

Moddari Bin Vs. Sukdeo Bin

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Court : Kolkata

Decided On : Feb-16-1966

Reported in : AIR1967Cal136,1967CriLJ335,70CWN686

Judge : P.B. Mukharji and ;A.K. Das, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 386(1), 488(1), 488(3), 488(4), 488(5), 439 and 489

Appeal No. : Reference No. 16 of 1965

Appellant : Moddari Bin

Respondent : Sukdeo Bin

Advocate for Def. : M. Sinha, Adv.

Advocate for Pet/Ap. : M.P. Mukherjee, Adv.

Disposition : Reference rejected

Judgement :

P.B. Mukharji, J.

1. This is a Reference by the learned Additional Sessions Judge, Alipore, under Section 438 read with Section 435 of the Code of Criminal Procedure challenging the legality and propriety of the order of the Magistrate dated the 7th November,

1964 which is in the following terms:

'The opposite party is produced under arrest. He is sentenced to R. I. for 6 months for failure to pay maintenance for 9 months and 16 days for the period from 16-9-63 to 30-6-64 without any excuse as he has means to pay.'

2. The first point raised in the Letter of Reference is whether it could be said that on the facts of this case the Magistrate had any evidence to show that the opposite party Suk-deo Bin had means to pay, but did not pay and whether he made any enquiry for that purpose on the records of this case. The learned Additional Sessions Judge appears to come to the conclusion that the Magistrate was wrong in throwing the opposite party to prison when he was brought under arrest before the court under a warrant without calling upon him to show cause.

3. Whether the Magistrate had reason to come to the conclusion that the opposite party had no means or not is here a mixed question of fact and law. In our view there was enough on the record to justify the Magistrate's conclusion that the opposite party had means to pay and without any excuse he was trying to avoid payment under the order of maintenance already made. The materials may be summarised here. The opposite party's married wife and their young son were neglected by the opposite party. Upon such refusal and neglect to maintain them the wife brought a petition before the Magistrate for an order of maintenance under Section 488 of the Code of Criminal Procedure. Upon her application an order was made by the learned Magistrate on the 8th April, 1964 allowing them respectively Rupees 30/- per month for the wife and Rs. 15/- per month for the young son aged 9 years named Laldhari by way of maintenance with effect from 16-9-63. The money was not paid. That fact is also clear from the record. On the 25th July, 1964 the wife again complained and filed a petition alleging that the opposite party was a defaulter, had not carried out the order for maintenance and that a sum of Rs 450/- was due and owing and she prayed for a warrant against the opposite party. Thereupon on the 25th July, 1964 the learned Magistrate issued a distress warrant for a sum of Rs 432.50 nP. being the total amount of maintenance for the period from 16-9-63 to 30-6-64 at the rate of Rupees 45/- per month as fixed by the order of maintenance. The distress warrant could not be

successfully executed for about three months Nothing was also paid in the meantime by the opposite party under the order of maintenance. Finally on the 3rd October, 1964 the distress warrant was returned on the report that the opposite party had no fixed place of residence. The distress warrant followed Form No. XL Schedule 5 under Section 386 (1) (a) of the Code of Criminal Procedure stating clearly that the opposite party was a wilful defaulter and that the person through whom the warrant was issued was authorised and required to attach any movable property belonging to the opposite party. On the 3rd October, 1964. The distress warrant was endorsed by the Sub Inspector executing the warrant with the report that the opposite party was not living at the address given and that the room always remained under lock and key and there was no particular place for his residence and he finally reported 'Under the above circumstances it is prayed that civil court authorities may be directed to deduct the amount from the pay' of the opposite party.

4. On that report it is clear that the distress warrant by attachment and sale of moveables could not be executed and became infructuous. The execution of the warrant had become unsuccessful. The other procedure under Section 386 (1) (b) of the Code of Criminal Procedure of issuing a warrant to the Collector authorising him to realise according to civil process against the movable or immovable property or both, was therefore suggested in the endorsement over the return of the distress warrant. That process, however, was no longer a distress warrant process.

