

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.REV.P. 489/2011 & CrI. M. A. No. 17450/2011**

ANIL KUMAR AGGARWAL Petitioner
Through Ms. Geeta A Kumar, Advocate

Versus

SUDHA AGGARWAL & ANR Respondent
Through Ms. Rakhi Dubey, Advocate

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

% **ORDER**
10.01.2013

1. By this order, I propose to dispose of the present Criminal Revision Petition whereby the Petitioner seeks setting aside/ modification of the orders dated 28th August, 2010 and 19th July, 2011 passed by Shri Kamlesh Kumar, Additional Principal Judge, Family Courts, Rohini, Delhi.
2. Briefly stated the facts of the case are :
 - a) That the Petitioner and the respondent no.1 are husband and wife and the respondent no. 2 is the daughter of the parties. On 27.10.1995 respondent no.1 filed a petition under section 125 Cr.P.C in the court of Id. M.M., Delhi claiming maintenance for herself and her daughter/ the respondent no.2 herein, against the petitioner @ Rs.500/- per month each. An

application for interim maintenance was also filed by the respondents.

- b) Thereafter, the application for interim maintenance was allowed by the Id. M.M., Delhi on 05.07.1997 and both the respondents were granted maintenance @ Rs. 400/- per month each, and the petitioner continued to pay the same as per the orders of the court. On 09.12.2005, the respondent no.1 filed an application under Section 127 of the Code of Criminal Procedure for enhancement of the interim maintenance granted to her and the respondent no.2 and claimed enhanced interim maintenance @ 5000/- per month each, for her and the respondent no.2. The Id. Judge allowed the application for enhancement in the interim maintenance of the respondents vide order dated 28.08.2010 and enhanced the interim maintenance for both the respondents w.e.f. January 1999. The relevant paragraph of the order dated 28.08.2010 is quoted below:

11. The Applicant/ Petitioner, therefore, would be entitled to a sufficient share of the salary amount drawn by the Respondent no.1, accordingly, direct the respondent to pay a sum of Rs.4900/- per month from January 1999 to December 2004; Rs. 8200/- per month from January 2005 to December 2005; Rs. 8400/- per month from January 2006 to

December 2006; Rs. 8800 per month from January 2007 to December 2007; 9100/- per month from January 2008 to December 2008, Rs.9500/- per month from January 2009 to December 2009 and Rs. 10000/- per month from January 2010 onwards. The respondent shall clear the arrears of maintenance within a period of six months and continue to pay the maintenance within a period of six months and continue to pay the maintenance amount (10000/- per month) regularly by 7th of each month.

- c) That on 12.12.2010, the respondent nos. 1 and 2 filed an execution application against the petitioner for recovery of arrears of maintenance. The execution petition was filed by the respondent no.1 for herself and for respondent no.2 , although the respondent no.2 had already attained the age of majority on 27.10.2009.
- d) That the Petitioner on the legal advice, filed objections in the said execution application, one of the objections being that the ld. Trial court made an apparent error as the order for enhancement of maintenance could not have been made w.e.f. January 1999, and at the most, enhancement could have been directed only from the date of order i.e. 28.08.2010.
- e) That however, the ld. Trial court vide order dated 19.07.2011 dismissed

the objections filed by the petitioner as being without any merit.

Therefore, aggrieved by the said order of the Id. Trial Court, the present revision petition is being filed.

3. Arguing the present petition, Ms. Geeta A Kumar, learned counsel for the petitioner submits that there is copious ambiguity in the impugned order passed by the learned Family Court, whereby the learned Family Court has granted enhancement in the amount with effect from January, 1999 without any whys and wherefores. Counsel also submits that Section 125 of the Cr. P.C. was amended on 21st September, 2012 and with the introduction of the said amendment, the embargo on the upper limit on the maintenance amount was elevated which was Rs. 500 before the amendment. Counsel also submits that the petitioner is prepared to pay the enhanced amount of maintenance from the date of the application preferred by the respondents before the said Court.

4. This legal position as stated by the counsel for the petitioner is not disputed by the counsel for the respondent. Counsel however states that the respondent has been incurring huge expenses on the education of the daughter and in the interest of justice, the Court has granted the

enhancement from January, 1999.

