

RAMASWAMI
v.
ALAGAYAMMAL.

Judge gives no reasons in support of his conclusion and, with due respect, we are unable to agree with it.

PATANJALI
SASTRI J.

As it has not been ascertained whether the mortgage debt due to the respondent and another is a debt due from an agriculturist, the case will have to go back for an inquiry on that matter. If it is found that the debt is also a debt due from an agriculturist, the respondent will be entitled to the benefit of the exemption; if not, such debt must be regarded as "other property" within the meaning of the provision and the respondent will be excluded from it. Costs throughout will abide and follow the result.

N.S.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Lakshmana Rao.

PENUBALA MUNI KRISHNAYYA (RESPONDENT),
PETITIONER,

v.

PENUBALA AKKULAMMA (PETITIONER),
RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), sec. 488—Petitioner directed to pay maintenance, under—Failure to comply with the order without sufficient cause—Sentence of imprisonment awarded—Filing an insolvency petition and obtaining an order for release under sec. 23 (1) of the Provincial Insolvency Act (V of 1920)—Petitioner, if could be released on the strength of the order.

The petitioner was directed by a Joint Magistrate to pay maintenance to his wife under section 488, Criminal Procedure Code. On his failing to comply with the order, the Magistrate found that he had done so without sufficient cause and sentenced him to suffer rigorous imprisonment for one month.

* Criminal Revision Case No. 966 of 1939
(Criminal Revision Petition No. 913 of 1939).

The petitioner then filed an insolvency petition, obtained an order for his release under section 23 (1) of the Provincial Insolvency Act and, on the strength of that order, made an application to the Joint Magistrate for his release. The Magistrate dismissed the application. On a revision petition filed against that order,

held that the order of the Magistrate was correct.

It is the duty of the Magistrate to find out whether the person ordered to pay maintenance under section 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order can be conclusive on this point. The question is one of fact which the Magistrate has to decide for himself.

A Magistrate who has passed a sentence of imprisonment under section 488 (3), Criminal Procedure Code, cannot cancel the sentence merely because an insolvency Court issues an order of protection. The sentence of imprisonment is a punishment inflicted for the breach of the order. A person who has been sentenced under section 488 (3), Criminal Procedure Code, is not a person under "imprisonment in execution of the decree of any Court for the payment of money" within the terms of section 23 (1) of the Provincial Insolvency Act.

Shyama Charan v. Anguri Devi(1), followed.

Mehr Khan v. Mst. Bakht Bhari(2), *Maung Tin v. Ma Hmin*(3) and *Mahomed Ali Mithabhai, In re*(4), referred to. PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Chandragiri Division, dated 29th October 1939, and made in Miscellaneous Case No. 104 of 1938.

N. Rangachari for petitioner.

Public Prosecutor (V. L. Ethiraj) for the Crown.

The ORDER of the Court was pronounced by BURN J.—This is an application to revise the order passed by the learned Sub-divisional Magistrate of Chandragiri on 29th October 1939 on an application

MUNI
KRISHNAYYA
v.
AKKULAMMA.

BURN J.

(1) I.L.R. [1938] All. 486.

(2) (1928) I.L.R. 10 Lah. 406.

(3) (1933) I.L.R. 11 Ran. 226 (F.B.).

(4) A.I.R. 1930 Bom. 144.

MUNI
KRISHNAYYA
v.
AKKULAMMA.
—
BUEN J.

made to him on 28th October 1939 on behalf of the petitioner. The petitioner is the husband of a woman named Akkulamma in whose favour the learned Joint Magistrate passed an order in Miscellaneous Case No. 104 of 1938 on 7th February 1939 directing this petitioner to pay his wife Rs. 3-8-0 per mensem as maintenance under section 488 of the Criminal Procedure Code. The petitioner did not pay in accordance with that order. Before she could enforce the order, the petitioner filed a suit, Original Suit No. 128 of 1939, in the Court of the District Munsif of Tirupati and obtained an interim injunction restraining his wife from enforcing the order for maintenance. The injunction was in force until 21st July 1939. On that date, the interim injunction was vacated and the petitioner's wife on 24th July 1939 applied to the Joint Magistrate to direct this petitioner to pay Rs. 17-8-0 being the arrears for five months. The learned Joint Magistrate issued a distress warrant and as the money was not realized, he gave notice to the petitioner who appeared before him. The Magistrate found that he had without sufficient cause failed to pay the money due to his wife under the maintenance order. The Magistrate, therefore, sentenced him to suffer rigorous imprisonment for one month or until the amount of the arrears should sooner be paid. This order was passed on 23rd October 1939. On the 24th October the petitioner filed an insolvency petition in the Court of the District Munsif and obtained from him an order for his release under section 23 (1) of the Provincial Insolvency Act. The District Munsif communicated a copy of this order to the Joint Magistrate with a letter, dated 25th October and the petitioner made an application on the 28th October for his release. The learned Joint Magistrate dismissed

his application for release and this revision petition has consequently been brought.

