
(1982) 07 BOM CK 0029

In the Bombay High Court

Case No : Criminal Revision Application No. 106 of 1982

Jagoo Sarju Kathaute

APPELLANT

Vs

Ramkali Jagoo Kathaute and others

RESPONDENT

Date of Decision : 29-07-1982

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(3), 4(2), 421, 421(b)
Penal Code, 1860 (IPC) — Section 22

Citation : (1982) MhLj 859

Hon'ble Judges : S.W. Puranik, J

Bench : Single Bench

Advocate : G.C. Choubey, for the Appellant; K.B. Neware for Non-applicants 1 to 3 and A.A. Desai, Asstt. Govt. Pleader for State, for the Respondent

Final Decision : Allowed

Judgement

S.W. Puranik, J.—By this Criminal Revision Application the applicant seeks quashing of the proceedings attaching his salary amounting to Rs. 5450/-issued by Judicial Magistrate, first Class, 8th Court, Nagpur in Miscellaneous Criminal Case No. 34/82 (Ramkali v. Jagoo) on an application filed by the present non-applicant for enforcement of the order of maintenance.

2. The applicant is the husband, while the non-applicant No. 1 is his wife and the non-applicant Nos. 2 and 3 are the children out of their wedlock. The non-applicant No. 1 had filed proceedings u/s 125 of Criminal Procedure Code, claiming maintenance for herself and her minor children-non-applicant Nos. 2 and 3. The proceedings were contested by the husband-applicant and after recording of evidence, the Trial Court came to the conclusion that the non-applicant No. 1 was entitled to grant of maintenance as also her two minor children. The Trial Court directed the applicant husband to pay Rs. 175/- per month as maintenance allowance to non-applicants.

3. The applicant husband, however, failed to pay the arrears of maintenance to the non-applicants and it is thereafter that the wife non-applicant No. 1 filed an

application for recovery of maintenance allowance and for order executing the recovery of the same. The said application was filed on 10-5-1982 before the Trial Court. It was Miscellaneous Criminal Case No. 34 of 1982. On 10-5-1982, the applicant husband who was non-applicant in the said proceedings was absent. On that date, the wife Ramkali filed another application stating inter-alia that the husband has been ordered to pay maintenance to her at the rate of Rs. 75/- per month and Rs. 50/- each for the two minor children. She further contended that she had applied for execution of the said order, but the husband has been seeking time to file reply to the execution application. She further submitted that the husband is absent on 10-5-1982 (the date of her application). He is thus avoiding payment of the maintenance arrears. She, therefore, submitted that since the husband has no valuable movables to attach, she desires that the salary of the husband should be attached. She then gave the address of the employer of the husband as "The Divisional Superintendent, Central Railway, Ajni, Nagpur." Upon this application dated 10-5-1982 the learned Judicial Magistrate passed a very brief order as follows:

Non-applicant absent. Applicant with her counsel. Issue warrant of attachment of salary of non-applicant to the tune of Rs. 5450/-.

It is this order which is impugned in the present revision.

4. Shri G.C. Choubey, the learned counsel appearing for the applicant husband contended that the said order is not only without jurisdiction, but is contrary to the modes of recovery laid down under the Code of Criminal Procedure. He submitted that the learned Trial Court has not followed the procedure laid down u/s 125-(3). He further contended that the future salary of the applicant husband cannot be said to be movable property within the meaning of section 421 of the Criminal Procedure Code for levy of fines. He, therefore, submitted that the impugned order is liable to be quashed and set aside.

5. Shri K.B. Neware Advocate, appeared for non-applicant Nos. I to 3. He supported the impugned order and contended that the applicant husband has been avoiding the payment of maintenance and there is no other alternative but to attach the salary of the applicant for recovery of the arrears of maintenance. Shri A.A. Desai, Asstt. Govt. Pleader appeared for the State.

6. The main question involved in this case is therefore whether during proceedings for recovery of arrears of maintenance, the Trial Court could issue a warrant of attachment of salary of the husband which had not accrued to him and which was his future salary.

