



Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION (ST) NO.2435 OF 2024

J

J

...Petitioner

Versus

1. The State of Maharashtra
(at the instance of Mulund Police Station)

2.

...Respondents

Mr. Himanshu S. Shinde for the Petitioner.

Mr. Bhuvan Singh for Respondent No.2. (Thr. Legal aid)

Mr. Tanveer Khan, APP, for the Respondent/State.

**CORAM : SHARMILA U. DESHMUKH, J.
RESERVED ON : FEBRUARY 22, 2024
PRONOUNCED ON : FEBRUARY 26, 2024**

JUDGMENT :

1. Rule. Learned AGP waives notice on behalf of State. Mr. Bhuvan Singh waives notice on behalf of Respondent No2. With consent of parties, the Petition is taken up forthwith for final hearing.

2. By this Petition challenge is to the order dated 20th January, 2024 passed by the Metropolitan Magistrate in C.C. No 96/DV/2018 sentencing the Petitioner to undergo simple imprisonment of 47 months for default in payment of maintenance of 47 months with the condition that if the Petitioner paid the amount earlier, he shall be released forthwith.

3. The facts of the case are that C.C. No. 96/DV/2018 was preferred by the Respondent No 2 wife under the provisions of Protection of Women from Domestic Violence Act, 2005 (D.V. Act.) on 18th August, 2018 seeking various reliefs under Section 18, 19, 20, 21, and 22 of the D.V. Act. By order dated 23rd September, 2019, passed under Section 23 of the D.V. Act, the Metropolitan Magistrate *interalia* directed the Petitioner to pay sum of Rs. 15,000/- per month as interim maintenance to the Applicant and a sum of Rs. 10,000/- per month to their daughter Mahek. By an Application dated 6th January, 2020 filed under Section 25 of the D.V. Act, the Petitioner sought modification of the interim maintenance order, which is stated to be pending. As the interim maintenance was being paid intermittently in installments, an Application for issuance of arrest warrant came to be filed by Respondent No. 1-wife on 27th July, 2023 setting out details of the part payments made on various dates from 4th December, 2019 to 10th July, 2023 amounting to

Rs. 3,25,000/-. It was contended that the arrears of maintenance of 59 months aggregates to Rs. 11,50,000/- as from the date of filing of the Application the maintenance has been granted out of which only a sum of Rs. 3,25,000/- has been received. By order dated 8th November, 2023, the Metropolitan Magistrate observed that no payments were made after 10rd July, 2023 and issued arrest warrant against the Petitioner under Section 125 (3) of Cr.P.C. read with Section 28 of the D.V. Act for recovery of interim maintenance of Rs. 11,58,000/-. Subsequently, an application was filed on 16th December, 2023 by the Respondent No 2 wife for reissuing of arrest warrant. On the same date another application was filed by the Respondent No 2 wife seeking issuance of arrest warrant now contending that the arrears of maintenance is for 64 months amounting to Rs 16,00,000/ out of which only Rs 3,25,000/ has been paid. On the application seeking re-issuance of arrest warrant, arrest warrant was issued on 27th December, 2023. The arrest warrant came to be executed and the Petitioner was produced before the Metropolitan Magistrate and by order dated 20th January, 2024, the Metropolitan Magistrate noted that the Petitioner is willing to deposit Rs 1,00,000/ and he be permitted to deposit. It was held that despite deposit of Rs 1,00,000/ there are arrears of Rs 11,75,000/. Resultantly, the Petitioner was sentenced to simple imprisonment for the period of 47 months for

the default in payment of arrears of maintenance of 47 months.

4. Heard Mr. Shinde, learned counsel for the Petitioner and Mr. Singh, learned appointed counsel for Respondent No.2. A short note on submissions has been tendered by learned Counsel for the Respondent No 2 setting out the facts of the case.

