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Court : Kolkata

Decided On : Apr-18-1983

Reported in : 1984CriLJ206

Judge : Padma Khastgir, J.

Appellant : Tarak Shaw

Respondent : Minto Shaw

Judgement :
ORDER

Padma Khastgir, J.

1. This is an application by the insolvent Tarak Chandra Shaw for an order for protection. The petitioner on his own petition was adjudicated an insolvent by an order of the Court dt. 30th August, 1982. According to the petitioner his only creditor is one Smt. Mintu Shaw, who has obtained a payment order against the petitioner from the Court of the 3rd Judicial Magistrate, Barrackpore, 24-Parganas whereunder the petitioner had been directed by the learned Court to pay maintenance of Rs. 75/- per month to his creditor. For non-compliance of the said order an warrant of arrest had already been issued against the petitioner for nonpayment of the maintenance. The petitioner had filed already a case against the said Mintu Shaw at Sealdah Court disputing the marriage with the said Smt. Mintu Shaw. Inasmuch as the petitioner is apprehensive of arrest in view of the

warrant issued by the Court of the 3rd Judicial Magistrate, Barrackpore, the petitioner has taken out this application for protection.

2. Mr. Pronab K. Chatterjee appeared in support of this application. The creditor in her affidavit affirmed on 25th of January, 1983 stated that she is the wife of the debtor applicant and she opposed this application on the ground that the debtor had made false averments in the petition inasmuch as the husband neglected and refused to maintain the wife and the minor child born out of the wedlock with the applicant. The said Smt. Mintu Shaw filed an application under Section 125 of the Criminal P. C. before the 3rd Court of Judicial Magistrate at Barrackpore and obtained an order for maintenance for a sum of Rs. 75/- per month. Against the said order the debtor preferred a revisional application before this Court. Mr. Justice Amitava Dutta by an order dt. 1st September, 1981 was pleased to issue a rule and stay of proceedings provided the debtor paid the entire arrears of maintenance in three monthly equal instalments, and it was further ordered that in the event of failure to pay instalments the rule would be discharged and the stay order would be vacated. Not only the petitioner had given wrong address to obtain the jurisdiction of this Court but also he suppressed material facts in the petition for winding up. According to the deponent the petitioner had been residing outside the jurisdiction of this Court at 126, B. K. Mitra Road, Barranagar, Dist. 24-Parganas. Under the circumstances this Court had no jurisdiction to entertain such application, It had been further contended that the application for protection under Section 25 of the presidency Towns Insolvency Act was not maintainable to defeat the proceedings taken by the wife under Section 125 of the Cr. P. C. The deponent further stated in para 5 of her affidavit that not only the debtor applicant has been permanently residing at Barranagar but he also carries on business. He is the owner of a house situated at Kalinath Road, Tantipara, Barranagar as also he had a joint interest in the premises situate at premises No. 164, B. K. Mitra Road, Barranagar. Over and above that he is the owner of a wholesale and retail shop at Barranagar. This application is mala fide and had been filed by the debtor to frustrate the order passed by the learned Judicial Magistrate at Barrackpore as also by the learned Judge Mr. Justice Amitava Dutta. Under the circumstances the deponent prayed that no order should be passed on this application.

3. In the case reported in (1940) 41 Cri LJ 785 : AIR 1940 Mad 697 Penubala Muni Krishnayya v. Penubala Akkulamma it was held:-

Wording of Section 488(3), Criminal P. C. shows that in every case it is the duty of the Magistrate to find out whether the person ordered to pay maintenance under Section 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order under Section 23(1), Prov. Insol. Act nor the adjudication order passed by the Insolvency Court subsequent to the sentence by the Magistrate could be conclusive on this point. The question is one of fact which the Magistrate has to decide for himself. Prima facie, of course, it would appear to a Magistrate that an order of protection or an order of adjudication would be sufficient to show that failure to comply with an order to pay maintenance had not been without sufficient cause, but it cannot be said that the Magistrate's hands would be tied by the order of the Insolvency Court. It is not possible for a Magistrate who has passed a sentence of imprisonment under Section 488(3) to cancel the sentence merely because the Insolvency Court has issued an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered in the terms of Section 23 of the Prov. Insol. Act, that a person who has been sentenced under Section 488(3) is under imprisonment in execution of the decree of any Court for the payment of money.

4. In the instant case it is the definde case of the respondent that the petitioner had declared himself as an insolvent on his own application. It is also the positive case of the respondent that with an ulterior motive the petitioner has invoked the jurisdiction of this Court which he is not entitled to. He not only resides in Barranagar but also he possesses properties and business at Barranagar. He has sufficient means to comply with the order of the learned Magistrate at Barrackpore passed under Section 125 of the Cri. P. C. He has wilfully neglected to maintain his wife in spite of having means to provide for her maintenance, This application has been taken out also with the intention of defeating the claim of the respondent for maintenance. The mere fact that the applicant had been adjudicated as insolvent is not sufficient to indicate that he is unable to maintain his wife inasmuch as under Section 125 of the Cri. P. C. it is not only the visible means which would be taken into consideration but also his capacity to work and earn a

salary to maintain and support his wife and child. It is for the learned Magistrate to take into consideration whether the applicant had sufficient means to maintain his wife. The order of insolvency or the order of protection is not conclusive while making an enquiry under Section 125 of the Cri. P. C.

