

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 167 OF 2019
IN
CRIMINAL WRIT PETITION NO. 2191 OF 2018

Chintan Ashok Busa ... Applicant

V/s.

Mansi Chintan Busa and Anr. ... Respondents

Mr. Subhash Jha a/w. Ms. Supriyanka Maurya I.by Mr. Samarth S. Karmarkar for the applicant.

Mr. Rajesh L. Dharap for the Respondent No.1.

Mr. Y.M. Nakhwa – APP for the State.

Mr. Laxman B. Bora, PSI, Waliv Police Station, Palghar.

Ms. Kalpana Suvvole, WPSI, Juhu Police Station.

CORAM : SMT. SADHANA S. JADHAV, J

RESERVED ON : 22nd August 2019.

PRONOUNCED ON : 18th September 2019.

P.C. :

1. This Criminal Application No. 167 of 2019 was filed seeking the prayer of expeditious hearing of the main Writ Petition and seeking stay to the execution, implementation and effect of the order dated 22nd February 2019 by which the learned Metropolitan Magistrate, 26th Court, Borivali, Mumbai had issued non-bailable warrant against the Petitioner for a sum of Rs.9,65,000/- as on 22nd February 2019 to be paid towards maintenance to the respondent.

2. In the course of hearing of the said application, for first time it was submitted before this Court on 25th March 2019 that the applicant is drawing salary of Rs.7,000/- to Rs.8,000/- p.m. and he is employed as worker in Plastic Industry, namely, Khush Enterprises in Vasai, where he pays rent of Rs.1,000/- and, therefore, the interim maintenance of Rs.35,000/- is exorbitant. This Court had directed the applicant to file salary certificates on record.

3. In fact pursuant to the order dated 19th March 2019 the applicant had agreed to deposit an amount of Rs.2,80,000/- which was not deposited till 25th March 2019, thereafter, this Court had directed the applicant to deposit the said amount in the Court of Metropolitan Magistrate on or before 28th March 2019. The Court had specifically directed, that in the eventuality the amount is not deposited within the stipulated time, the protection granted in respect of non-bailable warrant shall be vacated forthwith. It is clear, that the on 28th March 2019 some amount was deposited and yet there were arrears of Rs.8,20,000/-. The learned Metropolitan Magistrate had directed the petitioner to pay arrears of Rs.9,65,000/- and upon failure, had issued non-bailable warrant.

4. In the course of the arguments the learned counsel has submitted that earlier the petitioner was running a partnership business with his mother, under the name and style of M/s. Vini Pack Industries. The said industry is shut down, whereas the respondent is a qualified lady and has capacity and potential of earning. That, the son is the only dependent.

5. It is further urged that the applicant is dwelling in rental room in a Chawl and that he is paying a monthly rent of Rs.1,000/- that prior to separation, the couple was living in a Chawl at Vasai. That, the maintenance is granted arbitrarily without taking into account the salary of the applicant, that the applicant has no capacity to pay Rs. 35,000/- towards maintenance when he is getting a salary of hardly Rs.8,000/- and therefore, according to the applicant, the order suffers from unreasonableness and hence deserves to be quashed and set aside.

6. It is submitted that the applicant was working as a helper/peon initially in M/s.Rupa Steel situated at A-7, Daulat Vihar, Vile Parle, Mumbai and then in Khush Enterprises at Vasai East and earning salary of Rs.8,000/- and that the learned Metropolitan Magistrate has not taken into consideration this aspect and has saddled the applicant with an exorbitant amount of maintenance. As a matter of fact this was never pleaded before the Magistrate.

7. That, he was working as a labourer / worker with Khush Enterprises from April 2018 to March 2019 and he was paid a monthly salary of Rs.8,000/- per month.

8. The learned counsel for the respondent has placed on record the photographs of the applicant which were uploaded on social media showing the life style of the applicant and has submitted that the applicant has stated false facts before the Court. He has also placed on record the reports of the police officer which were filed before the Metropolitan Magistrate at Exhibit-40 and 44, the recovery warrants,

the photographs found on social media on 24th January 2017 and 25th February 2017 etc. and has submitted that the applicant is living a lavish life style.

9. Since the certificates were placed on record, to not only defy the claim of the respondent but challenging the very order of issuance of non-bailable warrant, hence, it was necessary to enquire into the same through the respondent no.2 i.e. the State of Maharashtra. Accordingly, the State was directed to make an enquiry through Sr.P.I. of the concerned Police station in respect of the certificates issued by M/s. Rupa Steel situated at A-7, Daulat Vihar, Vile Parle, Mumbai and Khush Enterprise situated at Vasai, East as well as the residential premises of the applicant.

10. The learned Counsel has questioned the powers of the High Court to initiate the enquiry in respect of the salary certificates filed by the Respondent No.2. in a petition under article 227 of Criminal Procedure Code.

11. In order to test the correctness of the order passed by the Metropolitan Magistrate it would be incumbent upon the Court to consider the facts which are being brought before the court for the first time, by way of an application.

12. Firstly, this Court had noticed that both the certificates were given as experience certificates and not salary certificates. It is specifically stated therein that the said certificates are not issued to test the liability of the petitioner.

