

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

% **Date of Order: 17th December 2021**

+ **CRL.REV.P. 614/2018**

ASHA DEVI & ORS

..... Petitioners

Through: Ms. Mallika Parmar, Advocate
(DHCLSC)

versus

MUNESHWAR SINGH @ MUNNA **..... Respondent**

Through: Mr. Kunal Malhotra and Mr. Ravinder
Gaur, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 397 read with Section 482 of the Code of Criminal Procedure, 1973, (hereinafter "Cr.P.C.") has been filed by the petitioners seeking setting aside of the Order dated 28th April, 2018, passed by Family Court, Dwarka, New Delhi in Execution Petition No. 122/2017.

2. The Petitioner No.1 (hereinafter "the Petitioner") and the Respondent are wife and husband, while Petitioner no. 2 and 3 are the daughter and the son, respectively, born out of their wedlock. The brief facts of the case leading up to the present petition are summarized as under:

- i) Marriage between the concerned parties was solemnized on 12th July, 1988, and after a span of time, temperamental issues and

marital differences arose between the parties, subsequent to which, they started living separately since 2000.

- ii) Thereafter, the Petitioner filed Maintenance Petition under Section 125 Cr.P.C. and vide Order dated 30th August, 2005, whereby the Respondent was directed to pay Rs. 1000/- per month to the Petitioner No.1 and Rs. 500/- per month to Petitioner No.2, 3 and the third daughter.
- iii) The Petitioner then moved the Court for execution of Order dated 30th August, 2005, which was withdrawn on account of the settlement between the parties before the Mediation Centre, Dwarka Courts, New Delhi. However, the Respondent did not comply with the terms laid down in the settlement agreement and hence the Petitioner filed another Execution Petition bearing No. 122/2017 before the learned Family Court, Dwarka, New Delhi for execution of order of maintenance.
- iv) The Respondent, in compliance of the maintenance order, was paying certain amount, in pursuance of which the Petitioners sought liberty from the learned Trial Court to amend/withdraw and refile the Petition with the prayer of payment of arrears of maintenance amount and warrants of attachment in case of failure on part of the Respondent.
- v) The learned Trial Court passed the Impugned Order dated 28th April, 2018, whereby it noted that the Memo of Parties in the Execution Petition indicated that the Respondent herein, resided

at Bharti Nagar, District Shaharsa, Bihar and that the Petitioner can seek execution of the Order of maintenance before the Courts in Shaharsa, Bihar. Hence, the learned Trial Court directed that a transfer certificate may be issued for execution against the Respondent.

- vi) The Petitioner is before this Court seeking setting aside of the said Order of the learned Trial Court.

3. Ms. Mallika Parmar, learned counsel appearing on behalf of the Petitioners submitted that Section 125 of the Cr.P.C. lays down the power with the Magistrate to order for monthly maintenance where they think fit. Such power is available to every Magistrate, and it is at the option of the person filing for maintenance who may decide where it may be filed. Under Section 126 of the Cr.P.C., it is unequivocally stated that the proceedings under Section 125 may be taken against any person in any district where he is, where he or his wife resides, or where he last resided with his wife. According, to this provision, the Petitioner was well within the mandate of the Code, having proceeded against the Petitioner in Delhi, since, the Respondent was in the jurisdiction of Delhi while the application for maintenance was filed and adjudicated against him. Further, under Section 128 of the Code, the order of maintenance may be enforced by any Magistrate where the person against whom it is made may be. Therefore, under the Cr.P.C., the Petitioner “may” have proceeded for execution at the place of permanent residence of the Respondent, but it is an option and not an obligation.

4. Learned counsel for the Petitioners submitted that the Petitioner had stated before the Court that she did not know the whereabouts of the Respondent when the Respondent was directed to file an affidavit, wherein he himself stated that he was residing in Delhi. Whether temporarily or permanently, is immaterial, since the fact remains that it allows the Petitioner to proceed for execution against the Respondent in Delhi. Learned counsel for the Petitioners also places reliance on **Jagir Kaur & Anr vs Jaswant Singh, 1964 (2) SCR 73** of the Hon'ble Supreme Court to assert the same.