5. I have heard learned counsel for the parties and given my anxious consideration to the arguments advanced by them.
6. As per the case at hand, question that arises for consideration is that whether the applicant-wife and her daughter are entitled to the enhancement in the interim maintenance amount with a retrospective effect. Before I proceed to consider this question, it would be appropriate to examine the relevant provisions of law. Sub-sections (1) and (2) of Section 125 of the Code, as they were originally enacted in 1973, reads as under:

125. Order for maintenance of wives, children and parents.- (1) *If any person having sufficient means neglects or refuses to maintain-*

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

*a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, **at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit**, and to pay the same to such person as the Magistrate may from time to time direct:*

Provided that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation.- For the purposes of this Chapter, -

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(emphasis supplied)

7. Bare reading of Sub-section (1) of Section 125 leaves no room for doubt that if any person having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself or his legitimate (or illegitimate) child (children) unable to maintain itself (themselves), or his father, or mother, unable to maintain himself or herself, a Court, upon proof of negligence or refusal, order such person to pay maintenance to his wife or child (children) or parents, as the case may be. It is also clear that maximum amount which could be ordered to be paid was Rs. 500/- p.m. which was clear from the expression "not exceeding Rs. 500/- in the whole".

8. It is further clear that under Sub-section (2), such maintenance can be made payable "from the date of order" or "if so ordered, from the date of the application for maintenance".

9. By the Code of Criminal Procedure (Amendment) Act, 2001 (Act 50 of 2001), Sub-sections (1) and (2) came to be amended with effect from September 24, 2001. The amended sub-sections now reads as under:

125. Order for maintenance of wives, children and parents.- (1) *If any person having sufficient means neglects or refuses to maintain-*

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

*a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, **at such monthly rate, as such Magistrate thinks fit**, and to pay the same to such person as the Magistrate may from time to time direct:*

Provided that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for

the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.- For the purposes of this Chapter, -

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

*(2) **Any such allowance** for the maintenance or interim maintenance and expenses of proceeding **shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance** or interim maintenance and expenses of proceeding, as the case may be.*

10. On bare perusal of the amended provision and considering the facts of the present case, it would be pertinent to note that the respondent no.1 moved an application on 9th December, 2005 seeking enhancement in the maintenance amount. The respondent/petitioners sought indulgence from the family court u/s 127 of Code of Criminal Procedure, 1973 to direct the husband to pay a sum of Rs. 5,000/- per month on the ground that as on that date; he was getting more than Rs. 50,000/- per month as his salary and the learned Judge of the Family Court awarded the enhancement in the

maintenance amount with effect from January 1999, which was more than the prescribed limit of Rs. 500/- per month as was permissible only till September 2001, until when the notification of amendment in the said provision came into force.

11. The application for enhancement itself was filed in December 2005, therefore the learned Family Court has committed a patent illegality in directing the husband to pay the enhanced amount of maintenance with the retrospective effect i.e. from the year 1999 onwards when the maintenance petition was moved at the first instance whereas Section 125 of the Cr. P. C. was amended later, which came into effect from 24th September, 2001.

12. There is no iota of doubt that the Id. Trial court at best could have granted the enhancement from the date of amendment, or in alternative could have granted payment of the enhancement amount from the date when the application was filed i.e. 09.12.2005. Legitimately the respondents are entitled to the enhanced amount of maintenance with effect from the date of filing the application for enhancement, and not prior to that. In this background, in any case, learned trial Court could not have enhanced the amount of maintenance prior to the introduction of the amendment in the

Section 125 of the Cr. P.C.

13. It is a settled principle of law that enhancement of maintenance can be allowed only from the date when the application for enhancement is filed in the court or from the date of order, which is at the discretion of the court to decide depending upon the facts of the case. (*See. Sau Suman Narayan Niphade & Anr V. Narayan Sitaram Niphade 1995 Supp.(4) SCC243*).

14. In a judgment passed by this Hon'ble court, in the case of *Rajkumari V. Dev Raj Vij, 1984 RajLR 554*, in paragraph 7, 8 and 9 , it was held as under:

"(7) The next question to be determined is whether the enhancement of compensation could have been allowed from the date when the petition for enhancement was moved, or should have necessarily been deferred to the date of the order of the court. There has been a conflict of decisions of different High Courts in this regard. A perusal of Section 125 Criminal Procedure Code . shows that the court may upon proof of neglect or refusal to maintain, order the defaulting person to make a monthly allowance at such rate not exceeding Rs.500.00 in the whole as may be thought fit and to pay the same as the court may "from time to time" direct. Thus these provisions postulate the availability of power with the court to require the payment of maintenance as may be directed from time to time. The significance, on time factor cannot be treated as without purpose. In fact the same is pointer to variations inherent indifferent situations, and the Magistrate taking note of them. Thus independent of Section 127 which specifically, makes provisions for alternation in maintenance allowance, the basis thereof is