13. The Court cannot be oblivious of the fact that the powers of judicial superintendence conferred by Article 227 is not limited by the technical rules which govern the exercise of the powers to issue writ of certiorari as has been laid down in the case of *Hari Vishnu Kamat Vs. Sayed Ahmed Ishaque and Ors.* reported in A.I.R. 1955 S.C. 233, wherein the Hon'ble Apex Court has held that the power under Article 226 can be exercised only on an application of the party but power under Article 227 may be exercised by the Court also Suo Motto.

14. In the case of *State of Gujarat etc Vs. Vakhatsinghji Sursinghji Vaghela and Ors.* reported in A.I.R. 1968 S.C 1481, wherein the Hon'ble Apex Court has held that in the same proceedings the Court can quash an order under Article 227 and also issue further directions which may not be available in a procedure under Article 226 for example to make further enquiries after taking the evidence or to dispose of the matter according to law.

15. The respondent no.2 has made enquiries and report of the enquiry is filed stating therein that the police has visited M/s.Rupa Steel situated at Flat No. 8 and found that it is occupied by the students of Mithi Bai College, Juhu on leave and license basis and that since last one and half year, there is no office of M/s. Rupa Steel. It was further learnt that the flat belongs to one Smt. Shaila Singh who is resident of the same building. There is no official premises in the said building. The statement of the brother of owner was recorded, he has stated that Flat No.7 is owned by Shri Mehta owner of M/s.Rupa Steel and since he could not repay the loan of Central Bank, the flat was

attached by Central Bank and auctioned to his sister Anju Singh. Smt Anju Singh has placed on record the said certificate of the said flat dated 27th June 2017.

16. The police officer also recorded the statement of (Rinki Panchal) who disclosed that the applicant was working as labourer/worker with Khush Enterprises from April 2018 to March 2019 and that he is not maintaining any record of the labourers or wages paid in cash. He further disclosed that the salary certificate was given to the applicant at his request on the letter head of the company and it was stated that his gross salary is of Rs.8,000/- per month. The letter was issued as per his request.

17. Mr. Amit Ram Parashar disclosed that the applicant is staying on leave and license basis at Room No. 5 in survey no. 15 at Palshet since last one and half year. The neighbours had also disclosed that the applicant visits the said room once in a while i.e. for two days in a week. The father of the applicant had disclosed to the police that he has learnt from his brother that the applicant is residing separately in a Chawl at Vasai.

18. The learned counsel has relied upon the order passed by this Court in Criminal Writ Petition No. 305 of 2014 wherein the Court has opined that “the Magistrate to make an attempt to recover the amount by taking recourse to the procedure contemplated under section 421 of Criminal Procedure Code and only then a non-bailable warrant could be issued”. In the present case the learned Metropolitan Magistrate has granted time to deposit the arrears right from

07/11/2017. The first distress warrant was issued on 2nd January 2018 for attachment and sale to recover an amount of Rs.11,35,000/-. The second distress warrant was passed on 20th March 2018 and after considering the provisions of section 421 of Cr.P.C. the first non-bailable warrant was issued on 3rd April 2018.

19. The learned counsel for the applicant vehemently submits that in fact there is non-compliance of Section 421 of the Criminal Procedure Code and that the Metropolitan Magistrate has committed grave error in issuing non-bailable warrant and has contended that the Metropolitan Magistrate could not have issued non-bailable warrant.

20. In fact Section 28(2) of the Protection of Women from Domestic Violence Act reads as follows '*(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*'. and therefore, this Court is of the opinion that the issuance of non-bailable warrant is a procedural order within the frame work of section (2) of the Protection of Women from Domestic Violence Act and hence cannot be faulted. The Court cannot be oblivious of the fact that in fact distress warrants were issued on more than two occasions. Non-bailable warrant was issued on 5th April 2018 which was stayed by the High Court after directing the applicant to deposit the amount and this is the second non-bailable warrant issued by the Court.

21. The learned counsel for the applicant had vehemently submitted that directing the applicant to pay an exorbitant amount of maintenance to the respondent is not only an abuse of process of law

but would also amount to injustice to the applicant.

22. The learned counsel has further stated that the Court has no powers to initiate the enquiry through the police. Every court must be deemed to possess all necessary powers to make its order effective. Infact, the contentions raised by the applicant, is a question of fact and the Court necessarily has to verify and test the correctness of the impugned order which is under challenge.

23. In any case, it would be futile to pass an order of maintenance if the order cannot be executed. An order of maintenance is an executable order.

24. It is apparent on the face of record that the applicant has challenged the order dated 22nd February 2019 that too by pleading false and frivolous grounds which are apparent on the face of the record. As contemplated under section 31 of Domestic Violence Act all orders passed under sections 19, 20, 21 or 22 can be executed as provided in the Code of Criminal Procedure and therefore, the order of the learned Metropolitan Magistrate issuing non-bailable warrant cannot be faulted. The grounds of incapacity to pay maintenance of Rs.25,000/- has been pleaded for the first time by concocting documents. In fact, neither income nor poverty has an answer to justify the claim of complainant under section 12 of the Domestic Violence Act. Inability to maintain wife and children cannot be considered by the Court since it is not only benevolent legislation but ensures Socio Economic Right of the women. The only alternative left before the Magistrate was to issue non-bailable warrant.

25. In view of the above discussion, Civil Application No. 167 of 2019 in Writ Petition No. 2191 of 2018 is rejected. The applicant to deposit the said arrears within one week from today failing which the Non-bailable warrant be executed without notice.

26. Interim relief stands vacated. The application stands rejected.

(SMT. SADHANA S. JADHAV, J)