

(1974) 08 BOM CK 0018

Bombay High Court

Case No: None

Sayed Abas Razavi

APPELLANT

Vs

Smt. Kaneeze Sakina and  
Another

RESPONDENT

**Date of Decision:** Aug. 1, 1974

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 488
- Evidence Act, 1872 - Section 112

**Citation:** (1976) CriLJ 47 : (1975) MhLj 378

**Hon'ble Judges:** Shimpi, J

**Bench:** Single Bench

### Judgement

@JUDGMENTTAG-ORDER

Shimpi, J.

The petitioner-husband was the respondent in a criminal case filed by opponent No. 1 in the Court of the Presidency Magistrate, 25th Court, Mazgon, Bombay, u/s 488 of the Code of Criminal Procedure for obtaining an enhancement of maintenance of Rs. 100 per month already granted in Criminal Revision Application No. 297 of 1967 in which the petitioner had raised an objection that such a petition was not maintainable, and the learned Presidency Magistrate, 25th Court, Mazgon, Bombay, was pleased to negative that contention. Aggrieved by that order, the present petition has been filed.

The facts in brief are as under:

2. Smt. Kaneeze Sakina had filed a Maintenance Application u/s 488 of the Code of Criminal Procedure on 2nd of March, 1966 against the present petitioner who was her husband in that case, alleging that she was married with the present petitioner on 15th of September, 1962, and during the valid marriage wedlock she conceived

and delivered a son from the present petitioner on 22nd April, 1965, who was named as Alamdar Hussain Razvi. It was alleged in that application that the present petitioner who was opponent in that case neglected her and was not providing for her maintenance, as well as the maintenance of the minor child Alamdar, Various contentions were raised in that petition on behalf of the present petitioner who was opponent husband. On appraisal of the evidence, the Presidency. Magistrate came to the conclusion that Smt. Kaneeze was married to the present petitioner on 15th of September, 1962. However, at the time of her marriage Smt. Kaneeze had already a husband living who had not divorced her. In short, her first marriage was subsisting at the time when she married the present petitioner. The learned Magistrate in view of these findings, on principles of Mohammadan Law came to the conclusion that the marriage between Smt. Kaneeze and the present petitioner who was the respondent, was void, He further held that the son Alamdar is presumed to be the legitimate son of Sayed Ashar Hussain the first husband. It appears that the Magistrate has given two contradictory findings as they apparently appear. In paragraph 19 of his judgment he has observed that Smt. Kaneeze after her marriage according to Islamic rites on 15th of September, 1962 with the present petitioner lived with him as husband and wife at Khandala as well as at Goregaon and the child Alamdar was conceived during that period, but after the learned Magistrate came to the conclusion that the first marriage was subsisting and therefore the marriage of Kaneeze with the present petitioner was void according to the provisions of the Mohammadan Law, he invoked on the application of the present petitioner the respondent before him, the provisions enumerated u/s 112 of the Indian Evidence Act as regards the legitimacy of the child Alamdar which would go to show that child Alamdar was the legitimate son of Sayed Asgar Hussein, the first husband of Kaneeze. The learned Magistrate relying upon the provisions of Section 112 in paragraph 27 of his judgment held, "in an application on u/s 488, Cr.P.C. by a woman against her paramour for the maintenance of their alleged child where the husband of the woman is living and their marriage is not dissolved, the woman must prove the non-access of the husband with her during the relevant period"<sup>1</sup>. The learned Magistrate further observed in the same paragraph, "she has not led any evidence, much less to the satisfaction of the Court, that she had no such access to her first husband Sayed Asgar Hussain. Although, therefore, she was living as husband and wife with the opponent and although her son Alamdar was born during that period of her with the opponent, it was for her to prove that she had no access to Sayed Asgar Hussain during that period so as to rebut the presumption of legitimacy arising u/s 112 of the Evidence Act." Thus the learned Magistrate held that Alamdar was also not proved to be the legitimate or illegitimate son of the present petitioner the original respondent.

