1937

Present : **Moseley J.**

SITHAYAMMA *v.* SINNIAH.

802—P. C. Teldeniya, 2,584.

Insolvency—Arrears of maintenance—Debt provable in insolvency—Insolvent protected from arrest—Ordinance No. 7 of 1853, s. 36.

An insolvent is protected from arrest for failure to pay arrears of maintenance that have accrued at the time of adjudication.

In re Insolvency of J. G. de Silva (2 N. L. R. 140) and Home v. de Kroos (5 S. C. C. 11) referred to.

APPEAL from an order of the Police Magistrate of Teldeniya.

This was an application to commit an insolvent to prison for failure to comply with an order for maintenance. The learned Police Magistrate held that the protection in insolvency proceedings was of no avail against an order for maintenance.

H. V. Perera (with him *G. E. Chitty*), for defendant, appellant.—The liability to pay maintenance is a civil liability although it is enforced in *quasi*-criminal proceedings in order to facilitate recovery (*Subaliya v. Kannangara* [1]). It is in effect nothing more than a judgment-debt and a judgment-debt is provable in insolvency proceedings. The applicant could have proved her claim in the insolvency proceedings and the respondent would then clearly have been entitled to the same protection available to him in respect of his other debts. We have not here one of the cases contemplated in the exceptions set out in section 36 of the Insolvency Ordinance (No. 7 of 1853), which would debar the insolvent from protection. Although in England alimony has been held not to be a debt provable in insolvency, the analogy between alimony and maintenance is incomplete, for the reason that while arears of maintenance are an ascertained amount which the Court has no jurisdiction to vary, alimony, including arrears of alimony may for good cause be modified or even deleted by the Court. (*Kerr v. Kerr* [2] *and Linton v. Linton* [3].) Alimony is thus, unlike arrears of maintenance, a debt incapable of being fairly estimated or accurately ascertained and therefore not provable. Maintenance falling due after the date of adjudication of insolvency may come into the same class as alimony.

No appearance for respondent.

Cur. adv. vult.

March 23, 1937. MOSELEY J.—

This appeal raises an interesting point as to whether or not, and if so to what extent, an insolvent is protected against an order committing him to prison for failure to comply with an order for maintenance, made under section 3 of the Maintenance Ordinance, No. 19 of 1889.

I quote the following extract from the order of the learned Magistrate:— "It has been held that a decree for alimony is not a debt provable in bankruptcy proceedings (*In the matter of the Insolvency of J. G. de Silva* [5].) Much less could it be held that an order for maintenance is a debt provable in insolvency. In my opinion, therefore, the arrears of maintenance do not fall within the scope of the debts provable in insolvency proceedings. Consequently the protection in the insolvency case is of no avail against an order for maintenance".

In the case cited by the learned Magistrate the following passage occurs in the judgment of Withers J.:—"It was irregular to arrest the husband under a writ in execution of that part of the decree which required him to secure alimony. He could not be adjudicated an insolvent on that as a debt, for it is not a debt provable in insolvency".

Now, I think it is settled law that the liability of a defendant under an order for maintenance is purely a civil liability (*Subaliya v. Kannangara* [4]), and that the relation subsisting between the parties is that of creditor and debtor. Section 36 of the Insolvency Ordinance provides that except in certain cases an insolvent shall be free from arrest or

[1] *4 N. L. R. 121.*
[2] *2 Q. B. D. 439 (77 L. T. 29).*
[3] *15 Q. B. D. 239 C. A. (52 L. T. 782).*
[4] *2 N. L. R. 140.*
[5] *4 N. L. R. 121.*

imprisonment by any creditor in coming to surrender or during the protection which is granted to him until his certificate be allowed. In the case of *In re S. L. M. Ibrahim Saibo*[1] it was ordered that a prisoner should be discharged under the provision of section 36, it not appearing that the case came within any of the exceptions in that section. Now, a maintenance order is not expressly included in the exceptions referred to, nor do I think that it can be held to be so by implication.

In *Home v. de Kroos*[2] the words "any creditor" were held to be limited, in this application, to any creditor who could have proved under the Insolvency. It seems to me that that construction is somewhat narrow, but assuming it to be the correct one, I would be prepared to say that a sum due in respect of arrears under a maintenance order which have accrued prior to adjudication is a debt provable in the insolvency for reasons which I shall set out.

