IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

WEDNESDAY, THE 15TH DAY OF NOVEMBER 2023 / 24TH KARTHIKA, 1945

RPFC NO. 462 OF 2023

CRIME NO.0/0 OF ,

IN CRMP NO.7/2023 OF FAMILY COURT, KALPETTA

REVISION PETITIONER/COUNTER PETITIONER:

RIJAS M.T,
[redacted]

BY ADV LEGITH T.KOTTAKKAL

RESPONDENTS/PETITIONER:

1 HAFSEENA M
[redacted]

2 RINISHA FATHIMA,
[redacted]

3 MUHAMMED ADHINAN,
[redacted]

OTHER PRESENT:

SMT T B RAMANI

THIS REV. PETITION(FAMILY COURT) HAVING COME UP FOR ADMISSION ON 15.11.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"CR"

Dated this the 15th day of November,2023

O R D E R

The question regarding the maximum sentence that can be imposed under Section 125 (3) of the Code of Criminal Procedure, 1973, refuses to fade out despite repeated pronouncements made by this Court on the point.

2. The revision petitioner challenges the proceedings in M.P.(Ex) No.7/2023 of the Family Court, Kalpetta, sentencing him to undergo imprisonment for ten months on his failure to pay the arrears of maintenance allowance to the respondents for twenty eight months. The revision petitioner was the respondent, and the respondents were the applicants before the Family Court.

Relevant Facts:

3. The respondents – the wife and two children

of the revision petitioner – had filed the execution application under Section 128 of the Code of Criminal Procedure (‘Code’ for short) to enforce the order dated 19.10.2022 in M.C No.21/2021 by directing the revision petitioner to pay the respondents arrears of monthly maintenance allowance @ Rs.4,000/- for the period from 12.03.2021 to 12.01.2023.

4. The revision petitioner has averred that he had appeared before the Family Court in the execution application and pleaded no means to pay arrears of maintenance. Even though he deposited Rs.10,000/- on 19.06.2023, the Family Court sentenced him to imprisonment for ten months. The revision petitioner has been in jail for the last four months. He has no near relatives and does not have the means to pay the maintenance allowance. The impugned proceedings are perverse, arbitrary and illegal because the Family Court is not empowered to sentence the revision

petitioner to imprisonment for more than one month. The proceedings are infringement of the revision petitioner's right to life as guaranteed under Article 21 of the Constitution of India, a violation of Section 125 (3) of the Code and the law laid down by the Hon'ble Supreme Court in ***Rajnesh v. Neha & Anr.*** [(2021) 2 SCC 324]. The revision petition may be ordered to be released from prison

5. Heard; Sri.Legith T. Kottakkal, the learned counsel appearing for the revision petitioner and Smt.T.B. Remani, the learned counsel appearing for the respondents.

6. The learned counsel for the revision petitioner strenuously argued that the impugned proceedings and the procedure followed by the Family Court are erroneous and improper. He contended that in view of the law laid down by the Honourable Supreme Court in ***Shahada Khatoon & Ors. v.***

Amjad Ali & Ors. [2000 (1) KLT 696 (SC)], the maximum period of imprisonment can only be one month. Furthermore, the Family Court has failed to issue a distress warrant as provided under sub-section (3) of Section 125 of the Code, and the execution application is time-barred as it is filed beyond one year. He urged that the revision petition be allowed.

7. The learned counsel for the respondents defended the impugned proceedings and submitted that there is no error warranting interference by this Court.

8. The two questions that emerge for consideration are:

(i) Whether the Family Court has exceeded its jurisdiction by sentencing the revision petitioner to imprisonment for a period of ten months; and

(ii) Whether the Family Court ought to have followed the procedure prescribed under

Section 421 of the Code, as postulated under Sub-Section (3) of Section 125, before sentencing the revision petitioner to imprisonment.

Question No.1

9. The respondents had filed M.C. No.21/2021 under Section 125 of the Code against the revision petitioner for maintenance. The application was allowed on 19.10.2022, directing the revision petitioner to pay the respondents Rs.8,000/- per month from the date of filing of the petition, i.e.,12.03.2021. Neither did the revision petitioner challenge the order nor pay the maintenance allowance. Accordingly, the respondents filed the execution application to recover an amount of Rs.1,76,000/- being the arrears of maintenance allowance from the date of filing of the original application till the date of filing of the execution application.

