

Misri Lal of the foreclosure proceedings. On the strength
 and another of these copies it seems to have been argued that
v. the defendants were estopped from setting up the
 Hari foreclosure proceedings as a defence in the pre-
 Parshad and sent suit for redemption.
 Ved Parkash

Falshaw, J.

In the first place it is difficult to see how this point was allowed to be raised without the plaintiffs being made to alter their pleadings and without framing an issue on the point and in the second place it is difficult to hold that the defendants are in any way estopped. The order of the Sub-Judge leaves in obscurity the exact nature of the dispute between the parties since, although the point before him seems to have been whether the house should be permitted to be sold or not in execution, the first part of the judgment clearly refers to the decree being executed as one for possession of the house in dispute, and the latter part of the judgment refers to the decree as being not a simple money decree but one "to enforce the mortgage of 1887," which I find incomprehensible. Moreover the statement of the law given by the Pleader representing the defendants appears to be wrong in view of my discussion above on the effects of foreclosure proceedings and no party can be estopped by a wrong statement by counsel on a point of law. The result is that I dismiss the appeal, but in the circumstances leave the parties to bear their own costs in this Court.

CRIMINAL REVISION

Before Kapur, J.

PALA SINGH,—Petitioner

versus

SHRIMATI RAM KAUR,—Repondent

Criminal Revision No. 982 of 1954

Code of Criminal Procedure (Act V of 1898)—Section 488—Application for arrest in execution of an order under section 488—Defence inability to pay—Whether plea sufficient to bar the application for arrest.

1955

March, 11th

Held, that the husband when he appeared before the Magistrate stated that he was unable to make the payment. No written statement was filed and no *prima facie* case was made out in such an application which could form the basis of adjudication between the parties. To merely say that the husband is unable to pay is not a sufficient plea in bar to an application for arrest in execution of an order made under section 488 Criminal Procedure Code.

Revision against the order of Shri Dharam Pal Pasricha, exercising the power of Magistrate, 1st Class, Giddarbaha in the Ferozepore District, dated 20th February, 1954 ordering Pala Singh petitioner to undergo simple imprisonment for a period of one year or until he pays the maintenance due to Shrimati Ram Kaur, whichever is earlier.

The facts of this case are as follows:—

The Resident Magistrate, Giddarbaha, by his order dated 17th July 1951, granted a maintenance allowance of Rs. 35 per mensem under section 488, Criminal Procedure Code, to Shrimati Ram Kaur, hereinafter referred to as the petitioner, against her husband Pala Singh, hereinafter referred to as the counter-petitioner. The petitioner took out two separate execution applications for arrears of this maintenance allowance, namely one on 7th September, 1952 for the arrears from 8th March, 1951 to 7th September 1951 and the other on 8th April, 1953 for the arrears from 8th September 1951 to 7th April 1952. In each of these execution applications a warrant of attachment against the property of the counter-petitioner for realizing the arrears was ordered to be issued, but remained unexecuted in spite of various adjournments. On 25th January, 1954, in the execution application filed on 8th April 1953, the learned Magistrate ordered that since the counter-petitioner was evading payment of the arrears and there was no other way to realize the arrears, a warrant of arrest be issued against him. The counter-petitioner turned up on 20th February 1954 in each execution case and in each case the learned Magistrate ordered that he had every reason to believe that the counter-petitioner was avoiding the payment of maintenance allowance due from him and

therefore ordered that the respondent be sentenced to undergo simple imprisonment for a period of one year in the earlier instituted execution case and seven months in the later execution case. The counter-petitioner has filed a revision petition against the order of his imprisonment in both the execution cases. Since the two revision petitions turn on the same questions of law and fact, they can be conveniently disposed of by a single order.

The records of this and the connected revision petition are forwarded to the High Court for revision on the following grounds:—

Under section 488, subsection (3) of the Criminal Procedure Code, the Magistrate can issue a warrant of attachment or arrest or order imprisonment for levying the amount due only if the person ordered to pay maintenance allowance *fails without sufficient cause* to comply with the order. That necessarily implies that a respondent can always appear before the court, even after an order under subsection (1) to section 488, Cr. P.C., has been made against him for making the allowance to his wife or child, as the case may be, and show cause against the arrears being levied by his arrest or attachment. That further implies that if the respondent appears to show cause he should be given an opportunity, if necessary, to substantiate that cause. It nowhere appears from the proceedings in either execution application in this case that any prior notice was given to the respondent to show cause against the levy of the arrears or against his arrest or imprisonment. He appeared on 20th February 1954 in court and it does not appear that he was allowed any opportunity to file objections in writing in court. It appears from the final order of the Magistrate sentencing the counter-petitioner to imprisonment in each case that Pala Singh counter-petitioner pleaded inability to pay the maintenance due from him. It is therefore clear that Pala Singh had alleged that he was unable to pay the arrears. In other words, he had pleaded that he

