

Magistrate Can Issue Warrant For Recovery Of Defaulted Maintenance U/S 125 CrPC As Arrears Of Land Revenue: Allahabad High Court

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HIGH COURT OF JUDICATURE AT ALLAHABAD

J.J. Munir, J.

SECOND APPEAL No. 1698 of 1990; 30.09.2022

Rama Nand *versus* Hira Lal

Counsel for Appellant: - S. Chatharjee, Santosh Kumar, Satya Deo Ojha, Saurabh Srivastava

Counsel for Respondent: - Akhileshwar Mishra, Aniruddh Kumar

1. This is a plaintiff's appeal, arising out of a suit for declaration and permanent prohibitory injunction.

2. The facts giving rise to this appeal are these:

The plaintiff-appellant, Rama Nand, who shall hereinafter be referred to as the 'plaintiff', instituted O.S. No. 390 of 1985 in the Ex-Court of Munsif Havali, Varanasi, seeking a declaration to the effect that the proceedings of revenue sale dated 04.12.1982 and the sale letter based on it relating to land, detailed at the foot of the plaint, be declared void and a decree of permanent injunction granted, restraining the defendant-respondent, Hira Lal (for short, 'the defendant') from interfering with the plaintiff's possession over the suit property or changing its nature and character.

3. The plaintiff's case is that Smt. Usha Devi brought proceedings against him under Section 125 Cr.P.C. in the Court of the Metropolitan Magistrate, Kanpur Nagar seeking award of maintenance. In the maintenance case aforesaid, the Magistrate passed an *ex parte* order, granting maintenance to Smt. Usha Devi on 13.01.1982. The *ex parte* maintenance order dated 13.01.1982 was passed against the plaintiff. The plaintiff, upon coming to know of the *ex parte* order, made an application to the Metropolitan Magistrate, Kanpur Nagar, seeking to set aside the sale. The Magistrate on 17.05.1982 allowed the plaintiff's application and set aside the *ex parte* maintenance order dated 13.01.1982. In the meantime, on the basis of the *ex parte* maintenance order dated 13.01.1982, the defendant, in connivance with the Tehsildar and Naib Tehsildar, Varanasi, brought the plaintiff's immovable property, detailed at the foot of the plaint (for short, 'the suit property') to sale on 04.12.1982. The plaintiff's wife applied for the recovery of dues under the *ex parte* maintenance order. The plaintiff did not know anything about the revenue sale held, creating rights in favour of the defendant.

4. It is the plaintiff's case that after the maintenance order dated 13.01.1982 had been set aside on 17.05.1982, sale of the plaintiff's property on 04.12.1982 was one made without jurisdiction, as there was no maintenance order in existence then to execute. It was also pleaded that the proceedings of the revenue sale are vitiated, because there was no proclamation by beat of drum, nor proceedings taken in accordance with law. The sale is fraudulent and illegal. The further case is that the defendant, on the basis of the revenue sale concluded in his favour, is moving to forcefully dispossess the plaintiff.

5. The defendant put in a written statement, pleading that he had purchased the suit property in the revenue sale held, wherein there was no illegality or irregularity. The defendant on 04.12.1982, upon payment of sale consideration, that was fetched in the auction proceedings, purchased the suit property *bona fide*. He had paid a total

consideration of Rs.10,000/-. The proceedings of the auction sale have been confirmed and the sale certificate issued in favour of the defendant. The legality or irregularity in conducting the sale cannot be questioned before the Civil Court. The defendant never connived with Smt. Usha Devi nor did he procure a judgment, based on any kind of conspiracy with Smt. Usha Devi, or got the revenue sale held in furtherance of any conspiracy, as alleged by the plaintiff. The Tehsildar and the Naib Tehsildar did not take proceedings of the revenue sale in a manner that is bogus or fraudulent. The defendant, Hira Lal never had knowledge of the fact about the maintenance order passed *ex parte* under Section 125 Cr.P.C. against the plaintiff being set aside. The further case is that even if the order of maintenance *ex parte* was set aside, the revenue sale held on 04.12.1982, cannot be set aside, because the defendant is a *bona fide* purchaser for value without notice and further the auction sale has been confirmed.

