

would, on the facts set forth in the learned Judge's order, be uncalled for. The learned Judge does not suggest in his order that the plaintiff is a man of straw or that he is not the real plaintiff. As I have noted before, the only reason given apparently is that one plaintiff has been transferred to the category of defendants.

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 CUMING J.

It has been contended that the petitioner has not challenged the order of the learned Judge so far as it concerns the giving of security for the costs already incurred and that his only grievance is as regards future costs. That that is so would appear from the grounds of his application, and I would not therefore propose to interfere with the order of the lower Court so far as it relates to costs already incurred but with regard to the order for security for future costs I would set it aside.

G. S.

*Rule absolute.*

### CRIMINAL REVISION.

*Before C. C. Ghose and Cuming J.*

HALFHIDE

v.

HALFHIDE.\*

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 April 25.

*Maintenance—Arrears—Husband adjudged an insolvent but not discharged—Protection order passed in his favour by Insolvency Court—Wilful neglect—Criminal Procedure Code (Act V of 1898), s. 488 (3)—Provincial Insolvency Act (V of 1920) ss. 27 and 44.*

The fact that a husband, who is in arrears of maintenance, has been adjudicated an insolvent, under s. 27 of the Provincial Insolvency Act (V of 1920), is conclusive, as 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 within s. 488(3) of Criminal Procedure Code.

\* Criminal Revision No. 305 of 1923, against the order of D. Swinhoe, Chief Presidency Magistrate of Calcutta, dated March 7, 1923.

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In January 1919, an order was made against the petitioner, under s. 488 of the Criminal Procedure Code, by an Honorary Presidency Magistrate, Calcutta, to pay Rs. 45 monthly as maintenance to his wife. After some payments the petitioner fell into arrears, and was arrested in December 1921. He paid thereafter the amounts due up to April 1921, and defaulted again except as to a sum paid in June 1922. On the 23rd January 1923, the wife applied to the Chief Presidency Magistrate to enforce payment of Rs. 870, the arrears due, and a warrant was issued against the petitioner, who was then in Darjeeling, on the 8th February. He thereupon filed his schedule in insolvency, on the 9th, before the Deputy Commissioner of Darjeeling, and included his wife in the list of creditors. He obtained a protection order from the Court on the 16th. On the 22nd he appeared before the Third Presidency Magistrate who discharged him, but the Chief Presidency Magistrate sent for the records, and overruling his objection declared him liable to pay the arrears due, and gave him time to the 7th March for that purpose. The amount not having been paid, the petitioner was sentenced on that date to one month's simple imprisonment. On the 5th April, the Deputy Commissioner adjudicated him an insolvent, and continued the protection order until his discharge. The petitioner then obtained the present rule.

*Babu Palit Paban Chatterjee* (with him *Babu Jotindra Mohan Mukherjee*), for the petitioner. The protection order in insolvency gave the accused immunity from arrest under s. 488(3) of the Criminal Procedure Code. There is no finding of wilful neglect by the Magistrate. It cannot be said after the adjudication order that the petitioner was in wilful neglect. Mere omission to pay the arrears is not sufficient: see,

*Bhikhu Khan v. Zahuran* (1). Section 44 of the Provincial Insolvency Act refers to the effect of an order of discharge, and does not apply. It is to the interest of the creditors that a full enquiry should be made into an insolvent's affairs, and his imprisonment impedes such enquiry: *Re Meghraj Gangabux* (2).

*Rabu Prabodh Kumar Dass* (with him *Labu Narendra Nath Mitter*), for the opposite party. A protection order of the Insolvency Court does not affect the Magistrate's jurisdiction under s. 488 (3) of the Code. An order of discharge is not a bar to the recovery of the arrears of maintenance. Such a debt is not proveable in insolvency. Refers to s. 44 of Act V of 1920, and *Mahomed Haji Essack Ehas v. Shaik Abdool Rahiman* (3). The petitioner has all along been in wilful default, as appears from the various applications by the wife for realization.

GHOSE AND CUMING JJ. We think that this Rule must be made absolute. The facts, shortly stated, are as follows:—On the 20th January 1919, an order was made directing the petitioner before us to pay a sum of Rs. 45 a month as maintenance allowance to his wife, who is the opposite party. Several warrants were issued for realization of the money due from the husband, but they were returned unexecuted. In December 1921, the husband was arrested, and thereupon the dues up to April 1921 were paid. Subsequently a further sum was paid some time in June 1922. The opposite party alleged that the arrears now due amounted to a sum of Rs. 870, and she accordingly prayed for the issue of a warrant against her husband. An order was made, on the 8th of February 1923, for the issue of a warrant against the

(1) (1897) I. L. R. 25 Calc. 291. (2) (1910) I. L. R. 35 Bom. 47, 49.

(3) (1915) I. L. R. 40 Bom. 461.

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husband, and thereupon the husband appeared before the Third Presidency Magistrate, Mr. Das-Gupta, on the 22nd February 1923, when he represented that he had no means whatsoever to pay the maintenance to his wife, and that a protection order had been issued in his favour, under the Insolvency Act, by the Deputy Commissioner of Darjeeling. The case was adjourned, the husband being let out on bail. Later on the same day the Magistrate recorded an order to the effect that, under the circumstances, the husband could not be arrested and could not be ordered to furnish bail. The record was, however, sent for by the Chief Presidency Magistrate, who came to the conclusion that section 44 of the Insolvency Act was no bar to an order under section 488 of the Code of Criminal Procedure. The Chief Presidency Magistrate thereupon gave time to the husband, till the 7th March 1923, to pay up the arrears of maintenance.

The petitioner states that, inasmuch as he was unable to pay the amount of arrears of maintenance, he filed a petition for being adjudicated as an insolvent before the Deputy Commissioner of Darjeeling on the 9th February 1923, and that in the schedule to his petition he entered the name of his wife as a creditor of his. He further states that on the 16th February 1923, the Deputy Commissioner of Darjeeling issued a protection order in his favour under the provisions of the Insolvency Act. The petitioner has produced before us a certified copy of the order made by the Deputy Commissioner of Darjeeling, dated the 5th April 1923, in the insolvency proceedings, from which it appears that the petitioner has been adjudicated an insolvent under section 27 of the Insolvency Act, and that it has been directed that the order for protection of the petitioner against arrest should continue to be in force till his discharge, which the

petitioner was directed to apply within six months from the date mentioned above.

These being the facts, it is impossible for us to come to an affirmative conclusion that there was wilful neglect on the part of the petitioner to pay the arrears of maintenance to his wife within the meaning of the words used in section 488 of the Code of Criminal Procedure. In our opinion the fact that he has been adjudicated an insolvent is conclusive, so long as the order of adjudication stands, that the petitioner is unable to pay his debts. There is also the order of protection. It follows, therefore, that the petitioner, being unable to pay his debts, is not guilty of wilful neglect within the meaning of section 488 of the Code of Criminal Procedure.

In this view of the matter, the Rule, as we have said, must be made absolute. The bail bond of the petitioner will, therefore, be cancelled.

E. H. M.

*Rule absolute.*

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