

[230] APPELLATE CRIMINAL.

The 27th October, 1881.

PRESENT :

MR. JUSTICE KINDERSLEY AND MR. JUSTICE MUTTUSAMI AYYAR.

The Queen *against* Karri Papayamma. **Criminal Procedure Code, Sections 536—538.*

Notwithstanding the provisions of Section 538 of the Code of Criminal Procedure, the Magistrate who has made an order for maintenance under Section 536 may issue a warrant for collection of arrears of maintenance when the husband is of his jurisdiction,

THIS case was referred for the orders of the High Court by the Sessions Judge of Ganjam in the following terms:—

“The petitioner is the wife of one Karri Ramanuja Naidu, now residing at Anakapalli in the Vizagopattam District. She obtained an order for maintenance in the Court of the Senior Assistant Magistrate of Berhampore.

“Upon her application to the Magistrate to issue a warrant for the collection of arrears, the Magistrate decline to grant her request on the ground that she was bound to make the application to the Magistrate having jurisdiction at the place where her husband resides.

“Section 538, says that the order ‘shall be enforceable.’

* Case No. 70 of 1881 referred by J. R. Daniel, Sessions Judge of Ganjam under Section 296 of the Code of Criminal Procedure.

Sec. 538:—A copy of the order of maintenance shall be given to the person for whose maintenance it is made or to the guardian of such person; and shall be enforceable by any Magistrate in any place where the person to whom the order is addressed may be, on the Magistrate being satisfied as the identity of the parties and the non-payment of the sum claimed.

Sec. 536:—If any person, having sufficient means, neglects or refuses to maintain his wife, or legitimate or illegitimate child unable to maintain himself, the Magistrate of the District, or a Magistrate of a division of a District, or a Magistrate of the first class may, upon due proof thereof by evidence, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding fifty rupees in the whole, as to such Magistrate seems reasonable.

Such allowance shall be payable from the date of the order.

If such person wilfully neglects to comply with this order, such Magistrate may, for every breach of the order, by warrant, direct the amount due to be levied in the manner provided for levying fines; and may order such person to be imprisoned with or without hard labour for any term not exceeding on month for each month's allowance remaining unpaid.

Provided that, if such person offers to maintain his wife on condition of her living with him, and his wife refuses to live with him, such Magistrate may consider any grounds of refusal stated by such wife; and may make the order allowed by this section notwithstanding such offer, if he is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by consent.]

“The petitioner submits that this is permissive only, and that the Magistrate ought to have issued the warrant and collected the arrears as laid down in Sections 536 and 307.

“The question is not free from doubt.”

No one appeared at the hearing.

The Court (KINDERSLEY and MUTTUSAMI AYYAR, JJ.) delivered the following.

Judgment.—We are of opinion that Section 538 of the Code of Criminal Procedure does not deprive the Magistrate, who has made an order for maintenance, of the jurisdiction given him by Section 536. When the defendant is beyond his jurisdiction, he may, in his discretion, exercise the jurisdiction or refer the applicant to the Magistrate having jurisdiction at the place in which the defendant is to be found.

We are not prepared to interfere with the order made in this case.

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The Queen against Vasantappa.

Madras Abkari Acts III of 1864, Section 25, and V of 1879, Section 26-B,

The offence, under Madras Act III of 1864, Section 25, (a) of not producing, when called upon by the Police, a liquor license, is not one for which a Magistrate may proceed under Section 26-B of Madras Act V of 1879, (b)

The Second-class Magistrate, Kalliandrug, convicted the accused, a licensed arrack-seller, under section 25 (a) of the Madras Abkari Act (III of 1864) because, when called upon by first witness (a constable), he failed to produce his license on 29th July 1881, and fined him one rupee.

The first witness having produced before the Magistrate some arrack which the accused was selling in his shop, together with certain brass and other vessels found in the shop, the Magistrate ordered the arrack to be thrown away, as the Abkari contractor would not buy it, and the vessels to be kept, pending a reference to the Collector soliciting orders for their confiscation and sale by auction.

* Case No. 71 of 1881 referred by H. P. Gordon, District Magistrate of Bellary, under Section 296 of the Code of Criminal Procedure.

(a) *Act III of 1864, Section 25.*—Every person who holds a license for the sale or manufacture of liquor shall keep such license at the house or shop specified in the license, and shall show the license on the demand of any Magistrate or Police officer above the rank of Deputy Constable who shall demand to see it; and any licensed dealer who shall refuse or be unable to produce his license on such demand shall, on proof of the same before of Magistrate, be liable to a fine not exceeding 200 rupees.

(b) *Act V of 1879, Section 26 B.*—One-half of all fines levied from persons convicted of the illicit possession, carrying or sale of liquor, and one-half of the proceeds from the sale of liquor, vessels, packages, conveyances, stills and other articles confiscated under this Act shall, upon adjudication of the case, be awarded, in such proportion as the Magistrate may think proper, to the officer or officers who apprehended the offender or seized the articles.