6. The defendant has averred that the plaintiff did not object to the auction proceedings before the Revenue Authorities. The Court has no jurisdiction to set aside the auction sale. The mutation order has been made on the basis of the auction sale directing mutation of the defendant's name over the suit property on 11.01.1985, whereagainst the plaintiff had objected. His objections were, however, rejected on 30.01.1985. The suit is barred by limitation. The suit property is in the ownership possession of the defendant. The suit is barred by the provisions of Section 331 of the U.P. Z.A. & L.R. Act and the Civil Court has no jurisdiction to try the suit.

7. On the pleadings of parties, the following issues were struck (translated into English from Hindi):

- (1) *Whether on the grounds set forth in the plaint, the proceedings of auction sale dated 04.12.1982 are illegal and void?*
- (2) *Whether the plaintiff is entitled to the relief of injunction?*
- (3) *Whether this Court has no jurisdiction to try the suit?*
- (4) *Whether the suit is undervalued and the court-fee insufficient?*
- (5) *To what relief is the plaintiff entitled to?*

8. Before the Trial Court, the plaintiff examined himself as PW-1 and one Bechan Mishra as PW-2. The plaintiff in his documentary evidence filed three documents *vide* a list, bearing Paper No. 8-Ga, one document *vide* list, bearing Paper No. 33Ga, another three documents *vide* Paper No. 53-Ga and two more documents *vide* list, bearing Paper No. 60-Ga.

9. The defendant examined himself as DW-1. In his documentary evidence, he filed some 11 documents *vide* list, bearing Paper No. 17-Ga, another 9 documents *vide* list, bearing Paper No. 37-Ga and 14 more documents *vide* list, bearing Paper No. 123-Ga.

10. The issue, about the jurisdiction of the Civil Court to try the suit, was not pressed before the Trial Court on 24.12.1987, and the issue of valuation was decided on 28.05.1986. These issues were dealt with at interlocutory stages and a record of determination thereof forms part of the Trial Court's judgment. It was Issue No.1, that was the substantial issue, on which event in the suit would turn. The Trial Court in its judgment has blamed the conduct of the plaintiff in not communicating the order dated 17.05.1982, setting aside the *ex parte* maintenance order dated 13.01.1982 to the Collector, Varanasi, as the reason why the revenue sale was held and the impugned sale certificate issued in the defendant's favour. The Trial Court also held that the

defendant was a *bona fide* purchaser for value without notice, whose rights ought to be protected. Nevertheless, the Trial Court held that the proceedings of the sale held on 04.12.1982 were illegal and void, but the decree of the Trial Court would be effective only upon the plaintiff paying the defendant a sum of Rs.10,000/- together with interest at the rate of 18% per *annum* from the date of the auction sale in the defendant's favour. The suit was, therefore, decreed in part *vide* judgment and decree dated 22.04.1989 passed by the 12th Additional Munsif, Varanasi with a conditional injunction that the injunction would become effective after the plaintiff paid the entire sum of Rs.10,000/- together with interest as directed.

11. Upon the defendant's appeal carried to the District Judge of Varanasi, being Civil Appeal No. 119 of 1989, the learned 9th Additional District Judge, Varanasi *vide* his judgment and decree dated 14.05.1990, allowed the appeal, set aside the Trial Court's judgment and decree dated 22.04.1989, and dismissed the suit. There was a cross-objection also preferred by the defendant before the Lower Appellate Court, which too was dismissed.

12. Dissatisfied with the judgment and decree passed by the Lower Appellate Court, the plaintiff has moved this Court, invoking our jurisdiction under Section 100 of the Code of Civil Procedure.

