
(1977) 02 BOM CK 0002

In the Bombay High Court

Case No : Criminal Appeal No. 1264 of 1973

M. Pushpanathen Marimuthu

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-02-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 48
Criminal Procedure Code, 1973 (CrPC) — Section 357, 401, 421, 484
General Clauses Act, 1897 — Section 25
Penal Code, 1860 (IPC) — Section 64, 70

Citation : (1978) 80 BOMLR 142

Hon'ble Judges : Vaidya, J;Sawant, J

Bench : Division Bench

Judgement

Vaidya, J.—The Deputy Registrar High Court, Appellate Side, has placed before us certain matters with his report, dated February 21, 1977, seeking directions regarding the practice to be followed on the returns in such matters.

2. The Criminal Department of the Appellate Side of this Court, noticed that in these matters while returning the final writs in criminal cases to this Court, the reports of the lower Courts are generally silent as regards the recovery of the fine from the accused persons, where the accused undergo the imprisonment in default of payment of fine, although the Courts have the power and the duty to decide whether the fine should be recovered u/s 70 of the Indian Penal Code, and hence the above report was placed before the Court for directions with report to the unexecuted writs and for modification or otherwise of instructions in the "Criminal Manual".

3. Section 70 runs as follows:

The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does

not discharge from the liability any property which would, after his death, be legally liable for his debts.

4. The authors of the Indian Penal Code observe in respect of imprisonment in default of payment of fine:

We do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in his person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to those very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment would be most likely to restrain. We therefore propose that the imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine; but his property will for a time continue to be so. What we recommend is, that at any time during a certain limited period the fine may be levied on his effects by distress. If the fine is paid or levied while he is imprisoned for default of payment his imprisonment will immediately terminate, and if a portion of the fine be paid during the imprisonment, proportional abatement of the imprisonment will take place.

It may perhaps appear to some persons harsh to imprison a man for non-payment of a fine, and, after he has endured his imprisonment, to take his property by distress in order to realize the fine. But this harshness is rather apparent than real, if the offender, having the means of paying the fine, chooses rather to lie in prison than to part with his money, his case is the very case in which it is most desirable that the fine should be levied, and he is the very convict who has least claim to indulgence. The confinement which he has undergone may be regarded as no more than a reasonable punishment for his obstinate resistance to the due execution of his sentence. If the offender has not the means of paying the fine while he continues liable to it, he will be quit for his imprisonment. There remains another case; that of an offender who, being really unable to pay his fine, lies in prison for a term, and within six years after his sentence acquires property. This case is the only case in which it can, with any plausibility, be maintained that the law, as we have framed it, would operate harshly. Even in this case, it is evident that our law will operate far less harshly than a law which should provide that an offender sentenced to a fine should be imprisoned till the fine should be paid. Under both laws imprisonment is inflicted, under both a fine is exacted. But the one law liberates the offender on payment of the fine, and also fixes a limit beyond which he cannot be detained, in gaol, whether the fine be paid or not. The other law keeps him in confinement till the money is actually paid. It is, therefore, at least as severe as ours on his property, and is immeasurably more severe on his person. The offender who has been sentenced to fine must be considered as a debtor, and, as a debtor, not entitled to any peculiar lenity. It will be difficult to show on what principles a creditor

ought to be allowed to employ, for the purpose of recovering a debt from a person who is perhaps only unfortunate, a more stringent mode of procedure than that which the State employs for the purpose of realizing a fine from the property of a criminal. If a temporary imprisonment for debt ought not to cancel the claim of the private creditor, neither ought a temporary imprisonment in default of payment of a fine to cancel the claims of public justice.

5. It is thus clear that Section 70 meant, to lay down what appears to us to be very clear provision for recovery of the claims of the state against offenders against public justice, in respect of fine even when the accused underwent sentence of imprisonment in default of payment of fine; and it is the duty of the Courts to exercise the powers u/s 70.

6. The powers u/s 70 of the Indian Penal Code are applied, u/s 25 of the General Clauses Act, 1897, to all fines imposed under any Act required by law unless it contains express provision to the contrary. Section 25 lays down that Section 70 of the Indian Penal Code and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all such fines.

7. The procedure under the Code of Criminal Procedure, 1898, was regulated by Section 386 till that section was replaced by Section 421 of the Code of Criminal Procedure, 1973, which has substantially reproduced that section with some material changes, which would be noticed hereinafter.

8. Section 421 of the new Code runs as follows:

(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-

(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:

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 u/s 357.

(2) The State Government may make rules regulating 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.

9. The following changes have been introduced in that section when compared to the old Section 386:

(1) In Sub-section 1(b), the words "as arrears of land revenue from" have been substituted for the words "by execution according to civil process against".