5. Mr. Shinde, learned counsel for the Petitioner would submit the orders passed under Section 12 of D.V. Act are enforced as per Section 125 of Code of Criminal Procedure, 1973 (Cr.P.C). Pointing out sub section (3) of Section 125, he submits that warrant can be issued by the Magistrate for failure to comply with the order of maintenance and the maximum punishment which can be imposed by the Magistrate is one month for the whole or any part of each month's maintenance remaining unpaid and the proviso provides for the application to be made within a period of one year from the date on which it becomes due. He submits that the proviso prescribes that the maximum punishment which could be imposed by the Magistrate is of 12 months. In support, he relies upon the following decisions.

- *Anil Sampatrao Kothawale vs. Pushpabai Anil Kothawale [II (2019) DMC 682 (Bom.)].*
- *Harbanslal Sahnia vs. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107].*
- *District & Sessions Judge, Pali vs. Unknown*

[2022(1) Criminal CC 361].

6. *Per contra*, Mr. Singh, learned counsel for the Respondent wife submits that it is the settled position in law that the D.V. Act provides for civil remedies and the proviso to Section 125 (3) has nothing to do with the sentencing power of the Magistrate. He submits that upon a careful reading of the proviso to Section 125 of the D.V. Act it is clear that the same provides for the period of limitation within which an Application is required to be filed. He submits that there is no bar to filing of common Application for recovery of arrears of maintenance even for a period of exceeding 12 months. He submits that considering that the provisions of the D.V. Act are civil in nature, while exercising the powers under Section 125(3) of the Cr.P.C., the Metropolitan Magistrate stands outside the regular scheme of Cr.P.C and sentencing powers are not circumscribed/restricted by the Cr.P.C. He distinguishes the judgment in the case of **Gorakshnathh Khandu Bagale vs. State of Maharashtra & Ors.** *[2005 CRILJ 3158]* relied upon by the learned counsel for the Petitioner and would submit that this Court had noted the decision of the Allahabad High Court and however, erroneously has not applied the same. He submits that the proviso in the present case does not qualify the main Section. According to him, a common Application for recovery of arrears can be maintained for arrears of collective months and the same is not

barred by the proviso. On the facts of the case, he submits that the Respondent No. 2 had filed application in December, 2019 for the arrears between August, 2018 to December, 2019, on 6th January, 2020 for arrears between August, 2018 till January, 2020, on 18th March, 2021 for the arrears between August, 2018 till March, 2021. He submits that as such, the applications have been within the period of limitation is provided within the proviso of Section 125(3) of Cr.P.C. He would submit that the limitation period would not apply where minors are involved and in the present case, there are arrears of maintenance in respect of the minor. Summarizing the arguments, he would submit that the Magistrate is empowered to impose a sentence for period exceeding 12 months and as failure to pay maintenance is not an offence as defined under Cr.P.C, the Magistrate's powers are not restricted to the punishment which can be imposed, higher punishment can be granted as arrears of maintenance is continuing breach and imprisonment under Section 125(3) is mode of enforcement of continuing liability. In support he relies upon the following decisions.

- *Nandkishor Vs. Mangala [2018 (3) Mh.L.J].*
- *Jaswantsinghji Fathehsinghji vs. Kasuba Harisinh. 1955 ILR 6.*
- *Emperor vs. Beni [AIR 1938All386].*
- *Ishverlal Thakorelal Almaula vs. Motibhai Nagjibhai*

[1965 SCC OnLine SC 102].

- *Shahada Khatoon And Others vs Amjad Ali and Ors [(1999) 5 SCC 672].*
- *Manoj Markas Thorat vs State of Maharashtra & Anr. [2010 SCC OnLine Bom. 63].*

7. I have considered rival contentions raised by the counsel for the parties and perused the record.

8. The issue which arises for consideration in the present case is whether the power of the Magistrate to sentence a defaulter for non payment of maintenance granted under the D.V. proceedings is restricted to impose imprisonment for period of 12 months by virtue of the proviso to sub section (3) of Section 125 of Cr.P.C. In the instant case, the Petitioner has been sentenced to imprisonment for a period of 47 months for default in payment of maintenance of 47 months.

