

1917*Present: De Sampayo J.*KATHERINA *v.* DAVITH.279—*P. C. Galle, 49,801.*

*Maintenance — Imprisonment for default of payment of allowance decreed—Is liability to pay allowance extinguished?*

Where a person ordered to pay maintenance under Ordinance No. 19 of 1889 has suffered imprisonment for default of payment of the allowance, the liability to pay the allowance in respect of which the imprisonment was imposed is extinguished.

**T**HE facts appear from the judgment.

*Bartholomeusz*, for applicant, appellant.—The liability for maintenance is of a civil nature. It is not extinguished by imprisonment. Any payment made subsequent to the imprisonment could be applied for the payment of arrears which became due previous to the imprisonment.

A sum of Rs. 231 was due at the time the respondent was sentenced to imprisonment. No part of that had been paid or recovered when he was brought up the second time on a warrant, but another Rs. 60 had by then become due. Therefore the sum of Rs. 18 which was paid had to be applied for the part payment of the Rs. 231; and till the whole of that sum of Rs. 231 is paid no sum could be applied to the payment of what became due subsequently.

In any case, as only Rs. 18 was paid, the respondent should not have been discharged. According to the journal entries, nothing has been paid at all from the date of the order.

*M. W. H. de Silva*, for defendant, respondent.—Section 9 of the Maintenance Ordinance clearly shows that any sums due are extinguished by undergoing imprisonment in default. The provision that the imprisonment should be “for the whole or any part of each month’s allowance remaining unpaid after execution of the warrant” implies that the imprisonment takes the place of payment; see *Sideshwar v. Cyanada Dasi*.<sup>1</sup>

If it be held that imprisonment does not wipe off the arrears, a man who once falls into arrear will hardly ever get a chance of getting out of jail. Such is not the intention to be gathered from the language of the Ordinance.

The Maintenance Ordinance provides that the amount due should be levied in the manner provided for levying fines. Therefore,

<sup>1</sup> (1894) *I. L. R.* 22 *Cal.* 291.

when imprisonment has been undergone in default the liability to pay the amount is extinguished (*Shockman v. Balaya*<sup>1</sup>).

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The parties accepted in the lower court that only Rs. 18 was due for the period subsequent to the imprisonment. The Judge proceeded on that footing. Even the petition of appeal makes no complaint as to the amount. There are journal entries showing that certain property has been sold.

*Cur. adv. vult.*

April 20, 1917. DE SAMPAYO J.—

This appeal raises an important point under the Maintenance Ordinance, No. 19 of 1889. The appellant was the mistress of the respondent and had four minor children by him, and on her application an order was made by the Police Magistrate, on January 24, 1911, for the payment to her of Rs. 5 a month for the maintenance of the children. The respondent having made default in the payment of this allowance, a distress warrant appears to have issued on March 15, 1911, but was returned with the report that the respondent was not possessed of any movable property. On March 27, 1911, a warrant was issued for the arrest of the respondent, but, though re-issued from time to time, it was not executed, as the respondent had absconded. He was accordingly proclaimed, and certain immovable property belonging to him was sequestered and ultimately sold. He was, however, arrested and brought to Court on February 26, 1916, at which time Rs. 310 was due as arrears of maintenance for five years and two months. He was therefore sentenced to imprisonment for a period of six months under section 9 of the Ordinance. He underwent the full period of imprisonment without making any payment. On February 23, 1917, a distress warrant, together with a warrant of arrest, was again issued. He was brought up on March 6, 1917, when the Magistrate made order committing him to jail again for a period of six months, but withheld the carrying out of the sentence till next day, with the view of considering the matter of a tender of Rs. 18 as the amount due since February, 1916, when the respondent was first committed to jail. The record is in a very confused state, and it is impossible to say how the amount of Rs. 18 was arrived at. No money had been paid or levied. The Rs. 18 is probably the balance after crediting the respondent with the proceeds sale of the immovable property sequestered and sold in connection with the proceedings in which the respondent had been proclaimed. However, by the order appealed from, the Magistrate accepted the Rs. 18 tendered and discharged the respondent.

The ground of the appeal is that the imprisonment in February, 1916, did not extinguish the respondent's liability in respect of the arrears of maintenance before that date; that the respondent was

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not entitled to appropriate any money paid or recovered to the arrears since that date; and that the order discharging him was therefore wrong. I do not think that this contention is sound. The liability to pay maintenance is no doubt of a civil nature, but section 9 of the Ordinance provides for the enforcement of the order for maintenance as follows:—" If any person against whom an order is made under section 3 neglects to comply with the order, the Magistrate may for every breach of the order issue a warrant directing the amount due to be levied in the manner by law provided for levying fines imposed by Magistrates in the Police Courts, 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 simple or rigorous imprisonment for a term which may extend to one month."

Sections 312 and 313 of the Criminal Procedure Code provide for the issue of distress for levying a fine by sale of any movable property, and for the commitment of the offender to imprisonment in default of payment or recovery. In view of the terms of sub-section (3) of section 312, it has been held by the Full Bench in *Shockman v. Balaya*<sup>1</sup> that where the offender has suffered the prescribed imprisonment the liability to pay the fine is thereby extinguished. I doubt whether a case under the Maintenance Ordinance is governed by that decision, though I think the same conclusion must be arrived at for a different reason. Section 9 of the Maintenance Ordinance above quoted regards the failure to pay each month's allowance as a separate breach of the order, and contemplates the commitment of the parties to imprisonment for each such breach for one month, though perhaps it is not contrary to its spirit to award at one time a longer period of imprisonment in proportion to the amount of arrears then due and limited by the general jurisdiction of the Police Court. But the provision for sentencing the party to imprisonment for one month " for the whole or any part of each month's allowance " is a clear indication that the payment of the allowance and the imprisonment for default are alternatives, and that when the party has suffered the imprisonment, the liability to pay the allowance in respect of which the imprisonment was imposed is extinguished. Section 9 of the Maintenance Ordinance closely corresponds to section 488 (3) of the Indian Criminal Procedure Code, and it has been held in India (*Sideshwar v. Cyanada Dasi*)<sup>2</sup> that the imprisonment for breach of the Court's order is but an alternative satisfaction of it. I therefore think that the contention of the appellant in this case cannot be sustained.

There remains, however, the question whether the order discharging the respondent in respect of the arrears due since the first period of imprisonment is right. That depends on the state of the account. Properly speaking, the amount realized by the sale of the immovable

<sup>1</sup> (1916) 19 N. L. R. 312.

<sup>2</sup> (1894) I. L. R. 22 Cal. 291.

property, when the respondent absconded and was proclaimed, cannot be regarded as a levy in respect of the order for maintenance. But if, as a matter of fact, it has been paid to, and received by the appellant, it is, I think, only fair to consider it as a payment to that extent. I am here assuming that the Rs. 18 accepted by the Magistrate completes the full amount, and the matter requires further inquiry. The order appealed from will for this purpose be set aside and the case sent back for fresh adjudication.

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*Sent back.*

