
(2013) 04 BOM CK 0079

In the Bombay High Court

Case No : Criminal Writ Petition No. 236 of 2013

Sagar Sudhakar Shendge

APPELLANT

Vs

Mrs. Naina Sagar Shendge and Others

RESPONDENT

Date of Decision : 04-04-2013

Acts Referred:

Citation : (2013) 3 ABR 597 : (2013) ALLMR(Cri) 2572 : (2013) 2 BomCR(Cri) 614 : (2013) 2 Crimes 218 : (2013) 4 RCR(Civil) 598

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Judgement

Roshan Dalvi, J.—The Petitioner is the husband against whom maintenance order has been passed U/s. 20 of the Protection of Woman from Domestic Violence Act (DV Act). The Petitioner has challenged the order of maintenance in the Sessions Court in which the Petitioner has not obtained any stay of the order ordering maintenance U/s. 20 of the DV Act. The husband breached the order of maintenance. Consequently, wife applied for execution of the order of maintenance. Hence the wife filed an application for issue of warrant for recovery of the maintenance amount. Consequent, NBW has been issued. The Petitioner has challenged the order of issuing NBW. In his application the learned Judge observed that an appeal was preferred, but no stay was granted and that the husband (petitioner herein) was given ample opportunity to deposit interim maintenance but he was only binding time. Hence learned Magistrate granted the application of the wife and issued the NBW. He also directed that if the Respondent paid off the arrears of maintenance which was Rs. 56,000/- he will be released at the time of the execution of the NBW. The amount of maintenance payable under the same order is now much more.

2. Counsel on behalf of the Petitioner has contended that the learned Magistrate has no powers to issue NBW under the DV Act.

3. The learned Special Public Prosecutor (Spl PP) has drawn my attention to Rule 6 of the DV Rules which relates to applications U/s. 12 of the DV Act.

Section 12 of the DV Act runs thus:

(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

4. The wife in this case applied for reliefs under Sections 17 to 23 of the DV Act. The learned Magistrate granted order U/s. 20. That is an order of maintenance.

The relevant part of Rule 6(5) runs thus:

6. Application to the Magistrate. -

(5) The applications u/s 12 shall be dealt with and the orders enforced in the same manner laid down u/s 125 of the Code of Criminal Procedure, 1973 (2 of 1974).

5. Consequently under Rule 6(5) the order passed U/s. 20 upon an application made U/s. 12 would have to be enforced in the manner laid down in the Section 125 of the CrPC.

6. Further the Magistrate would have to follow the procedure U/s. 28(1) of the DV Act to which my attention has been drawn by the learned Spl PP. Section 28(1) of the DV Act runs thus:

28. Procedure.-

(1) Save as otherwise provided in this Act, all proceedings under Sections 12 ,18 ,19 ,20 ,21 ,22 & 23 and offences u/s 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973.

7. The provisions in the CrPC lay down that the Section 125 is to be r/w. along with Form 19 followed by Form 18.

The relevant part of Section 125(3) runs thus:

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

(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:

8. Under sub section 3 upon failure to pay maintenance and committing breach of the order of maintenance the Magistrate will be entitled to issue a warrant. The warrant would be for levying the amount as a fine.

9. Counsel on behalf of the Petitioner drew my attention to Section 421 of the

CrPC which deals with the warrant for levying of fine.

The relevant part of Section 421 runs thus:

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---

(a) issue a warrant for the levy of the amount by attachment and sale of any moveable 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.

10. It is argued on behalf of the Petitioner husband that in this case the Magistrate would follow u/s. 421(1)(a). He would issue a warrant for attachment and sale of the property of the husband. The form of issuing such a warrant is under Form 19 of the CrPC. The form is issued upon Police Officer to attach moveable property and sale up to the extent of the unpaid amount of maintenance.

11. If even after such warrant is issued for attachment and sale and the property is attached and sold but yet the maintenance amount remains unpaid, the Magistrate, under the latter part of Section 125(3) would sentence the husband for such amount up to for one month.

12. It is further argued on behalf of the Petitioner that the issue of that warrant would be as per Form 18 of the CrPC which is the warrant for imprisonment for failure to pay maintenance U/s. 125 of the CrPC which is different from the form for NBW issued by the learned Magistrate.

13. It may be stated that the proof of sufficient means of the husband to maintain the wife would have already been seen in the order of maintenance. The inability to pay maintenance to her would also have been seen. The order would have been duly made for payment of maintenance to the wife and/or child for the specific amount. The first recital is in that behalf. The failure of the husband would be seen upon non payment as also non execution of warrant of attachment and sale. The Magistrate would be entitled to pass an order adjudging the husband to undergo imprisonment in the jail for the period allowed U/s. 125(3) which is up to one month.

14. A reading of Section 125(3) shows that after execution of the warrant for levying an amount of maintenance due as levying a fine is executed the Magistrate may sentence the husband.

15. It is contended on behalf of the husband that the Magistrate has yet not sentenced the husband. There is no order to undergo imprisonment.

Consequently, Form 18 which requires to show the order directing imprisonment cannot be made applicable before Form 19 which requires attachment and sale of his moveable property.

16. In this case the learned Magistrate has issued NBW against the husband. It is contended by counsel on behalf of the Petitioner husband that the learned Magistrate has not followed procedure under CrPC which is required to be followed U/s. 28(1) of the DV Act. It is contended by the counsel on behalf of the husband that for application u/s 12 in which relief U/s. 20 is granted, Section 125(3) under Rule 6 of the DV Rules becomes applicable.

17. My attention has been drawn by counsel on behalf of the Petitioner husband to the Judgment of the learned Single Judge of the Kerala High Court in the case Shanavas, S/o. Abdulsalam Vs. Raseena, D/o. Shihabudeen and Anr., Cri M C No. 4843 of 2010. In that an interim protection order passed U/s. 23(1) of the DV Act was breached. The Court held that the penalty for the breach is provided only in Section 31 of the DV Act and the Court held that NBW cannot be issued for the breach of a protection order and arrest cannot be directed by issuing NBW before the Magistrate takes cognizance of the offence U/s. 31(1) of the CrPC. That was also the case of failure to pay maintenance. It was held that the Magistrate could not issue NBW as was done in that case.

18. Hence it is contended that at present the simpliciter issue of order of NBW is not in accordance with the complete procedure laid down under the DV Act r/w. 125(3) of the CrPC.

19. The Court appointed Ms. Flavia Agnes, to assist the Court as amicus curiae. She has drawn my attention to Section 28(2) of the DV Act which runs thus:

Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application u/s 12 or under sub-section (2) of section 23.

20. Thus the aforesaid argument becomes academic. The provisions of the CrPC relating to maintenance as also the DV Act which are beneficial legislations for protection of women such as the Respondent wife in this case are required to be construed such as to benefit those persons for whom they are enacted.

21. The Magistrate issuing NBW, therefore, seems to have followed the Special Procedure for the arrest of the husband for non payment of the maintenance ordered to be paid. Such procedure and such procedural order is within the framework of Section 28(2) of the DV Act and hence cannot be faulted as it is not seen to be illegal.

22. Hence the NBW is confirmed. The Writ Petition is dismissed. The NBW shall be executed unless the husband pays off the entire arrears now due and payable.

23. The Court is grateful to the learned amicus curiae for her guidance. Writ Petition is disposed off accordingly.