7. Section 125-(3) with its first proviso says as under :--

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

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.

I have only reproduced the material portion from sub-clause (3) of section 125 Criminal Procedure Code for deciding the present proceedings.

8. Thus, on an application filed before the Trial Court, he may, in case there is breach of order of grant of maintenance, issue a warrant for levying the amount due in the manner provided for levying the fines. The manner for levying the fines is prescribed in section 421 of Criminal Procedure Code. It gives two modes of recovery of fines, viz;

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) 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.

Thus, the Trial Court in breach of recovery of the order of maintenance has to follow the procedure laid down u/s 421 and may adopt either or both of the modes stated in section 421, Criminal Procedure Code. Shri Neware for the non-applicants contended that the future salary of the applicant being the cash amount to be recovered by the husband from time to time was also movable property within the meaning of section 421, Criminal Procedure Code. I am unable to agree with this contention. The future salary of a person which is not yet a tangible movable property in his possession cannot be said to be movable property within the meaning of section 421 of Criminal Procedure Code. The words "movable property" in clause (a) of section 421, Criminal Procedure Code refer to tangible movable property which can be seized or attached and which must be belonging to the defaulter. If it is movable property of other description, the remedy would be under clause (b) of section 421 by civil process through the Collector of the District for recovery of the defaulted amount as arrears of land revenue. The very fact that execution by civil process is allowed in the case of movable property also shows that there is difference in the meaning of the words "movable property" as used in clause (a) and as used in clause (b) of section 421, Criminal Procedure Code. Movable property has not been defined in Criminal Procedure Code. But the definition of movable property as given in section 22 of the Indian Penal Code can be used by virtue of section 4(2) of Criminal Procedure Code. u/s 22, Indian Penal Code, "movable property" includes corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth. Thus, this definition is more restrictive and different from that given in the General Clauses Act, where "movable property" means property of every description

except immovable property. It appears that for the purpose of Indian Penal Code, "movable property" must be tangible corporeal property which could be perceived and seized. In the instant case also, the wife could not ask the Magistrate to attach the future salary of her husband as and when it becomes due. Firstly, the future salary is not tangible corporeal property available for seizure. Secondly, it does not belong to the husband because he cannot be said to have earned his future salary.

9. I am supported in this view by the decisions in the matter of Ali Khan v. Hajrambi 1981 Cri. LJ 682 as also by the decision in Baldevi Vs. Ramnath, . In the instant case, therefore, when the wife had preferred an application for recovery of maintenance and when the Court proceeded ex-parte against the husband, in the said proceedings, the trial Court erroneously issued warrant of attachment of salary of the husband to the tune of Rs. 5,000 and odd. Obviously, the salary to the tune of Rs. 5,000 and odd was not due to the husband from his employer. It was, therefore, the future salary of the husband which was proposed to be attached by the Trial Court. Such future salary could not be attached by warrant issued u/s 125-(3) of Criminal Procedure Code. The Trial Court grossly erred in not following the provisions for levying of fine as prescribed u/s 421 of Criminal Procedure Code. The impugned order is patently illegal and liable to be quashed. If at all, the Trial Court could take steps u/s 421(b) of Criminal Procedure Code, by issuing a certificate of warrant to the Collector, Nagpur District, for recovery of the amount due as arrears of land revenue from out of the movable or immovable properties of the defaulter, it would thus be a civil process for recovery of arrears of maintenance as provided by law and would be subject to restrictions of the CPC in the matter of attachment and recovery. In the result, therefore, finding that the impugned order is perverse and patently illegal, I find that interference in this revision is necessarily called for to avoid the abuse of the process of law and to meet the ends of justice. Hence the following order.

10. Criminal Revision Application No. 106/82 is allowed. The impugned order is quashed and set aside. The proceedings for recovery by issue of the impugned order of attachment of salary of the applicant husband are set aside. The trial Court may take such other steps according to law as are available for purpose of recovery.