

Jagdamba Trivedi Vs Neha Trivedi

Court: Chhattisgarh High Court

Date of Decision: Jan. 18, 2021

Acts Referred: Code Of Criminal Procedure, 1973 " Section 125(1), 125(3), 128, 421, 421(1)(a), 421(1)(b), 482, 488(3)

Hindu Marriage Act, 1955 " Section 28A

Hon'ble Judges: Sanjay K. Agrawal, J

Bench: Single Bench

Advocate: Sangharsh Pandey

Final Decision: Disposed Of

Judgement

Sanjay K. Agrawal, J

1. The petitioner herein has called in question the legality, validity and correctness of the order dated 09/05/2019 (Annexure A/1) passed by the Family

Court, Bilaspur in MJC No. 43/2019 by which non-bailable warrant of arrest has been issued against him for non-payment of the arrears of

maintenance amount of ₹ 38,000/- awarded against him as well as the ex-parte order dated 22/11/2018 (Annexure A/2) passed by the Family Court in

MJC No. 06/2018 granting maintenance to the tune of ₹ 7,000/- per month in favour of the respondent/his wife.

2. It is the case of the petitioner that MJC No. 43/2019 was filed under Section 125(3) of the CrPC in which the petitioner herein appeared on

25/03/2019 and deposited an amount of ₹ 4,000/- and thereafter, the matter was adjourned on 18/04/2019 and again it was adjourned for 09/05/2019.

Since, on that day, the petitioner was absent, the respondent herein made a request before the Family Court for issuance of warrant of arrest against

the petitioner herein and ultimately, by the impugned order dated 09/05/2019 non-bailable warrant of arrest was issued against the petitioner which is

without jurisdiction and without authority of law.

3. Mr. Sangharsh Pandey, learned counsel for the petitioner, would submit that learned Family Court was absolutely unjustified in issuing non- bailable

warrant of arrest against the petitioner. He would also submit that if the order passed under Section 125(1) of the CrPC directing for payment of

maintenance amount is not complied with, then the procedure prescribed under Section 125(3) has to be followed and for the breach of that order, the

concerned Court may issue a warrant for levying the amount due in the manner prescribed for levying fines, and may sentence such person, for the

whole, or any part of each month's allowance (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case

may be) remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner

made, and that the warrant for levy of fine has been provided under Section 421 of CrPC and without following the procedure mentioned in Section

421 of CrPC, learned Family Court could not have issued the warrant of arrest directly as the provisions prescribed under Section 421 of CrPC are

mandatory in nature which was not followed by learned Family Court, as such, the impugned order dated 09/05/2019 (Annexure A/1) and 22/11/2018

(Annexure A/2) deserve to be set aside.

4. None appeared for the respondent though served.

5. I have heard learned counsel for the petitioner, considered his submission and went through the record with utmost circumspection.

6. It is true that the petitioner has suffered the ex-parte order of maintenance dated 22/11/2018 passed by learned Family Court in MJC No. 06/2018

for execution of which MJC No. 43/2019 was filed by the respondent for recovery of arrears of maintenance amount of â, 38,000/- wherein on

09/05/2019, learned Family Court has issued non- bailable warrant of arrest against the petitioner.

7. Section 125(3) of CrPC provides for the procedure to be followed for non-compliance of the order passed under Section 125(1) of CrPC for grant

of maintenance, which states as under :-

“125. Order for maintenance of wives, children and parents. -

(1) XXX XXX

(2) XXX XXX XXX

3. If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a

warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each

month's (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,) remaining unpaid after the

execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such

amount within a period of one year from the date on which it became due :

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate

may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is

just ground for doing so.

1 A plain reading of the aforesaid provision would show that if the order has been passed with regard to the grant of maintenance against a person

and he fails to comply without sufficient cause, the Magistrate is empowered to issue warrant for levying the amount due in the manner provided for

levying fine and may sentence such person for whole or any part of each month's allowance (allowance for the maintenance or the interim

maintenance and expenses of proceeding, as the case may be) remaining unpaid after the execution of the warrant, to imprisonment for a term which

may extend to one month or until payment if sooner made.

