Court No. - 84

Case :- APPLICATION U/S 482 No. - 4483 of 2022

Applicant :- Vipin Kumar
Opposite Party :- State of U.P. and Another
Counsel for Applicant :- Omvir Singh Rajpoot
Counsel for Opposite Party :- G.A.

Hon'ble Ajit Singh,J.

Heard learned counsel for the applicant and learned A.G.A. for the State.

The applicant by means of this application under Section 482 Cr.P.C. has invoked the inherent jurisdiction of this Court with a prayer to quash the order dated 30.11.2021 passed by the Principal Judge, Family Court, Kasganj in Case No. 118 of 2020 (Smt. Kaushalya @ Kaushal vs. Vipin Kumar), under Section 128 Cr.P.C., P.S. Kasganj, district-Kasganj. A further prayer is that a direction be issued to the court below to release the applicant from jail forthwith.

It is submitted by learned counsel for the applicant that marriage between applicant and opposite party no. 2 was solemnized on 8th December, 2010. Out of the aforesaid wedlock, a baby girl was born. However, after some time, the relationship between the husband and wife became strained and incompatible. Thereafter the opposite party no. 2 has initiated several litigations against the applicant. In connection with the same, she along with her daughter filed an application under Section 125 Cr.P.C. before the Family Court, Kasganj, which was allowed by the Principal Judge, Family Court, Kasganj vide judgment and order dated 30.11.2021. It is also submitted that the applicant is a handicapped person, certificate whereof has been filed as Annexure-2 to the affidavit accompanying the application. Due to the reason he failed to comply with the order passed under Section 125(3) Cr.P.C. and the learned court below has issued the recovery warrant dated 8.10.2021, directing that the applicant shall pay a sum of Rs. 1,65,000/- (Rs. one lac sixty five thousand) to the opposite party no. 2 as maintenance w.e.f. 30.7.2017 to 19.1.2020 and in pursuance of recovery warrant the applicant was sent to jail. On 30.11.2021 the applicant was summoned by the court below and he was produced by the jail authority before the court blow and the court below had passed the order, while detaining the applicant in jail for a period of one month and directed that during detention, the applicant shall pay a sum of Rs. 5,000/- per month to opposite party no. 2, fixing next date, i.e. 2012.2021, directing the Jail Superintendent to produce the applicant again on the next date fixed.

It is also submitted by learned counsel for the applicant that provisions of Section 125(3) Cr.P.C. specifically provides for issuance of a warrant for lavying the amount issued in the manner provided for lavying of fines. The learned court below has passed the order dated 30.11.2021 for detention of applicant in jail for one month without complying the provision contained in Section 125(3) Cr.P.C. and without imposing any fine, hence the impugned order dated 30.11.2021 is liable to be quashed. In support of his submissions, learned counsel for the applicant has placed reliance upon the following judgments of Gauhati High Court, Calcutta High Court and Punjab & Haryana High Court:

1. Hazi Abdul Khaleque vs. Mustt. Samsun Nehar, 1991 CriLJ, 1843;

2. Dipankar Banerjee vs. Tanuja Banerjee reported in 1998 CriLJ 907; and

3. Om Prakash @ Parkash vs. Vidya Devi reported in 1992 CrlLJ 658.

Per contra, learned A.G.A. for the State has opposed the submissions made by the learned counsel for the applicant by contending that that the applicant is a defaulter and has not paid any amount as awarded by the Family Court under order dated 30.7.2017 to opposite party no. as interim allowance. Therefore, the Family Court has rightly issued recovery warrant against the applicant for realization of the amount so due and there is no error in the order impugned.

I have considered the submissions made by the learned counsel for the parties and have gone through the record.

Before coming to the merits of the present case, it would be worthwhile to reproduce Sections 125 (3) and 421 Cr.P.C., which read as follows:

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

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 allowances 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.

....."

"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.

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.

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."

On a plain reading of sub-section (3) of Section 125 Cr.P.C., it is apparently clear that in the event of any failure on the part of any person to comply with an order to pay maintenance allowance, without sufficient cause, the Magistrate is empowered to issue warrant for levying the amount due in manner provided for levying of fines for every breach of the order. Section 421Cr.P.C. prescribes the manner for levying fine and clause (a) of sub-Section (1) of Section 421 provides for issuance of warrant for levy of the amount by attachment and sale of any movable property belonging to the offender. In other words, in the event of any failure without sufficient cause to comply with the order for maintenance allowance, the Magistrate is empowered to issue distress warrant for the purpose of realization of the amount, in respect of which default has been made, by attachment and sale of any movable property, that may seized in execution of such warrant. Sub-section (3) of Section 125 Cr.P.C. makes it further clear that the jurisdiction of the Magistrate for sentencing such person to imprisonment would arise only after the maintenance allowance, in whole or in part, remains unpaid after the maintenance allowance, in warrant. It is only after the sentence of imprisonment is awarded by the Magistrate under sub-section (3) of Section 125 that the occasion may arise for issuance of warrant of arrest for bringing the person concerned to Court for his committal to prison to serve out the sentence.

It is further apparent that the Magistrate has no jurisdiction to issue warrant of arrest straight way against the person liable for payment of maintenance allowance in the event of non-payment of maintenance allowance within the time fixed by the court without first levying the amount due as fine and without making any attempt for reaslization that fine in one or both the modes for recovery of that fine as provided for in clauses (a) or (b) of sub-Section (1) of Section 421 Cr.P.C. say by issuance of distress warrant for attachment and sale of movable property belonging to the defaulter as contemplated under Section 421 (1) (a) and without first sentencing the defaulter to imprisonment after the execution of the distress warrant.

In view of aforesaid, this Court finds that the Principal Judge, Family Court, Kasganj has not followed the establish procedure for issuance of recovery warrant in default of payment of arrears maintenance allowance within the time allowed by him in the execution case concerned. The order directing issuance of warrant of arrest is patently illegal and not warranted by law. Order dated 30.11.2021 is hereby set aside. Let the Principal Judge pass a fresh order in the aforesaid execution cases filed by opposite party no.2 in light of the observations made herein above.

Subject to the observations made above, the present petition is allowed.
Order Date :- 25.2.2022
Faridul