

21.03.2023

Item No.24
Ct.No.34
dc.

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION**

**C.R.R. 1161 of 2021
with
CRAN 1 of 2021**

**Sabrin Khatun & Anr.
versus
Hafijur Rahaman Mullick**

In Re: An Application under Section 401 read with Section 482 of the Code of Criminal Procedure.

Mr. Shibasis Chatterjee ... For the Petitioners.

Re: CRAN 1 of 2021
(an application under Section 5 of the Limitation Act)

Learned advocate appearing for the petitioners prays for condonation of delay of 357 days in preferring this revisional application.

The reasons so assigned in the application for condonation of delay are found to be just and sufficient. Accordingly, delay is condoned. The application being CRAN 1 of 2021 is, thus, allowed.

Re: CRR 1161 of 2021

The subject-matter of grievance of the present petitioners relates to the order dated 22.01.2020 passed in Execution Case No. 804 of 2019 by learned Judicial Magistrate, 2nd Court, Berhampore, Murshidabad.

The learned advocate appearing for the petitioners submits that the execution case was filed for claiming maintenance for a period of 42 months 13 days i.e. from

12.07.2015 to 26.06.2019. The learned Magistrate only granted the same from 25.06.2018 to 26.06.2019. So far as the claim of the petitioners for the rest of the period from 12.07.2015 to May 2018, the learned Judicial Magistrate did not allow the maintenance to be paid or directed the opposite party to pay the maintenance.

Having considered the purpose for which the provisions under Section 125 of the Code of Criminal Procedure was brought in force and the fact that the amount which is to be paid by the husband/father do not exonerate him only with passage of time, the duty of a court of law in such situation is to address the issue of vagrancy. Further it has been settled by the Hon'ble Supreme Court in **Poongodi & Anr. -Vs. - Thangavel** reported in **(2013) 10 SCC 618**, the following paragraphs are relevant for the purpose of the present case and are set out hereunder:

“Ranjan Gogoi, J.— *Delay condoned. Leave granted. The appellants are the wife and son of one Thangavel. By an order dated 12-1-1998 passed by the learned trial court each of the appellants have been granted maintenance @ Rs 300 per month w.e.f. 4-2-1993 i.e. date of filing of the application under Section 125 of the Code of Criminal Procedure (CrPC). As the respondent husband had not complied with the order of payment, in a miscellaneous petition i.e. CMP No. 566 of 1998 filed by the appellant, the trial court by its order dated 21-7-1998 had sentenced the respondent to imprisonment. The default in payment of maintenance was for the period 4-2-1993 to 4-2-1998.*

2. *On 5-2-2002 another miscellaneous application (Crl. MP No. 394 of 2002) was filed by the appellants claiming maintenance for the period 4-2-1993 to 5-2-2002. The same was allowed by the learned Magistrate on 31-12-2002 against which the*

respondent had filed CrI. RC No. 620 of 2003. The High Court by its order dated 21-4-2004 [*Thangavel v. Poongodi*, Criminal Revision No. 620 of 2003, order dated 21-4-2004 (Mad)] held that as CrI. MP No. 394 of 2002 was filed on 5-2-2002, under the first proviso to Section 125(3) CrPC, the appellants were entitled to claim arrears for the period of one year preceding the date of filing of the application i.e. from 4-2-2001 to 5-2-2002. Accordingly, the High Court directed the respondent (revision petitioner before it) to pay the arrears for the aforesaid period within two months failing which it was directed that an arrest warrant would be issued against the respondent and the sentence of imprisonment earlier imposed by the learned Magistrate would come into effect. As the aforesaid order of the High Court had curtailed the entitlement of the appellants to maintenance to a period of one year prior to the date of filing of CrI. MP No. 394 of 2002, the appellants have filed this appeal.

