

1913
INDIA
GENERAL
NAVIGATION
AND
RAILWAY
CO. LD.
v.
GOPAL
CHANDRA
GUIN.

risk-note under which the railway Company were absolved from all liability for loss of, or damage to the goods, subject to the proviso that the Company would be liable for loss due to wilful negligence on the part of their servants. Section 9 of the Carriers Act clearly shows that the *onus* of proving negligence is not upon the plaintiff. Moreover, in this case, the plaintiff gave positive evidence of negligence which has been apparently believed by the Courts below.

We are accordingly of opinion that the Courts below came to a right conclusion, and that the appeal must be dismissed. Having regard, however, to the circumstance of the case, we think that each party should bear his own costs in all Courts.

S. K. B.

Appeal dismissed.

CRIMINAL REVISION.

Before Imam and Chapman, JJ.

EAD ALI

v.

LAL BIBI.*

1913
May 22.

Maintenance—Liability of estate of deceased person for arrears of maintenance accrued prior to death—Abatement of order for maintenance after death—Criminal Procedure Code (Act V of 1898) s. 488 (1), (3), (6).

A claim for arrears of maintenance abates on the death of the person against whom an order under sub-s. (1) of s. 488 of the Criminal Procedure Code has been made, and cannot be enforced thereafter against his estate.

Semble: Before a warrant is issued under sub-s. (3), wilful neglect to comply with the order must be found, and for that purpose evidence has to be taken under sub-s. (6) in the presence of the accused.

* Criminal Revision No. 343, of 1913, against the order of J. M. Chatterjee, Subdivisional Officer of Arambagh, dated Feb. 17, 1913.

THE opposite party, Lal Bibi, obtained an order, under s. 488 of the Criminal Procedure Code, from the Subdivisional Officer of Arambagh, against one Ashmatulla to whom, she alleged, she had been married in the *nika* form. The amount was paid regularly by the accused till a few months before his death. Thereafter she applied to the Magistrate to realize the arrears due up to the date of her husband's death. A distress warrant was accordingly issued, and a stack of paddy, said to belong to the deceased, attached in execution. The petitioner, who was the son of Ashmatulla, thereupon filed a claim to the attached paddy, but the Magistrate after taking evidence on both sides rejected the same, on the 17th February 1913, and ordered the arrears to be realized by the sale of the crops. The petitioner then moved the High Court and obtained the present Rule.

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Babu Manmatha Nath Mookerjee, for the petitioner.

Babu Gour Chandra Pal, for the opposite party.

IMAM AND CHAPMAN, JJ. The petitioner, Ead Ali, is the son of one Ashmatulla, deceased, against whom an order under section 488 of the Criminal Procedure Code had been passed in favour of Lal Bibi, opposite party, who claimed to be the wife of Ashmatulla by a *nika* marriage. She had claimed against him maintenance for herself and two children, and the order of the Magistrate passed under section 488 was that she should be given a maintenance of Rs. 15 per month by Ashmatulla. For a time the amount of maintenance was paid, but towards the latter part of the life of Ashmatulla, that is to say, for a few months before his death, the maintenance allowed fell into arrears, and on his death the complainant,

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Lal Bibi, applied to the Magistrate for enforcing the order of maintenance in respect of the arrears under section 488, clause (3), by issuing a warrant for levying the amount due in the manner provided for levying fines under the Code. The Magistrate issued such a warrant and attached some paddy said to belong to the estate of the deceased, whereupon Ead Ali, the petitioner, filed his objection; and after an enquiry in the presence of Ead Ali, the Magistrate arrived at the conclusion that the attached paddy did, as a matter of fact, belong to the estate of the deceased, and thereafter disallowed the claim of the petitioner and directed that the amount due be recovered out of the attached paddy. This order of the Magistrate has been questioned by the petitioner in this Court, and a Rule was issued on the District Magistrate and the opposite party to show cause why the order should not be set aside on the ground that the Magistrate had erred in law in not holding that now that Ashmatulla was dead the order for maintenance could not be executed.

The only point that we have got to consider in this case is whether by reason of the death of Ashmatulla the claim to arrears of maintenance is any more enforceable.

In order that a warrant may be issued under section 488, sub-section (3) for levying the amount due, it must be found that there had been a wilful neglect to comply with the order, and to enable a Magistrate to find that there had been a wilful neglect, evidence has to be taken under sub-section (6) of section 488; and that sub-section says that "all evidence under the Chapter XXXVI shall be taken in the presence of the husband or the father, as the case may be, or when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded

in the manner prescribed in the case of summons cases." From the language of the sub-section, it is quite clear that in the mind of the Legislature the instance of a deceased person, against whose estate arrears of maintenance may be claimed, was never present. That of course is merely a surmise that we express, and we cannot say anything more; but the law as it stands is quite explicit in regard to the necessity for the presence of the party against whom evidence is being taken, and it has been pointed out by the learned vakil, who has appeared in support of the Rule, that the man against whom the order was passed being dead, there is no claim that can be now enforceable under section 488 of the Code against the estate of the deceased.

We are disposed to accept the view that has been pressed upon us by the learned vakil. We, therefore, make this Rule absolute and set aside the order passed by the Magistrate.

E. H. M.

Rule absolute.

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