5. Mere omission to pay arrears is not sufficient inasmuch as there should be a finding of wilful neglect by the husband. Although in the case reported in (1923) ILR 50 Cal p. 867 : (1924) 25 Cri LJ 1088 Halfhide v. Halfhide it was held by a Division Bench of this High. Court that the fact that the husband has been adjudicated as an insolvent was conclusive so long as the order of adjudication stands that the husband was unable to pay his debts but there it was observed that the learned Judges in that particular case could not come to an affirmative conclusion that there was wilful neglect on the part of the husband to pay the arrears of maintenance to his wife within the meaning of the words of the then Section 488 of the Cr. P. C. In that particular case there was already an order of protection passed by the Commissioner at Darjeeling. The instant case is factually different. There is no protection order. The petitioner herein has applied for being adjudicated himself as insolvent on his own motion showing his wife as the only creditor in view of the various disputes having already raised by the wife contending that the petitioner has immovable properties as also he has a running business. It was for the learned Magistrate at Barrackpore to decide whether he had means to support and whether he had wilfully neglected to maintain his wife.

6. In the case reported in AIR 1936 Mad 793 : 1936-37 Cri LJ 1129 S. Yahia, Insolvent Amaturrub Ghousunnissa Begum, Applicant, it was held that arrears of maintenance under a magisterial order under Section 488 of .the Cr. P. C. is a present certain debt within the purview of Sub-section (3) of Section 47 of the Presidency Towns Insolvency Act and is therefore provable in insolvency and a protection order in respect of the same can be given. The learned Judge in the said case further observed quoting various English cases that liability to alimony is not a debt provable in insolvency on the reason that payment may be varied from time to time by the Court and it could be at any time put to an end by resumption of co-habitation. The case further referred to the case reported in (1923) ILR 50 Cat 867 : 1924-25 Cri LJ 1088, In the instant case the order for maintenance was

passed in the year 1976. The petitioner had himself adjudged as an insolvent on 30th August, 1982.

7. In the case reported in AIR 1940 Bom 344 : 1941-42 Cri LJ 101 Mahomed Hussein Abdul Kadar Shaikh Bhikan v. Emperor it had been held by a Division Bench of the Bombay High Court that a protection order under Section 25 of the Presidency Towns Insolvency Act does not protect the insolvent against the special statutory power of committal given to a Criminal Court under Section 488 of the Cr. P. C. A protection order would not protect against prosecution and conviction for a criminal offence by reason of which a provable debt might have been incurred by the insolvent. It further held that husband's insolvency is prima facie evidence of his inability to pay maintenance debt but it is not a conclusive evidence. Although it was held in that case that order for payment of past maintenance constituted a debt provable in insolvency but even then the learned Judges were hot satisfied that the protection order protected the debtor from being proceeded against in a Criminal Court. There the learned Judges held that the protection order did not protect the husband against the special statutory power of committal given to a Criminal Court under Section 488 of the Criminal p. C. The learned Judge relied on ILR (1938) All 486 : 1938-39 Cri LJ 553.

8. In the case reported in : AIR1960 Mad348 Kandaswami Moopan v. Angammal it had been held:-

The possession of property is not at all the criterion for awarding maintenance under Section 488. It is independent of possession of property. So long as a man is able-bodied and can work and earn his livelihood, it is his duty to support his wife, Therefore, notwithstanding the fact that a husband may be an insolvent or a professional beggar or a minor or is a sadhu or a monk, he must support his wife, so long as he is able-bodied and can eke out his livelihood and support his wife. In fact, even under the Hindu Law, the obligation which attaches from the moment of marriage, is independent of possession of property.

9. In the case reported in AIR 1965 Manipur 49 : 1965(2) Cri LJ 785 Laisram Nipamacha Singh v. Smt. Khaidem Ningol Sakhi Devi it had been held:

The word 'means' in Section 488 does net signify only visible means such as real property in the shape of income, revenue, or estate, or a definite employment. It includes the capacity to earn money. If a man is healthy and able-bodied he must be taken to have the means to support his wife or child. Before passing an order for payment of maintenance allowance, the person to be so ordered must be proved to have sufficient means within the meaning of this section. In the case of an able-bodied man there is a presumption that he has sufficient means to support his wife or child. The onus lies on him to show that by accident, disease or the conditions of the labour market or the like he is incapable of earning anything. The section requires that there should be not only 'means' but 'sufficient' means.

10. An order of insolvency does not determine the capacity to earn. Under the circumstances the very fact of adjudication of insolvency would not be sufficient to avoid the liability of maintenance of the wife and the child. Under the circumstances this Court is of the view that the petitioner is not entitled to the protection order as prayed for; as a result this application is dismissed with cost.

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