5. Naturally the Magistrate thereupon issued warrant of arrest without bail against the opposite party on the 3rd August, 1964. Even that could not be executed for one whole month until the 7th November, 1964 when the opposite party was produced under arrest before the Court and the order quoted above and now challenged was made.

6. On these facts on record and circumstances this much is clear that there was an order for maintenance under Section 488, Criminal Procedure Code, that not a penny was paid under that order, that a sum of more than Rs. 430/- was due under that order, that no attempt had been made by the opposite party to pay that

money. On the other hand the fact also remains that the opposite party could not be found and the distress warrant for attachment and sale of his movables could not be effective. The further circumstance remains that the opposite party neither took any steps either under section 489, Criminal Procedure Code, to make any alteration in the order of allowance nor any steps under Section 488 (4) or (5) of the Code for cancellation of the order of maintenance. These, in our opinion, are sufficient materials and circumstances before the Magistrate to come to the conclusion which he did that the opposite party had means to pay, that he was wilfully avoiding to carry out the order of maintenance and that there was no excuse for not doing so.

7. Having disposed of the facts and the circumstances of the case it only remains to say on the point of law that Section 488 (1) (3) of the Criminal Procedure Code expressly emphasises the element of 'sufficient means'. As a matter of law and legal interpretation, therefore, any order made under Sub-sections (1) and (3) of Section 488. Cri. P. C., must be on the satisfaction of the Magistrate on this point of fact of sufficient means. We hold that on the facts the Magistrate had ample materials to come to the conclusion that the opposite party had sufficient means. On the law, therefore, the Magistrate was justified in recording that finding without making any further or additional enquiry about his means. Neither the law nor the facts in this case required any further or additional enquiry.

8. This disposes of the first point of the law on this Reference.

9. The second point in the Letter of Reference raises the important question whether the Magistrate's order under section 488 (3) of the Code of Criminal Procedure is bad on the ground (1) that no punishment other than simple imprisonment could be given and therefore the punishment by rigorous imprisonment was bad in law; (2) secondly, that the quantum of punishment was also beyond the permissible limits under the law and that the Magistrate had only a power to award punishment by imprisonment for one month only and not for six months as ordered in this case and (3) thirdly, the order of sentence was bad because the right of the Magistrate to pass the sentence under Section 488 (3) Cr. P. C. could only be exercised at a stage which is described in that sub-section

'after the execution of the warrant', and that in this case the Magistrate issued the warrant before the execution of such warrant, and (4) lastly the Magistrate's order is bad because it is an incomplete order in so far as it sentenced the opposite party to six months' rigorous imprisonment without giving an option to make earlier payment and reduce the sentence as provided in Section 488 (3) using the expression 'or until payment if sooner made.'

10. The learned Additional Sessions Judge expressed the view that only an order for simple imprisonment could be made and the order for rigorous imprisonment in this case was bad in law. Having carefully considered this question we are unable to accept that interpretation. We shall state our reasons briefly.

11. Section 488 (3) of the Code of Criminal Procedure provides for the enforcement of the order of maintenance of the wives and children. It uses the words that where there is no such payment and where there has been issue of a warrant for levying the amount due, the Magistrate '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.' Having regard to the language of this statutory provision the sentence is not limited either to simple imprisonment or to rigorous imprisonment in fact it does not say whether it should be simple or rigorous.