10. Despite receipt of the summons, the revision petitioner failed to appear before the Family Court and was set *ex-parte*. The first respondents filed an affidavit stating that the revision petitioner had no property or assets. Consequently, a non-bailable warrant was issued against the revision petitioner and he was arrested and produced before the Family Court. The revision petitioner pleaded that he had no means to pay the arrears of maintenance. Accordingly, by the impugned proceedings, the Family Court sentenced the revision petitioner to undergo imprisonment for ten months.

11. Chapter IX of the Code of Criminal Procedure is a Code by itself. It would be apposite to extract the relevant portions of Section 125 of the Code to properly understand the question that arises for determination.

> "125. Order for maintenance of wives, children and parents.- 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 a period of one year from the date on which it became due;
>
> xxx xxx xxx"

12. There was a cleavage of opinion among the different High Courts in interpreting sub-section (3) of Section 125 of the Code.

13. In ***Mohammed Kutty v. State of Kerala*** [1984 KLT 835], this Court has pithily interpreted Section 125 (3) of the Code in the following manner:

> "4. The sentencing power of the Criminal Court for the recovery of the maintenance amount is the question that arises for consideration. Proviso to Sub-s.(3) of S.125 of the Code says 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. The amount, in this case became due on 26-10-1982, when the Court passed the order and every month thereafter. The application was to be filed within one year from the date when the amount became due. An

application filed, as in this case within the first twelve months after the order is passed by the Magistrate is thus within time. If any application is filed subsequently, recovery of the amounts which fell due within 12 months of that application alone would be recoverable. The fact that the court had ordered the petitioner to pay maintenance from the date of application i. e. 24-6-1981 only meant that the amount was payable from 24-6-1981; but it became due when the order was passed on 26-10-1982. The arrears will thus be one lump sum due on the date of the order, i e. 26-10-1982. **Time for filing the application to recover this amount thus commences only from the date of the order. Any other interpretation would impose a premium on the right of the Court to grant maintenance, for, in that event, the Court can grant maintenance, not from the date of the application for maintenance, but only for 12 months prior to the date of the order. There is no warrant for any such assumption Even if it be true, the application for execution will have to be filed on the same date as otherwise a portion will again get barred under S.125(3). S.125(3) does not admit of any such unfair interpretation to import an unjust conclusion as well.**

5. The next 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 ofthe 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."**
>
> (emphasis given)

14. Subsequently, in ***Shahada Khatoon*** (supra), the Honourable Supreme Court observed in the following lines:

> "The short question that arises for consideration is whether the learned Single Judge of the Patna High Court correctly interpreted sub-s.(3) of S.125 of Cr.P.C. by directing that the Magistrate can only sentence for a period of one month or until payment, if sooner made. The learned counsel for the appellants contends that the liability of the husband arising out of an order passed under S.125 to make payment of maintenance is a continuing one and on account of non-payment there has been a breach of the order and therefore the Magistrate would be entitled to impose sentence on such a person continuing him in custody until payment is made. We are unable to accept this contention of the learned counsel for the appellants. The **language of sub-s.(3) of S.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."
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> (emphasis given)

15. After the exposition of the law in ***Shahada Khatoon*** (supra), divergent views emerged in interpreting the above decision.

16. This Court in ***Alora Sundaran v. Mammali Sumathi and Another*** [2006 (3) KLT 725] interpreted ***Shahada Khatoon*** as under:

> "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(3)**. 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 factual 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 Dilip 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) (FB) and Ram Bilas v.Bhagwati Devi (1991 Crl.L.J. 1098)".

(emphasis supplied)

17. Subsequently, a Division Bench of this Court in ***Sunilkumar v. Jalaja*** [2007 (1) KLT 877] interpreted ***Shahada Khatoon*** (supra) and confirmed the law laid

down in ***Mohammed Kutty*** (supra) by holding thus:

> "6. The Supreme Court has thus specifically mentioned in that decision that "for breach of non-compliance with the order of the Magistrate, the wife can approach the Magistrate again for similar relief". **That means merely because of undergoing imprisonment for one month provided for in sub-section (3) of S.125, it cannot be stated that a breach will never occur. Therefore, the decision relied on by the petitioner does not support the case of the petitioner fully. This Court in Mohammed Kutty v. State of Kerala (1984 KLT 835) held that "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. In the light of this pronouncement, the contention of the petitioner cannot be said to be sustainable."**
>
> (emphasis supplied)

18. Even after the proclamation of law by the Division Bench, there were divergent views taken by this Court, and the matter was again referred to the Division Bench for an authoritative pronouncement.

