VEERAYYA v. VENKATA BHASHYA-KARLA RAO.

MOCKETT J.

discretion in the Court under section 41, a discretion of course to be exercised judicially in accordance with the equitable doctrine laid down. I have not heard nor has any reference been made to cases where that doctrine has been invoked in aid of a party whose conduct can in any way be compared to that of the defendants herein. It is not impossible that their position may be one of misfortune. In my judgment, any misfortune they have suffered was entirely their own fault. I generally agree with all the conclusions at which my learned brother has arrived and with the result of those conclusions.

A.S.V.

INSOLVENCY JURISDICTION.

Before Mr. Justice Wadsworth.

1936, July 27.

IN THE MATTER OF S. YAHIA, AN INSOLVENT.

AMATURRUB GHOUSUNNISSA BEGUM *alias* AMIR BEGUM—APPLICANT.*

Presidency-towns Insolvency Act (III of 1909), sec. 46(3)—"Debt"—Arrears of maintenance payable under sec. 488, Criminal Procedure Code (Act V of 1898)—Whether constitute "debt".

Arrears of maintenance payable under a magisterial order under section 488 of the Code of Criminal Procedure are a debt provable in insolvency within the purview of sub-section (3) of section 46 of the Presidency-towns Insolvency Act, and in respect of such arrears a protection order can be given.

*Application No. 160 of 1936, in Petition No. 176 of 1936.

In the matter of Tokee Bibee v. *Abdool Khan*, (1879) I.L.R. 5 Cal. 536, followed.

Halfhide v. *Halfhide*, (1923) I.L.R. 50 Cal. 867, and *Victor* v. *Victor*, [1912] 1 K.B. 247, referred to.

Linton v. *Linton*, (1885) 15 Q.B.D. 239; *Kerr* v. *Kerr*, [1897] 2 Q.B. 439; and *In re Hawkins Ex parte Hawkins*, [1894] 1 Q.B. 25, distinguished.

APPLICATION of Amaturrub Ghousunnissa Begum *alias* Amir Begum praying to set aside the order of the Master made in Application No. 1054 of 1936 and dated 23rd April 1936 making protection of the insolvent absolute and to confine the protection to the dower debt disclosed in the schedule.

M. A. Kirmani for applicant.

P. R. Ramakrishna Ayyar for insolvent.

Cur. adv. vult.

JUDGMENT.

This is an appeal against an order of the Master granting protection in insolvency. The appellant is a Mahomedan wife whose husband has been required by a magisterial order under section 488 of the Code of Criminal Procedure to pay her maintenance. The maintenance has not been paid regularly, and it was in respect of the debt for arrears of maintenance that the protection order in insolvency was granted.

It is argued for the appellant that such arrears do not constitute a debt provable in insolvency with reference to section 46 of the Presidency-towns Insolvency Act. There is nothing in the terms of section 46 which very obviously excludes such a debt. The exclusion of the debt could only be by virtue of its being not a "debt or liability, certain or contingent", to use the words

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of sub-section 3 of the section. There is express authority in a very old Calcutta case, *In the matter of Tokee Bibee* v. *Abdool Khan*(1), for the view that arrears of maintenance under a magisterial order can be a debt or liability provable in insolvency, in respect of which a valid protection order may be issued. But since this decision, there has been a line of English cases which have held that a liability to alimony under an order of the Divorce Court is not a debt provable in insolvency, vide *Linton* v. *Linton*(2), the reason being that the payment may be varied from time to time by the Court and may at any time be put an end to by resumption of cohabitation ; and the English Courts have even gone so far as to hold that the liability for arrears of alimony, whether accrued before or after the order of adjudication, cannot be proved in insolvency, vide *Kerr* v. *Kerr*(3) and *In re Hawkins. Ex parte Hawkins*(4). The *ratio decidendi* of these cases appears to be the same as in the case of *Linton* v. *Linton*(2), viz., that the Divorce Court can and will, wholly or partially, relieve a husband of payment of arrears, if it is just to do so. It may at once be pointed out that no such power lies under section 489 of the Code of Criminal Procedure and it is well established that any reduction in the rate of maintenance by a Magistrate can only affect payments accruing due after the date of the order. There are also English cases, e.g., *Victor* v. *Victor*(5), in which it has been held that an annuity payable to a wife under a separation deed stands on a different footing from alimony which is

(1) (1879) I.L.R. 5 Cal. 536.
(2) (1885) 15 Q.B.D. 239.
(3) [1897] 2 Q.B. 439.
(4) [1894] 1 Q.B. 25.
(5) [1912] 1 K.B. 247.

variable by the Court and that, even though such an annuity is terminable on the resumption of cohabitation, it can be proved in bankruptcy. A more recent decision of the Calcutta High Court, *Halfhide* v. *Halfhide*(1), though not precisely on this point, seems to assume that arrears of maintenance can be proved in insolvency. Having in view the fact that the power given under section 489 of the Code of Criminal Procedure to a Magistrate to vary an order for maintenance does not include the power to make such variation retrospective so as to cover arrears already accrued due, it seems to me not possible to contend on the strength of the English decisions regarding alimony that such a debt is not a present certain debt or that such debt does not come within the purview of sub-section (3) of section 46 of the Presidency-towns Insolvency Act.

I therefore hold that the learned Master was right in deciding that the arrears of maintenance are a debt provable in insolvency and in respect of which a protection order can be given. The appeal is therefore dismissed with costs.

V.V.C.

(1) (1923) I.L.R. 50 Cal. 867.