9. Perusal of the Application filed by the Respondent No. 2 wife seeking issuance of arrest warrant would indicate that the non payment of maintenance of 59 months has been alleged which would be from the date of filing of the D.V. Application on 18th August, 2018. In the present case, by order dated 23rd September, 2019, the Metropolitan Magistrate has granted interim maintenance of Rs. 15,000/- to the Respondent No. 2 and Rs. 10,000/- to the minor from the date of the application i.e. 18th August, 2018. Admittedly, only a sum of Rs. 3,25,000/- has been paid

from December, 2019 till July, 2023 and thereafter at the time of sentencing the Petitioner has been permitted to deposit a sum of Rs. 1,00,000/.

10. It is settled by the Full bench decision of this Court in case of *Nandkishor Pralhad Vyawahare vs Mangala w/o of Pratap Bansar* (supra) that the proceedings under the D.V. Act are predominantly of civil nature. Coming to the D.V. Act, the provisions of the D.V. Act empowers the Metropolitan Magistrate to grant monetary reliefs under Section 20 of the D.V. Act which includes grant of maintenance to the aggrieved person as well as her children. Section 28 of D.V. Act provides that the proceedings are to be governed by the provisions of Cr.P.C. The provisions of D.V. Act do not provide any mechanism for enforcement of maintenance orders passed in the D.V proceedings. The proceedings are predominantly civil in nature and take the colour of criminality only upon breach of protection order by the Respondent or for non discharge of duties by Protection officer which is evident from Section 31 and Section 32 of D.V. Act which provides for maximum punishment of imprisonment of one year and/or fine.

11. In exercise of powers conferred by Section 37 of the D.V. Act, the Central Government has framed Rules in the year 2006. Sub Rule (5) of Rule 6 of the Rules of 2006 provides that the Application under Section

12 shall be dealt with and the orders enforced in the same manner laid down under Section 125 of the Cr.P.C. If that be the position in law, while exercising the power under Section 125(3) for enforcing the orders of maintenance, the provisions of Cr.P.C governs the proceedings.

12. For our purpose, sub section 3 of Section 125 of Cr.P.C is relevant which reads thus:

“(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 many make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.”

13. Sub section 3 of Section 125 of Cr.P.C. empowers the Magistrate for every breach of the order to issue warrant for levying the amount due and for sentencing the person for the whole or any part of each months maintenance remaining unpaid to imprisonment for a term which may extend to one month or until payment if sooner made. Proviso to sub section (3) of Section 125 restricts the power of the Magistrate to issue warrant for recovery of the amount due unless application is made to the Court to levy such amount within a period of one year from the date on which it becomes due. Upon holistic reading of sub section 3 of Section 125, it is evident that the same provides for maximum imprisonment of one month for each month’s maintenance or any part thereof remaining unpaid, which application for issuance of warrant is required to be filed within a period of one year from the date it becomes due.

14. There has been considerable debate on the proviso to sub section (3) as to whether the proviso limits the power of the Magistrate to sentence the defaulter to a term exceeding 12 months. Plain reading of the proviso makes it evident that the proviso creates an embargo on power of Magistrate to issue warrant for recovery of amount which has become due

beyond period of one year. Although on first blush it appears that the proviso deals with the limitation for filling of application and bars issuance of warrant in respect of any amount unless an application is made within period of one year from the date from which the amount has become due, the proviso when read with the main section makes it evident that by limiting the application for issuance of warrant to a period of 12 months, the power of the Magistrate stands restricted to impose maximum punishment of imprisonment for period 12 months. If an application cannot be filed seeking warrant for recovery of amount remaining unpaid for period of more than one year, there is no question of imprisonment being imposed for a term exceeding one year. The period of 12 months is the outer limit.