19. In ***Santhosh v. State of Kerala*** [2014 (1) KLT 98], the Division Bench upheld the view in ***Alora Sundaran*** (supra) and ***Sunil Kumar*** (supra) by, *inter*

alia, holding that “a month's imprisonment” for “every month's default” is a maximum period of imprisonment under Section 125(3) and not a maximum of one month's imprisonment for the total default.

20. Thereafter, a learned single Judge of this Court in ***Gopika v. Stalin*** [2014 (4) KLT 907] re-iterated the legal position in ***Mohammed Kutty*** *(supra)* and ***Sunil Kumar*** (supra).

21. In the instant case, the Family Court had partly allowed the maintenance application on 19.10.2022, directing the revision petitioner to pay the respondents monthly maintenance allowance @ Rs.8,000/- from 12.03.2021 onwards. As the revision petitioner failed to comply with the order, the respondents filed the execution application on 12.01.2023, i.e., well within the prescribed time period of one year, as provided under the first proviso to sub-

section (3) of Section 125, claiming arrears of maintenance for 28 months.

22. The revision petitioner was initially set *ex-parte*, and the first respondent filed an affidavit, following the principles laid down in ***Rajnesh*** (supra), affirming that the revision petitioner had no property or assets. Subsequently, the revision petitioner appeared and submitted that he had no means to pay the maintenance allowance. He also did not controvert the assertions by the respondents that he had no property or assets.

23. The enunciation of law in the afore-cited precedents leaves room for no further interpretation that the maximum sentence that can be imposed under Section 125 (3) of the Code is a month's imprisonment for every month’s default and not a maximum of a month's imprisonment for the total default.

24. In ***Kuldip Kaur v. Surinder Singh and another*** ((1989) 1 SCC 405), the Honourable Supreme Court has held that the sentencing of a person to jail is a mode of enforcement, though it is not a mode of satisfaction of the liability, which can be satisfied only by actual payment. The whole purpose of sending a defaulter to jail is to oblige the person to obey the order.

25. It is to be remembered that the respondents had filed the maintenance application on 12.03.2021, and the same was allowed only on 19.10.2022, that is, after 19 months, directing the revision petitioner to pay the respondents' maintenance from 12.03.2021. The respondents filed the execution application under Section 128 on 12.01.2023, claiming arrears of maintenance for 28 months, well within one year as prescribed under the first proviso to Sub-Section (3) of Section 125.

26. In the said situation, it would be a mockery of justice to sentence the revision petitioner with a fleabite sentence of imprisonment for one month, as urged by his Counsel, when admittedly the revision petitioner has to pay arrears of maintenance for 28 months. It is only a hyper-technical contention that the respondents have to file separate execution applications for each month's default, and only then can separate sentences of imprisonment for up to a month be imposed. The law does not postulate such an arduous procedure to be followed by persons living in vagrancy and destitution.

27. Even otherwise, a careful reading of the first proviso to sub-section (3) to Section 125 demonstrates that a warrant of arrest cannot be issued for recovery of arrears of maintenance if the application is filed beyond one year from the date on which the arrears became due, and not the execution application is not

maintainable.

28. At the cost of repetition, it is reiterated that the execution application in the present case was filed well within one year from the date the arrears of maintenance fell due. Therefore, there is no illegality or irregularity in the Family Court sentencing the revision petitioner to undergo imprisonment for 10 months for non-payment of the arrears of 28 months maintenance allowance. Thus, I answer question No.1 against the revision petitioner.

Question No.2

29. Now, coming to the next question regarding the failure of the Family Court in not following the procedure for levy of fines as contemplated under Section 421 of the Code.

30. Section 125 (3) extracted above, stipulates that in case of failure of a person to comply with an

order to pay maintenance without sufficient cause, then for every breach, the Magistrate has to issue a warrant for levying the amount due in the same manner provided for levying fines.