3. Aggrieved by this order, Smt. Kaneeze has filed a Revisional Petition challenging these findings of the learned Magistrate, and it appears that during the pendency of that petition the parties arrived at a compromise, and the following order appears

to have been passed in the Revision Application No. 297 of 1967 pending before the High Court:

It is agreed between the applicant and opponent No. 1 that without prejudice to their contention and without admitting any allegation made by the other side opponent No. 1 shall pay Rs. 100 per month " maintenance of the minor child Alamdar. The payment to be made as from the date of the application in this Court, i.e., March, 1967. Money to be paid to applicant Kaneeze. The arrears to be paid on or before 31st March, 1968. Upon this toeing done the applicant does not press rest of her claim, Rule discharged.

The present petitioner went on paying the amount of maintenance at the rate of Rs. 100 per month to Smt Kaneeze for the maintenance of the minor child Alamdar. As the prices of every material and article are raising from day today. Smt. Kaneeze found that the amount of maintenance given by the present petitioner for the maintenance of the minor child was insufficient. In that view she filed an application u/s 489 of the Code of Criminal Procedure to revise the original order purporting to be, according to her u/s 488 of the Code of Criminal Procedure, granting maintenance at the rate of Rs. 100 She claimed the enhanced rate of maintenance at "pirate of Rs. 200 per month. The present petitioner who was the respondent raised a preliminary point of jurisdiction, and his contention in short was that there was no order passed u/s 488 of the Cr.P.C. which would enable Smt. Kaneeze to file a petition u/s 489, Cr.P.C. for the enhancement of the maintenance amount. It was contended, as it is contended before me, that the order of the High Court passed in the Criminal Revision Application is not an order passed u/s 488 of the Criminal Procedure Code, but it is simply an agreement arrived at between the parties, and emphasis was laid on the following portion of the order before the trial Court as well as before me :

Upon this being done the applicant does not claim the rest of her claim. Rule discharged.

The learned Magistrate on hearing the advocates of both the sides, held that the High Court's order reproduced above clearly showed that the High Court did not go into the merits of the order passed by the Presidency Magistrate. However, the learned Magistrate observed, "admittedly the order which was passed by the High Court is passed u/s 488 of the Criminal Procedure Code." Shri Chagla who has appeared before me on behalf of the petitioner, submitted that the learned Magistrate's assumption that it was an admitted fact that the order was passed u/s 488, Cr, P, C. is not a correct appreciation of the submissions advanced on behalf of the respondent because the respondent, i.e. the present petitioner had contended before the Magistrate that the order passed by the High Court was not passed u/s 488, Cr. P. C, but it was simply an agreement. The learned Magistrate further observed "if so the finding given by the learned Magistrate regarding the paternity of the child will have to be held as set aside by the High Court" With respect to him,

one fails to understand from where he carved out this inference, because even if a compromise has taken place that compromise is without prejudice to the contentions of the parties and without admitting any allegations made by each other. The learned Magistrate held that the order passed by the High Court was an order u/s 488, Cr. P. C and therefore, he had every right to revise it on evidence u/s 489 of the Code of Criminal Procedure. Therefore, he ordered the application to be set aside. Feeling aggrieved, the present petitioner has preferred this petition.

4. The short question for consideration would be, whether the order reproduced by me in the earlier part of the revisional order is an order passed by the High Court u/s 488. It is not disputed before me that the Magistrate will have the jurisdiction to consider an application u/s 489 provided there is an earlier order passed by the Magistrate u/s 488. Section 488 Cr.P.C. gives right to the Magistrate to award monthly allowance for the maintenance of a wife or a child whether the child is legitimate or illegitimate on proof of neglect or refusal to maintain the wife or legitimate or illegitimate child by the opponent. Sub-section (3) relates to enforcement of the order. If there is an order passed u/s 488, Cr. P. C, then if the person ordered to pay the maintenance fails without sufficient cause to comply with the order, then the Magistrate may punish him for every breach of the order as laid down under Sub-section (3) of Sec, 488. Sub-section (6) of Section 488 lays down "all evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons cases." Sub-section (7) deals with the power of the Court to make such order as to costs as the court thinks fit Therefore, in the instant case what we have to find out is whether the High Court passed an order which has in law effect of an order u/s 488. Cr.P.C. Shri Kamat who appears for the respondent-wife stated that he was representing Smt. Kaneeze, the respondent, and the minor child at the stage of the Revisional Appln. No. 297 of 1967 which was decided by Justice Wagle, and he submits that reading the order passed by the High Court. it appears that it is not purely a compromise but it is an order u/s 488 of the Code of Criminal Procedure. It is true that the petitioner has raised a technical objection. The facts show that upon the compromise having been entered into between the parties, the petitioner who was respondent, paid the amount of maintenance from the date of the application i.e.. March 1967. and I am told at the Bar by the advocate for the present petitioner that the petitioner was prepared to pay the amount of maintenance and was also ready to increase it to the extent of Rs. 125. However, that is not acceptable to the respondent Smt. Kaneeze who. without prejudice, claims at least Rs 150, and it would have been better for the present petitioner to have paid the amount of Rs. 150 as maintenance amount as he was paying the amount of Rs. 100, instead of sitting tight on the legality by raising the contention. As the parties are not agreeable, I have to decide the contention as a pure question of law. Shri Chagla relied upon three authorities reported in [P. Madhavan Vs. Munir Begum](#), and AIR