13. This appeal was admitted to hearing *vide* order dated 09.11.1990, without any substantial question of law being formulated. Before proceeding with the hearing, therefore, based on the submissions of parties, particularly, the learned Counsel for the appellant, this Court formulated the following substantial question of law *vide* order dated 26.02.2020:

Whether it is open to a Magistrate to enforce an order of maintenance passed under Section 125 Cr.P.C. by forwarding a recovery certificate to the Collector, and to recover the sum of money due under the maintenance order as arrears of land revenue?

14. Heard Mr. S.D. Ojha, learned Counsel for the plaintiffappellant and Mr. S.N. Tripathi, Advocate holding brief of Mr. Akhileshwar Mishra, learned Counsel for the defendantrespondent.

15. The Lower Appellate Court went into wholesome detail of evidence bearing on the issues of fact and law involved and held that a copy of the order dated 17.05.1982, setting aside the *ex parte* maintenance order dated 13.01.1982, had not been produced in evidence by the plaintiff. Rather, there is a record of a later order dated 20.09.1982, again ordering *ex parte* maintenance, which bears Paper No. 34-Ga. The Lower Appellate Court also took note of some orders made by this Court in Criminal Misc. Application No. 264 of 1983, where the auction sale of the suit property in execution of the *ex parte* maintenance order, which was then awaiting recall, was challenged. The Lower Appellate Court has recorded that the said 482 Application was rejected by this Court *vide* order dated 22.10.1983 and a certified copy of the order was on record as Paper No. 26-Ga. This Court too has found on record a document, marked Ex. A1.

16. The Lower Appellate Court has held further that the plaintiff has urged a case that proceedings of the auction were illegal, but if that were so, the plaintiff had the right to move the Revenue Authorities and get the sale set aside. This has not been done. The case of a conspiracy between the plaintiff's wife and the defendant has too been disbelieved by the Lower Appellate Court in the absence of the slightest of evidence. What has further been observed is that if the plaintiff's case of the *ex parte*

maintenance order being set aside is believed, though there is no evidence about it, the defendant is a *bona fide* purchaser. The auction sale in his favour has been confirmed. In such circumstances, the consequence of the sale, even if it were set aside, would not be to deprive auction purchaser of his rights in the suit property.

17. The Lower Appellate Court has also recorded facts to the effect that pursuant to the sale certificate, the defendant's name has been mutated in the revenue records, of which certified copies are on record. There are also records of *Khasra* across a period of three years, showing recorded possession in favour of the defendant. There are also irrigation receipts brought on record to show that the defendant is in possession.

18. It is on all these findings that the Lower Appellate Court has reached the conclusion that it did.

19. Mr. S.D. Ojha, learned Counsel for the plaintiff at the hearing before this Court has but logically confined himself to the substantial question of law, on which this appeal has been admitted and heard. He submits that it was not open to the Magistrate, who had the execution of the *ex parte* maintenance order before him, to enforce it by forwarding a recovery certificate to the Collector. As such, all proceedings taken by the Revenue Authorities at Varanasi, pursuant to the recovery certificate issued by the Magistrate for enforcement of the *ex parte* maintenance order, are without jurisdiction.

20. Mr. S.N. Tripathi, Advocate holding brief of Mr. Akhileshwar Mishra, learned Counsel for the defendant submits that there is jurisdiction under the law available to the Magistrate to issue a recovery certificate to the Collector by virtue of the provisions of Section 125(3) Cr.P.C.

21. Upon hearing the learned Counsel for parties with reference to the substantial question of law involved, this Court thinks that a reference to the provisions of Section 125(3) Cr.P.C. is necessary. Section 125(3) Cr.P.C. reads:

125. Order for maintenance of wives, children and parents.—(1) x x x x

(2) x x x x x

(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.

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) x x x x

(5) x x x x

(emphasis by Court)

22. Now, the manner of levying fines under the Code of Criminal Procedure finds place in Section 421(1) of the said Code. Section 421 reads:

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 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 under Section 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.