4. A reading of the order dated 21-4-2004 [*Thangavel v. Poongodi*, Criminal Revision No. 620 of 2003, order dated 21-4-2004 (Mad)] passed by the High Court would go to show that the proviso to Section 125(3) CrPC has been construed by the High Court to be a fetter on the entitlement of the claimants to receive arrears of maintenance beyond a period of one year preceding the date of filing of the application under Section 125(3) CrPC. Having considered the said provision of the Code we do not find that the same creates a bar or in any way affects the entitlement of a claimant to arrears of maintenance. What the proviso contemplates is that the procedure for recovery of maintenance under Section 125(3) CrPC, namely, by construing the same to be a levy of a fine and the detention of the defaulter in custody would not be available to a claimant who had slept over his/her rights and has not approached the court within a period of one year commencing from the date on which the entitlement to receive maintenance has accrued. However, in such a situation the ordinary remedy to recover the amount of maintenance, namely, a civil action would still be available.

5. The decision of this Court in *Kuldip Kaur v. Surinder Singh* [(1989) 1 SCC 405 : 1989 SCC (Cri) 171] may be usefully recalled wherein this Court has held the provision of sentencing under Section 125(3) to be a “mode of enforcement” as distinguished from the “mode of satisfaction” of the liability which can only be by means of actual payment. Para 6 of the Report to the above effect, namely, that the mode of enforcement i.e. sentencing to custody does not extinguish the liability may be extracted below: (SCC p. 409, para 6)

“6. A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail 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. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance ‘without sufficient cause’ to comply with the order. It would indeed be strange to hold that a person who ‘without reasonable cause’ refuses to comply with the order of the court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail. A sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail. Sentencing to jail is the means

for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability. The section does not say so. Parliament in its wisdom has not said so. Commonsense does not support such a construction. From where does the court draw inspiration for persuading itself that the liability arising under the order for maintenance would stand discharged upon an effort being made to recover it? The order for monthly allowance can be discharged only upon the monthly allowance being recovered. The liability cannot be taken to have been discharged by sending the person liable to pay the monthly allowance, to jail. At the cost of repetition it may be stated that it is only a mode or method of recovery and not a substitute for recovery. No other view is possible. That is the reason why we set aside the order under appeal and passed an order in the following terms”

(emphasis in original)

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.*

8. *In view of the above, we are left in no doubt that the order passed by the High Court needs to be interfered with by us which we accordingly do. The order dated 21-4-2004 [Thangavel v. Poongodi, Criminal Revision No. 620 of 2003, order dated 21-4-2004 (Mad)] of the High Court is set aside and we now issue directions to the respondent to pay the entire arrears of maintenance due to the appellants commencing from the date of filing of the maintenance petition (MC No. 1 of 1993) i.e. 4-2-1993 within a period of six months and current maintenance commencing from the month of September 2013 payable on or before 7-10-2013 and*

thereafter continue to pay the monthly maintenance on or before the 7th of each successive month. If the above order of this Court is not complied with by the respondent, the learned trial court is directed to issue a warrant for the arrest of the respondent and ensure that the same is executed and the respondent taken into custody to suffer imprisonment as provided by Section 125(3) CrPC.”

The claim of the person entitled under Section 125 of Code of Criminal Procedure is not waived with passage of time.

Considering the settled proposition of law, I direct that the learned Magistrate would direct the opposite party to pay the arrear maintenance for the period from 12.06.2015 to May 2018 (if not already paid).

The petitioners would be at liberty to bring this order to the notice of the learned Judicial Magistrate, 2nd Court, Berhampore. Learned court would issue notice and direct the opposite party to clear the dues within a reasonable period of time.

It has been informed that till date, the quantum of maintenance for the period from 25.06.2018 to 26.06.2019 has not been paid. If the situation remains same, as has been submitted by the learned advocate appearing for the petitioners, the learned Magistrate would exhaust harsher process of law for recovery of the whole quantum of 42 months 13 days.

With the aforesaid observations, the revisional application being CRR 1161 of 2021 is allowed.

Pending connected application, if any, is consequently disposed of.

All parties shall act on the server copy of this order duly downloaded from the official *website* of this Court.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)