(2) In the proviso, an alternative condition precedent is laid down before issuing a warrant for recovery of the fine in default by adding the words: "or unless it has made an order for the payment of expenses or compensation out of the fine u/s 357."

(3) In Sub-section (5), consequential changes have been made by substituting the words "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.

10. In other words, the effects of the changes made in the new Code are, that the alternative method of recovery of fine under the old Code through the civil Courts has been changed from the previous "dilatory, cumbrous and time consuming process through the civil Courts" to a simple one as the arrears of land revenue machinery.

11. It appears that before the 1923 amendment of the Code of Criminal Procedure, Section 386 read as follows:

Whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned.

12. As a result of the 1923 amendment, Section 386 of the Code of Criminal Procedure, 1898, read as follows:

386. (I) Whenever 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-

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

(b) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the moveable 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 to do so.

(2) The Local Government may make rules regulating the manner in which warrants under Sub-section (1), Clause (a), 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 Courts issue a warrant to the Collector under Sub-section (I), Clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly:

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

13. It was thus clear that even after the 1923 amendment, the fine in respect of which sentence of imprisonment in default was levied could be recovered in certain circumstances even after the default sentence of imprisonment was undergone by the convict, provided the Court gave special reasons for issuing a warrant.

14. Immediately after the 1923 amendment of the Criminal Procedure Code, a circular appears to have been issued by this Court, which we find in the seventh edn. of the "Circular Orders issued by the High Court of Judicature, Appellate Side, Bombay", published in 1925. That Circular was printed as Rule 136 of chap. IX in the ninth edn. of the "Criminal Manual", issued by the High Court, published in 1947.

15. That Circular was also reproduced as Circular No. 143 at p. 106, which runs as under:

The attention of Sessions Judges and Magistrates is called to Section 70 of the Indian Penal Code, and Sections 386, 387 and 388 of the Code of Criminal Procedure, and to the fact that the proviso to Section 386(1), directs that after the whole of the imprisonment awarded in default of payment of fine has been undergone, no further steps should be taken for the recovery of the fine unless the Court for special reasons to be recorded considers it necessary to do so. In cases where further steps are required, if at any time subsequent to the return of the original warrant and within a period of six years from the passing of the sentence, the fine or any part of it, remains unpaid, and the Court, from information gained, has reason to think that there is any movable property belonging to the offender, it should issue a fresh warrant for the attachment and

sale of that property within a specified period returnable within a certain time.

The discretion to issue a warrant u/s 386 and suspend the execution of the sentence of imprisonment u/s 388, Criminal Procedure Code, should ordinarily be exercised whenever there is a reasonable prospect of the fine or part of it being so recovered and no likelihood of the offender absconding. The Magistrates' attention is also drawn to the fact that the infliction of a sentence of imprisonment in default of payment of fine is discretionary u/s 64, Indian Penal Code. (Vide Bombay Government Gazette, Part I, for 1922, page 2302).

16. In the meanwhile, the proviso to Section 386, Sub-section (1) of the Criminal Procedure Code, was considered in *Emperor v. Digambar Bhavarthi* (1934) 37 Bom. L.R. 99, by Sir John Beaumont C.J. and Wadia J. in an application in revision, in which the applicant asked this Court to review the order of the Sessions Judge of Sholapur refusing to order the withdrawal of a warrant issued u/s 386 of the Criminal Procedure Code.

17. The relevant facts of the case were that, in the year 1930, the applicant was convicted of certain offences. He was sentenced to substantive terms of imprisonment. He was also sentenced to pay a fine amounting to Rs. 1,500, with a sentence of imprisonment in default of payment of fine. Whilst he was still in prison, i.e. in January 1932, a warrant was issued for the recovery of the fine u/s 386 of the Criminal Procedure Code, and was sent to the Collector for execution under Sub-section (1), Clause (b).

18. As a result of the issue of that warrant a part of the fine amounting to Rs. 600 was recovered, and the warrant had been sent for execution under Sub-section (5) of Section 386 to the subordinate Judge's Court at Akalkot, where it was sought in darkhast proceedings to sell the applicant's interest in certain joint family lands. On June 30, 1934, the applicant was released from jail, having served not only his substantive sentence, but also the sentence imposed upon him in default of payment of the fine.