5. It is submitted that the 41st Report of the Law Commission of India on Maintenance of Wives and Children provides as under: -

“36.10. Under sub-section (8), the place where the wife resides after desertion by the husband is not material as regards the venue of the proceedings, though the place where the husband resides- even temporarily- is relevant. Often deserted wives are compelled to live with their relative far away from the place where the husband and wife last resided together. They would be put to great harassment and expenditure, unless the venue of the proceeding is enlarged so as to include the place where they may be residing on the date of the application.

With reference to sub-section (8), there is the following controversy. Is it sufficient if the husband resides in the district in which proceedings are taken, or is it further necessary that the court in which the proceedings are instituted must itself be one having jurisdiction over the place where the husband resides? The Bombay view is, that a proceeding under Section 488 instituted in any competent court within the district in which, the husband resides, or is, or in which he last resided with his wife. This is also the Patna view and the Kerala view. The Madras High Court has, however, taken a different view. In our opinion, the

Bombay view is correct, as the wording of the sub-section does not seem to justify the addition of any further restriction.”

Therefore, in light of the observation by the Law Commission of India, the Petitioner was well within her right to proceed against the Respondent in Delhi, which was his residence at the time of application for maintenance.

6. Learned counsel for the Petitioners vehemently submitted that the Hindu Adoption and Maintenance Act, 1956, is a welfare legislation and the interest of the aggrieved parties is to be kept paramount. It is submitted that it is after four years into the matter pending for execution of maintenance order that the learned Trial Court raised the issue on the maintainability of the Petition solely basing its findings on the memo of parties and not appreciating the fact that the Cr.P.C. itself gives the option to the wife to exercise her right at the place of even temporary residence of the husband.

7. It is, further, submitted that a coordinate bench of this Court in the matter ***Sachin Gupta vs Rachana Gupta***, Crl. Rev. P. 476/2018, decided on 21st January, 2019, had observed as under: -

“6. In terms of Section 126(1)(b), the respondent would be entitled to maintain a petition both at the place where the husband is residing as also at the place where she is residing. Section 126(1) does not contemplate a permanent place of residence. Even a place where the wife is for the time being residing would confer jurisdiction on such a court, where she is residing. However, residence temporarily acquired solely for conferring jurisdiction would not satisfy the requirements of Section 126(1).”

Hence, the Petitioner was entitled to proceed against the Respondent at the place where she was residing as well as where the Respondent was residing at the time of application, that is Delhi. Furthermore, it is submitted that the Respondent was arrested on 11th May, 2018 from Delhi, which is an affirmation of the fact that he was residing within the territorial borders of Delhi and is sufficient to invoke the legal jurisdiction of the concerned Courts here. Further, placing reliance on ***Bhaskar Lal Sharma vs Monica & Ors, (2014) 3 SCC 383***, submitted that order of maintenance may be enforced against the concerned person within the jurisdiction of the Court that has passed maintenance order, even if he is living outside the country.

8. *Per Contra*, Mr. Kunal Malhotra, learned counsel appearing on behalf of the Respondent, vehemently opposed the submissions made by the counsel for the Petitioner and submitted that Section 126 of the Cr.P.C. discusses the procedure and proceedings under Section 125 with regard to the maintenance and not for execution of the same.

9. It is submitted that the Respondent is a seasonal labourer and his work may take him to any State, but the same does not imply that proceedings against him can be initiated and executed against him in any such State where he may be.

10. Learned counsel for the Respondent submitted that the Petitioner, in her maintenance petition, had prayed for attachment of property of the Respondent for recovery of default amount and arrears. This property, which may be attached for recovery is an immovable property situated in Shaharsa, Bihar. Moreover, the memo of parties before the learned Trial Court

indicated the permanent place of residence of the Petitioner in Bihar. Hence, the execution proceedings should have been initiated and concluded against the Respondent in Bihar.

11. Heard learned counsel for the parties and perused the record.

12. Some relevant provisions of the Cr.P.C. must be considered while determining the question of jurisdiction in maintenance cases, these are laid out 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.

