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Court : Kolkata

Decided On : Jul-14-1927

Reported in : AIR1928Cal513

Appellant : Pauline White

Respondent : S.W. White

Judgement :

Costello, J.

1. This is an application on behalf of the petitioner in a suit for judicial separation who had obtained an order for alimony pendente lite. The application is made on behalf of the petitioner for an order that the respondent should carry out the terms of an order made by Gregory, J., dated 7th April 1927 whereby he was ordered to pay certain sums to the petitioner by way of alimony pendente lite, and the application further asks that in default of compliance with the order to pay the respondent be committed to jail as for a contempt of Court.

2. On the previous occasion when the matter came up before me, by consent of counsel for the respective parties it was agreed that the order made by Gregory, J., should be varied and that in future the respondent should pay to the petitioner's solicitors the sum of Rs. 400 or rather the equivalent of it in English money, that is to say, 30, by delivering to them a cheque upon an English bank on the 7th of each month. That agreement will be embodied in an order of this Court. The

question then remains as to whether or not any order should be made with regard to the costs of the proceedings. It is said on behalf of the respondent that the procedure adopted for the enforcement of the order of Gregory, J., will not lie and in fact it is incompetent for the Court to enforce an order of this character as for contempt.

3. It was very ably argued by Mr. Barwell that proceedings by way of contempt will still lie in this country for the enforcement of an order of this kind, and he bases his argument upon this footing that in England until the passing of the Debtor's Act in the year 1869 it was the practice to enforce orders for the payment of alimony pendente lite by means of proceeding in contempt, and that it was only by reason of Section 4, Debtors Act, that such procedure was abolished.

4. That would indeed appear to be the case and indeed Hill, J.,-so held in the case of Leavis v. Leavis which was decided in the year 1921 and is reported in 21, Pro. Div. It also appears from that case and from other authorities that although noncompliance with an order for payment of alimony cannot be enforced by attachment by reason of Section 4, Debtor's Act, it nevertheless remains a contempt and has certain effects as a contempt, as for example in preventing a contumacious respondent himself from obtaining relief. It is clear from the English authorities, which I need not go into in any detail, that other orders made by the Divorce Court in England, as for example, an order requiring a respondent to furnish security for his wife's costs, may still be enforced by proceedings for contempt of Court. From all the authorities it indeed appears that noncompliance with any order made by the Divorce Court in England is a contempt of Court, but so far as an order which directs the payment of money is concerned, although it is a contempt, it cannot be enforced by attachment.

5. Mr. Barwell argued that as there is no counterpart in this country of Section 4, Debtors Act of 1869, the English procedure not only survives but is imported into the machinery of the Courts of India, and that partly, if not wholly, by the operation of Section 7, Indian Divorce Act of 1879.

6. It is perhaps a little difficult to follow the reasoning of that argument, because Mr. Barwell admitted quite frankly and indeed there are plenty of authorities to

show that Section 7 is concerned not with adjective law but with substantive law, and it applies to matters which are not specifically otherwise dealt with in the Divorce Act.

7. However, be that as it may, even if it were the intent of Section 7 to bring into this country all the rules of procedure in the Divorce Court in England, it would not avail the petitioner in the present instance, not only because it is no longer the practice in England to enforce orders for payment of money made by the Divorce Court by means of contempt, but because there is in the Indian Divorce Act itself an express direction as to the method by which orders of this kind are to be dealt with, Section 55, Divorce Act, provides that all decrees and orders made by the Court in any suit or proceeding's under this Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction. They may be appealed from under the laws, rules and orders for the time being in force.

8. Therefore, in order to ascertain how orders made by the Court in any suit or proceeding under the Divorce Act should be enforced, it is necessary to turn to the provisions of the Code of Civil Procedure and to see how orders of the Court made in the exercise of its original civil jurisdiction are to be enforced, and upon turning to the Code we find that by Section 36 it is laid down that the provisions of this Code relating to the execution of decrees, shall so far as they are applicable, be deemed to apply to execution of orders; and by Section 2, Clause 14, 'order' is defined as meaning a formal expression of any decision of the civil Court which is not a decree. There can be no doubt, in my opinion, that the order made by Mr. Justice Gregory on the 7th July was an 'order' within the definition of Section 2, Clause 14, and reading that in conjunction with Section 36 that order has to be enforced in accordance with the provisions of the Code relating to the execution of decrees, and there is an appropriate part of the Code dealing with the matter into which I need not go at the moment. Suffice it to say that the provisions relating to the execution of decrees for the enforcement of orders do not contemplate the Court dealing with the matter purely as one of contempt. On the contrary, there are various specific provisions laying down how the matter should be dealt with and how the debtor in default should be brought before the Court.

9. In those circumstances it seems to me that it is not competent for a Court to send a defaulting respondent to jail straightaway. The machinery dealing with the execution of orders must be complied with and then ultimately, if there is a failure to pay, the respondent may be committed to jail.

10. From what I have said the consequence is that these proceedings are in a sense misconceived. In so far as they purport to be an application to commit the respondent to jail they are not in order. I will also observe that the petition itself prays that there shall be an order directing payment, which is inconsistent with a proper application for commitment into prison as for a contempt. Having regard to all the circumstances I think the proper method of dealing with this question of costs is to say that there shall be no order as to costs.

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