(emphasis by Court)

23. A conjoint reading of the provisions of Sections 125(3) and 421(1) of the Code shows that it is open to the Magistrate to enforce an order of maintenance that remains uncomplished with, for every breach of it, by the issue of a warrant for levying the amount due in the manner provided for levying fines. Section 421(1) gives two options to the Magistrate: firstly, under Clause (a) of sub-Section (1) of Section 421, he may issue a warrant for levying of the amount by attachment and sale of any movable property belonging to the offender. In the context of maintenance proceedings, the provision would bear reference to the person in default of the maintenance order in place of the offender. Secondly, the Magistrate may issue a warrant to the Collector of the district, authorizing him to realize the amount as arrears of land revenue from the movable or immovable property, or both, belonging to the defaulter. Sub-Section (3) of Section 421 obliges the Collector, whenever a warrant is issued to him, to recover any amount, that qualifies for a fine, as arrears of land revenue in accordance with law, treating the warrant to be a recovery certificate issued under the law relating to land revenue recovery.

24. It is the discretion of the Magistrate, before whom an application for enforcement of the maintenance order comes up, either to issue a warrant for the levy of the amount by attachment and sale of movables of the defaulter under Section 421(1)(a) of the Code, or to issue a warrant to the Collector, authorizing him to realize the amount as arrears of land revenue. It is open to issue both kind of warrants

simultaneously also. Acknowledgment of the Magistrate's power to simultaneously issue both kind of warrants or either of them, under Section 421(1)(a) or 421(1)(b) is there, albeit in a different context in **Om Parkash v. Vidhya Devi, 1991 SCC OnLine P&H 387**. In **Om Parkash** (*supra*) , it has been held :

(4)

The perusal of the above-quoted section 421 reveals that there are two methods for levying fine and the Court has been empowered to opt for either of these two modes or both at one and the same time. One of these modes provided under subsection (1)(a) is to issue a warrant for levy of the amount by attachment and sale of movable property belonging to the offender and the other being issuance of a warrant to the Collector authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both. In the case in hand, the trial Court had not resorted to any of these coercive measures for the recovery of the arrears of maintenance allowance although it is mentioned in the impugned order of the trial Court that the husband is a man of means. Thus, legally the impugned order of the trial Court being not sustainable calls for quashment.

25. Again, the principle that the Magistrate, before whom a maintenance order comes for enforcement, can simultaneously issue both kind of warrants under Sections 421(1)(a) and 421(1)(b) of the Code, was wholesomely endorsed by the Kerala High Court in **Ramakrishnan T.K. v. C.N. Subhadra & another, 2009 SCC OnLine Ker 6397**, where it was held:

15. The express language of Secs. 421(1)(a) and (b) Cr. P.C. is that either or both of the following ways (ie., issue a warrant for attachment of movable and issue of a warrant to the Collector to attach the movable and immovable properties) can be resorted to by the court. I find the said submission to be very impressive. This court in *Nithiyandan and Kuttappan* had no occasion to consider that question. The express language employed by the Code makes it very clear that when it comes to levy of fines the court is not obliged to resort to both the methods under Secs. 421(1)(a) and (b) Cr. P.C. Either of the two or both can be pursued by the court in its discretion.

26. Here, the plaintiff questions the jurisdiction of the Magistrate to issue a warrant to the Collector for the recovery of the amount of maintenance in default as arrears of land revenue, because he says that the Magistrate had no such power. The said proposition is only stated to be rejected. The provisions of Section 125(3) and Section 421 read conjointly are a complete answer to the plaintiff's denial of jurisdiction with the Magistrate to issue a warrant to the Collector for recovering the defaulted maintenance as arrears of land revenue.

27. The substantial question of law framed is, accordingly, answered in the **affirmative and it is held that the Magistrate has power to enforce an order of maintenance passed under Section 125 Cr.P.C. by issuing a warrant to the Collector to recover the same as arrears of land revenue.**

28. No other point was pressed.

29. The appeal fails and is **dismissed with costs.**

30. Let a decree be drawn up, accordingly.