

HIGH COURT OF CHHATTISGARH AT BILASPURCriminal Misc. Petition No.2343 of 2019Order reserved on: 14-1-2020Order delivered on: 24-2-2020

Mustak Khan, S/o Shri Rafik Khan, aged about 33 years, Caste Musalman, R/o Village Kharwatoli Keradih, Police Station & Tahsil Kunkuri, District Jashpur, Chhattisgarh.

(Non-applicant) (In jail)
--- Petitioner

Versus

1. Smt. Naima Khatun, W/o Shri Mustak Khan, aged about 31 years, Caste Musalman.
2. Shahin Khan, S/o Shri Mustak Khan, aged about 10 years, Minor through his Mother Smt. Naima Khatun, W/o Shri Mustak Khan, aged about 31 years, Caste Musalman.

Both R/o Village Kharwatoli Keradih, Police Station & Tahsil Kunkuri, District Jashpur, Chhattisgarh, Present Address: Madhubantoli, Jashpur, Police Station & Tahsil Kunkuri, District Jashpur, Chhattisgarh.

(Applicants)
---- Respondents

For Petitioner: Mr. Alok Kumar Pandey, Advocate.
For Respondents: Mr. J.K. Saxena, Advocate.
Amicus Curiae: Mr. Hari Agrawal and Mr. Ravi Kumar Bhagat, Advocates.

Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Order

1. The two short but interesting questions that arise for consideration in this petition under Section 482 of the CrPC are:

1. Whether any jurisdictional court exercising jurisdiction under Section 125(3) of the CrPC for recovery of amount due to a wife

can pass an order of confinement of a defaulter husband for a period of more than one month in one stretch?

2. Whether the said court is empowered to direct the husband to undergo “rigorous” imprisonment under Section 125(3) of the CrPC for non-payment of maintenance?

2. The aforesaid twin questions arise on the following factual backdrop: -

2.1) The petitioner herein is husband of respondent No.1 and father of respondent No.2, against whom order dated 29-6-2015 was passed in Miscellaneous Criminal Case No.3/2013 directing payment of maintenance amount being ₹ 2,000/- per month to respondent No.1 and ₹ 1,500/- per month to respondent No.2, but he defaulted in making payment of the said maintenance amount pursuant to which an application under Section 125(3) of the CrPC was filed by the respondents. On 18-7-2018, the petitioner was sent to jail to suffer imprisonment of one month as provided in the provisions contained under Section 125(3) of the CrPC and after completion of that mandatory period of one month, he was released from jail, but thereafter, again he failed to make payment of arrears of the maintenance amount due to which he was again arrested on 19-2-2019 and this time, he was sent to jail to undergo imprisonment of one year under Section 125(3) of the CrPC and that too “rigorous” imprisonment.

2.2) Questioning the impugned order dated 19-2-2019 passed by the learned Judge, Family Court, Jashpur, this criminal miscellaneous

petition under Section 482 of the CrPC has been preferred by the petitioner.

3. Mr. Alok Kumar Pandey, learned counsel appearing for the petitioner, would submit that the learned Judge, Family Court is absolutely unjustified in imposing rigorous imprisonment of one year upon the petitioner. The provision contained under Section 125 (3) of the CrPC clearly enunciates that a person so accused for non-payment of maintenance amount cannot be sentenced for imprisonment of more than one month in one go, therefore, sentencing the petitioner for imprisonment of one year under Section 125(3) of the CrPC is totally unauthorized and lies beyond the jurisdiction of the learned Judge of the Family Court who has gravely erred and misdirected himself in exercising its jurisdiction by sentencing the petitioner for imprisonment of one year. The petitioner is in jail since 19-2-2019 and has suffered imprisonment for a period of eight months so far. He would further submit that the sentence cannot also be rigorous, but it can only be a simple sentence for a period of one month, as such, the order impugned deserves to be set aside.
4. Mr. J.K. Saxena, learned counsel appearing for the respondents, would support the impugned order.
5. Mr. Hari Agrawal, learned Advocate assisting the Court as *amicus curiae*, would submit that the Supreme Court in the matter of Shahada Khatoon and others v. Amjad Ali and others¹ has held that under Section 125(3) of the CrPC, the jurisdictional Court is only competent to impose

1 (1999) 5 SCC 672

imprisonment for a term which may extend to one month or until the payment, if sooner made and this power of the Court trying the application under Section 125(3) cannot be enlarged and sentence cannot be imposed for a period of more than one month. He would further submit that in the light of the judgment rendered by the Kerala High Court in the matter of MoideenKutty Kunhankutty Haji v. State of Kerala², sentence to be awarded under Section 125(3) of the CrPC cannot be rigorous.

