

(1937) 03 BOM CK 0032

Bombay High Court

Case No: None

Zinabhai Bhimbhai

APPELLANT

Vs

Bai Mani

RESPONDENT

Date of Decision: March 30, 1937**Acts Referred:**

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

Citation: AIR 1937 Bom 454 : 171 Ind. Cas. 899**Hon'ble Judges:** N.J. Wadia, J; Broomfield, J**Bench:** Division Bench

Judgement

Broomfield, J.

This is an application for revision of an order by the First Class Magistrate, Bulsar, rejecting the petitioner's application u/s 489, Criminal Procedure Code, for an alteration of the amount of maintenance which the petitioner has been ordered to pay to his wife. The original order for payment of maintenance of Rs. 19 a month to the petitioner's wife, Bai Mani, was made in January 1925. The allowance was duly paid for ten years. Thereafter the petitioner's, circumstances changed, as he alleges, and he applied u/s 489 for a reduction of the amount of maintenance. At that time it was found that Bai Mani was of unsound mind. The proceedings were kept pending while an inquiry was made into the state of her mind. Ultimately her brother made an application to the District Judge under the Lunacy Act and was appointed manager of her estate u/s 71 of that Act., The application made by him shows that his object in applying was inter alia to enable him to recover the amount of maintenance payable to Bai Mani under the Magistrate's order. After the appointment of the manager for Bai Mani's estate, the petitioner renewed his application u/s 489. He described it as an application, against Bai Mani represented by her guardian. The Magistrate took the view that as these proceedings under Chap. XXXVI, Criminal Procedure Code are criminal proceedings or proceedings of a criminal nature, the Court has no power to appoint a guardian ad litem and a

guardian or manager appointed u/s 71, Lunacy Act, is not entitled to speak on the lunatic wife's behalf. He accordingly held that he had no alternative but to reject the application. The learned Magistrate's decision has been supported before us on the following grounds. It is conceded that proceedings under Chap. XXXVI are not strictly speaking criminal. Nevertheless, the procedure is as laid down in the Criminal Procedure Code and not as laid down in the CPC and there is no provision for hearing any party by his or her guardian. If it were a civil proceeding under Order XXXII, Rule 3, the Court would have to appoint a guardian ad litem in spite of the fact that a guardian or manager may have been appointed for a lunatic party under the Lunacy Act. But under the Criminal Procedure Code there is no provision] for appointing a guardian ad litem.

2. Reliance has been placed upon [Appichi Goundan Vs. Kuthujammal](#). That was a case where an application for maintenance had been made against a husband u/s 488 and the husband was found to be of unsound mind. The Court held that by analogy the provisions of Chap. XXXIV. Criminal Procedure Code, in particular Section 464, ought to be applied and the proceedings stayed indefinitely until such time as the lunatic husband was capable of understanding the proceedings. But, in our opinion, an application u/s 488 for maintenance against a husband or father stands on a different footing altogether from an application u/s 489 by the person who has been ordered to pay maintenance. Clause (6) of Section 488 provides that all evidence 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. As pointed out in [Appichi Goundan Vs. Kuthujammal](#), the result of proceedings under the Chapter may possibly be that an order of imprisonment may be made against a person disobeying the order. It is easy to understand, therefore, that where the husband or father becomes incapable of understanding the proceedings, there may be no alternative but to stay those proceedings until he recovers his sanity. But the same considerations do not apply where it is the person in whose favour an order has been made who becomes insane. It is nowhere provided that the person claiming to be entitled to maintenance should necessarily be heard in person. There is no provision in Section 489 requiring the issue of a notice to the wife or child. u/s 488 it may be ordered that the maintenance should be paid to such person as the Magistrate from time to time directs. Section 490 provides that a copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid. These may be said to be indications that the guardian of a minor child or of a lunatic wife for instance may be recognized as in a sense a party to the proceedings under this Chapter.

3. No doubt in accordance with the maxim audi alteram partem, the Court may properly require that the point of view of the wife or child, as the case may be, should be properly placed before it in the case of an application under 1989 for reduction of the amount of maintenance. But the Court is not fettered by any

technical rules as to representation or as to the kind of evidence Which it may accept as sufficient. There is no need for the, appointment of, a. guardian ad litem. Section 75 of Act IV of 1912 provides that every manager of the estate of a lunatic may collect and pay all just claims, debts and liabilities due to or by the estate of the lunatic. As I have said, the application was made by the wife's brother to the District Court mainly for the purpose of collecting the amount of maintenance made payable by the husband. Under the circumstances the manager appointed by the District Judge is obviously the proper person to state the case for the wife. There is nothing in the Code which prevents the Magistrate from taking his evidence. Nor is there anything in the Code which requires that any additional or different evidence should be produced or that the wife should be otherwise represented. We think the Magistrate took too narrow a view of his powers under Chap. XXXVI in holding that he could not proceed with this application. We, therefore, make the Rule absolute, set aside the order rejecting the application and direct that it be proceeded with according to law.