19. He asked that the warrant for the recovery of the fine issued against him should be withdrawn, in view of the proviso to Section 386(1) of the old Criminal Procedure Code. Sir John Beaumont C.J. laid down (p. 101):

‘I think that, in dealing with such existing warrants, the Court should follow the policy which seems to have inspired the proviso to Section 386. That policy appears to be that in general an offender ought not to be required both to pay the fine and to serve the sentence in default. But the proviso enables a warrant to be issued for recovery of the fine, even if the whole sentence in default has been served, if the Court considers that there are special reasons for issuing the warrant, I apprehend that the special reasons should be reasons accounting for the fact that the fine has not been recovered before the sentence in default has been served, and any reasons which are directed to that point would be relevant. It may be that the authorities, through no negligence on their part, did not know of the existence of the property or the accused may have inherited property after

he served his sentence in default; or there may not have been time to execute the warrant. Matters of that sort would all be special reasons for issuing a warrant after the sentence in default had been served; and I think, in the same way, they are reasons justifying the Court in refusing to withdraw a warrant already issued. In the present case, in my opinion, there are special reasons, though not quite those which were recorded by the Judge. I think that a special reason for not withdrawing the warrant is that before the sentence in default had been served the authorities had taken steps to enforce this warrant by levying execution upon the Immovable property of the applicant, and the delay which has taken place is not, in my opinion, shown to be due to any default on the part of the authorities.

20. In other words, it was laid down that even after the sentence of imprisonment in default was suffered by the convict, it was the duty of the Court to execute the sentence with regard to fine as required by Section 386 of the Criminal Procedure Code read with Section 70 of the Indian Penal Code, subject to special reasons as mentioned in the proviso.

21. The second case, in which Broomfield and Divatia JJ. dealt with the matter, is Collector of Broach v. Ochhavlal Bhikhatal (1940) 43 Bom. L.R. 122, where on January 12, 1929, Ochhavlal Bhikhatal was convicted of the offence of cheating by the Sessions Judge of Broach, and sentenced to three years' rigorous imprisonment and a fine of Rs. 15,000, and in default of payment of the fine to further rigorous imprisonment for nine months.

22. As Ochhavlal failed to pay the amount of fine, the Sessions Judge sent a letter to the Collector of Broach, on May 10, 1929, authorising him u/s 386 (1) (b) of the Criminal Procedure Code, 1898, to realise the amount of fine by attachment and sale of the Immovable property of the opponent. The Collector filed a darkhast in 1929 and another in 1930 to realise the amount of the fine and a sum of Rs. 4,227 was realised in execution. In 1933 he filed a third darkhast; and the undivided interest of the opponent in certain Immovable property was ordered to be sold. On June 19, 1935, an auction for sale took place, but as there were no bidders, the property could not be sold, and the darkhast was disposed of.

23. On February 8, 1938, the Collector filed a fourth darkhast to recover the balance of the fine out of the interest of the opponent in certain immovable property. The opponent Ochhavlal contended that as he had undergone further imprisonment in default of payment of the fine, his property was not liable to the payment of the arrears of the fine; and that u/s 70 of the Indian Penal Code, the amount of fine could not be recovered after six years from the date of the sentence.

24. The First Class Subordinate Judge held that the opponent's liability to pay the fine imposed on him remained although he had undergone imprisonment in default of payment of the fine; that u/s 386(3) of the Criminal Procedure Code,

the warrant issued by the Collector did not become a decree of a civil Court, and Section 48 of the CPC did not apply; that the provisions of Section 70 of the Indian Penal Code were not affected by Section 386(3) of the Criminal Procedure Code, and the darkhast was therefore time-barred.

25. The decision was challenged in the First Appeal to this Court by the Collector of Broach and it was contended that having regard to the provisions of Sub-section (3) of Section 386, where the Court issues a warrant to the Collector under Sub-section (1), Clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, and hence Section 48 of the CPC applied and the application for the recovery of the balance of the fine was in time.

26. It may be noted that the question as to whether after the imprisonment in default was undergone by the convict, the issue of fine or the balance of the fine was not taken at all on behalf of the convict in this Court; and the question there was only one of limitation u/s 70 of the Indian Penal Code or u/s 48 of the Code of Civil Procedure, 1908, as it stood before its recent amendment in 1976.

27. This Court observed with regard to the scheme of the provisions of Section 70 (p. 125):

The warrant which was to be deemed to be a decree was to be executed according to the mode laid down in the Civil Procedure. That is the only effect of Sub-section (3). But the learned Government Pleader says that under that Sub-section all the provisions of that Code as to execution shall apply, and that would include the application of Section 48 of the Civil Procedure Code. But that section only says that no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from certain dates. It does not prescribe any period of limitation for taking out execution. That is provided for in the Indian Limitation Act, and, if it was the intention of the legislature that the provisions of the Indian Limitation Act were to apply, it would have expressly stated that the warrant, which was deemed to be a decree, was to be governed for the purpose of execution by the Indian Limitation Act. But the fact that it does not say so, and the further fact that there has been no amendment or alteration in Section 70 of the Indian Penal Code, mean that so far as limitation i.e. the period during which the fine was to be realised was concerned, it did not contemplate any change. All that it intended to do was that over and above the moveable property of the offender the Immovable property could also be proceeded with by means of execution of the warrant which was to be treated for that purpose as if it were a decree, but the levy of the fine as against moveable as well as Immovable property was subject to the control of the provisions of Section 70, viz., that it was to be levied within the period of six years. We think, therefore, the lower Court was right in holding that the darkhast which was presented after the period of six years from the date of the sentence is barred u/s 70 of the Indian Penal Code.

