

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 692 of 2018

Rina Sarkar

Versus

Kajal Sarkar

For the Petitioner : Mr. Indranil Chandra, Adv.
Mr. Ashirbad Sarkar, Adv.

Heard on : 28.03.2024

Judgment on : 19.04.2024

Ajay Kumar Gupta, J:

1. By filing this application under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973, the petitioner/wife has challenged the correctness, legality and propriety of the impugned order dated 09.01.2018 passed by the Learned Chief

Judicial Magistrate, Suri, Birbhum in Misc. Execution Case No. 100 of 2015 in connection with Misc. Case No. 35/97 under Section 125 of the Code of Criminal Procedure thereby rejected the prayer of the petitioner to recover the amount due under Section 125 (3) on the ground that the execution case filed beyond the period of limitation and time barred.

2. The factual matrix of the instant case is that the petitioner herein got married with one Kajal Sarkar, opposite party herein according to Hindu Rites and Customs at Ahmadpur on 16th January, 1996. The opposite party was in Indian Military Service at the time of marriage. Petitioner was compelled to leave the house of the opposite party as such she started living separately. To meet necessary expenses, she filed a Misc. Case No. 35 of 1997 under Section 125 of the Cr.PC, seeking maintenance before the learned Chief Judicial Magistrate, Birbhum. At the same time, opposite party also filed a Matrimonial Suit No. 76/2000 praying for divorce but the same was dismissed for default with cost vide an order dated 13th January, 2003 by the Learned Additional District and Sessions Judge, Fast Track, 1st Court, Suri, Birbhum.

2a. It is further case of the petitioner that the learned Chief Judicial Magistrate, after hearing the parties, allowed a maintenance

to the tune of Rs. 1500/- per month on 29th January, 2004 and directed the opposite party/husband to pay maintenance. Despite of the said order, the opposite party wilfully neglected to pay the maintenance in pursuant to the order dated 29th January, 2004. The same fact was informed to the concerned authority of the Indian Military Service i.e. Electroniki Aur Yantrik Engineer, Abhilekh Karyalaya, EME Records, Secundrabad – 21 about non-compliance of order dated 29.01.2004 by the opposite party. In response to the said information, the departmental memo being Memo No. 14550897K/T-I/V-I/02/MA dated 29th April, 2004, the arrear maintenance with cost and regular maintenance was allowed to the petitioner directly from the salary of the opposite party/respondent. Maintenance amount used to come directly to the petitioner from the department of Indian Military but suddenly it was stopped from February, 2007 and petitioner had no knowledge of the reason for such non-payment. Subsequently, it came to the knowledge of the petitioner that opposite party had retired from service. The concerned department had informed the petitioner to approach the Court for recovery of her arrear maintenance allowance. Having no other alternative, the petitioner filed two Misc. Execution Cases being Misc. Execution Case No. 106/2014 and Misc. Execution Case No. 62/2015 before the learned Chief Judicial Magistrate, Suri, Birbhum. However, the

learned Court allowed only the maintenance of Rs. 28,500/- out of total arrear maintenance of Rs. 1,51,500/- but Rs. 1,23,000/- remained unpaid for past 82 months i.e. from February, 2007 to October, 2014. Accordingly, petitioner again filed another Misc. Execution Case No. 100 of 2015 praying, inter alia, for the aforesaid remaining due amount of Rs. 1,23,000/- but the said prayer was rejected by the learned Chief Judicial Magistrate, Suri, Birbhum vide order dated 09.01.2018 on mere technical ground of limitation although the case of the petitioner for arrear maintenance is a continuing one.

2b. Feeling aggrieved by and dissatisfied with the said rejection order, the present petitioner has filed this revisional application.

3. Under such circumstances, the criminal revisional application has come up before this Bench for disposal.

SUBMISSION ON BEHALF OF THE PETITIONER:

4. Learned counsels appearing on behalf of the petitioner filed written notes of argument and further submitted that the learned Court below erred in law while rejecting the prayer for payment of arrear dues remained unpaid from February, 2007 to October, 2014.