6. I have heard learned counsel for the parties and *amicus curiae* and considered their rival submissions made herein-above and also went through the material available on record with utmost circumspection.
7. In order to consider the plea raised at the Bar, it would be appropriate to notice the provisions contained under Section 125(3) of the CrPC which read as under :-

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

—(1) xxx xxx xxx

(2) xxx xxx xxx

(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

² (2008) CrLJ 3402

a period of one year from the due 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."

8. A careful perusal of the aforesaid provision would show that if the amount of arrears including maintenance and expenses of the proceeding are not paid after the issuance of warrant, the Court trying the application under Section 125(3) of the CrPC is competent to direct for imprisonment of the person so accused for a term which may extend to one month or "until payment if sooner made". Even this provision does not entitle the Court trying the application under Section 125(3) of the CrPC to impose imprisonment for more than one month at the most in one stretch and that one month's period can be reduced, provided if the payment is made even before the one month period.
9. In the matter of Amjad Ali alias Munna v. The State of Bihar³, the Patna High Court has held that under Section 125(3) of the CrPC, the Magistrate may sentence for a period which may extend to one month or until payment is sooner made, therefore, sentence for more than one month cannot be passed and holding the detention of the petitioner therein for more than 2½ years to be illegal, the impugned order

³ Cr.Misc.No.15965/93, decided on 9-12-1993

(therein) detaining the petitioner therein who was in custody for more than 2½ years, was set aside. The order states as under: -

“9.12.93 Heard learned counsel for the petitioner and State.

It is stated that the petitioner is in custody for more than two and half years on his failure to pay maintenance to his wife under Section 125(3) Cr.P.C.

From a bare perusal of the aforementioned Section it appears that the Magistrate may sentence for a period which may extend to one month or until payment is sooner made.

It is, thus, evident that a sentence for more than one month could not have been passed. The detention of the petitioner beyond the period of one month appears to be illegal.

In this view of the matter, this application is allowed and the petitioner namely Amjad Ali alias Munna is directed to be set at liberty forthwith.

After the order is transmitted to the court below, the record of the case may be placed before Hon’ble the Inspecting Judge of Rohtas district.”

10. The aforesaid order of the Patna High Court was challenged before the Supreme Court in Shahada Khatoon (supra) in which it was clearly held by their Lordships of the Supreme Court that the Magistrate has no power to impose a sentence for more than one month and it was observed as under :-

“The language of sub-section (3) of Section 125 is quite clear and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. This power of the Magistrate cannot be enlarged and therefore the only remedy would be after expiry of one month, for breach or non-compliance with the order of the Magistrate the wife can approach the Magistrate again for similar relief. By no stretch of imagination can the Magistrate 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.”

11. The principle of law laid down by the Supreme Court in Shahada Khatoon (supra) was followed with approval in the matter of Poongodi and another v. Thangavel⁴ wherein the relevant portion being paragraphs 6 and 7 is quoted herein below :-

“6. In another decision of this Court in *Shantha v. B.G. Shivananjappa*⁵ it has been held that the liability to pay maintenance under Section 125 CrPC is in the nature of a continuing liability. The nature of the right to receive maintenance and the concomitant liability to pay was also noticed in a decision of this Court in *Shahada Khatoon v. Amjad Ali* (supra). Though in a slightly different context, the remedy to approach the court by means of successive applications under Section 125(3) CrPC highlighting the subsequent defaults in payment of maintenance was acknowledged by this Court in *Shahada Khatoon* (supra).

7. The ratio of the decisions in the aforesaid cases squarely applies to the present case. The application dated 5-2-2002 filed by the appellants under Section 125(3) was in continuation of the earlier applications and for subsequent periods of default on the part of the respondent. The first proviso to Section 125(3), therefore did not extinguish or limit the entitlement of the appellants to the maintenance granted by the learned trial court, as has been held by the High Court.”

