

(1879) 12 CAL CK 0012

Calcutta High Court

Case No: None

In Re: Tokee Bibee

Vs

APPELLANT

RESPONDENT

Date of Decision: Dec. 18, 1879

Acts Referred:

- Presidency Magistrates (Court- Fees) Act, 1877 - Section 234
- Provincial Insolvency Act, 1920 - Section 13

Citation: (1880) ILR (Cal) 536

Hon'ble Judges: Wilson, J

Bench: Single Bench

Judgement

Wilson, J.

This was an application u/s 147 of the High Courts Criminal Procedure Act (Act X of 1875) to transfer to this Court a proceeding before a Presidency Magistrate for the purpose of quashing an order made therein. (His Lordship then stated the facts of the case as above, and proceeded as follows): The section under which maintenance may be ordered (Section 234 of the Presidency Magistrate's Act) is as follows:

If any person, having sufficient means, neglects or refuses to maintain his wife, or legitimate or illegitimate child unable to maintain itself, a Presidency Magistrate may, upon due proof thereof by evidence, order such person to make a monthly allowance for the maintenance of his said wife, or child, or both, at such monthly rate not exceeding fifty rupees in the whole as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

Such allowance shall be payable from the date of the order.

If any person so ordered wilfully neglects to comply with the order, a Presidency 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 each month's allowance remaining unpaid, to imprisonment for any term not exceeding one month.

Provided that, if such person offers to maintain his wife on condition of her being with him, and his wife refuses to live with him, such Magistrate may consider any grounds of refusal stated by such wife, and may make the order allowed by the section notwithstanding such offer, if he is satisfied that such person is living in adultery or that he has habitually treated his wife with cruelty.

No wife shall be entitled to receive an allowance from her husband under the section, if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

2. The section under which ad interim protection is granted is Section 13 of the Insolvent Act (11 and 12 Vict., Cap. 21). It is as follows:

And be it enacted that in any case when a petition shall have been presented by an insolvent debtor as aforesaid, or an act of insolvency shall have been adjudged to have been committed as aforesaid, it shall be lawful for the said Court, after the filing of the schedule required by this Act, if under the circumstances it shall appear proper, to make an interim order for the protection of the insolvent from arrest, and any such interim order may apply either to all the debts or liabilities mentioned in the schedule, or to any of them, as the Court may think proper, and may commence and take effect at such time as the Court shall direct; and any such order may be recalled and may be renewed as to the Court may appear proper; and any such order, when so made, shall protect the person to whom it shall be given from being arrested or detained in prison for any debt or liability to which such order shall apply within the limits of the Town of Calcutta, Madras, and Bombay respectively, or any other place within the territories under the Government of the East India Company; and any person arrested or detained, contrary to the tenor and effect of any such order, shall be entitled to his discharge out of custody upon application to any Court or Judge which or who shall have power to set at large any person illegally detained in custody under the process by virtue of which such person shall have been arrested or be so detained: Provided always, that no such order shall operate as a release or satisfaction of the debt or demand of any creditor, nor prejudice the right of any such creditor to arrest the insolvent, whether he shall or not have been previously arrested for the same debt or demand, in case the order shall be recalled or shall fall by reason of the petition of the insolvent being dismissed or the adjudication being reversed.

3. The Advocate-General argued that, in determining what is a "debt or liability" under this section, we must look forward to the later sections dealing with final discharge, namely: Section 47, which, instead of "debt or liability," uses the words "demand" and "debt or demand;" Section 61, which again changes that phrase to "debt, claim or demand;" and Section 62, which excepts certain matters from the

operation of the Act.

4. It could hardly be seriously contended that Section 62 applies; maintenance ordered to be paid is not a fine, penalty, or forfeiture.

5. But it was said the language of Sections 13, 47, and 61 point to matters purely civil, not to anything of a criminal character, and the liability now in question is a criminal liability. Two grounds were given for saying that the liability is a Criminal one: first, because the whole proceedings are before a Criminal Court; Secondly, because non-payment of maintenance may be punished with rigorous imprisonment. Now the precise liability in question is the liability to pay sums of money which have become payable under an order for maintenance. That is *prima facie* a purely civil liability, and a debt or liability or claim or demand within the meaning of the Insolvent Act. The fact that the debt is created and may be enforced by a Criminal Court cannot affect the matter. Many purely civil rights are, for convenience sake, made enforceable in Criminal Courts. Nor, in my opinion, does the fact that penal consequences have been attached to the non-payment of a debt make it less a debt.

6. Bastardy proceedings before Justices have been held in England to be civil, not criminal, proceedings--*Reg. v. Barry* (28 L.J., M.C. 86); *Beg. v. Fletcher* (L.R., 1 C.C.R., 320). And this case is very similar.

7. I think that arrears of maintenance included in the schedule are a debt or liability within the meaning of Section 13 of the Insolvent Act; that the protection order protected the insolvent from arrest or imprisonment in respect of it. The proceedings will, therefore, be removed into this Court, and the Magistrate's order quashed.

8. I say nothing as to the effect of the insolvency proceedings upon any maintenance accruing subsequently to that in the schedule. And of course there is nothing in this decision to interfere with the Magistrate's discretion u/s 235 of the Presidency Magistrate's Act.