Before Mr Justice Banerjee and Mr. Justice Sale.

SIDHESWAR TEOR (PETITIONER) v. GYANADA DASI (OPPOSITE PARTY.)*

1894. *November* 14.

Maintenance, Order of Criminal Court as to—Criminal Procedure Code, 1882, section 488—Breach of order for monthly allowance—Imprisonment for default of payment of maintenance—Sentence absolute.

A wife, who had obtained an order for maintenance against her husband on the 1st August, applied to have it enforced with respect to three months then in arrears. A distress warrant having issued without anything being realized, the husband was brought up under a warrant for his arrest. The husband previous to his arrest petitioned the Court to be allowed to prove his altered circumstances and his inability to pay. On that petition an order was passed that he could produce the evidence after the amount due was paid. On being brought up, and not paying the amount due, an order was made committing him for one month under section 488 of the Code of Criminal Procedure. The day following his commitment his brother tendered the money and asked for his release. The Magistrate took the money but refused to order the release, holding that under the section the punishment of imprisonment was absolute and not dependent on payment of the maintenance allowance. The husband moved the High Court contending (1) that the order of imprisonment should not have been passed without an opportunity being given him of proving the change in his circumstances which would show that the order to pay required modification ; (2) that the section did not authorise imprisonment unless wilful neglect to comply with the order be proved ; and (3) that the imprisonment authorized by the section being only a mode of enforcing payment, he should have been released on the amount being paid.

Held, that the first ground was untenable, inasmuch as the order for maintenance carries with it all its proper consequences as long as it remains in force.

Held, also, that before an order for imprisonment under the section can be passed it must be proved that the non-payment of the maintenance is the result of wilful negligence, and that there being no evidence of that in the case the order was bad.

Held, further, that the imprisonment which can be awarded under the section is not a punishment for contempt of the Court's order but merely a means of enforcing payment of the amount due, and that upon the payment of that amount being made the husband was entitled to be released.

Biyacha v. *Moidin Kutti* (1) dissented from.

* Criminal Revision No. 630 of 1894, against the order passed by E. G. Drake-Brockman, Esq., Officiating District Magistrate of Hooghly, dated the 18th October 1894.

(1) I. L. R., 8 Mad., 70.

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THE facts of this case were as follows:—

On the 1st August 1894 the wife of the petitioner applied to the Magistrate of Hooghly to enforce the payment of arrears of maintenance at the rate of Rs. 9 per month for herself and her children, which had been directed to be paid by the petitioner by an order dated the 28th April.

On the 3rd August the Magistrate passed the following order: "Some evidence must be produced within seven days to show the amount has not been paid."

On the 10th August a distress warrant was issued to realize the sum of Rs. 27.

On the 1st September a return was made showing that nothing had been realized, and a warrant was issued for the arrest of the petitioner.

On the 7th September he was brought up, and an order was made on him to pay the amount, *viz.*, Rs. 27, or in default to be imprisoned for one month, and he was allowed out on bail to pay the amount within fifteen days. The petitioner thereafter failed to appear, and as his surety could not produce him, on the 3rd October a warrant was issued for his arrest. He was brought up on the 17th October and an order passed in the following terms: "Defendant appears to-day. He has not paid the money. Warrant of commitment to jail for one month under section 488, Criminal Procedure Code, to be issued."

On the following day, the 18th October, a brother of the petitioner applied to be allowed to pay the money and to have him released. On that application the Magistrate passed the following order: "The amount may be paid by the petitioner, but the punishment of imprisonment is absolute, It is not dependent on payment of the maintenance allowance."

It further appeared that on the 15th September the petitioner applied to the Magistrate to be allowed an opportunity to produce evidence to prove his altered circumstances and his inability to pay the amount which he had been ordered to pay as maintenance, and that the Magistrate passed the following order thereon: "Can produce evidence after the money is paid."

The petitioner after the order of the 18th October applied

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to the High Court to have it set aside as illegal upon the following grounds :—

(1.) That in the absence of any evidence as to wilful neglect on the part of the petitioner the Magistrate ought not to have issued the warrant and taken proceedings thereunder.

