

**Pavakkal Vs. Athappa Goundan**

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**Court** : Chennai

**Decided On** : Mar-13-1925

**Reported in** : AIR1925Mad1218; (1925)49MLJ269

**Appellant** : Pavakkal

**Respondent** : Athappa Goundan

**Judgement** :

ORDER

Phillips, J.

1. The petitioner in this case obtained an order of maintenance against the counter-petitioner in 1919. In 1920 the counter-petitioner filed a suit for restitution of conjugal rights and obtained a decree on 30th June, 1922. He put in an application for execution on 28th August, 1922. On a statement being filed by the petitioner the execution petition was dismissed. Another execution petition was presented on 24th February, 1923, and it was dismissed as no notice was served on the petitioner. Finally he put in a third petition On 5th April, 1923, and the order on that was as follows :--' The defendant is not willing to live with the plaintiff in the room proposed to be allotted to her. The petitioner does not press the petition. Hence dismissed. 'I think it is clear from the course of the proceedings in execution that the counter-petitioner was not at all anxious to get back his wife to live with him for even on the last application in which the execution of the decree came up for consideration it appears that he proposed that the petitioner should live in a separate room. The counter-petitioner has a second wife and children by her and when he obtained a decree for the restitution of conjugal rights it was not open to him to impose terms upon his wife. If he wanted her to come back to him, he must accept her and live with her on the ordinary terms as husband and wife and not keep her confined to one portion of the house. The counter-petitioner's object in getting the decree for the restitution of conjugal rights is obviously not bona fide and he did not mean to allow his wife to live with him without restrictions. It was found in 1919 that he ill-treated her and her children, without allowing them food, and the obvious conclusion would be, that this suit was filed by him in order to evade the order of maintenance and not bona fide in order to recover possession of his wife. Under Section 489(2) of the Criminal Procedure Code, as recently amended, it is competent for a Magistrate to cancel or vary an order of maintenance, if, he thinks that it should be cancelled or varied in consequence of any decision of competent Civil Court. Undoubtedly if a Civil Court had given to the husband a decree for restitution and the husband bona fide wished to execute that decree and the wife refused that would be a good ground for cancelling the order of maintenance under Section 488; but in the circumstances in this case, where I am satisfied that the counter-petitioner did not wish to have his

wife back and his object in getting the decree was merely to get the maintenance order cancelled, I think that in the exercise of the discretion under Section 489(2) it would be wrong to cancel the order for maintenance. The Joint-Magistrate in cancelling the order gives no reason except that he follows the ruling in *In re Bulakidas* ILR (1898) B 484, which was decided before the Code was amended. Another case has been cited before me but I need not refer to it in any detail for this particular point, namely, the discretion of the Court under Section 489(2) was not dealt with there.

2. The petition is allowed and the maintenance order is restored.

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