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Court : Kolkata

Decided On : Jun-06-1940

Reported in : AIR1940Cal569

Appellant : Radharani Dassi

Respondent : Mati Lal Sen

Judgement :

Bartley, J.

1. This rule was issued upon the Chief Presidency Magistrate of Calcutta to show cause why an order made on a petition under Section 488, Criminal P.C., should not be set aside. The facts briefly are that the petitioner obtained a maintenance order against her husband at the rate of Rs. 25 a month. Subsequently, the opposite party, her husband, was adjudicated an insolvent under the Presidency Towns Insolvency Act. In the interval he paid no maintenance to his wife. She applied for a distress warrant and the order made by the learned third Presidency Magistrate was 'the accused has been adjudicated insolvent. Petitioner referred to the Insolvency Court. The case is filed.' The rule came up originally for hearing before Edgley J., who has referred it to a Division Bench for decision. The point for decision is whether an order of adjudication is or is not a complete bar to realization of maintenance under Section 488, Criminal P.C.. On behalf of the opposite party it is contended on the strength of the case in Halfhide v. Halfhide :

AIR1924 Cal230 , that the fact that her husband, who was in arrears of maintenance, has been adjudicated an insolvent, is conclusive, so long as the order of adjudication stands, that he is unable to pay the amount due, and he is not therefore guilty of wilful neglect under Section 488(3), Criminal P.C., the section which empowers a Magistrate to issue a distress warrant for the amount due. As pointed out by Edgley J., a different view has been adopted by the High Court of Rangoon and approved of by the High Court of Lahore. The conflict of opinion however is more apparent than real. In the Calcutta case it was held that the fact that a person has been adjudicated an insolvent is conclusive that he is unable to pay his debts and therefore that he is not guilty of wilful neglect within the meaning of Section 488, Criminal P.C.

2. As the law stands at present however the amended Section 488(3), Criminal P.C., does not specify wilful neglect. That definition was contained in the law before amendment. But under the amended Code if any person ordered to pay maintenance fails, without 'sufficient cause,' to comply with that order, the Magistrate may proceed by means of a distress warrant. Under the previous law, he could only do so on proof of wilful neglect by the party to comply with the order made and what the case in Halfhide v. Halfhide : AIR1924 Cal230 referred to above lays down is that an order of adjudication in insolvency is a complete answer to an allegation of wilful neglect. That case however does not lay down that an order of adjudication, in itself, is a rebuttal of an allegation that the insolvent has failed without sufficient cause to comply with the order of the Magistrate directing the payment of maintenance and therefore does not affect the question at issue in the present case. The correct position seems to us to be therefore that on presentation of an application to a Magistrate of the nature now before us, the duty of the Magistrate is to decide, in the first place whether the person against whom the adjudication is made, has failed without sufficient cause to comply with the order and if that fact is established, to proceed as directed by Section 488(3), Criminal P.C.

3. The opposite party in this case is a pleader of the Small Cause Court and his professional earnings up to the extent required for the maintenance of himself and his family do not vest in the official assignee. It is therefore a matter for inquiry

whether, in view of what may be elicited in evidence as to his income from professional earnings and from other sources, be has or has not failed, without sufficient cause, to comply with the order to maintain his wife. This rule must therefore be made absolute. The order of the learned Magistrate, is set aside and the case remanded to the Court below for a further inquiry on the lines indicated and for such action as may be called for as a result of that inquiry. As it appears that certain applications in connexion with the matter have been made to the Chief Presidency Magistrate, it is desirable that he should dispose of the whole case.

Roxburgh, J.

4. I agree.

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