was destitute. To send a man who is really destitute to imprisonment would be against our humane laws and our constitution if the counter-petitioner could show that he was really destitute and unable to pay the arrears of maintenance, that would have been sufficient cause for his non-compliance with the Magistrate's order making the allowance. The proceedings of the Magistrate in each case suffer from the material defect that no notice was given to the counter-petitioner to show cause against his arrest or imprisonment and no opportunity was given to him to show and substantiate such cause. It may be noted in this connection that the maintenance law under section 488, Cr. P.C., as it originally stood has been overhauled by amendments introduced into that law, and the law as it now stands provides for an opportunity to be given to the counter-petitioner, even after an order has been made under sub-section (1) to section 488, Cr. P. C., actually making the maintenance allowance to show cause why the arrears should not be levied from him and why he should not be imprisoned. If any authority is needed in this connection, see 26 Cr. L.J. 953. As remarked in this ruling, there may be pleas which have already been covered by the order making the allowance itself, for it can very well be that the plea raised by the counter-petitioner after an order for levy of the arrears has been made against him, may have already been raised by him in the original petition under section 488, sub-section (1) Cr. P. C. In such a case the plea has already been considered and the Magistrate can very well hold that there is no force in the plea as repeated before him. All the same, it is for the Magistrate to decide that plea after giving the counter-petitioner opportunity to show full cause. I have seen the original record of the petition filed by Shrimati Ram Kaur in which the maintenance allowance was allowed to her. There is some material on the file to show that the counter-petitioner owned some land. While the petitioner had alleged that the land was 100 *ghumaons* in area, the respondent led evidence to show that he owned only 40 *ghumaons* of land,

which was Barani and yielded very little income. However that may be, this aspect of the case was never discussed by the learned Magistrate, and a man, who is well-to-do at one time may, for reasons beyond his control, become destitute a year after. At any rate, the counter-petitioner's plea of destitution raised by him before the Magistrate when he appeared in the execution case must have been determined by the Magistrate before he could be sentenced to imprisonment for default of payment of the arrears of maintenance. In my view of the case the counter-petitioner should have been given a regular opportunity to file all objections that he chose and he should not have been treated so unceremoniously as he was, namely, orally heard, condemned on the spot and sentenced. I, therefore, hereby recommend that the order of the Magistrate in each case sentencing the counter-petitioner to imprisonment dated the 20th February 1954 be set aside and the case remanded to the trial Magistrate so that in view of the above remarks he may give the counter-petitioner an opportunity to show cause against his arrest and imprisonment and after determining the pleas raised by him make the final order in accordance with law and justice.

C. L. LAKHANPAL, for Petitioner.

RAJINDER SACHAR and N. S. KEER, for Respondent.

ORDER OF THE HIGH COURT

Kapur, J.

KAPUR, J. These are two references made by the learned Additional Sessions Judge of Ferozepore recommending that the order of the Magistrate of Giddarbaha, dated the 20th of February 1954, ordering the present petitioner to be detained in jail for one year and seven months in execution of two orders of maintenance under section 488, Criminal Procedure Code, be set ~~aside~~ on the

ground that the present petitioner was not given an opportunity to show cause as required under section 488 of the Criminal Procedure Code.

Pala Singh
v.
Shrimati
Ram Kaur

Kapur, J.

The husband Pala Singh was ordered to pay maintenance to his wife Ram Kaur of Rs. 35 per mensem by an order, dated the 17th July 1951. As the amount was not paid the wife took out execution for maintenance for two periods on the 7th of February 1954, the periods being 8th March 1951 to 7th September 1951 and 8th September 1951 to 7th April 1952. Of the latter period the execution was taken out on the 8th April 1953. As nothing was recovered as a result of attachment, the Magistrate ordered the arrest of the present petitioner, the husband.

When the husband appeared he simply stated that he was unable to pay the maintenance. He made no application at least none is available on the record, and it is not clear what was the ground on which the inability to pay was based.

The learned Sessions Judge was of the opinion that merely on the husband's oral statement that he was unable to pay the learned Magistrate should have given him an opportunity to show cause and he relied upon a judgment of the Madras High Court in *Theetharappa Pillai v. Meenakshi Ammal* (1), where it was held that the words 'sufficient cause' as used in clause 3 of section 488 required the Magistrate to use his judicial discretion having regard to all the circumstances and that such discretion should not be fettered by any definite rules. In the present case this ruling is, in my opinion, wholly inapplicable. The present petitioner when he appeared before the Magistrate stated that he was unable to make the payment.

(1) 26 Cr. L.J. 953

Pala Singh
 v.
 Shrimati
 Ram Kaur
 ———
 Kapur, J.

No written statement was filed and no *prima facie* case was made out in such an application which could form the basis of adjudication between parties. To merely say that the husband is unable to pay is not a sufficient plea in a bar to an application for arrest in execution of an order made under section 488. As a matter of fact the order of the learned Additional Sessions Judge itself shows that the present petitioner, the husband, possesses at least 40 *ghumaons* of land, although it is stated that the land is *barani* and yields no income. No affidavit was filed before the Magistrate, nor has it been filed here to show as to what the income of 40 *ghumaons* in Muktsar Tahsil is, and I have no reason to doubt that when the Magistrate made the original order of payment of Rs. 35 a month as maintenance it must have been done objectively and not as a result of subjective determination.

In my opinion no reason has been shown as to why the order of the Magistrate should not be carried out but in the circumstances I think it would be proper that I should allow to the petitioner three months' time in which to make the payment and if it is not so made it will be open to the Magistrate to send the present petitioner to such a term of imprisonment as he thinks proper but it should not exceed a period of six months in the aggregate.

CIVIL APPELLATE.

Before Khosla, J.

SMT. VIRANWATI,—Appellant.

versus

GULAB SINGH,—Respondent.

1955

First Appeal from Order No. 35-D of 1954

March, 15th

Displaced Persons (Debts Adjustment) Act (LXX of 1951)—Section 36—Promissory note executed at Rawalpindi on the 16th September, 1946—Both the debtor and the creditor displaced persons—Limitation for suit expired on the 15th September, 1949—Application by the displaced