12. Section 67 of the Indian Penal Code provides inter alia "If the offence be punishable with fine only, the imprisonment which the court imposes in default of payment of the fine shall be simple .. ' On the strength of this provision Mr. Sinha for the opposite party argues that the imprisonment in this case can only be a simple imprisonment and no more. We are unable to accept his contention. This Section 67 of the Indian Penal Code begins with the significant expression 'If the offence be punishable with fine only'. A violation under Section 488 (3) of the Code of Criminal Procedure is not an 'offence punishable with fine only' within the meaning of that expression. Indeed it is not an 'offence' in the sense understood in the Indian Penal Code or under the Criminal Procedure Code. Section 488 really is a speedy way of providing for the maintenance of neglected wives and children

under Chapter 36, Criminal Procedure Code, From that point of view it is strictly not an offence within the meaning of Section 67 of the Indian Penal Code. But the more serious objection to Mr. Sinha's argument is that the order under Section 488 (3) Cr P. C. cannot satisfy the other test 'punishable with fine only' used in Section 67 I.P.C The order in this case under Section 488 Cr. P. C. is an order for maintenance and it is not an order for fine at all. Section 488 (3) dealing with the enforcement of the order of maintenance only provides that the Magistrate may 'for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines....' 'Hereinbefore provided' means the procedure laid down for warrants for levy of fine under Chapter XXVIII of the Cr. P. C. relating to execution. That only means that the amount under order for maintenance is realisable only in the manner provided for levying fines. That does not make the maintenance a fine within the meaning of either the Indian Penal Code or the Criminal Procedure Code. It is only realisable in the manner fines are realised. Therefore, section 67 I. P. C. cannot limit the right of the Magistrate to pass the sentence under Section 488 (3) Cr. p. C. to pass a sentence other than simple. On the other hand section 53 under Chapter III of the Indian Penal Code in describing the punishment mentions under the fourth head 'imprisonment, which is of two descriptions, namely (1) rigorous, that is with hard labour; (2) simple'. If that is in the dictionary provided by the Statute itself, the word 'imprisonment' may mean either simple or rigorous as the case may be, and unless the language of the section either by expressly or by most compelling necessity limit the type of imprisonment then the right to pass an order of sentence cannot be limited and may be either simple or rigorous. This view is also supported by a reference to some of the sections in the Criminal Procedure Code, for instance, Section 123 of the Code of Criminal Procedure dealing with imprisonment in default of security and specially Sub-sections (5) and (6) thereof which expressly mention that imprisonment for failure to give security for keeping the peace shall be simple and imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under section 108, be simple and at the same time expressly stating that where the proceedings have been taken under Section 109 or Section 110, be rigorous or simple as the Court or Magistrate in each case directs. Similarly Section 250 (2A) of the Code of Criminal Procedure dealing with

false, frivolous or vexatious accusations, the Magistrate is expressly given the power by the order directing payment of the compensation and that in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment. If, therefore, the legislature wanted to limit the express right of sentence under Section 488 (3) Cr. P. C. only to a simple imprisonment then the legislature would have said so. This conclusion is also borne out by reference to Form XL. Schedule V of the Code of Criminal Procedure which sets out the form of warrant of imprisonment on failure to pay maintenance under section 488 (3) and that statutory form expressly uses the language 'and thereupon an order was made adjudging him to undergo simple or rigorous imprisonment in the said jail' Comparison may also be made with the situation that in a civil debt an order for imprisonment by a civil court is expressly limited to be one of simple imprisonment.

13. For these reasons we are of the opinion that the Magistrate's order is not bad on the ground that it awarded the sentence of rigorous imprisonment and not simple imprisonment. This view is supported by a Full Bench decision of the Allahabad High Court in *Emperor v. Beni* : AIR1938 All386 . Straight, J. also expressed the same view in *Queen Empress v. Narain*, (1887) ILR 9 All 240 at p. 243, although that decision on another point was overruled by that Full Bench decision of the same High Court.