15. In this context, it will be profitable to refer to Section 29 of Cr.P.C which provides that the Court of Magistrate of First Class may pass a sentence of imprisonment for a term not exceeding three years and/or fine. Reading the provisions of Section 125(3) with Section 29 of Cr.P.C and Section 28 of D.V. Act, I am not inclined to accept the submission of learned Counsel for Respondent No. 2 wife that as the D.V proceedings provide for civil remedies, there is no restriction on sentencing powers of Metropolitan Magistrate.

16. That however cannot be interpreted to mean that separate

application is required to be filed for each months' default and a common application can be filed limited to 12 months default and lone warrant can be issued for default of 12 months, however, the sentence which can be imposed is maximum of 12 months in case the default is of 12 months. Successive applications for issuance of warrant can be filed provided that only 12 defaults are clubbed in one application. In case of ***Gorakshnath Khandu Bagal vs State of Maharashtra*** (supra), Division Bench of this Court was dealing with the contention that under Section 125 (3) of Cr.P.C the Magistrate has the power to impose sentence of only one month and the sentence of 12 months in that case was not justifiable. The facts of that case were that application for issuance of warrant for recovery of arrears of maintenance for period of 16 months was filed. The Division Bench considered the provisions of Section 125 of Cr.P.C and held that in one application for enforcement of order under Section 125 maximum due amount which can be claimed is of 12 months and reading the proviso it is clear that for default of the whole or any part of each month's unpaid maintenance the total imprisonment may extend upto period of 12 months. The Division bench held in paragraph 9 as under :

“9. However, we have noted that the controversy involved for the said reference has been decided by the Apex Court in the case of Shahada Khatoon v. Amjad Ali (1999 Cri LJ 5060) referred to above. Since we have distinguished the judgment of Shahada Khatoon v.

Amjad Ali, taking into consideration facts of the present case and also by making reference to the language of Section 125(3) and the proviso referred thereto and also from form of warrant provided under Schedule-II in Form No. 18, we record our finding that the Magistrate can impose a punishment for default of each month or a part of each month's default in payment of maintenance, by awarding imprisonment for a period of one month or till the payment is made, whichever is sooner. If there are arrears for more than one month then the imprisonment exceeding for a period of one month can be imposed. However, what, we find that the proviso contemplates Application within 12 months and thereby at the most, in one application 12 defaults can be clubbed together and after every 12 defaults, a separate application will have to be filed. However, in that eventuality in each application, as there are maximum 12 defaults, the Magistrate may impose imprisonment extending up to a period of 12 months, but that is outer limit. The lesser Imprisonment can be imposed and such Imprisonment will be followed until the payment is made, that means, if the amount is paid during the period of imprisonment, the person will have to be released immediately. In short, we find that there is no substance in this revision petition and the revision petition is accordingly rejected”.

17. The Apex Court in case of ***Shahada Khatton & Ors. Vs. Amjad Ali & Ors.***, [(1999) 5 SCC 672] has held thus:

“ The short question that arises for consideration is whether the learned single Judge of the Patna High Court correctly interpreted Sub-section (3) of [Section 125](#) of the 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 Section 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-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 of non-compliance of the order of the Magistrate the wife can approach again to the Magistrate for similar relief. By no stretch of imagination the Magistrate can 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”.

18. The Apex Court in the above noted decision was considering the issue of power of Magistrate to impose imprisonment for a term which may extend to one month and has upheld the power of Magistrate to impose imprisonment for maximum period of one month. The said decision does not lay down an absolute proposition of law that by reason of power of Magistrate to impose imprisonment for period of one month, the Magistrate can impose imprisonment for each months default without

any outer limit. The submission of learned counsel for Respondent No. 2 is that the decision of *Gorakshnath Khandu Bagal vs. State of Maharashtra* (supra) has not laid down the correct law as the full bench decision of Allahabad High Court in *Emperor vs. Beni, [AIR 1938 All 386]* was not considered. It is trite that the decision of the other High Courts is not binding on this Court and the same has only persuasive value. What is preposterous is the submission that the decision of Apex Court in *Shahada Khatoon & Ors. Vs. Amjad Ali & Ors.* has not laid down the correct law as the decision of Full Bench of Allahabad High Court was not noted. Under Article 141 of Constitution of India the law declared by the Apex Court is binding on all Court within the territory of India. I am respectfully bound by the decisions of the Apex Court and Division Bench of this Court.

