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Court : Karnataka

Decided On : Dec-09-1966

Reported in : 1969CriLJ572

Judge : Tukul, J.

Appellant : Anthas

Respondent : Lakshmi and ors.

Judgement :

ORDER

Tukul, J.

1. The petitioner in this case is the husband of respondent No. 1 and father of respondents Nos. 2 and 3. There was an order in the proceedings instituted by the respondents under Section 488 of Criminal P.C. for payment of Rs. 50 per month to the respondents for their maintenance. The order is dated 23.11.1965. Respondent No. 1 then filed an application on January 25, 1966 for recovery of the arrears of maintenance due to her and her minor children. The present petitioner appeared through his Lawyer who filed a written statement contending that he was getting a monthly salary of Rs. 100 which was insufficient even for his own maintenance and that he was prepared to maintain the petitioners if they chose to live with him in Bombay.

The petitioners stated expressly in their application in the Court below that the husband had no movable or immovable property of his own. The wife who was examined also stated to the same effect and there was no allegation or suggestion in the cross-examination that the husband was possessed of any movable or immovable property. The learned Magistrate ordered that as the present petitioner had committed default in the payment of maintenance amount for 15 months, he should undergo sentence of imprisonment for 15 months, at the rate of one month for each month's default. As regards the offer of the husband to maintain his wife and children, if they chose to join him in Bombay, the wife's refusal to accept the offer was held justified on the ground that deliberate attribution of immorality falsely to a wife amounts to legal cruelty entitling the wife to separate maintenance and residence.

2. In the present petition, Mr. Mohandas N. Hegde, learned Counsel appearing for the petitioner, has submitted four points for my consideration and I propose to deal with each of them in the order in which they were submitted.

3. The first contention raised by the learned Advocate is that the issue of warrant of imprisonment without first issuing a warrant for attachment and sale of movable was in contravention of Sub-section (3) of Section 488 and that on that account the entire order passed by the Magistrate should be quashed. In support of this contention, he has placed reliance on the decision of the Rangoon High Court in *Maung Tun Zan v. Ma Myaing* AIR 1941 Rang 247.

4. Sub-section (3) of Section 488 of the Criminal P.C. which provides for enforcement of an order for maintenance reads as follows:

If any person so ordered (fails without sufficient cause) to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal

stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

It is obvious from the first paragraph of Sub-section (3) that two remedies may be resorted to for enforcement of the order. The first is for issue of a warrant for levying the amount due in the manner provided for levying of fine. Section 386 prescribes the procedure for recovery of fine by following either or both of the ways mentioned therein. One of the ways indicated in that section is the issue of warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender. The second way is that of issuing warrant to the Collector authorising him to realise the amount by execution according to civil process against the movable or immovable property or both of the defaulter.

So under the first method by which the order of maintenance can be enforced, it was open to the Magistrate to issue a warrant for recovery of the amount by attachment and sale of movable or to have sent the warrant to the Collector for attachment of movables or immovables or both and for sale of the same. The second method indicated by Sub-section (3) of Section 488 is that the Magistrate may sentence a person making default in the payment of the maintenance amount for whole or in part of each month's allowance to imprisonment for a term which may extend to one month or until payment, if made earlier.

The contention of Mr. Mohandas N. Hegde is that the second method prescribed by the section, viz., passing an order of sentence of imprisonment cannot be exercised by the Magistrate until he had first issued a warrant for attachment and sale of movable property and failed to recover either whole or any portion of the allowance due on the date of the application. Reading Sub-section (3) as a whole, it does not appear to me that the power to pass an order of sentence can be exercised only if the warrant for attachment and sale of movables proves abortive. The two powers appear to be independent. In this connection reference may be made to the Full Bench decision of the Bombay High Court in *K.R. Chawda v. State of Bombay* : AIR1958 Bom99 (FB), where Chagla, C.J., speaking for the Bench examined the scope of Sub-section (3) of Section 488 and observed:

Therefore, this sub-section confers upon the Magistrate two independent powers; one to issue a warrant which has to be executed in the manner laid down in the sub-section and the other to sentence the person also in the manner laid down in the sub-section.. The power of the Magistrate to sentence the applicant is not dependent upon the issue of the warrant or, in other words the issue of the warrant is not a condition precedent to the jurisdiction of the Magistrate to sentence the applicant..