1930 Lah 524 : 31 Cri LJ 1176 , It is not necessary to refer to all the three authorities, but it would be sufficient to refer to the Lahore authority which is relied upon in the Calcutta case reported in [S.W. Colbert Vs. Mrs. H. Colbert](#) . The head note of the Lahore Authority runs thus:

Where, in an application u/s 488, the parties arrive at a compromise, the proper course for the Court is to dismiss the application leaving the parties to enforce the compromise in Civil Courts. Such a compromise is a bar to an application u/s 289. An order of maintenance passed in accordance with a compromise cannot be enforced by a Criminal Court.

However, the later trend of decisions of the other High Courts shows that even if the parties arrive at a compromise and if that compromise is incorporated in the order by the Court, then alone it would amount to an order u/s 488, Cr.P.C. Maintenance proceedings are civil proceedings though they are to be decided and dealt with by criminal court because the idea behind it is to have a speedy remedy at the hands of the criminal courts. Therefore, we have to find out whether by agreeing upon the compromise before the High Court the parties intended to arrive at only a compromise or whether the parties intended to have an order of the Court and the compromise incorporated in that order. In a later decision of the Calcutta High Court reported in [Debjeni Biswas Vs. Rasik Lal Biswas](#), it is observed as follows:

In proceedings u/s 488 where a petition of compromise fixing the maintenance allowance is filed by both the parties the proper order to be passed by the Magistrate in such a case is, "Petition of compromise filed. Order in terms of compromise" and not "Case amicably settled. Petition of compromise filed. Rule discharged.

This is a Divisional Bench judgment of the Calcutta High Court. The teamed Chief Justice who has spoken for the Bench, has observed AIR 895 Cri LJ 558 as follows:

On 23rd February 1940, when the terms of settlement were put in and ordered to be filed, the Magistrate ought to have made an order to put the matter beyond doubt and he could have done so in these words:

Petition of compromise filed. Order in terms of compromise". That would have meant that there was an order for the payment of the money in the terms of the petition of compromise. That would have put the matter beyond all question and such a course will be the proper procedure in future for a Magistrate to adopt in cases of this kind. Then it would be beyond all doubt that the provisions of Section 488 (3), Criminal P. C, could be invoked in order to secure the carrying out of what the parties had agreed to do.

I agree with the reasoning of this case and I find that the order passed in Revisional Application No 297 of 1967 by Justice Wagle is not an order incorporating the compromise in his order but it appears to me a mere agreement arrived at between

the parties. The application as I have stated earlier, was filed in 1966 Therefore, the child, if he would have succeeded in the Revisional Application, would have obtained the order of maintenance from the date of maintenance application filed in the trial Court by his mother, and the findings of fact arrived at by the learned Magistrate have not been at all taken into consideration by the parties for arriving at a compromise because the compromise is arrived at without prejudice to their respective contentions and the maintenance amount is paid or accepted without admitting any allegation made by the other side, and upon this compromise the applicant Smt. Kaneeze before the High Court did not press the Revisional Application. Therefore, rule was discharged. I, therefore, find that the order passed in the Revision Application No. 297 of 1967 cannot be considered as an order passed u/s 488, Cr. P. C, relying upon the Calcutta authority reproduced by me above, in that view of the matter. I accept the contention of the present petitioner that the application filed by Smt. Kaneeze u/s 489 of the Criminal Procedure Code and pending before the Presidency Magistrate. 25th Court, Mazgaon, Bombay, is not maintainable because it seeks to revise an order which has not been passed u/s 488 of the Code of Criminal Procedure. Rule therefore made absolute with no order as to costs.