

**Crl. Rev. (F) No. 106 of 2018 (O&M)**

**IN THE HIGH COURT OF PUNJAB & HARYANA  
AT CHANDIGARH**

**Crl. Rev. (F) No. 106 of 2018 (O&M)  
Date of decision : 21.08.2018**

**Rakesh @ Rakesh Lohiya**

**.....Petitioner(s)**

**Versus**

**Babita**

**...Respondent(s)**

**CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY**

Present: Mr. Amitabh Tiwari, Advocate  
for the petitioner.

Mr. Sarfraj Hussain, Advocate  
for the respondent.

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**ANITA CHAUDHRY, J.**

The petitioner has assailed the order dated 03.02.2018, passed by the Family Court, Gurugram whereby petitioner was sentenced to undergo civil imprisonment from 01.03.2015 to 13.12.2016 and for another period of six months from 14.12.2016 for non-payment of arrears of maintenance of Rs. 1,10,000/-.

The counsel for the petitioner contends that the Family Court in utter disregard of the judgment rendered in *Shahada Khatoon and others Vs. Amzad Ali and others 1999(II) OLR (SC) 333* has sentenced him to imprisonment for more than a month. He urges that a Magistrate cannot impose imprisonment for a term which can extend to one month in case of non-payment of maintenance and the language of Sub-Section 3 of Section 125 Cr.P.C. is quite clear and the power given to the Court does not get

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enlarged and if there was a breach or non-compliance of the order, the wife can approach the Magistrate again for the same relief.

The counsel representing the respondent urges that the petitioner has not cleared the arrears and there are still outstanding.

The point for determination is whether the Family Court could send the petitioner to civil imprisonment for a period longer than one month in default of payment of arrears of maintenance and whether the order was legally sustainable.

It is necessary now to refer to the provisions.

**Section 125(3) of the Cr.P.C. reads as under:**

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."

In *Shahad Khatoon's* case (supra) the question raised was whether on account of non-payment of maintenance, the Magistrate would be entitled to impose a sentence on the husband and whether he could be

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kept in custody until the payment is made. The Apex Court had held that the view was not acceptable and the language of Section 125(3) Cr.P.C. was clear and the power of the Magistrate could not be enlarged. The concluding lines of the judgment are as under:-

*.....This power of the Magistrate cannot be enlarged and therefore, the only remedy would be after expiry of one month, for breach of non-compliance of the order of the Magistrate the wife can approach again to the Magistrate for similar relief. By no stretch of imagination the Magistrate can be permitted to impose sentence for more than one month. In that view of the matter the High Court was fully justified in passing the impugned order and we see no infirmity in the said order to be interfered with by this Court. The appeal accordingly fails and is dismissed.”*

In ***Sundaran Vs. Sumathi 2006(3) KLT 725*** it had been contended before the Court that irrespective of the number of defaults that are committed in paying each month's maintenance, there is a cap of one month on the total period of imprisonment that can be imposed and therefore, the sentence ordered by the Magistrate for more than one month was illegal. The contention was rejected and it was answered by the Court as follows:-

“8. I have carefully gone through each sentence in the judgment extracted above. It is impossible to deduce the conclusion which the learned counsel for the petitioner wants this court to accept from any sentence of the judgment or the cumulative effect of all