(2) xxx xxxxxx

(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.*

126. Procedure. — (1) *Proceedings under section 125 may be taken against any person in any district—*

- (a) *where he is, or*
- (b) *where he or his wife resides, or*
- (c) *where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.*

128. Enforcement of order of maintenance.—*A copy of the order of [maintenance or interim maintenance and expenses of proceedings, as the case may be,] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be,] is to be paid; and such order may be forced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the [allowance, or as the case may be, expenses, due].*

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.

422. Effect of such warrant. — *A warrant issued under clause (a) of sub-section (1) of section 421 by any Court may be executed within the local jurisdiction of such Court, and it shall authorise the attachment and sale of any such property outside such jurisdiction, when it is endorsed by the District Magistrate within whose local jurisdiction such property is found.*

13. It is apparent from the bare reading of Section 126 read with Section 128 of the Cr.P.C. that a person may file for maintenance and have the proceedings initiated under Section 125 of the Cr.P.C. before the concerned Magistrate in any district where the husband is, where he or the wife resides or where they have last resided. Further, the mandate under Section 128 of the Cr.P.C. categorically provides for enforcement of order of maintenance by any Magistrate in any place where the person against whom it is made may be. The Code gives ample prerogative with respect to the jurisdiction where the person seeking maintenance may file for the same and its subsequent execution. The words used are, '*where the person against whom it is made may be*' and not where he is residing or where his permanent property is. The material fact, hence, would be the presence of the person at the preferred jurisdiction at the time of the application for maintenance.

14. Further, sub-section 3 of Section 125, empowers the Magistrate to issue a warrant for levying the amount due in the manner provided for levying fines, where there is default of payment in contravention of the orders of maintenance by the Magistrate. The same is guided by the provisions under Section 421 and 422 of the Cr.P.C., that authorize the Court concerned to sell or attach a property even outside its jurisdiction. Although, the contention of requirement of attaching the property of the Respondent has not been decided by the learned Trial Court, however, on bare perusal of the abovementioned Sections it is evident that, if required, a property situated in Bihar, may be attached for the purposes of obtaining maintenance upon the order passed by the Courts in Delhi.

15. Moreover, the Hon'ble Supreme Court in ***Jagir Kaur & Anr vs Jaswant Singh (Supra)***, observes as under: -

“11. The third expression is the word "is". It is inserted between the words "resides" and "last resided". The word, therefore, cannot be given the same meaning as the word "resides" or the expression "last resided" bears. The meaning of the word is apparent if the relevant part of the sub-Section is read. It reads: "Proceedings under this Section may be taken against any person in any district where he ... is...". The verb "is" connotes in the context the presence or the existence of the person in the district when the proceedings are taken. It is much wider than the word "resides"; it is not limited by the animus manendi of the person or the duration or the nature of his stay. What matters is his physical presence at a particular point of time...

12.To summarize: Chapter XXXVI of the Code of Criminal Procedure providing for maintenance of wives and children intends to serve a social purpose. Section 488 prescribes

alternative forums to enable a deserted wife or a helpless child, legitimate or illegitimate, to get urgent relief. Proceedings under the Section can be taken against the husband or the father, as the case may be, in a place where he resides, permanently or temporarily, or where he last resided in any district in India or where he happens to be at the time the proceedings are initiated.”

16. Further, in **Muthuvel vs Nalini**, Crl RC (MD) No. 123 of 2012, decided on 8th September, 2015, the Hon’ble Madras High Court has noted as under: -

“13. Enforcement of the order of maintenance is provided under Section 128 of Cr.P.C., giving option to the wife to seek enforcement either in a place where the order was passed or in a place the respondent was residing. The provision for passing an order of imprisonment is provided only under Section 125(3) Cr.P.C. Provision of Section 128 Cr.P.C, has been quoted, because the application was towards enforcement of order of maintenance. The mode of enforcement is provided under Section 125(3) Cr.P.C. The application under Section 128 Cr.P.C., is sufficient to grant the remedy under Section 125(3) Cr.P.C.”