14. The next point raised in the letter of reference is whether the punishment can be limited only to a period of one month as the maximum under Section 488 (3), Cr. P. C. The language of the section has been quoted above. It expressly provides that the Magistrate may sentence such person for the whole or in part of each month's allowance to a term which may extend to one month or until payment if sooner made. The maximum of one month, in our view, in this context and on proper interpretation of the language of the section is relatable to a period of the arrear for one month. In other words, default of one month is punishable by one month's imprisonment and no more. If the default is more than one month then the imprisonment can be for as many months of default subject to a maximum of 12 months. The question here is whether a default of 9 months which had occurred could be punishable with six months' imprisonment which the Magistrate here has ordered. On the authorities and on the construction of Section 488 (3). Cr. P. C.

we have come to the conclusion that the Magistrate can make an order for six months' imprisonment for nine months default. In fact the maximum imprisonment which he on the present facts could have given was 9 months, but he has given less. Section 488 (1) of the Criminal Procedure Code provides expressly for a monthly allowance for the wife or the child at such monthly rate not exceeding five hundred rupees in the whole as the Magistrate thinks fit. The second proviso to Section 488 (3) makes it clear that no warrant shall be issued for the recovery of any amount due under the section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due. That would indicate that at the most the wife could only accumulate twelve months' maintenance and no more and the Magistrate could give in such case at most twelve months' imprisonment and no more, The whole idea is to provide a speedy and expeditious remedy. The idea is not to permit unnecessary accumulation of maintenance for the simple reason that maintenance is a current necessity and is not to be used for making a claim in lump after a long delay.

15. Apart from the interpretation of the section which we have given above the authorities also appear to support our view although there was some conflict of judicial decisions on the point which appears now to have been dissolved We shall now notice some of these decisions Reliance was placed by Mr. Sinha on this point on two decisions The first case is reported in (1887) ILR 9 All 240. It looks the view that where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant, the Magistrate, acting under Section 488, Cri. P. C., had no power to pass a heavier sentence in default than one month's imprisonment as if the warrant only related to a single breach of the order. The second case on which Mr. Sinha relied was a Division Bench case of the Lower Burma Chief Court in *Zaw Ta v. Emperor*, 16 C. LJ 434: (AIR 1914 Low Bur 163 (2)) also taking the view that the Magistrate is not competent to pass a sentence of imprisonment exceeding one month under Section 488 (S) of the Code of Criminal Procedure. But the difficulty of Mr. Sinha is that both the cases have been overruled by their own High Courts. The decision in (1887) ILR 9 All 240 was overruled on this point by the Full Bench in : AIR1938 All386 and the decision in 15 Cr LJ 434: (AIR 1914 Low Bur 163 (2)) was overruled in *Ma Tin Tin*

v. Maung Aye, AIR 1941 Rang 135, where it was held that the Magistrate could under Section 488 (3), Cri. P. C. sentence the defaulter to one month's rigorous imprisonment for each full month's arrears of maintenance. Without repeating ourselves we would only say this that we respectfully agree with the decisions in : AIR1938 All386 and AIR 1941 Rang 135 and the reasons given there. The same view that we are taking here was taken by a Full Bench of the Bombay High Court in Karson Ramji Chawda v. Panibai Karson Chawda : AIR1958 Bom99 (FB).

16. For these reasons both on the ground of interpretation of Section 488 (3) of the Criminal Procedure Code and on the authorities we are of the opinion that the Magistrate's order is not bad because it awarded in the present facts a sentence of six months' imprisonment for nine months' default.

17. Turning now to the question of interpretation of the expression 'after the execution of the warrant' in Section 488 (3), Cri. P. C., Mr. Sinha's contention cannot succeed on the facts of this case in challenging the Magistrate's order. No doubt before the execution of the warrant the Magistrate cannot sentence the defaulter. But on the facts as we have already recorded the distress warrant has been executed. Execution of the warrant in this case does not mean successful execution of the warrant. It also includes unsuccessful execution of the warrant yielding no fruits. If the execution of the warrant was always successful then obviously there would be no further question of sentencing the defaulter. Besides, the sentence can be awarded by the Magistrate under Section 488, Cri. P. C. which expressly provides for the case even if the whole amount remains unpaid after the execution of the warrant. That must necessarily contemplate a case where the whole of the amount due remains unrealised after unsuccessful execution of the distress warrant or the other warrant under Section 386 (1) (b) of the Code of Criminal Procedure. On the facts we have come to the conclusion in already indicated that the distress warrant issued in this case has been unsuccessfully executed and was infructuous. Therefore, the Magistrate had the right to order a sentence of imprisonment. Mr. Sinha also suggested in argument that only the distress warrant could not be executed, but then the Magistrate should have followed this by another kind of warrant to the Collector under Section 386 (1) (b), Cri. P. C. and it is only after having exhausted both the warrants the

