

CRIMINAL REVISION.

Before Mr. Justice Mosely.

MAUNG PO KWE v. MA PWA SHEIN.*

1939

May 11.

Maintenance order—Decree for restitution of conjugal rights—Husband's failure to comply with conditions—Suit filed to evade payment—Order for separate residence of wife—Non-compliance with order—Refusal of Magistrate to cancel maintenance order—Criminal Procedure Code, s. 489 (2).

A husband who obtains a decree for restitution of conjugal rights must comply with the conditions of the decree, and failure to comply with those conditions would justify the Magistrate in holding that an order of maintenance made previously against the husband under s. 488 of the Criminal Procedure Code should not be cancelled. Where the suit for restitution is brought, not with a view to take the wife back, but to evade the payment of maintenance, or the husband fails to comply with the conditions of the decree, e.g. fails to provide a separate accommodation for his wife as required by the decree for restitution, the Magistrate is justified in the exercise of his discretion under s. 489 (2) of the Criminal Procedure Code in refusing to cancel the order of maintenance.

Bulaki Das, In re, I.L.R. 23 Bom. 484; *Devi Ditta v. Ganga Devi*, 4 Cr. L.J. 73; *Maung Pan Aung v. Ma Hmuwe Bon*, 1 B.L.T. 104; *Maung Tha U v. Maung Mya Khin*, 9 B.L.T. 162; *Nur Muhammad v. Ayesha Bibi*, I.L.R. 27 All. 483, referred to.

Shu Maung for the applicant.

MOSELY, J.—The applicant, Ma Pwa Shein, obtained an order for maintenance of herself at the rate of Rs. 3 a month and of her child at the rate of Re 1 per month on the 2nd January, 1936. Immediately afterwards, on the 25th January, 1936, the respondent, her husband Maung Po Kwe, filed a suit for restitution of conjugal rights, which was resisted. Ma Pwa Shein had left the house because her husband brought a lesser wife to it. She was willing to go back to him on condition that she was provided with a separate house, and there was a decree accordingly for restitution of conjugal rights on condition that the plaintiff provided his wife with a separate house for dwelling in in their village, Tawbo. In January, 1939, Ma Pwa Shein applied under section 490, Criminal Procedure Code, for arrears of maintenance

* Criminal Revision No. 141B of 1939 from the order of the Township Magistrate (2) of Kyunbla in Cr. Misc. Trial No. 1 of 1939.

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for herself from the 2nd January, 1938, to the 2nd January, 1939, Rs. 36, and for the child from the 2nd August, 1938, until the same date, Rs. 5, Rs. 41 in all. Maung Po Kwe objected that he had obtained a decree for restitution of conjugal rights, but this objection was not gone into. In the order now under revision, recorded in the diary of the 28th February, 1939, the Magistrate held that the order of the Civil Court did not affect the order for maintenance, and directed Maung Po Kwe to pay the Rs. 41 in question and costs.

This order, of course, was erroneous, and is contrary to section 489 (2), Criminal Procedure Code. The law reads as follows :

"Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the order accordingly."

The order of the Civil Court does not affect the question of Maung Po Kwe's liability to maintain the child: *Nan Saw Shwe v. Maung Hpone* (1). As regards the order for maintenance of the wife, the law itself is clear enough. The decree of the Civil Court has to be considered, and if the wife persists without cause in refusing to live with the husband, then the order for maintenance is to be cancelled.

There is no reported ruling of this Court on the subject. There are two judgments reported in unauthorized reports, *Maung Pan Aung v. Ma Hmwe Bon* (2) and *Maung Tha U v. Maung Mya Khin* (3), which quotes *In re Bulaki Das* (4) as authority. *Nur Muhammad v. Ayesha Bibi* (5) is to the same effect.

Of course, the party who obtains a decree for restitution must comply with the conditions of the decree, and failure to comply with those conditions

(1) 6 L.B.R. 127.

(3) 9 B.L.T. 162.

(2) 1 B.L.T. 104.

(4) (1898) I.L.R. 23 Bom. 484.

(5) (1905) I.L.R. 27 All. 483.

would justify the Magistrate in holding that the order for maintenance should not be cancelled. A decision of the Chief Court of the Punjab to this effect is *Devi Ditta v. Ganga Devi* (1).

Another case where the Magistrate would be justified in not cancelling the order for maintenance is where the suit for restitution is brought, not with a view to take the wife back, but simply to evade the payment of the allowance awarded, and there the Bombay High Court has passed a rule that the order of the Magistrate must remain in force until the husband has executed the decree against his wife by taking her home (Bombay High Court Circular Rule "Bombay Gazette" 8th January, 1892).

The High Court of Madras has held also that where the object of getting the decree for restitution was merely to get the maintenance order cancelled, as was shown by the husband's refusal to provide proper accommodation for his wife, the Magistrate ought not in the exercise of his discretion under section 489 (2) to cancel the order for maintenance.

In the present case it would seem that the husband after obtaining his decree for restitution, took no steps to execute it, and actually paid the maintenance until the 2nd January, 1938. That is a matter, however, which should be properly established. There is nothing either to show that the husband either provided separate accommodation for his wife, or refused to do so, and that, again, should be judicially established.

The Magistrate's order for payment of the arrears, Rs. 5, for the child will be maintained, but the order for payment of Rs. 36, arrears of maintenance for Ma Pwa Shein, will be set aside, and the Magistrate directed to make further enquiry in the light of these remarks and pass proper orders accordingly.

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