

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO.305 OF 2014.

Mr. Sachin s/o Suresh Bodhale,
Aged 36 years,
Occupation – Business,
R/o Plot No.2, Apana Ghar Scheme,
Visava Naka, Godoli, Satara (MH).

.... **PETITIONER**

VERSUS

Sau. Sushma w/o Sachin Bodhale,
Aged 35 years,
Occupation – Nil,
R/o C/o Sau. Savita Sanjay Patil,
Plot No.119, Shri Mahalaxmi Apartment,
Nelco Housing Society, Subhash Nagar,
Nagpur.

.... **RESPONDENT**

Shri Sudhir Moharir, Advocate for the petitioner,
Shri R.R. Vyas, Advocate for the respondent.

CORAM : M.L. TAHALIYANI, J.
DATED : 6th MAY, 2014.

ORAL JUDGMENT :

1. Heard learned Counsel Shri Sudhir Moharir for the petitioner and learned Counsel Shri R.R. Vyas for the respondent.

2. **Rule.** Rule made returnable forthwith by the consent of the learned Counsel appearing for the parties.

3. The petitioner has moved this Court by invoking powers of this Court under Article 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure. The petitioner is aggrieved by the order passed by the learned Magistrate in Misc. Criminal Application No.890/2012 (Sushma vs. Sachin). The order, which is questioned before this Court, reads as under :-

“Perused the application and stay.

Heard learned Advocate for both sides.

Applicant relied on 2013 All M.R.(Cri.) 2572. Learned Advocate for N.A. has opposed that Magistrate has no powers. N.A. has not paid any amount towards interim maintenance. Learned Advocate has also confessed that N.A. has not paid any amount towards interim maintenance order which is passed on Exhibit 13.

Provision under Section 28(2) is very clear when N.A. has not paid amount and not complied the order, she cannot be kept high and dry. Magistrate is empowered under Section 28(2) to issue N.B.W. Citation filed by applicant is very much applicable in the case in hand. Hence application is allowed. Issue N.B.W. against non-applicant.”

4. The petitioner is husband of the respondent. The respondent has filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 before the learned Magistrate. An interim order has been passed granting monetary relief. It appears that the petitioner has

not paid the amount to the respondent as per the interim order. A non-bailable warrant has been issued for non-payment of amount of interim maintenance to the respondent by the petitioner. It appears from the order of the learned Magistrate that the learned Magistrate was of the view that he could formulate his own procedure under Section 28(2) of the Protection of Women from Domestic Violence Act, 2005. It appears that the Magistrate was also of the view that he can lay down his own procedure for recovery of the amount of interim maintenance. Sub-section (2) of Section 28 of the Protection of Women from Domestic Violence Act, 2005 reads as under :-

“28(2). Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.

Sub-section(1) of Section 28 of the said Act reads as under :-

“28(1). Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)”

5. Therefore, it is abundantly clear that basically the learned Magistrate has to follow the procedure laid down in the Code of Criminal Procedure for recovery of maintenance either final or interim. Sub-section (2) of Section 28 of the Protection of Women from Domestic Violence Act, 2005 can be pressed into service when there is no provision available for

implementing a particular order passed under the Protection of Women from Domestic Violence Act, 2005. If the procedure is available in Code of Criminal Procedure, that is necessarily to be followed.

6. In my considered opinion, the procedure laid down under Section 125(3) of the Code of Criminal Procedure for getting compliance of the orders passed by the Magistrate under Section 125(1) of the Code will have to be followed for executing the orders passed by the Magistrate under Section 20 (Monetary Reliefs) of the Protection of Women from Domestic Violence Act, 2005. The reliefs available under Section 125(1)(a) of the Code of Criminal Procedure are analogous to the reliefs available under Section 20 of the Protection of Women from Domestic Violence Act, 2005. The procedure for getting compliance of the order passed under Section 125(1) of the Code of Criminal Procedure is available under Section 125(3) of the Code of Criminal Procedure, which runs as under :-

“125(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 so doing.”

7. The procedure for levying of fines is available under Section 421 of the Code of Criminal Procedure as under :-

“421. Warrant for levy of fine – *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:”

8. Thus there is absolutely clear provision under the Code of Criminal Procedure, which lays down as to how the amount of maintenance, final or interim, is to be recovered. The Magistrate, in my opinion, could not have issued non-bailable warrant directly. He should have followed the procedure laid down in sub-section (3) of Section 125 and Section 421 of the

Code of Criminal Procedure. In the scheme of Code of Criminal Procedure, in the first place, the Magistrate was under obligation to issue a warrant for levy of the amount by attachment and sale of any movable property. The other remedy available was to 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. The Magistrate could have sentenced the petitioner 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 might extend to one month or until payment if sooner made.

9. As such the first option available to the Magistrate was to issue a warrant for levying fine. If whole of the amount was recovered by adopting the procedure under Section 421 of the Code of Criminal Procedure, the question of putting the defaulter in prison did not arise. In case amount was not recovered or part of it was recovered and part of it was not recovered, then the question would have arisen as to how much sentence should be imposed on the defaulter as per the provision laid down in the Code of Criminal Procedure. The stage of issuing warrant comes only after sentencing and not before that.

10. In view of above discussion, it is abundantly clear that the order dated 02-4-2014 passed by the learned Magistrate in Misc. Criminal Application No.890/2012 cannot be sustained. It needs to be quashed and is accordingly quashed. The respondent is at liberty to take necessary steps in accordance with law.

11. Rule is made absolute in the above terms.



JUDGE

pma