Magistrate's right to sentence could arise. That argument is obviously unsound. The language of Section 386 (1) of the Criminal Procedure Code expressly uses the words:

'Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways. . . .'

and then follows (a) method of issuing a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender; and (b) method of issuing a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property or both, of the defaulter. Having regard to the language 'either or both of the following ways' it is plain that the Magistrate is not compelled to start the (b) method when the (a) method which he had adopted previously had failed before he could sentence a defaulter.

18. While discussing the Magistrate's right and jurisdiction to order a sentence of imprisonment under Section 488 (3). Cri. P. C. it will be appropriate at this stage to dispose of another argument advanced on behalf of the opposite party. It is argued that the Magistrate may issue a warrant notwithstanding the husband's offer to maintain his wife and this provision itself contemplates that the offer has been made before the issue of warrant and therefore the best way of ensuring that the husband has been afforded an opportunity of making such an offer before a warrant is by issuing a notice to him to show cause why a warrant should not be issued. It is contended that the provision in Sub-section (6) to Section 488, Cri. P. C. also indicates that a notice should be given to the husband and an enquiry should be made in his presence before issuing a warrant. The apparent plausibility of this argument really rests on the ground that the Magistrate must have evidence to satisfy himself that a warrant should be issued and therefore an order passed by Magistrate without issuing a notice and holding an enquiry is illegal. In fact in support of this proposition Mr. Sinha for the opposite party relied on the decision of a learned single Judge in *Laxmi Narain v. State* : AIR1959 All556 . On the facts here we have already said that this question does not arise because the

Magistrate had ample materials on which he was rightly satisfied that the opposite party in this case was wilfully disregarding the order of maintenance although he had the means to pay. We have given the reasons already for coming to that conclusion. In that view of the matter we do not think that a further notice to show cause was at all called for in the facts of the present case. It may be mentioned here that Section 488 (3) of the Criminal Procedure Code does not expressly lay down any requirement for a notice to show cause. The distress warrant in this case expressly recited that the opposite party here has wilfully disregarded the order of maintenance and therefore, order for attachment and sale of movables was made. Notwithstanding that the opposite party never answered that warrant and avoided its service.

19. The Full Bench of the same Bombay High Court in : AIR1958 Bom99 (FB) (already noticed on another point) laid down that as under Section 488 (3) of the Criminal Procedure Code, the power of the Magistrate to sentence a person was independent of the power to issue a warrant and as the power to sentence was for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term not exceeding one month, the Magistrate was right in that case in passing an order sentencing the defaulter to imprisonment. The accused in the Bombay Full Bench case also failed to comply with an order for maintenance and the wife made an application that there was default in the payment for four months. In that case also the Magistrate issued a warrant but it could not be executed as the accused had no property. The wife then applied under Section 488 (3) of the Code and on that application the Magistrate had passed the order sentencing the accused to imprisonment for fifteen days in respect of each month for which the allowance remained unpaid. It was also there that the accused challenged the sentence. Here also in the present case before us we have already discussed that the distress warrant for movables could not be executed because the room was under lock and key and no movable could therefore be found on which attachment could be levied and whose sale could be effected to realise the compensation.