4a. It is further submitted that the petitioner filed the Misc. Execution Case No. 100 of 2015 for getting the arrear maintenance as a whole as per the advice of concerned department of Indian Military on considering the representation of the petitioner that the maintenance cannot be paid from the pension of the opposite party.

4b. Under such circumstances, the petitioner does not come within the ambit of provision of limitation of Section 125(3) of the Code of Criminal Procedure, 1973. The petitioner cannot be deprived from her legitimate claim of arrear maintenance for no fault of her own but it was ill motive of the opposite party not to pay maintenance as per the order dated 29.01.2004 passed in connection with the Misc. Case No. 35/97. As such the impugned order of rejection for arrear for more than one year maintenance u/s 125(3) of CrPC is liable to be set aside and her all arrear maintenances are to be paid by the opposite party.

4c. Finally, he placed reliance of a judgment passed in **Poongodi and Another v. Thangavel**¹ to support his contention that wife is entitled to entire arrears of maintenance due from opposite party.

5. Despite of service, no body appeared on behalf of the opposite party/husband.

¹ **AIR 2014 SC 24: (2013) 10 SCC 618**

DISCUSSIONS, ANALYSIS AND CONCLUSION OF THIS COURT:

6. Having heard the submission of the learned counsels appearing on behalf of the Petitioner and on perusal of the application as well as annexure thereto, this Court finds the petitioner had filed a Misc. Execution Case No. 100 of 2015 in connection with Misc. Case No. 35/97 for recovery of arrear dues amount of maintenance from the opposite party/husband combining all the arrear dues i.e., from February, 2007 to June, 2015 in one aforesaid Misc. Execution Case.

7. Learned Magistrate has only allowed arrear maintenance for a period of November, 2014 to June, 2015 i.e. Rs. 12,000/- @ Rs. 1,500/- per month for eight months. However, learned Magistrate rejected other arrears of maintenance dues from February, 2007 to October, 2014 as the same is barred by limitation under Section 125(3) of the Cr.PC.

8. It is relevant to mention here that the petitioner had filed earlier two execution cases for recovery of maintenance allowance but the learned Magistrate allowed only the maintenance of Rs. 28,500/- out of total arrear maintenance of Rs. 1,51,500/- and rejected the prayer for recovery of maintenance allowance for past 82 months i.e. from February, 2007 to October, 2014. Without challenging such

rejection order either by filing revision or appeal rather the petitioner filed another fresh Misc. Execution Case No. 100 of 2015 praying, inter alia, for recovery of arrear maintenance for the aforesaid period including current arrears of maintenance but Learned Magistrate again rejected such prayer for recovery of maintenance for the period from February, 2007 to October, 2014 on second time, which is the subject matter of this revisional application.

9. In view of the above facts, a question arises before this Court whether the petitioner can file a fresh Execution Case for recovery of arrear dues of maintenance from opposite party/husband combining all the arrear dues which were remained unpaid from February, 2007 to October, 2014 after expiry of one year, under Section 125(3) of the Code of Criminal Procedure, 1973 or not?

10. To decide this issue, this Court would like to refer Section 125(3) of the Code of Criminal Procedure, 1973 for the purpose of ready reference, proper and fair disposal of this case as under:

“Section 125(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 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.

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."

