

(1983) 02 BOM CK 0003
In the Bombay High Court
Case No : Writ Petition No. 664 of 1982

Ramnath Laxman Jadhav

APPELLANT

Vs

Kausalya Ramnath Jadhav and Others (Smt.)

RESPONDENT

Date of Decision : 18-02-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125(3)

Citation : (1983) 2 BomCR 483 : (1983) 85 BOMLR 185

Hon'ble Judges : G.M. Khandekar, J

Bench : Single Bench

Advocate : R.M. Agrawal, for the Appellant; R.V. Govilkar and Varsha Wagh for respondents 1 to 3, for the Respondent

Judgement

G.M. Khandekar, J.—By this writ petition under Article 227 of the Constitution of India read with section 482 of the Criminal Procedure Code the petitioner seeks to challenge the order dated 15th May, 1982 passed below Exh. 11 Recovery Application No. 180 of 1980 pending on the file of the Judicial Magistrate, First Class, Nasik.

2. It is common ground that the present respondent No. 1 is legally married wife of the petitioner while respondent Nos 2 and 3 are her minor sons born to her from him. The present respondents Nos. 1 to 3 had filed Misc. Application No. 30 of 1970 in the Court of Judicial Magistrate, First Class, Nasik for maintenance against the petitioner u/s 488 of the Code of Criminal Procedure. After enquiry the learned Magistrate awarded maintenance to respondent No. 1 at the rate of Rs. 60/- per month and respondents Nos. 2 and 3 at the rate of Rs. 35/- per month each respectively. This application was decided by the learned Magistrate on 4th July, 1972. Thereafter the present respondents Nos. 1 to 3 preferred Misc. Applications Nos. 7 of 1972, 9 of 1973 and 17 of 1974 for recovery of maintenance amounts as per the order mentioned above and in all these cases the petitioner was sentenced to jail for a period of three months, four months and for some period respectively.

3. It is not in dispute that the amount of arrears due to respondents Nos. 1 to 3 from the petitioner had amounted to Rs. 6820/- and as the petitioner was in jail, the brother of the petitioner took pity on him and he directly settled with the respondents and executed a sale deed of 2 hectares and 4-1/2 acres out of land Survey Nos. 85 in favour of respondents Nos 1 to 3 by way of permanent settlement. Thereafter, respondent No. 1 stayed with the petitioner for a period of four years and some time in May 1979 she abandoned his company. She, therefore, again filed an application for recovery of maintenance for the period from 1st July, 1979 to May 30, 1980 in the sum of Rs. 1430 and that application was numbered as Recovery Application No. 180 of 1980. It appears that in the said proceedings the learned Magistrate passed order on 12th April, 1982 for issue of distress warrant against the present petitioner. Before any report on the said warrant was received by the learned Magistrate, respondent No. 1 filed an application on 17th April, 1982 for detention of the petitioner in jail since he had failed to pay the amount of maintenance. Say of the petitioner was obtained on that application which is at Exh. 11 and on 15th May, 1982 the learned Magistrate passed an order for issue of warrant of arrest against the petitioner and directed that he be detained in jail for a period of six months.

4. Feeling aggrieved by this order dated 15th May, 1982 the present petitioner carried Criminal Revision Application No. 118 of 1982 to the Sessions Court at Nasik. The learned Additional Sessions Judge, placed reliance on the decision of Madhya Pradesh High Court in Bhure Vs. Gomatibai, wherein it was held that the order of imprisonment or the sentence can be passed without first issuing the distress warrant. With that finding the learned Additional Sessions Judge upheld the impugned order of the learned Magistrate and dismissed the revision petition vide his order dated 23rd August, 1982. Feeling aggrieved by this order of the learned Additional Sessions Judge as also of the learned Magistrate the petitioner has filed this petition.