20. In contending that the warrant which could be issued for the levy of the amount payable under Section 488 (1), Cri. P. C. must be preceded by a notice issued to

the husband requiring him to comply with the order, Mr. Sinha also relied on a decision of the Mysore High Court of the learned Single Judge in Padma-vathi Bai v. Kalyan Rao, 1962 (2) Cr. LJ 706 (Mys). The learned Judge there noticed the decision reported in : AIR1959 All556 and appears to have expressed the view that although Section 488 (3) does not in so many words require that such notice should be issued it is implicit in that sub-section. We are afraid we cannot go to the extent of saying that the notice is implicit. The section does not say so. What is implicit or is required is the Magistrate's satisfaction about the means of the offender to comply with the order for maintenance So long as the Magistrate is satisfied on the materials before him actual notice to the husband requiring him to comply with the order of maintenance is, in our view, uncalled for under the provision of Section 488 (3) of the Code. All that we need say is that this decision of the Mysore High Court did not consider the provisions of Section 489 of the Code of Criminal Procedure nor the other provisions in Subsections (4) and (5) of Section 488 of the Code under which the party complained against the order of maintenance could come for relief.

21. Having seen the decision of the other High Courts we may now appropriately refer to some decisions of this High Court on which reliance was placed by Mr. Sinha for the opposite party. The decision in Kamala Sun-dan Dassi v. Nilmony Das : AIR1953 Cal343 lays down that the failure of the husband to obtain a cancellation of the order for maintenance under Section 488 (5) does not stand in the way of his filing an objection under Section 488 (3) and that if as a matter of fact, the husband is able to prove the allegations which he had made in his objection, the Magistrate would not only refuse to issue a distress warrant under Section 488 (3). but he should also cancel the order of maintenance under subsection (5) This decision also emphasised the provision in the statute under Section 488 (3) that the Magistrate must hold an enquiry as to the sufficiency of the cause shown by the husband and he cannot order the issue of a distress warrant without satisfying himself as to the sufficiency of the cause shown. This again appears on the question whether the Magistrate could he said to have been satisfied on the materials of the case before him. We hold on facts of the present case before us that the Magistrate had ample materials to be so satisfied. No one for a moment doubts the proposition of law that a husband's failure to obtain

cancellation of the order of maintenance under Section 488 (5) prevents his filing an objection under Section 488 (3) of the Code of Criminal Procedure. But the fact remains that the opposite party accused in this case never filed an objection nor wanted to do so. The distress warrant that had been issued proved infructuous. He was brought I hereafter under warrant of arrest. Notwithstanding that situation the opposite party accused never claimed to raise any objection either to the distress warrant or when he was brought to the Court under arrest. On the facts, therefore, the decision in : AIR1953 Cal343 cannot be applicable here Section 488 (3) does not speak of any actual enquiry under the Criminal Procedure Code. All that it requires is that the person so ordered fails to comply with the order of maintenance without sufficient cause and the Magistrate, therefore, has to be satisfied about the sufficiency of the cause and he can be so satisfied either by formal enquiry or on the materials before him in the facts of the case Neither a formal notice nor a formal enquiry, in our view, is imposed by Section 488 (3) Another point of distinction is that Kamala Sundari's case : AIR1953 Cal343 dealt with the case of Sub-section (5) of Section 488, Cri. P. C. which deals with adultery or wife's refusal to live with the husband and their living separately by mutual consent, but that is not the case before us. No dispute arises on that point at all. The Calcutta decision in Kamala Sundari's case : AIR1953 Cal343 also did not discuss the effect of Section 489, Cri. P. C. as part of the circumstance that the Magistrate could take into his consideration.

22. It is necessary to refer to another Division Bench decision of this Court in Sidhe-swar v. Gyanada Dasi, ILR 22 Cal 291. There in that case a distress warrant was issued without anything being realised and the husband was brought up under a warrant for his arrest. The husband, previous to his arrest, had petitioned to the Court to be allowed to prove his altered circumstances and his inability to pay and on that petition an order was passed that he could produce the evidence after the amount due was paid. On being brought up and not paying the amount due. an order was made committing him for one month under Section 488 of the Code of Criminal Procedure. The day following his commitment, the brother of the husband tendered the money and asked for his release, but the Magistrate took the money but refused to order the release, holding that under the section the punishment of imprisonment was absolute and not dependent on payment of the