11. From careful perusal of aforesaid provision, it reveals that there is a limitation for filing application for recovery of arrears of maintenance within a period of one year from the date on which it became due and Magistrate 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. Arrears beyond a period of one year from the date, on which the amount became due, cannot be recovered. This Court places reliance of a judgment passed in **Ganga Prasad V. Gomti**² wherein paragraph nos. 5 & 6 held, inter alia, as under:

“5. The only flaw in passing the above said order *prima facie* apparent is that the Court has not taken care of complying with the proviso to Sub-section (3) of Section 125, Cr.P.C. According to the proviso no arrears beyond a period of twelve months from the date it falls due can be recovered. As a matter of fact an application for the recovery of arrears of maintenance amount beyond one year is barred by the proviso. Thus the above order stands modified to this extent. Learned Magistrate is directed to issue fresh recovery warrants for the period of one year alone. Arrest warrant may be issued only if the applicant fails to satisfy the recovery. Arrest warrants cannot be issued until applicant fails to pay the arrears so claimed on him by the recovery warrant.

6. In view of the above discussions the order dated 2.5.1996 stands modified to the extent that arrears for one year alone may be recovered from the applicant i.e., from 2.5.1995 to 1.5.1996.”

² 2000 Cri LJ 3914

12. On further perusal of the judgment passed in **Poongodi and Another v. Thangavel** relied by the petitioner, it reveals the Hon'ble Supreme Court held in Paragraph Nos. 4, 6 and 7 as under:

“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.

6. *In another decision of this Court in Shantha V. B. G. Shivananjappa reported in (2005) 4 SCC 468 : 2005 SCC (Cri) 1089 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 reported in (1999) 5 SCC 672 : 1999 SCC (Cri) 1029. 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 reported in (1999) 5 SCC 672 : 1999 SCC (Cri) 1029.*

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.”*

13. Having gone through the judgment as aforesaid and considering the submission of the learned counsel appearing on

behalf of the petitioner, this Court finds the judgment relied by the petitioner is not applicable in this case as the facts and circumstances of the instant case is different. In the present case, petitioner had filed a fresh case being Misc. Execution Case No. 100 of 2015 in Misc. Case No. 35/97 for recovery of arrears maintenance from her husband/opposite party combining all arrear dues from February, 2007 to June, 2015 in one single execution case. After hearing the parties, learned Magistrate only allowed arrear maintenance for the period of November, 2014 to June, 2015 i.e. Rs. 12,000/- @ Rs. 1,500/- per month for eight months and rejected other arrears maintenance for the period from February, 2007 to October, 2014 as barred by limitation under the provision of Section 125(3) of the Cr.PC. The objection of the husband was that the petitioner cannot claim arrears of maintenance beyond a period of one year under the provision of Section 125(3) of the Cr.PC being barred by limitation. It was earlier rejected by the learned Magistrate in earlier execution cases. Petitioner has filed again a fresh application for execution seeking recovery of arrear maintenance as such question of successive application does not arise in this instant case.

14. The proviso to sub-section (3) of Section 125 of Cr.PC, specifically stipulated that no arrears beyond a period of twelve

months from the date it falls due can be recovered. As a matter of fact, an application for the recovery of arrears of maintenance amount beyond one year is barred by the provision of Section 125(3) of the Cr.PC. The limitation contemplated in the said proviso is the purpose of providing immediate relief to the wife or child in order to enable the wife, child and/or parents to live by providing with the essential economic wherewithal. Neither the neglected wife or parents nor the neglected child can live without maintenance amount for purchasing food and the essential articles to enable them to live with dignity in the society. The Code does not provide relief to the 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 arrears of maintenance has accrued. However, for recovery of arrears beyond the period of one year, the party has a civil remedy. Thus, the criminal revisional application has devoid of merits as such order passed by the learned Magistrate is hereby affirmed.

15. Accordingly, **CRR 692 of 2018** is, thus, dismissed without order as to costs. Connected applications, if any, are also, thus, disposed of.

16. Case Diary, if any, is to be returned to the learned Advocate for the State.

17. Let a copy of this judgment and order be sent to the learned Court below for information.

18. Interim order, if any, stands vacated.

19. Parties shall act on the server copies of this order uploaded on the website of this Court.

20. Urgent photostat certified copy of this judgment, if applied for, is to be given as expeditiously to the parties on compliance of all formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)