In the instant case no difficulty arises even if the Sub-section (3) were construed in the manner in which the learned advocate wants me to construe, because the wife stated on oath that her husband had no movable property which could be attached for enforcing the order of maintenance, She was neither cross-examined nor was any averment made in the written statement filed in the proceedings that he had any movable property which could be attached and sold for realising the amount due under the order in execution. It cannot, therefore, be said that the Magistrate was wrong in holding that there was no propriety in issuing a warrant for attachment as the petitioner possessed no movable property for recovery of the amount.

As regards the decision cited by the learned advocate, it is true that a single Judge of the Rangoon High Court has come to the conclusion that the Magistrate cannot straightway order a person to be committed to jail and the first thing which the Magistrate should do is to issue a distress warrant. With respect, I am unable to agree with this view as there is nothing in the sub-section which makes the operation of the second part dealing with the power of sentence of imprisonment dependent upon the issue of a warrant for attachment of property. I am, therefore, of the opinion that the order of the Magistrate passing the order of sentence is in accordance with law.

5. The second contention raised by the learned advocate is that it was an error on the part of the Magistrate to have held that the wife had a good ground for refusing to stay with the petitioner when he made an offer to take her to his house and live with her. The learned Magistrate has referred to the maintenance proceedings and the contention raised by the present petitioner therein and came to the conclusion

that the present petitioner falsely stated that his wife was living in adultery and that the third petitioner (son) was not born of him. The Magistrate also noted that the facts and circumstances suggested that the present petitioner had deserted his wife and her small children and the offer made at the hearing of the enforcement proceedings was not bona fide. The contention of the learned advocate is that the view taken by the Magistrate that attribution of immorality falsely to a wife would be a good ground for separate maintenance and for her to live separately was erroneous.

There are a number of decisions which support the view taken by a Magistrate. Mention may be made of the decision of the Madras High Court in Gangamma v. Venkata Rami Reddy : AIR1950 Mad385 , to which it has been laid down that 'a deliberate attribution of immorality falsely to & wife will certainly fall under the definition of legal cruelty and entitle a wife to live separately from such; a husband and claim, separate maintenance'. In support of this view the learned Judge has referred to Chanakya's Arthasastra wherein an attribution of immorality to a wife was considered' as a grave charge entitling her to live apart.

There is another decision of the same Judge in Subbama v. Venkata Reddy : AIR1950 Mad394 . The views taken in the aforesaid decisions have been further affirmed by the-same High Court in Kandaswami v. Angammal : AIR1960 Mad348 I may also-mention the decision of the Travancore-Cochin High Court in Narayanan v. Amini AIR 1952 Trav-Co 562, in which it has been, stated that an unfounded imputation of un-chastity to the wife by her husband and reiteration of the same in his evidence is sufficient reason for her refusing to live with him, apart from the fact whether such, imputation amounts to legal cruelty or not.

6. In the present case, it does not appear that the husband was sincere about his offer. He has not cared to appear in the proceedings and does not appear to have expressed any regret for the imputations made. The circumstances of the case justify the conclusion drawn by the Magistrate that the offer is not bona fide.

7. The remaining two objections may be dealt with together. One of them is that the-Magistrate ought to have passed an order of imprisonment in respect of default for eleven months only and not for fifteen, months and that he should have

used his discretion in determining the period of sentence instead of inflicting the maximum sentence. As regards the first aspect of this contention, I am in full agreement with the submission. It appears that arrears only for eleven months were due at the time of the application and the Magistrate could not have passed the sentence of imprisonment for arrears of fifteen months. I also agree that the maximum period of one month for each default is somewhat severe. I would accordingly modify the order passed by the Magistrate and reduce the period to fifteen days for each default, in respect of eleven months' default. In the result, the total imprisonment will be for five and a half; months in respect of the defaults for eleven' months.

8. Subject to this modification in the order, the other contentions in the petition fail, and the same is dismissed.

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