maintenance allowance. The husband then moved the High Court contending (1) that the order of imprisonment should not have been passed without an opportunity being given to him of proving the change in circumstances which would show that the order to pay required modification; (2) that the section did not authorise imprisonment, unless wilful neglect to comply with the order be proved; and (3) that the imprisonment authorised by the section being only a mode of enforcing payment, he should have been released on the amount being paid. It will be seen from these contentions before that Division Bench decision that the points were almost the same as have been urged before us. Now the Division Bench there decided: first, that the first ground was untenable, because the order for maintenance carried with it all its proper consequences as long as it remained in force; secondly, that before an order for imprisonment under the section could be passed, it must be proved that the non-payment of the maintenance was the result of wilful negligence, and that there being no evidence of that in the case, the order was bad. and thirdly, that the imprisonment which could be awarded under the section was not a punishment for contempt of Court's order, but merely a means of enforcing payment of the amount due, and that upon the payment of that amount being made the husband was entitled to be released. It is the first point of that decision which is necessary to emphasise here. On the other two points in which the order in that case was held to be bad are not decisive in the present case before us because of the facts found that the refusal to pay the maintenance was wilful and the opposite party had sufficient means and there was no question of any payment of money being offered at any time in the case before us so as to entitle the opposite party to escape the order for maintenance or to avoid the sentence.

23. A reference may also be made to a Division Bench decision of this Court in *Bhiku Khan v. Zahuran*, (1898) ILR 25 Cal 291 which also emphasises the fact that an order of commitment to prison for default in payment of a wife's maintenance allowance cannot be made without proof that the non-payment was due to wilful neglect of the person ordered to pay and thus followed the decision in (1895) ILR 22 Cal 291 noticed above. It also lays down that the law contemplates a single warrant of commitment in respect of the arrears due at the time of its issue. Where six months arrears were due an order for separate warrants of

commitment awarding a separate sentence of imprisonment of one month on each warrant was therefore held to be valid in law. The decision was that the law contemplates a single warrant of commitment in respect of arrears due at the time of the decision. The reason given was that it was not intended that a person against whom warrant for maintenance had been made under Section 488, Cri. P. C. should be subject, when arrears had been allowed to accumulate before the aid of the Court was invoked to a series of separate terms of imprisonment in respect of arrears of each month, preceded by a separate enquiry and warrant of distress in each case.

24. In short the view that we are taking in this case that no formal notice to show cause or no formal enquiry is required under Section 488 (3), Cri. P. C. is supported by the decision of Srinivasa Iyengar, J. in *Theetharappa Pillai v. Meenakshi Ammal* : AIR1925 Mad715 where the learned Judge at p. 954 (of Cri LJ): (at p. 710 of AIR) observed:

'The legislature has deliberately used the expression 'sufficient cause' obviously intending that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances and that such judicial discretion should not be fettered or limited by any definite rules'.

This appears to us with respect to be the golden rule for interpreting a provision like Section 488 (3), Cri. P. C. and to impose the fetters of a formal enquiry or a formal notice to show cause would be to introduce limitations which are prima facie not in the language of the sub-section. No doubt in an appropriate case the Magistrate will be free to issue a notice to show cause or to hold an enquiry if he finds that it is necessary to discover whether the offender had sufficient means or not. But that does not mean that in every case as a rule of law it has got to be done even where there are sufficient materials before the Magistrate to come to the conclusion that there are sufficient means and the offender is wilfully neglecting to comply with the order of maintenance. To hold that even then as a matter of ritual the Magistrate will still have to issue a notice to show cause for holding an enquiry, will be to misinterpret that section.

25. For these reasons we reject the reference of the learned Additional Sessions Judge except with this reservation that the order of the learned Magistrate sentencing the opposite party to six months' rigorous imprisonment without expressly mentioning that the imprisonment would come to an end if payment is made earlier must be read subject to that limitation which is expressly provided by the language of Section 488 (3), Cri. P. C. providing 'or until payment if sooner made'.

A.K. Das, J.

26. I agree.

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