12. The principle of law enunciated by the Supreme Court in Shahada Khatoon (supra) was followed by the Single Bench of the Allahabad High Court in the matter of Dilip Kumar v. Family Court, Gorakhpur and others⁶ by holding as under: -

4 (2013) 10 SCC 618

5 (2005) 4 SCC 468

6 1999 SCC OnLine All 1244

“4. From these it is clearly available that the person can be kept under confinement for each month’s default and the confinement can be only for a period of one month. The subsequent part “until payment if sooner made” further clarifies the situation to the extent that such a husband can be confined to a period of one month even if the default is of more than a month and he can be allowed to come out of jail if the payment is made earlier at any point of time within this period. This very clearly indicates that if the payment is made within this period on any date his confinement will come to an end. The purpose behind this enactment of provision for confinement is to put to an end to the sufferings of the wife by compelling the husband to pay the maintenance amount. The Court cannot keep him in confinement any further beyond a period of one month by one stroke of pen. In the present case an application was moved by the wife for the recovery of the arrear amount, which appears to be for several months. The Family Judge has passed a consolidated order of 12 months’ confinement of the applicant, i.e. for the total period of default. The applicant is the husband, who has failed to make payment of the maintenance amount allowed not only to the wife but also to his children. He has failed to discharge his obligation. The Court is vested with this extensive power with this interest in mind, i.e. compelling the husband to discharge his obligation imposed upon him by an order of a competent Court.

5. 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 latest decision of the Apex Court reported in *Shahada Khatoon v. Amjad Ali* (supra). 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. In the own words of the Apex Court “By no stretch of imagination can the Magistrate be permitted to impose sentence for more than one month.” Thus, this latest 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. This power can be exercised only after a warrant for recovery of the unpaid maintenance allowance is issued by the Court. This warrant is to be executed like any warrant for recovery of fines. This fine can be recovered like any land revenue arrears. Unless that exercise is first adhered to, the power of confinement to jail for his failure cannot be resorted to by any court.”

13. Similarly, the decision of the Allahabad High Court in Dilip Kumar (supra) was followed by the Single Judge of the Bombay High Court in the matter of Sanjay Sakhararam Dongare v. Jyoti Sanjay Dongare and others⁷ in which the Bombay High Court speaking through A.M. Khanwilkar, J. (as His Lordship then was) clearly held that for non-compliance of the order of maintenance, Magistrate cannot award imprisonment exceeding one month at a given point of time and not beyond one month and His Lordship further held that if after expiry of imprisonment the order is not complied it will be open to approach Magistrate for similar relief. His Lordship pertinently observed as under:-

“6. That takes me to the last grievance which alone needs to be considered in the present petition relating to the inappropriateness of the order passed by the Magistrate awarding sentence of imprisonment of 12 months in two orders for different periods and ten months in the third order for another period. All these three orders are passed on the same day i.e. on 29th May, 2000. Counsel for the petitioner has rightly placed reliance on the decision of the Apex Court reported in (1999) 5 SCC 672, *Shahada Khatoon and others v. Amjad Ali and others* as well as another decision of the Allahabad High Court reported in 2000 Cri.L.J. 3893, *Dilip Kumar v. Family Court, Gorakhpur*. It is contended that

7 2003(4) Mh.L.J. 319

having regard to the plain language of Section 125(3) of Criminal Procedure Code, the Magistrate was empowered to impose sentence only for a period of one month at a given point of time and not beyond one month. There is substance in this submission, for this proposition has been accepted by the Apex Court in the aforesaid decision. In the case of *Shahada Khatoon* (supra), the Apex Court has observed that the power of the Magistrate cannot be enlarged so as to award imprisonment exceeding one month period and the only remedy would be that after expiry of one month, for breach of non-compliance of the order of the Magistrate, the wife can approach Magistrate again for the same relief. In other words, Magistrate cannot award punishment for a period of twelve months for different periods at one time. Understood thus, the orders passed by the Magistrate on 29th May, 2000, which has been confirmed by the Sessions Court on 20th October, 2000, would stand modified in terms of the decision of the Apex Court. In other words, the petitioner shall suffer imprisonment in terms of order dated 29th May, 2000 for a period of one month, and on expiry of that period, if the petitioner fails to comply with the maintenance order, it will be open to the respondents 1 to 3 to approach the Magistrate for similar relief.”