The contention on behalf of the petitioner is that the protection order passed by the insolvency Court is a decision of a competent civil Court within the meaning of section 489 (2) of the Criminal Procedure Code in consequence of which the Joint Magistrate is compelled to cancel the sentence of imprisonment passed upon this petitioner. There is no authority for this contention. Learned Counsel for the petitioner has referred us to the cases reported as *In the matter of Tokee Bibee v. Abdool Khan*(1) and *Halfhide v. Halfhide*(2). But we do not think that they have any application. In the earlier case there was no sentence of imprisonment passed at all. In the second case, the protection order had been issued before the sentence of imprisonment was passed and, after the sentence of imprisonment was passed, an adjudication order had been passed and the protection order continued until discharge. Their Lordships of the Calcutta High Court said :

“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.”

It is noticeable that there was also no finding by the Magistrate of wilful neglect in that case. The terms of section 488 (3) have since been altered. There is no question now of “wilful neglect”. The section reads :

“If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every

MUNI
KRISHNAIYA
v.
AKKULAMMA.
—
BURN J.

(1) (1879) I.L.R. 5 Cal. 536.

(2) (1923) I.L.R. 50 Cal. 867.

MUNI
KRISHNAYYA
v.
AKKOLAMMA.
—
BURN J.

breach of the order, sentence such person
to imprisonment.”

This wording shows that in every case it is the duty of the Magistrate to find out whether the person ordered to pay maintenance under section 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order could be conclusive on this point. The question is one of fact which the Magistrate has to decide for himself. Prima facie, of course, it would appear to a Magistrate that an order of protection or an order of adjudication would be sufficient to show that failure to comply with an order to pay maintenance had not been without sufficient cause, but it cannot be said that the Magistrate's hands would be tied by the order of the insolvency Court. Learned Counsel for the petitioner has referred us to the decision of WADSWORTH J. reported as *Yahia, In re*(1). That has no bearing upon the point before us. The learned Judge has held that arrears of maintenance payable in respect of a magisterial order under section 488 of the Criminal Procedure Code constituted a “debt or liability provable in insolvency” within the meaning of section 46 (3) of the Presidency Towns Insolvency Act. The learned Judge has not anywhere suggested that a protection order issued by an insolvency Court would necessarily be conclusive for a Magistrate making an inquiry under section 488 (3) of the Criminal Procedure Code. The matter has been dealt with very clearly by ALLSOP J. of the Allahabad High Court in the case reported as *Shyama Charan v. Anguri Devi*(2). The learned Judge has said :

“It has also been urged that the mere fact that the applicant has been adjudicated an insolvent shows that he is

(1) I.L.R. [1937] Mad. 90.

(2) I.L.R. [1938] All. 486.

unable to pay for the maintenance of his wife and that constitutes sufficient cause for non-payment. Here again I am unable to agree. Learned Counsel has suggested that the whole of the insolvent's property vests in the receiver and there is nothing left out of which he can maintain his wife. This argument overlooks the fact that the property of the insolvent which vests in the receiver does not include any property which is exempted by the Code of Civil Procedure, from liability to attachment and sale in execution of a decree. Under the provisions of section 60 of the Code of Civil Procedure as now enacted the salary to the extent of the first hundred rupees and one-half of the remainder of such salary is exempt from such attachment. The applicant would therefore, if he is prepared to do work and earn a salary, be in a position to support his wife."

The learned Judge has also pointed out that

"an order passed by a Magistrate under section 488 (3) of the Code of Criminal Procedure for the imprisonment of a person who fails to pay a maintenance allowance is a sentence of imprisonment."

That is the word used in the Code itself. The learned Public Prosecutor has contended with much force that the Magistrate who has passed such a sentence has no power to cancel his own order. Learned Counsel for the petitioner has discussed the question whether a proceeding under section 488 is "a criminal case" or not. But we think that that is not a relevant discussion. It appears to us that the orders referred to in section 489 (2) which the Magistrate can cancel or vary are orders relating to the amount of maintenance payable. We do not think that it is possible for a Magistrate who has passed a sentence of imprisonment under section 488 (3) to cancel the sentence merely because the insolvency Court has issued an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order. It cannot be considered, in the terms of section 23 of the Provincial Insolvency Act, that a person who has

MUNI
KRISHNAYYA
v.
AKKUZAMMA.
—
BURN J.

MUNI
KRISHNAYYA
v.
AKKULAMMA.
—
BORN J.

been sentenced under section 488 (3) is under "imprisonment in execution of the decree of any Court for the payment of money." This view derives support from the decisions in *Mehr Khan v. Mst. Bakht Bhari*(1), *Maung Tin v. Ma Hmin*(2) and *Mahomed Ali Mithabhai, In re*(3). In the last case, it was held that a wife could make an application for maintenance under section 488 of the Criminal Procedure Code in spite of the fact that she had already obtained a decree in the civil Court for maintenance, payments under which were suspended by her husband who had filed an insolvency petition. Moreover even discharge of an insolvent does not free him from liability to obey an order under section 488, Criminal Procedure Code; *vide* section 44 (1) (d) of the Provincial Insolvency Act.

For these reasons, we think that the order of the learned Magistrate is correct and this revision petition is dismissed. The petitioner must surrender to his bail to serve out the remainder of the period of imprisonment to which he has been sentenced.

V.V.C.

(1) (1928) I.L.R. 10 Lah. 406. (2) (1933) I.L.R. 11 Ran. 226 (F.B.).
(3) A.I.R. 1930 Bom. 144.