On this point in the course of his argument Counsel for the appellant referred me to Dixon's *Divorce Law and Practice* (*1908 ed.*), where at p. 289 it is laid down that "the amount due under an order for alimony is a debt provable in bankruptcy, like any other debt, and the discharge releases the bankrupt from all further claim in respect of all debts anterior to his bankruptcy". The learned author goes on to say that arrears of alimony accruing after adjudication are not provable in bankruptcy and quotes as his authority *Linton v. Linton*[3]. The *ratio decidendi* appears to have been that inasmuch as an order for alimony is liable to be rescinded or varied, it is not capable of valuation. Bowen L.J. in the course of his judgment observed that "It seems to me to be a wild idea to suppose that the liability to pay alimony is a liability capable of being proved in bankruptcy. If it were so, it must be capable of being estimated in some way or other, which this liability is not."

In the latter case of *Kerr v. Kerr*[4] the following appears in the judgment of Williams and Hawkins JJ. :—"It follows that *Linton v. Linton* is an authority for the proposition that, so far as regards permanent alimony, there can be no proof for arrears arising before the receiving order unless there is something in the nature of arrears . . . . which make it possible in such a case to form that estimate which the Court held in *Linton v. Linton* could not be formed in respect of the subsequent arrears . . . . "

They went on to hold that the value of the liability both as to the past and the future was incapable of being fairly estimated. Wright J. in a dissenting judgment thought that they ought to hold that arrears due and payable before the receiving order are provable in bankruptcy unless the Court has declared them incapable of valuation.

The reason for the decision in this case is, to use the words of Williams and Hawkins JJ., that "the uncertainty as to the continuance of the obligation to make the payment exists, not only as to future payments but also as to arrears, for the Divorce Court will wholly or partially relieve a husband from payment *of arrears*, if it is just to do so . . . . In fact, the practice of the Divorce Court so much treats the sums periodically payable under its order as a fund for maintenance and not

[1] *1 Lorenz 124.*
[2] *5 S. C. C. 11.*
[3] *52 L. T. 782.*
[4] *77 L. T. 29.*

as property and so much keeps its hand on the obligation to make these periodical payments for maintenance, that it is a standing rule that the Court will not, in the absence of means, make an order enforcing more than one year's arrears ".

In the case of *In re Hawkins*[1] it was held that arrears of alimony which become due after a receiving order cannot be proved by the wife in the bankruptcy of the debtor. Vaughan Williams J. held that as to future instalments there could be no doubt that the decision in *Linton v. Linton* (*supra*) is conclusive. He referred also to " the broader ground that there can be no proof at all for arrears of alimony ".

Now, it seems to me that a clear distinction can be drawn between arrears of alimony and arrears of maintenance in the light of a debt which can be proved in insolvency. The difficulty in the case of the former is that it is not possible to value them exactly. No such difficulty occurs in the case of arrears under a maintenance order inasmuch as the Court does not appear to have any power to discharge or modify such an order with retrospective effect but only to cancel or alter it, as provided by section 10 of the Ordinance, with effect from the date of such cancellation or alteration.

Since the argument Counsel for the appellant has drawn my attention to an Indian case reported in *5 Calcutta 538*, which is an authority for the proposition that in India under similar legislation an insolvent who has obtained a protection order is not liable to arrest or imprisonment in respect of arrears of maintenance when such arrears are included in the schedule filed by him. The judgment further supports the view that " maintenance is a purely civil liability . . . . ".

I am satisfied therefore that such arrears as had accrued, at the date of the adjudication are, since they are capable of estimation, a debt provable in bankruptcy. I am unable to ascertain, on the material before me, the date of the adjudication order. It appears from the petition of appeal that at the time of the adjudication the appellant owed the sum of Rs. 230, which was shown as a liability in the insolvency case. The order of commitment is in respect of Rs. 138. It seems therefore that the order must be in respect of arrears, the amount of which was ascertainable at the date of the adjudication.

I would allow the appeal and set aside the order for imprisonment without prejudice to any steps the applicant may care to take to enforce payment of monies due under the order for maintenance which have accrued subsequently to the adjudication order.

Appeal allowed.

[1] *(1894) 1 Q. B. D. 25.*