this authority has been disapproved by the same High Court in a latter case, reported in [Kunti Bala Dassi Vs. Nabin Chandra Das](#), In that case Guha J. was of the view that where the husband obtained a decree for restitution of conjugal rights against his wife, in whose favour a prior order for maintenance has been passed, u/s 488, Cr. P. C., a Magistrate is not justified in surrendering his own discretion of cancelling the order for maintenance simply because the husband was armed with a decree of Civil Court for restitution of

conjugal rights. Learned Sessions Judge has also referred to AIR 1945 Pesh 53. A careful examination of the case suggests that it hardly supports the views embodied in the order of reference. In that case it has been clearly laid down that if subsequent to the decree other circumstances have arisen which might provide the wife with a reasonable cause for not returning to her husband., then the Magistrate might in a proper case, in spite of the existence of a decree for restitution of conjugal rights, make an order for maintenance.

5. From what has been discussed above, it is manifest that the Magistrate, acting under Sub-section (2) to Section 489, Cr. P. C., has a discretion in giving effect to a Civil Court's decree. On a decree for restitution of conjugal rights in favour of the husband, the Magistrate is not bound to cancel an order passed u/s 435, Cr. P. C. He must consider it along with other circumstances. If the Magistrate is satisfied that the object of the husband in obtaining a decree for restitution of conjugal rights is to get the maintenance order cancelled and not to take his wife back, he may decline to cancel his previous order. The mere fact that Civil Court has passed a decree for restitution of conjugal rights will not nullify the order for maintenance passed by the Magistrate, Where the husband bona fide wishes to execute the decree for restitution of conjugal rights but the wife unreasonably refuses to obey, the order for maintenance may be cancelled. Thus, where a competent Civil Court has pronounced an order, which runs counter to the order for maintenance it may still remain discretionary with the Magistrate to cancel or vary the order for maintenance u/s 489(2), Cr. P. C. In such a case, the proper remedy for the husband is to apply to the criminal Court u/s 489(2), Cr. P. C. In the circumstances of the case, I am of the opinion, that the reference submitted by learned Sessions Judge, Bikaner, hardly merits any consideration.

6. In the result, the reference stands rejected.