(2.) That the amount having been deposited the Magistrate ought to have received it and released the petitioner.

(3.) That the sentence of rigorous imprisonment was not warranted by law and was too severe.

(4.) That the petitioner ought to have been allowed an opportunity to produce evidence as to the absence of neglect on his part in not paying the maintenance, and other circumstances to show his inability to pay and non-liability to pay the same.

A rule was issued which now came on for hearing.

Babu *Hara Kumar Mitter* for the petitioner in support of the rule.

No one appeared to show cause.

The judgment of the High Court (BANERJEE and SALE, JJ.) was as follows :—

It appears that the petitioner in this case was directed by an order, dated the 28th of April last, to pay maintenance to his wife, Gyanada Sundari and his son, at the rates of Rs. 6 and Rs. 3 a month, respectively. The amount due for the last three months having remained unpaid, an application was made for the enforcement of payment, and a warrant for levying the amount by distress was issued on the 10th of August last. The amount not having been realised under the warrant, the arrest of the defendant was ordered on the 1st September, and on the 7th September the following order was made : "Brought up to-day to pay Rs. 27 or in default to be imprisoned for one month. Allowed bail to the amount to pay in fifteen days." The amount not having been paid, the following order was made on the 17th October : "Defendant appears to-day. He has not paid the money. Warrant of commitment to jail for one month under section 488 of the Code of Criminal Procedure to be issued." Then on the 18th idem an application was made by the brother of the defendant offering

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the amount due and praying for the release of the defendant. Upon that, this is the order that was made: "The amount may be paid by the petitioner, but the punishment is absolute. It is not dependent on payment of the maintenance allowance." The amount was received, but the defendant was not released.

It is this order the propriety and legality of which have been called in question before us, and we have been asked, under section 439 of the Code of Criminal Procedure, to set it aside for three reasons—*first*, because an opportunity should have been allowed to the petitioner to prove the change of circumstances which he alleged in his petition and which went to show that the order required to be modified; *secondly*, because no sentence of imprisonment is authorised by section 488 of the Code of Criminal Procedure, unless it is shown that there was wilful neglect to comply with the order of the Court; and, *thirdly*, because the imprisonment that is authorised by section 488, being only a mode of enforcement of payment, should have been ordered to cease as soon as the payment was made.

We do not think that the first ground is tenable. Though, upon a change of circumstances being shown, the existing order may be modified, still, so long as that order remains in force, it must carry with it its proper consequences. This view is, we think, to some extent supported by the case of *Nepoor Aurat* v. *Jurai* (1).

The second ground urged before us is, however, in our opinion, a valid ground for our interfering with the order. The provisions of the third paragraph of section 488 being of a penal character ought, as observed by Mr. Justice Straight in the case of *Queen-Empress* v. *Narain* (2), to be strictly construed, and, as far as possible, construed in favour of the subject. The paragraph runs thus: "If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, &c." It is necessary, therefore, before the order can be enforced by a sentence of imprisonment, that it should be made out that the non-payment of maintenance was

(1) 10 B. L. R. Ap., 33 : 19 W. R Cr., 73. (2) I. L. R., 9 Calc., 240.

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the result of wilful negligence on the part of the defendant. There is nothing on the face of the order to show that that condition has been satisfied. All that the Magistrate says in his order of the 3rd August is this: "Some evidence must be produced within seven days to show that the amount has not been paid." The Magistrate here seems to think that the mere fact of non-payment of maintenance being made out would be sufficient to justify an order sending the defendant to jail. That view is, in our opinion, quite wrong.