31. It is profitable to extract Section 421 of the Code, which reads as follows:

> "**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:
>
> Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.
>
> (2) The State Government may make rules regulating the manner in which warrants under clause (a) of subsection (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.
>
> (3) Where the Court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land

revenue, as if such warrant were a certificate issued under such law:

Provided that no such warrant shall be executed by the offender's arrest or detention in prison."

32. It is well-settled in a whole line of precedents that the Courts shall not order a warrant of arrest against a defaulter, without following the procedure under Section 421 of the Code.

33. Nonetheless, after the pronouncement of the celebrated judgment in ***Rajnesh v. Neha*** (supra), a revolutionary change has been brought in the procedure to be followed by the courts in dealing with the applications filed under Chapter IX of the Code. The Hon'ble Supreme Court has issued comprehensive procedural and normative directions streamlining the maintenance laws, *inter alia,* directing that the parties in a maintenance application have to file affidavits of disclosure of their assets and liabilities, which must be considered by Courts while deciding the application. It is also held that, in case of a dispute on the declaration

made in the affidavits of disclosure, the aggrieved person can seek leave of the Court to serve interrogatories on the opposite side and seek production of relevant documents as provided under Order 9 of the Code of Civil Procedure, and in case a false statement or misrepresentation is made, the Court can initiate proceedings under Section 340 of the Code or for contempt of court.

34. In the instant case, the Family Court, following the directions laid down in ***Rajnesh v. Neha*** (supra), directed both parties to file their affidavits of disclosure in the original proceedings. The revision petitioner filed his affidavit stating that he had no movable or immovable properties. Again, on the execution side, the Family Court directed the first respondent to file an affidavit regarding the assets of the revision petitioner, and she reiterated that the

revision petitioner had no assets or properties. Based on the affirmation in the affidavits, that the revision petitioner had no movable or immovable properties, the Family Court issued a non-bailable warrant against the revision petitioner. I do not find any error or illegality in the procedure adopted by the Family Court in the post-***Rajnesh*** era. Once a party declares on oath that he has no movable and immovable properties, it would be an empty formality to follow the procedure under Section 421 because, ultimately, the enquiry by the revenue authorities would yield the same result as disclosed by the parties on solemn affirmation. The exposition of the law in ***Rajnesh*** was to remove the stumbling blocks in the procedure and the inordinate delay being caused in the disposal of maintenance applications and the enforcement of the orders. It is trite, that procedural laws are handmaids of justice. Therefore, the dispensation of the procedure

under Section 421 of the Code, in a case where the respondent disclosed that he has no movable or immovable property, is justifiable and sustainable in law. In the emerged scenario post ***Rajnesh***, I do not find any meaningful purpose in the Courts ritualistically following the procedure under Section 421, especially after the respondent states on oath that he has no property, other than to prolong the miseries of the persons living in vagrancy.

35. There are thirty-five Family Courts in the State. The statistics reveals that there are approximately 3000 cases pending before the Revenue Authorities, at different stages, under Section 421 of the Code. Destitute women and children are made to loiter in the corridors of the Courts to receive their monthly maintenance, which adds to their woes.

36. In the light of the authoritative

pronouncement by the Hon'ble Supreme Court in ***Rajnesh*** (supra) and again reiterated in ***Aditi Alias Mithi v. Jithesh Sharma*** (MANU/SC/1220/2023), this Court is of the firm view that the time is ripe for the Parliament to ponder in bringing corresponding changes in Chapter IX of the Code to make it consonance with the law declared in ***Rajnesh*** or even think of a comprehensive maintenance law.

37. In view of the discussions rendered above, I answer Question No.2, also against the revision petitioner.

38. In the result,

(i) The revision petition is dismissed.

(ii) The sentence of imprisonment ordered by the Family Court is confirmed, but by clarifying that, if the revision petitioner pays the entire arrears of maintenance before completing the sentence, he shall be released from prison on the date the entire arrears of maintenance

are paid.

(iii) Needless to mention, the Family Court shall give credit to all the payments made by the revision petitioner while calculating the arrears of maintenance.

Sd/-

C.S.DIAS,JUDGE

DST/15.11.23

//True copy//

P.A. To Judge