

CRIMINAL REVISION.

Before Bartley and Roxburgh JJ.

RADHA RANI DASI

v.

MATI LAL SEN.*

1940

June 6.

Maintenance—*Distress-warrant, when can be issued—Insolvency of the husband, if an answer to an application for distress-warrant—Code of Criminal Procedure (Act V of 1898), s. 488.*

Sub-section (3) of s. 488 of the Code of Criminal Procedure as amended in 1923 does not specify "wilful neglect." Under the amended section, when the wife makes an application for the issue of a distress-warrant against the husband for arrears of maintenance, it is the duty of the Magistrate to enquire whether the husband has or has not failed "without sufficient cause" to comply with the order for payment of maintenance and then make the appropriate order.

An order of adjudication of the husband as an insolvent does not, in itself, amount to rebuttal of an allegation that the insolvent has failed "without sufficient cause" to comply with the order, though, under the previous law, it might be a complete answer to an allegation of "wilful neglect."

Halfhide v. Halfhide (1) distinguished.

The professional earnings of a pleader up to the extent required for the maintenance of himself and his family do not vest in the Official Assignee.

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The material facts of the case and arguments in the Rule appear sufficiently from the judgment.

Suresh Chandra Talukdar and *Biswanath Dhar* for the petitioner.

The Officiating Deputy Legal Remembrancer, Debendra Narain Bhattacharjee for the Crown.

Guruprosad Ghose for the opposite party.

BARTLEY J. This Rule was issued upon the Chief Presidency Magistrate of Calcutta to show cause why

*Criminal Revision, Case No. 294 of 1940, against the order of S. Wajid Ali, Third Presidency Magistrate of Calcutta, dated Feb. 6, 1940.

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an order made on a petition under s. 488 of the Code of Criminal Procedure 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 Division Bench for decision.

The point for decision is whether an order of adjudication is or is not a complete bar to realisation of maintenance under s. 488 of the Code of Criminal Procedure. On behalf of the opposite party it is contended, on the strength of the case of *Halfhide v. Halfhide* (1), 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 s. 488 (3) of the Code of Criminal Procedure, 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 s. 488 of the Code of Criminal Procedure.

As the law stands at present, however, the amended s. 488 (3) of the Code of Criminal Procedure 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 of *Halfhide v. Halfhide*, 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 s. 488 (3) of the Code of Criminal Procedure.

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 enquiry whether, in view of what may be elicited in evidence as to his income from professional earnings and from other sources, he has or has not failed, without sufficient cause, to comply with the order to maintain his wife.

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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 enquiry on the lines indicated and for such action as may be called for as a result of that enquiry.

As it appears that certain applications in connection with the matter have been made to the Chief Presidency Magistrate, it is desirable that he should dispose of the whole case.

ROXBURGH J. I agree.

Rule absolute. Case remanded.

A.C.R.C.