We are also of opinion that the third ground is valid, though we must say that the question raised in connection with it is not altogether free from difficulty. The language of the third paragraph of section 488 is not very explicit, and this creates some difficulty in construing it; and that difficulty is enhanced by the fact that the Madras High Court has in the case of *Biyacha* v. *Moidin Kutti* (1) taken a view which is different from that which we are now disposed to take. Mr. Justice Hutchins observes: "The question is a difficult one, but we are bound to go by what the Legislature has said, and I am constrained to hold that, although the Magistrate is not bound to order the full term of imprisonment for which the defaulter is liable under section 488 of the Code of Criminal Procedure, yet whatever time is ordered must be served. The language of that section, and of the corresponding form in Schedule V., is very different from that employed in cases where the imprisonment is to cease on payment." And Sir Charles Turner, Chief Justice, adds: "It is difficult to see what object the Legislature can have had beyond the enforcement of the payment unless it be to punish the husband for contempt of the order; but I am unable to say that the language of the Code warrants any other construction than that which has been adopted by my learned colleague."

No doubt, if the construction put upon the section by the Court below had merely led to anomalous or unreasonable consequences, but had clearly been the only construction warranted by the language of the section, we should be bound, however great the unreasonableness might be, to follow the express words

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of the law. But with all respect for the learned Judges who decided the case of *Biyacha* v. *Moidin Kutti* (1), we must say that the language of the section is not so explicit and clear in favour of the view taken by the Magistrate. The section says: "If any person so ordered wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month." That shews that a sentence of imprisonment can be passed only after there has been wilful neglect to comply with the order, followed by an unsuccessful process of distraint; and in that contingency, the sentence of imprisonment is to be "for the whole or any part of each month's maintenance remaining unpaid after execution of the warrant." This, to our minds, clearly indicates that the imprisonment that is ordered is, in the first place, not a punishment for contempt of the Court's order, as the learned Judges of the Madras High Court in the case cited above seem to think; and, in the second place, it is *for* the whole or any part of each month's allowance remaining unpaid after execution of the warrant. It cannot be regarded as a punishment for the breach of the order; for, if that were the case, the punishment would follow upon the breach of the order, irrespective of any success or the reverse in the levying of the amount by warrant, whereas that is not what the section enacts. According to the express terms of the section, the disobedience of the order may be never so gross and wilful, and yet, if the amount ordered to be paid is realised in full by execution of the warrant, no sentence of imprisonment is to follow. This conclusively shows that the sentence is not for the disobedience or contempt of the Court's order. Nor again would it be right in our opinion to hold that the sentence of imprisonment is an absolute sentence, for the law says that the Magistrate may sentence such person "for the whole or any part of each month's allowance remaining unpaid" to imprisonment. That shows

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that the imprisonment is for the unpaid portion of the maintenance or, in other words, that it is owing to default of payment of the unrealised portion of the maintenance; and, if that is so, the imprisonment that is ordered ought to cease upon payment being made.

We should add that even if the meaning of the section had been otherwise, still, in the exercise of our powers of revision under section 439 of the Code of Criminal Procedure, we should have felt bound to reduce the sentence to imprisonment for a day or for such term as has been already undergone.

For these several reasons we think that the order complained of must be set aside and the petitioner discharged.

Rule made absolute and order set aside.

H. T. H.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

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December 17.

THE KATRAS-JHERRIAH COAL COMPANY, FIRST PARTY (PETITIONERS) *v.* SIBKRISHTA DAW & COMPANY, SECOND PARTY (OPPOSITE PARTY.)*

Criminal Procedure Code (Act X of 1882), sections 145, 146—Possession, Inquiry as to—Time at which Magistrate is to determine who was in possession—Order passed under section 146 on proceedings taken under section 145, Criminal Procedure Code.

In setting aside an order passed by a Magistrate under section 145 of the Code of Criminal Procedure, the High Court has power itself to pass such order as should have been made by the Magistrate in the case.

It is impossible to lay down any hard and fast rule which may be applicable to all cases as to the exact point of time to which an enquiry under section 145 must be directed, and the time at which possession must be found in one party or the other must be governed by the facts of each particular case.

To hold that the Magistrate is precluded from enquiring into anything before the date when he actually commenced his own proceedings might in some cases lead to a person who has been acting in an unwarrantable manner misusing the process of the law to enable him to carry out a high-handed and improper scheme, which could never have been the intention of the Legislature.

* Criminal Revision No. 641 of 1894, against the order passed by J. E. Webster, Esq., Officiating Joint Magistrate of Raniganje, dated the 1st of October 1894.