17. The Hon’ble Supreme Court in **Bhaskar Lal Sharma vs Monica & Ors (Supra)** it has been observed as under:-

“15. The order passed under Section 125 of the Code granting maintenance to the writ petitioner appears to have attained finality in law. Such an order can be executed by following the provisions of sub-Section (3) of Section 125 of the Code. The scope and ambit of the said provision of the Code has recently been dealt with in Poongodi and Another Vs. Thangavel wherein reference has been made to several earlier decisions on the issue. When the enforcement and execution of an order passed under a statute is contemplated by the statute itself, normally, an aggrieved litigant has to take recourse to the

remedy provided under the statute. In fact the petitioner has initiated a proceeding for, execution of the order of maintenance granted in her favour. The fact that the husband (respondent herein) against whom the order of maintenance is required to be enforced outside the territory of India, in our considered view, cannot be a reasonable basis for - invoking the extraordinary remedy under Article 32 of the Constitution inasmuch as the provisions of the Code i.e. Section 105 makes elaborate provisions for service of summons in case the person summoned by the court resides outside the territory of India. Comprehensive guidelines have been laid down by the Government of India with regard to service of summons/notices/judicial process on persons residing abroad, in view of the remedy that is available to the petitioner under the Code and having regard to the fact that resort to such remedy has already been made, we decline to invoke our jurisdiction under Article 32 of the Constitution in facts of the present case. Instead, we direct the Family Court No. 2, Saket, New Delhi to pass appropriate final orders in Petition No.M-296/2011 as expeditiously as possible... ”

18. It is found that the provisions under the Cr.P.C. and the findings of the Hon'ble Courts are clear and definitive on the issue of jurisdiction in cases of maintenance under Section 125 of the Cr.P.C. The Court makes available the option to the wife to proceed before a Court for maintenance and its execution where either the husband is, or where either of the parties resides as well as the place where they used to reside. There may be alternative jurisdictions available to the person seeking execution of order of maintenance and it is upon the meeting of the requirements of the provisions that the person “may” approach the concerned court in the appropriate jurisdiction. Further, the finding of Hon'ble Apex Court settles the position that a judicial process may be enforced against a person even when he is in abroad.

19. Insofar as the attachment of property is concerned, Section 125 (3) read with Section 421 and 422 of the Cr.P.C. prescribe the provision for sale and attachment of property which may be outside the jurisdiction of the Court issuing warrants against the person against whom the order is made. In the present matter, while the Petitioner-wife may have approached the concerned Courts in Bihar, where the Respondent is alleged to have his permanent residence and the immovable property, simultaneously, her right to approach a Court in New Delhi also subsisted. The rights of the Petitioners are in consonance with the provisions of the law, since, the Respondent used to reside in Delhi at the time of application. Moreover, the Petitioners had the opportunity to execute within the jurisdiction of the Court where the order of maintenance was passed.

20. The order of maintenance was passed in the year 2005 and now the learned Trial Court has, after 16 years of the order and 4 years into the matter of execution, taken up the issue of maintainability, despite the clear mandate of the Cr.P.C. It is unfortunate that a woman and her children have to run pillar to post to avail their rights to which they are entitled under the law of the country. To this point is strongly urged that where the conduct of the Respondent is clearly violative of orders of the Court as well as of the settlement between the parties, in providing due and timely maintenance to the wife and the children, the learned Trial Court shall not bring into matter issues that have no grounds for survival.

21. After taking in view all the facts and circumstances of this case, arguments advanced as well as the perusal of pleadings, this Court finds sufficient ground to allow the present Petition. The learned Court below has

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erred while giving its finding since, the Petitioner was well within her right under the law for having the maintenance order executed in her favour within the jurisdiction of Delhi.

22. Hence, the Order dated 28th April, 2018, of the learned Trial Court is set aside and the proceedings are remanded back to the Family Court, Dwarka, New Delhi, with directions for fresh adjudication of the execution petition. In light of the aforesaid observations, the petition is allowed and disposed of.

23. The pending application, if any, stands disposed of.

(CHANDRA DHARI SINGH)
JUDGE

December 07, 2021
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