1 Section 421 of CrPC provides the procedure for levy of fine which states as under :-

Section 421. Warrant for levy of fine. - (1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the

recovery of the fine in either or both of the following ways, that is to say, it may -

1. issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender;

2. issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable

property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the

whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary

so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under Section 357.

2 The State Government may make rules relegating the manner in which warrants under clause (a) of sub-section (1) are to be executed, and for the

summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3). Where the Court issues a warrant to the Collector under clause (b) of sub- section (1), the Collector shall realise the amount in accordance with

the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law :

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

10. A careful perusal of the aforesaid provision would show that for recovery of the amount of maintenance, procedure under Section 421(1) has to

be followed by either issuing warrant for levying the amount due by attachment and sale of movable property belonging to the offender or by issuing a

warrant to the Collector of the district, for authorising him to realise the amount as arrears of land revenue from the movable or immovable property,

or both, of the defaulter. Section 421(3) provides that where the Court issues a warrant to the Collector under clause (b) of Sub-section (1), the

Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate

issued under such law.

11. A conjoint reading of the provisions contained under Section 125(3) read with Section 421 of CrPC would show that by virtue of Section 125(3) of

CrPC, the Magistrate has been empowered to recover the amount of arrears of maintenance by following the procedure prescribed for levy of fine

under Section 421 of CrPC. Two modes are prescribed under Section 421 of CrPC for recovery of the arrears of maintenance due as if it were a fine

levied. The Court can either issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the defaulter or

issue a warrant to the Collector of the District, authorising him to realise the amount as arrears of land revenue from the movable or immovable

property, or both, of the defaulter under Section 421(1)(a) and 421(1)(b) of CrPC. It is only after the Magistrate has exhausted the two modes

prescribed under Section 421 of CrPC and still fails to recover the arrears of maintenance due that he can sentence the person who committed the

default to imprisonment as enjoined under Section 125(3) of CrPC for the period prescribed in the above- stated provision and if in the execution of

sentence of imprisonment so awarded, the defaulter does not appear to suffer, the sentence so awarded, the Court should at the first instance issue

summons/notice for his appearance and if the defaulter seems to be avoiding the summons, the Court in the second instance should issue bailable

warrant for his appearance to undergo sentence. The Courts, at first and second instance, shall refrain from issuing non-bailable warrant.

4 It is quite vivid that the provisions contained under Section 125(3) of CrPC itself provide that the Court may sentence such a person for whole or

any part of each month's allowance after the execution of the warrant, as such, Section 125(3) CrPC speaks only of issue of a warrant for levying the

amount in the manner provided for levying fines and does not speak of a warrant of arrest. The issue of a warrant for levy of the amount due by way

of attachment and sale is a condition precedent to the sentencing of the defaulter to imprisonment. As such, without following the procedure

prescribed under Section 421(1)(a) and 421(1)(b) of CrPC and without issuance of warrant of attachment and sale, no warrant can be issued and no

order for imprisonment can be passed under Section 125(3) of CrPC.

4 In the matter of Jagannath Patra v. Purnamashi Saraf AIR 1968 Orissa 35, it was held that in the first instance the warrant of attachment of

movable and immovable properties would be issued, the properties would be sold and applied for discharge of the arrear due, and if on such steps

being taken the arrear amount still remains unpaid, it is open to the Magistrate to issue a body warrant and not until then. The order of the Magistrate

issuing simultaneously warrant of attachment and body warrant is not in accordance with law.

(n) The Kerala High Court in the matter of Nithiyandanan v. Radhamani 1980 SCC Online Ker 93 has clearly held that the powers conferred on the

Magistrate in this regard have to be exercised in the manner and in the sequence indicated in sub-section (3) of Section 125 of the Code.