the sentences. The Supreme Court has not held so. It would be unreasonable for this court to hold that the Supreme Court has held so because it goes against the policy of law and the specific stipulations in S.125. I have adverted to this contention in detail, though a reading of the statutory provisions in the light of the decision of the Supreme Court does not leave behind any doubt in my mind, only because it is submitted at the Bar that many Family Courts/Magistrates do choose to follow the interpretation which the petitioner wants to place on the decision in Shahada's case, I need only say that the Supreme Court has not held so. It would be myopic and puerile to hold that the Supreme Court said so. The statutory provisions must lead to the inevitable and unmistakable conclusion that each month's default would be visited with the maximum sentence of one month's imprisonment. The mere fact that the destitute has not chosen to complain every month and has chosen to complain of the breach in respect of plurality of months in one petition within a period of 12 months cannot at all deliver to the defaulter any undeserved advantage. This contention is obviously unacceptable and unsustainable. The Supreme Court was obviously not considering the question whether more than one months imprisonment can be awarded for breach of the direction to pay maintenance committed in respect of more months than one. Though the tactual matrix is not adverted to in detail in the judgment extracted above it is evident that the Supreme Court was considering the question whether more than one month's imprisonment can be imposed on the defaulter if the breach to pay maintenance for one month continues for more months than one. If the default to pay maintenance for a particular month continues for any length of time, maximum imprisonment of one month alone can be imposed. That is all what the Supreme Court has held. The Supreme Court was considering the contention by the counsel that in the event of breach, the defaulter can be detained in custody till the payment is made. That is evident from the judgment (see the portion underlined which refers to the contention). That contention was repelled holding that endless detention until payment was effected cannot be made. There is no reported decision of this court or any other court on the interpretation of Shahada Khatoon except that of the Allahabad High Court. I respectfully disagree with the learned Judge of the Allahabad High Court who understood Shahada Khatoon differently in *Dhilip Kumar v. Family Court* (2000) CrL.L.J. 3893) without reference to the earlier decisions of that Court in [Emperor v. Beni](#) (AIR 1938 Allahabad 386) (F.B.) and [Ram Bilas v. Bhagwati Devi](#) (1991 CrL.L.J. 1098)."

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Doubting the correctness of the above judgment, the matter was referred to a Division Bench and to resolve the conflicting decision of various single Benches, the matter was taken up in ***Santosh Vs. State of Karela RPFC No.34 of 2010***, decided on 18.11.2013 and after referring to numerous judgments, the principle laid down in ***Sundaran Vs. Sumathi 2006(3) KLT 725*** was approved.

So the question relates to the quantum of punishment that can be imposed for recovery of arrears of maintenance. Under S.125(3), the sentence, for the whole or any part of each month's allowance remaining unpaid, after the execution of the warrant, can only be imprisonment for a term which may extend to one month or until payment if sooner made. Does this provision mean that the maximum sentence which the Magistrate can impose is only one month? The power to sentence is in respect of the whole or any part, of each month's allowance defaulted and therefore for the default in respect of each month, there can be a sentence of imprisonment upto one month. It is not correct to assume that the power of Magistrate is to impose only a month's imprisonment irrespective of the duration of the arrears of maintenance. A month's imprisonment for every month's default is the maximum penalty under S.125 (3) and not a maximum of a month's imprisonment for the total default.

The court has to exercise its discretion in each case and decide whether the maximum penalty should be imposed or whether a lesser punishment is sufficient. A month's imprisonment for every default is not the rule and sentencing cannot be mechanical. The court has to apply its mind, consider the circumstances of each case and then decide

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about the quantum of punishment, having due regard to the statutory limit of the maximum punishment of one month for each default.

In view of the discussions made above, the order of the learned Family Judge is wholly unsustainable. I am fortified in my view by a decision of the Apex Court reported in **(1999) 5 SCC 672:(1999 AIR SCW 4880) (Shahada Khatoon v. Amjad Ali)**. The Apex Court has gone to the extent of saying that the confinement can extend to only one month and if even after the expiry of one month the delinquent husband does not make the payment of arrears then the wife can approach the Magistrate again for a similar relief but the confinement of the husband must be only of one month. This decision of the Apex Court further lays down a fetter in the exercise of this power by the Judicial Magistrate or the Family Judge to the extent that only a confinement for a period of one month can be passed on an application whether the amount claimed by the wife as arrears is for more than one month or for only a month. In one stroke no composite confinement can be directed by the Court. It very clearly flows from the above decision.

The petition is allowed. Liberty is granted to the wife to file fresh application asserting non-compliance of the order passed under Section 125 Cr.P.C. The Court below would pass order on the prayer made.

**21.08.2018**

Sunil

**(ANITA CHAUDHRY)  
JUDGE**

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No