5. Shri R.M. Agarwal, learned Counsel for the petitioner, pressed a legal point before me. It was submitted by him that both the courts below were in error in exercising powers u/s 125(3) of the Criminal Procedure Code, when it was not established that the petitioner had means to pay the maintenance and inspite of it had failed to comply with the order passed by the Judicial Magistrate. Another argument advanced by Shri Agarwal was that issue of distress warrant was absolutely necessary before the petitioner could be remanded to jail. This later point is being kept open and I shall not deal with that point here since I feel that the first point pressed on behalf of the petitioner leads to success of this petition.

6. The learned Counsel for respondents Nos 1 to 3 however, supported the impugned order of the learned Magistrate as also the view taken by the learned Additional Sessions Judge, Nasik and referred me to the previous history of this case which is already referred to above. It was urged on behalf of the respondents that the petitioner was already sent to jail on three occasions previously which clearly indicates that he had no means to pay the amount and

as such the learned Magistrate was correct in ordering warrant of arrest against the petitioner. It appears that the report of distress warrant issued by the learned Magistrate was not received till the impugned order dated 15th May, 1982 came to be passed by him. It appears that the report on the distress warrant was also not there on record till the time the Criminal Revision Application came to be dismissed by the learned Additional Sessions Judge. The learned Counsel for the respondent placed reliance on the decision of the Madhya Pradesh High Court in Bhure Vs. Gomatibai, and supported the order of the learned Additional sessions Judge.

7. The learned Counsel for the petitioner in support of his argument placed reliance on two unreported rulings of this Court in Criminal Revision Application No. 65 of 1982 Abdul Ajij Puddan Ansari v. Smt Jubedabai w/o Abdul Ajij, decided by Pendse, J., on 1st March, 1982 and on the decision in Writ Petition No. 103 of 1982 Sampat Jeebhau Nikam v. Sou Jijabai w/o Sampat Nikam and another, decided by Rele, J., on 29th July, 1982. In the case of Abdul Ajij Puddan Ansari cited (supra), the trial Magistrate had issued distress warrant for default of payment of maintenance but as distress warrant remained unserved, the warrant of arrest of the husband came to be issued and it was observed by Pendse, J., as under :

"Section 125(1) opens with the words "if any person having sufficient means neglects or refuses the maintenance" and sub-section (3) of section 125 provides that "if any person so ordered fails without sufficient means to comply with the order". Reading these two expressions together, it is obvious that powers u/s 125(3) of the Code could be exercised and the husband could be detained in jail provided it is established that at the time of passing the order he has means to pay and still he declines to comply with the order."

8. This ruling of Pendse, J, was accepted by this Court viz., Rele, J., in Writ Petition No. 103 of 1382 cited (supra). With respect, I am in agreement with the view taken by the Court in both these petitions mentioned above.

9. When we turn to the facts of the present case we find that the report on distress warrant which was once issued against the petitioner was not received by the learned Magistrate when he passed the impugned order dated 15th May, 1982. According to me, the order passed by the learned Magistrate, which was confirmed by the Additional Sessions Judge in criminal revision application was illegal and in violation and contravention of the provisions of section 125(3) of Criminal Procedure Code as interpreted by this Court in two petitions mentioned above. In this view of the matter, it is not necessary for me to consider the effect of the ruling of the Madhya Pradesh High Court in Bhure v. Gomatibai, 1981 Criminal Law Journal 789 which is on a different point altogether. Whether it is necessary for the learned Magistrate to issue distress warrant before issuing warrant of arrest is a matter which is left open in this revision.

10. In the result I pass the following order:

Rule made absolute. The order dated 15th May, 1982 passed by the Judicial Magistrate, First Class, III Court, Nasik below Exh. 11 in Recovery Application No. 180 of 1980 and confirmed by the learned Additional Sessions Judge, Nasik on 23rd August, 1982 in Criminal Revision Application No. 118 of 1982 is hereby set aside. Since the applicant has not been remanded to jail, no order for setting him at liberty is necessary. No order as to costs.