(o) The Punjab and Haryana High Court in the matter of Karnail Singh v. Gurdial Kaur 1974 CrLJ 38 while considering the similar provision contained

in the old Code i.e. Section 488(3) of CrPC, 1898, held that in the first instance warrant of attachment of property to satisfy the demand of arrears

should issue and only if the whole or any part of it remains unpaid after execution of warrant, imprisonment can be ordered. Therefore, the issue of a

warrant of attachment and sale is a condition precedent to the issue of a warrant of imprisonment.

(P) Finally, in the matter of Rajnesh v. Neha 2020 SCC Online SC 903, the Supreme Court considered the issue as to the enforcement of orders of

maintenance in paragraph 80 and held as under :-

“V. Enforcement of orders of maintenance :-

80. Enforcement of the order of maintenance is the most challenging issue, which is encountered by the applicants. If maintenance is not paid in a

timely manner, it defeats the very object of social welfare legislation. Execution petitions usually remain pending for months, if not years, which

completely nullifies the object of the law.

XXX XXX XXX XXX

Discussion and Directions on Enforcement of Orders of Maintenance :-

9. The order or decree of maintenance may be enforced like a decree of a civil court, through the provisions which are available for enforcing a

money decree, including civil detention, attachment of property, etc. as provided by various provisions of the CPC, more particularly Sections 51, 55,

58, 60 read with Order XXI.

10. Striking off the defence of the respondent is an order which ought to be passed in the last resort, if the Courts find default to be wilful and

contumacious, particularly to a dependant unemployed wife, and minor children.

11. Contempt proceedings for wilful disobedience may be initiated before the appropriate Court.

VI. Final Directions :-

81. In view of the foregoing discussion as contained in Part B " I to V of this judgment, we deem it appropriate to pass the following directions in

exercise of our powers under Article 142 of the Constitution of India :

(a) XXX XXX XXX

(b) XXX XXX XXX

(c) XXX XXX XXX

(d) XXX XXX XXX

(e) Enforcement / Execution of orders of maintenance For enforcement / execution of orders of maintenance, it is directed that an order or decree of

maintenance may be enforced under Section 28A of the Hindu Marriage Act, 1956; Section 20(6) of the D.V. Act; and Section 128 of Cr.P.C., as

may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the CPC, more particularly

Sections 51, 55, 58, 60 r.w. Order XXI. "€

17. Reverting to the facts of the instant case in light of the aforesaid legal analysis, it is quite vivid that learned Family Court, finding that the arrears of

maintenance is due from the petitioner, straightway issued warrant of arrest without following the procedure laid down in Section 421(1)(a) and 421(1)

(b) of CrPC, whereas learned Magistrate ought to have followed the procedure laid down in Section 421 of CrPC for recovering the arrears of the

amount of maintenance, and if after following the procedure as envisaged in Section 421 of CrPC by issuance of warrant of attachment of movable

and immovable property of the defaulter and sale thereof; still arrears of amount of maintenance remains due, th order of imprisonment can be passed,

as such, the order directing issuance of non-bailable warrant of arrest against the petitioner is contrary to Section 125(3) read with Sections 421(1)(a)

and 421(1)(b) of the CrPC. Accordingly, the order dated 09/05/2019 (Annexure A/1) passed in MJC No. 43/2019 is hereby set aside and learned

Family Court is directed to follow the procedure laid down by the Supreme Court in the matter of Rajnesh (supra) strictly for recovery of the amount

of maintenance.

18. The petitioner has also called in question the order dated 22/11/2018 (Annexure A/2) passed in MJC No. 06/2018 by which ex-parte order of

maintenance has been passed by the Family Court against the petitioner. This Court would not like to directly entertain the petition with regard to

setting aside of the said order (Annexure A/2). However, the petitioner is at liberty to move appropriate application before the Family Court which will

be considered by that Court expeditiously and in accordance with law.

19. With the aforesaid direction/observation, the instant petition under Section 482 of CrPC stands disposed of. No cost(s).