

(1936) 07 MAD CK 0003
In the Madras High Court

In Re: S. Yahia and Amaturrub Ghousunnissa Begum alias Amir Begum

Date of Decision : 27-07-1936

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 488

Citation : 165 Ind. Cas. 297 : (1936) 44 LW 292 : (1936) 71 MLJ 430

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—This is an appeal against an order of the aster granting protection in insolvency. The appellant is a Lohammadan wife

whose husband has been required by a magisterial order u/s 488 of the Criminal Procedure Code, to pay her maintenance. The maintenance has

not been paid regularly and it was in respect of the debt for arrears of maintenance that the protection order in insolvency was granted.

2. It is argued for the appellant that such arrears do not constitute a debt provable in insolvency with reference to Section 46 of the Presidency

Towns Insolvency Act. There is nothing in the terms of Section 46 which very obviously excludes such a debt. The exclusion of the debt could only

be by virtue of its being not a "debt or liability, certain or contingent, to use the words of Sub-Section (3) of the section. There is express authority

in a very old Calcutta case, Tokee Bibee v. Abdool Khan I.L.R (1879) 5 Cal. 536 for the view that arrears of maintenance under a magisterial

order can be a debt or liability provable in insolvency, in respect of which a valid protection order may be issued. But since this decision there has

been a line of English cases which have held that a liability to alimony under an order of the Divorce Court is not a debt provable in insolvency vide

Linton v. Linton (1895) 15 Q.B.D. 239, the reason being that the payment may be varied from time to time by the Court and may at any time be

put an end to by resumption of cohabitation; and the English Courts have even gone so far as to hold that the liability for arrears of alimony,

whether accrued before or after the order of adjudication, cannot be proved in insolvency vide *Kerr v. Kerr* (1897) 2 Q.B.D. 439 and *In re*

Hawkins (1894) 1 Q.B.D. 25. The ratio decidendi of these cases appears to be the same as in the case of *Linton v. Linton* (1895) 15 Q.B.D.

239, viz., that the Divorce Court can and will, wholly or partially, relieve a husband of payment of arrears, if it is just to do so. It may at once be

pointed out that no such power lies u/s 489 of the Criminal Procedure Code, and it is well established that any reduction in the rate of maintenance

by a Magistrate can only affect payments accruing due after the date of the order. There are also English cases, for-example, *Victor v. Victor*

(1912) 1 K.B. 247, in which it has been held that an annuity payable to a wife under a separation deed stands on a different footing from alimony

which is variable by the Court and that even though such an annuity is terminable on the resumption of cohabitation, it can be proved in

bankruptcy. A more recent decision of the Calcutta High Court, *Halfhide v. Halfhide* I.L.R (1923) 50 Cal. 867, though not precisely on this point,

seems to assume that arrears of maintenance can be proved in insolvency. Having in view the fact that the power given u/s 489 of the Criminal

Procedure Code to a Magistrate to vary an order for maintenance does not include the power to make such variation retrospective so as to cover

arrears already accrued due, it seems to me not possible to contend on the strength of the English decisions regarding alimony that such a debt is

not a present certain debt or that such a debt does not come within the purview of Sub-Section (3) of Section 46 of the Presidency Towns

Insolvency Act.

3. I therefore hold that the learned Master was right in deciding that arrears of maintenance are a debt provable in insolvency and in respect of

which a protection order can be given. The appeal is therefore dismissed with costs.