14. The Division Bench of the Andhra Pradesh High Court in the matter of Abdul Gafaoor @ Ashan v. Smt. Hameema Khatoon and others⁸ was posed with a reference with similar question for consideration and their Lordships while following the decision of the Supreme Court in Shahada Khatoon (supra) held that under Section 125(3) of the CrPC, the maximum imprisonment would be one month. Their Lordships observed as under: -

“3. ... Therefore, it is immaterial whether there were arrears of 12 months or of any other duration. The material question is whether a warrant under Section 125(3) of the Code, there can only be one imprisonment and the maximum imprisonment would be one month. So in case a person chooses to file an application under Section 125(3) of the Code on every successive months on failure to get

⁸ 2004 (1) A.P.L.J. 154 (HC)

maintenance, she may get successive orders of imprisonment if the person against whom the warrant is issued fails to make the payment. But if a person chooses to make an application after several months, then again she will be able to get an order of imprisonment on failure to make the payment which will be only a maximum imprisonment of one month. We are fortified in our view by a judgment of the Supreme Court reported in *Shahada Khatoon vs. Amjad Ali*, 1999 SCC (Cri) 1029. ...”

15. Similarly, the Single Bench of the Rajasthan High Court in the matter of **Sunil Kumar Jain v. State and another**⁹ held that long imprisonment for a period of more than one month cannot be awarded under Section 125(3) of the CrPC.

16. I am in respectful agreement with the view so expressed by the Allahabad High Court, the Bombay High Court, the Andhra Pradesh High Court and the Rajasthan High Court in the aforesaid cases following the judgment of the Supreme Court in **Shahada Khatoon** (supra). However, the Full Bench of the Gujarat High Court in the matter of **Suo Motu v. State of Gujarat**¹⁰, the Division Bench of the Kerala High Court in the matter of **C. Ali and others v. State of Kerala and others**¹¹, and the Division Bench of the Madhya Pradesh High Court in the matter of **Amar Singh v. Smt. Kamla alias Sapna Panthi and others**¹² have distinguished the decision of the Supreme Court in **Shahada Khatoon** (supra) and held that a month’s imprisonment for every month’s default is the maximum penalty under Section 125(3) of the CrPC and not a maximum of a month’s imprisonment for the total default and further held that Magistrate can entertain separate applications from the claimants or even entertain a common application

9 2005 SCC OnLine Raj 676

10 2008 SCC OnLine Guj 295

11 2013 SCC OnLine Ker 24542

12 Criminal Revision No.5630/2018, decided on 28-3-2019

for several months of default and pass a cumulative order of imprisonment, sentencing a defaulting person up to a maximum one month for each month of default. I am in respectful disagreement with the view so expressed by the Gujarat High Court, the Kerala High Court and the Madhya Pradesh High Court in the aforesaid decisions in view of the authoritative pronouncement of the Supreme Court in Shahada Khatoon (supra) laying down the law authoritatively. As such, it is held that the jurisdictional court dealing with the application under Section 125(3) of the CrPC is empowered to impose imprisonment for a term which may extend to one year or until the payment is sooner made, but he cannot pass an order directing imprisonment of defaulting husband for more than one month at the most at one stretch. It is held accordingly.

Answer to question No.2: -

17. The next question for consideration would be, whether a defaulter husband can be sentenced to undergo rigorous imprisonment under Section 125 (3) of the CrPC for non-payment of maintenance?
18. In the matter of Kuldip Kaur v. Surinder Singh and another¹³ their Lordships of the Supreme Court have held that provision of sentencing a person to jail under Section 125(3) of the CrPC is a 'mode of enforcement'. It is not a 'mode of satisfaction' of the liability. The liability can be satisfied only by making actual payment of the arrears.
19. The Supreme Court in the matter of Shanti Lal v. State of Madhya Pradesh¹⁴ has held that sentence of imprisonment in default of fine is not

13 AIR 1989 SC 232

14 (2008) CrLJ 386

a punishment. It is only a penalty which a person incurs on account of non-payment of fine. It was held as under :-

“27. ... The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or otherwise. A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount..”