28. Perhaps in view of the above decision when the ninth edn. of the "Criminal Manual" issued by the High Court of Bombay was revised and the tenth edn. was issued in 1960, all that was stated in chap. XV, Rule 1, at p. 181, was as under:

If in cases in which the accused has undergone the imprisonment awarded in default of payment of fine, the Sessions Judge or the Magistrate is of the opinion that there are no special reasons for issuing a warrant for the recovery of the fine, or that the fine is not recoverable, he may write off the fine from the Fine Register.

29. It is, therefore, clear that the position in law with regard to the recovery of fine in respect of which the convict has undergone the imprisonment in default is that, it was the duty of the Court u/s 386 of old Criminal Procedure Code to find out whether there were special reasons to issue a warrant under the proviso and to issue the warrant where there were special reasons, such as those noted by Sir John Beaumont C.J. in the aforesaid case in *Emperor v. Digambar Bhavarthi*. The reasons suggested by Sir John Beaumont C.J. are only illustrative and not exhaustive.

30. Where there are special reasons such as discovery of property within the time specified, it is the duty of the Court to proceed with the execution proceedings regarding the fine. The law continues to be the same u/s 421 of the new Criminal Procedure Code subject to what is stated hereinbelow.

31. Under the new Criminal Procedure Code, even in the absence of the special reasons, u/s 421, it is the duty of the Court to execute the decree wherever the Court has made an order for the recovery of expenses out of the fine u/s 357. Where there is such an order, the Court cannot just return the warrant to this Court stating that the sentence of imprisonment in default of payment of fine has been undergone.

32. Having regard to the changes effected in Section 421, it would be necessary for this Court to modify Rule 1 of chap. XV of the Criminal Manual by incorporating the new provision contained in the proviso to Sub-section (1) of Section 421, as stated above.

33. In the result, we are of the opinion that the present practice followed by the Courts subordinate to this Court of returning the writs with regard to the payment of fine unexecuted, whenever the sentence of imprisonment in default has been undergone by the convict, is inconsistent not only with the aforesaid two previous decisions of this Court, but also against the plain provisions contained in Section 386 of the old Code and Section 421 of the new Criminal Procedure Code.

34. In view of what is stated above, it is not necessary for us to discuss the cases referred to and relied upon in the report made by the Deputy Registrar, namely, *Nil Kantha Pal Vs. Bisakha Pal*, , *Siddappa v. State* AIR[1957] GAU. 52 and *Paras Nath and Others Vs. State*, , where a similar view appears to have

been taken.

35. Having regard to the provisions of Section 70 of the Indian Penal Code, it is clear that an accused cannot escape his liability of payment of fine by undergoing the default sentence and make a mockery of the sentence of fine, which is many times heavy, running into thousands of rupees or nullify the order with regard to the expenses and compensation.

36. We, therefore, upon perusal of the report of the Deputy Registrar and after hearing the public prosecutor and in exercise of the powers of this Court u/s 401 of the Code of Criminal Procedure, 1973, lay down that, as a matter of practice, before returning the writs for recovery of the fine, the subordinate Courts should apply their minds to the provisions of Section 421 of the new Criminal Procedure Code and decide whether any warrant is to be issued or whether any other order is to be passed in accordance with Section 421, in the light of the observations made hereinabove.

37. The attention of all the Courts, subordinate to this Court is, therefore, invited to the provisions contained in Section 70 of the Indian Penal Code, which must be read along with Section 421 of the new Criminal Procedure Code and also the rules framed by the Government u/s 386(2) of the Criminal Procedure Code, 1898, with regard to the manner in which the execution is to be levied, which are continued until modified or superseded u/s 484(2) of the new Criminal Procedure Code.

38. Returns of writs should be sent back to the subordinate Courts directing them to submit reports stating why fine is not recovered or why process is not issued as required by Section 421, wherever not stated and also for complying with the requirements of Section 70, Indian Penal Code and Section 386 of the Code of Criminal Procedure, 1898, or Section 421 of the Code of Criminal Procedure, 1973, as the case may be, in the light of what is stated hereinabove.