

under section 106 of the Criminal Procedure Code would be coupled with a non-appealable sentence. In my opinion it should rarely, if ever, be necessary to do this, and it should certainly not be done until it has been ascertained that the accused is able to furnish security.

1934  
 KING-  
 EMPEROR  
 v.  
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 LU.  
 MOSELY, J.

In the present case I consider that the respondent has been more than sufficiently punished. The Magistrate's order will be modified to one directing the respondent to furnish security to keep the peace under section 106, Criminal Procedure Code, for a period of three months. The respondent will, therefore, be released forthwith.

## CRIMINAL REVISION.

*Before Mr. Justice Mosely.*

### U HPAY LATT v. MA PO BYU.\*

1935  
 Jan. 12.

*Maintenance order—Enforcement by the magistrate passing the order—Residence of the person liable—Criminal Procedure Code (Act V of 1898), ss. 488 (3), 490—Proviso to s. 488 (3), meaning of.*

The provisions of s. 490 of the Criminal Procedure Code are supplementary to those of s. 488 (3) which allow the magistrate who passed the order for payment of maintenance to enforce it. It is not obligatory that the order shall be enforced in the district in which the person directed to pay lives.

*Ma Thaw v. King-Emperor, 7 L.B.R. 116—referred to.*

The proviso to s. 488 (3) is intended to prevent a person entitled to maintenance from being negligent and allowing arrears to accumulate, but it is not intended for the benefit of the person who evades payment by avoiding service of process.

The respondent applied on the 18th July 1933 for 4 months' maintenance ending June 1933. The case had to be closed as the applicant could not be found. She then applied on the 31st May 1934 for 15 months' maintenance in arrears.

*Held*, that the application lay.

\* Criminal Revision No. 792B of 1934 from the order of the Headquarters Magistrate, Sandoway, in Criminal Misc. Trial No. 23 of 1934.

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*A. N. Basu* for the applicant. The order of the Magistrate is *prima facie* illegal. Under the 2nd proviso to s. 480 (3) of the Criminal Procedure Code no warrant can be issued for the recovery of arrears of maintenance unless the application is made within one year from the date on which they became due. The first application was made on the 19th July 1933 for the recovery of arrears from 1st March 1933 to June 1933. That case was closed on 12th October 1933 as the respondent could not be served with notice. The second application out of which the present revision arises was filed in May 1934, and in it the amount mentioned in the first application was also included. The first application having been closed it must be deemed to have been rejected, and arrears of maintenance can be claimed only from July 1933.

*R. M. Sen* for the respondent. The second application was in fact a continuation of the first application. All that is laid down by the 2nd proviso to s. 488 (3) is that the application for the enforcement of arrears of maintenance must be made within a year; it does not bar the recovery of any amount if the application is within time. The first application was within time; so was the second; and they cannot be treated as separate applications. Moreover, on equitable grounds the respondent is entitled to the relief asked for.

MOSELY, J.—There is nothing in the first ground for revision that the order of maintenance could only be enforced,—*vide* section 490, Criminal Procedure Code,—in the district in which the person ordered to pay lives. The provisions of that section are merely supplementary to those of section 488, sub-section (3), Criminal Procedure Code, which allows ~~the~~

Magistrate who passed the order for payment of maintenance to enforce it, as was pointed out as long ago as *Ma Thaw v. King-Emperor* (1).

The other ground is that the present respondent was not entitled to recover arrears of maintenance for more than a period of 12 months prior to the present application.

In Criminal Miscellaneous No. 37 of 1933, instituted on the 18th July 1933, she applied for maintenance at the rate of Rs. 20 per mensem for 4 months, March to June 1933. The case had to be closed as the present applicant could not be traced. Then in Criminal Miscellaneous No. 23 of 1934, the case now in question, instituted on the 31st May 1934, she applied for the 15 months' maintenance in arrears, that is to say from the starting date of her original application, 1st March 1933, to the 31st May 1934.

The proviso to section 488 (3) reads as follows :

" Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due."

This proviso does not say that no such warrant shall be issued *except on* an application made to levy such amount within a period of one year from the date on which it became due.

The proviso was clearly enacted to prevent the person in whose favour an order for maintenance was made from being negligent and allowing arrears to pile up until their recovery would become a hardship or an impossibility. It was not meant that a loop hole should be given to the person against whom an order for maintenance was made to evade payment by preventing the service of process on him. In fact the proviso was

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evidently worded in the way it was expressly to preclude the possibility of such an evasion.

The order of the Magistrate allowing enforcement of the order of maintenance for 15 months was correct. This application in revision will be dismissed.

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## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr Justice Mya Bu.*

1935

Jan. 17.

### THE ADMINISTRATOR-GENERAL, BURMA

v.

### TEWARY.\*

*Mortgage—Suit for simple money-decree by mortgagee—Averment in plaint as to surrender of security—Attachment and sale of mortgaged property in execution of money-decree—Civil Procedure Code (Act V of 1908), O. 34, r. 3 (6).*

A mortgagee who obtains a simple money-decree against his debtor, averring in his plaint that he surrenders his security, cannot bring the mortgaged property to sale in execution of his decree. The mere averment in the plaint that he gives up his rights under the mortgage for the purpose of that suit cannot be regarded as an extinguishment of the mortgagee's rights.

*Chedi Lal v. Sadar-Un-Nisa Bibi, I.L.R. 39 All. 36; Uderpal Singh v. Mewa Lal, I.L.R. 36 All. 264—referred to.*

*Barnabas* for the appellant. A mere statement in the plaint that the plaintiff surrenders his security without effectively transferring the same to the debtor and even his offer to hand over the title deeds, is not a valid and effectual surrender of his security.

The decree-holder cannot proceed against the security on a mere allegation of surrender. He must file a regular suit for sale under O. 34, r. 3 (6), of the Civil Procedure Code, as amended by the Rule Committee of the High Court, corresponding to O. 34, r. 14, of the Code. It is tantamount to a fraud on the mortgagor and an abuse of the process of the

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\* Civil First Appeal No. 124 of 1934 from the order of this Court on the Original Side in Civil Execution Case No. 598 of 1933.