20. Thus, a sentence of imprisonment imposed under Section 125(3) of the CrPC is not a punishment *stricto sensu*, but is only a mode of recovery/enforcement of a defaulted payment.

21. The Kerala High Court in MoideenKutty Kunhankutty Haji (supra) considered this issue by formulating the following question :-

“Can a defaulter be sentenced to undergo rigorous imprisonment under Section 125 (3) Cr.P.C for non-payment of maintenance? Does the expression “imprisonment” in Section 125 (3) Cr.P.C take within its sweep rigorous imprisonment also ?”

22. After a detailed discussion, the Kerala High Court answered the above-stated question in paragraphs No.29 to 31 as under:-

“29. The rationale underlying Section 125(3) Cr.P.C makes it clear that the law wants the direction to pay maintenance to be enforced and executed strictly. Under the threat of detention in a criminal prison compliance is insisted. I am of the opinion that going by the purpose which such detention/imprisonment has to serve also, it is not necessary to impose the harsh punishment of rigorous imprisonment under Section 125(3) Cr.P.C. The threat of being sent to prison is according to me by itself sufficient deterrent and it is not necessary to cap the same with the further direction

that such prisoner should undergo rigorous imprisonment with obligation to render hard labour.

30. It follows from the above discussions that the expression "imprisonment" in Section 125(3) Cr.P.C must receive a more liberal and humane interpretation consistent with the constitutional ideals as to avoid the consequence of subjecting such a defaulter to the ordeal of rendering involuntary hard labour for the mere indiscretion of failure/refusal to make payment of the maintenance amount.

31. I do in these circumstances come to the conclusion that it is impermissible to impose a sentence of rigorous imprisonment on a defaulter under Section 125(3) Cr.P.C. I respectfully disagree with the conclusions/observations of the Full Bench of the Allahabad High Court and the Division Bench of the Calcutta High Court. "

I respectfully agree with the view taken by the Kerala High Court and hold that it is impermissible to impose a sentence of rigorous imprisonment on defaulter under Section 125(3) of the CrPC and imprisonment to be awarded on defaulter husband would only be simple imprisonment. It is held accordingly.

23. Reverting to the facts of the present case in the light of the legal analysis answer returned to the two questions formulated herein-above, it is quite vivid that for non-payment of arrears of maintenance, the petitioner was sentenced to suffer rigorous imprisonment of one month on 18-7-2018 and on completion of one month, he was released from jail but, since he had yet not made payment of maintenance amount to the respondents, he was again arrested on 19-2-2019 and this time, learned Judge, Family Court, Jashpur sentenced the petitioner to suffer rigorous imprisonment for one year under Section 125(3) of the CrPC which is absolutely without authority of law and is in teeth of the provisions contained under Section 125(3) of the CrPC. The Family Court had no

jurisdiction to impose rigorous imprisonment for more than one month upon the petitioner as mandated in Section 125(3) of the CrPC and as interpreted by their Lordships of the Supreme Court in Shahada Khatoon (supra) followed by the High Courts of Allahabad, Bombay Andhra Pradesh and Rajasthan. The rigorous imprisonment imposed by the Family Court upon the petitioner is also unauthorised. The petitioner had already suffered more than one month of imprisonment. The award of imprisonment for more than one month that too, rigorous imprisonment is totally unauthorized and lacks legislative sanction. The impugned order is set aside, as the petitioner has already suffered more than one month in compliance of the impugned order. He was arrested on 19-2-2019 and he was granted bail by order of this Court on 5-11-2019.

24. Accordingly, this petition under Section 482 of the CrPC is allowed to the extent indicated herein-above. However, the respondents would be entitled to claim and recover arrears of maintenance in accordance with law.

25. Registrar (Judicial) shall furnish a copy of this order to all the Judges of Family Courts for their perusal with the leave of Hon'ble the Chief Justice (if appropriate).

26. This Court appreciates the assistance rendered by Mr. Hari Agrawal and Mr. Ravi Kumar Bhagat, Advocates as *amicus curiae*.

Sd/-
(Sanjay K. Agrawal)
Judge