laid in Section 125 itself and recognised there. What Section 127 elaborates is the nature of proof that the Magistrate may require. The same is the change in circumstances. Here again the upper limit of Rs. 500.00 in the whole is maintained. This Section is thus supplemental to Section 125, and even has been treated as proviso by the Mysore and Punjab & Haryana High Courts in the decision reported as Dr. T.K. Thayumanavar v. Asanambal Ammal Air 1958 Mys 190, and Bhagat Singh v. Smt. Prakash Kaur 1972 P.L.R. 952. In both these decisions the power of a Magistrate to direct that the increased rate of maintenance be paid from the date of the application asking for the increase was upheld. It was, of course, observed that ordinarily an order of this type should be effective only from the date of the order, and that before the same was given retrospective effect, there must be special circumstances. The mere fact that there was some delay in the enquiry of the case, it was observed, would not be a sufficient ground to direct the payment of increased rate maintenance from the date of the application.

(8) The Kerala High Court has as well in Parameswars Motherv. Balameenakshi, MANU/KE/0025/1969 : AIR1969Ker108 recognised the power of the Magistrate to award enhanced maintenance from the date of the application. It was noted that there was a distinction between an order reducing the maintenance allowance and an order increasing the allowance. In the former case, the principle that amounts already accrued could not retrospectively varied, had to be applied. In the other case, i.e. of an enhancement of allowance, there was no scope for the application of the principle. The Magistrate, it was held, was free to enhance the allowance either from the date of the application for enhancement or from the date of the order. However, the Calcutta, Lahore and Cuttack High Courts in the decisions reported as J.H. Arnroon v. Miss R. Sassoon Air 1949 Cal 584, Mt. Lilawanti v. Madan Gopal Air 1935 Lah 24 and 1980 Cut L.R. 128, have been of the opinion that there is no power available with the Magistrate to allow increase in the allowance from the date of the application as that would amount to retrospective operation of the order. The increase, it was observed, could be from the date of the order itself. In this regard it was noted by the Cuttack authority that while Section 125(2) permitted the grant of allowance at the initial stage from the date of the application for maintenance, there was no corresponding provision in

Section 127, and in the circumstances it should be assumed that the legislature did not intend to permit such enhancement retrospectively.

(9) A social legislation for the unprivileged who are neglected and forsaken and who have no income of their own to support has to be liberally and beneficially construed. The effort should be to ensure that the purport of the legislation in real sense flows to them, and what is due to them is not denied, delayed or defected by technicalities, designs or motivation of the opposite side to thwart as long as possible, or the unfortunate delays which have come to stay in our system of administration of justice. In the present case the petition for enhancement though moved in August, 1977, could not bear result till August, 1983. Thus a period of 6 years was allowed to lapse. The course of conduct of the petitioner shows that she had been all through clamoring for higher maintenance. There is no reason why she should suffer in the very minimum maintenance payable for her living and upkeep for no fault of her own. To hold it otherwise, would be to provide a handle to any uncanny litigant to delay the proceedings as far as possible, and thus take advantage of his own wrong or bank upon the judicial delays. It would also stand in the way of consent orders. The proper approach to interpret Section 127 is to treat it as incidental provision to the main Section 125, and what is provided for in Section 125 is not taken away, unless specifically enjoined. I am Therefore, of the considered opinion that the petitioner is entitled to enhancement of maintenance from the date of the application in terms of what is stated in para 6 above. She will be entitled to maintenance allowance at the rate of Rs. 250.00 per month from 1-9-1977 Which will stand raised to Rs. 350.00 per month from 1-1-1980 and still raised to Rs. 450.00 per month from 1-1-1982."

15. In the light of the above discussion, the order dated 28th August, 2010 is modified to the extent that the petitioner shall not be liable to pay the enhanced amount of maintenance with effect from January, 1999 till 8th December, 2005. The petitioner is accordingly directed to pay the

enhanced amount of the maintenance with effect from 9th December, 2005 as per the enhanced amount directed in the order dated 28th August, 2010 passed by the Id. Family Court. The arrears of the enhanced amount of the maintenance shall be paid by the petitioner within a period of two months from the date of this order.

16. The aforesaid direction however shall not come in the way of the respondent to claim a separate amount in respect of education of her child. In the event of any such claim made by the respondents, the petitioner will have every right to contest the same.
17. With the aforesaid directions, the present petition is disposed of.

It is ordered accordingly.

KAILASH GAMBHIR, J

JANUARY 10, 2013

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