19. Apart from the above, the submission has been made upon misreading of the Full bench decision of Allahabad High Court. The issue for consideration in that case was whether the defaulter in payment of maintenance under Section 488 of Old Cr.P.C. can be sentenced for period of more than one month where only one warrant has been issued. The Full Bench held that the legislative intent was to empower the Magistrate after execution of one warrant only to sentence the defaulter to imprisonment for period of one month in respect of each month's default

and that the section does not enjoin that there should be a separate warrant in respect of each term of imprisonment for one month. It was held that where arrears have been allowed to accumulate the Court can issue lone warrant and impose a cumulative sentence of imprisonment. Before the Full Bench there was no issue raised as to power of the Magistrate to impose sentence for term exceeding 12 years in view of the proviso limiting the application for recovery of 12 months unpaid arrears of maintenance. Learned Counsel for the Respondent No. 2 has read only the concluding paragraph without noticing the facts of the case, the issue which arose for consideration before the Full Bench and the reasoning for the conclusion. In that case the defaulter was sentenced to imprisonment of 6 months for arrears of maintenance of about 24 months.

20. The issue as to whether the Magistrate is empowered under Section 125 (3) of the Cr.P.C. to impose imprisonment for a term extending beyond 12 months is no longer *res integra* and has been settled by the Division Bench decision in the case of ***Gorakshnath Khandu Bagale*** (*supra*) noted above. The contention of learned Counsel for Respondent No 2 wife is that in case of ***Anil Sampatrao Kothavale Vs Pushpabhai Anil Kothavale***(*supra*), it has been held that a common application can be maintained with respect to arrears exceeding 12 months. In that case, in paragraph 13, the learned Single Judge has held that the Magistrate can

entertain separate applications or even entertain a common application for several months of default and pass appropriate order. There is no observation that a common application can be filed with respect to arrears exceeding 12 months and words used by the learned Single Judge is “several months of default”. Pertinently the learned Single Judge has noted and followed the decision of Division Bench in *Gorakshnath Khandu Bagale (supra)*.

21. Now coming to the decisions relied upon by the learned counsel for Respondent No. 2, there is no quarrel with the full bench decision in the case of *Nandkishor Pralhad Vyawahare vs. Mangala w/o Pratap Bansar, [2018 (3) Mh.L.J.]* which held that the proceedings under the D. V. Act are essentially civil in nature. In the case of *Jaswantsingji Phatehasinghji vs. Kasuba Harisinh* the Court was concerned with an Application filed under Section 488 of the old Cr.P.C. and the issue was whether the same was maintainable without previous sanction of the Central Government. The learned Single Judge held that the proceeding under Section 488 is essentially civil remedy given to the abandoned wife and children to approach the Magistrate for an order of maintenance. There is no dispute with the proposition of law laid down in the said decision. The next decision in the case of *Ishverlala Thakorelal Almaula vs. Motibhai Nagjibhai, [1965 SCC OnLine SC 102]* dealing with the

functions of a proviso. The said decision does not assist the case of Respondent No. 2 for the reason that in the present case, the proviso to sub section 3 qualifies the period within which an application for issuance of warrant can be made to the Magistrate. The proviso cannot be said to be independent of the subject matter of sub section 3 nor can it be interpreted as a substantial provision dealing independently with the matter specified therein. A reading of the proviso, with sub section 3 would indicate that the same qualifies the power of the Magistrate to issue a warrant for recovery of any amount limiting the same for the period of one year from the date on which it becomes due. In the case of **Manoj Markas Thorat** (supra), several execution applications were filed for periods of 12 months or less and the learned Single Judge upheld the power of sentencing the husband in four execution applications to such number of months as were the arrears. The Learned Single Judge followed the judgment of Division Bench in case of **Gorakshnath Khandu Bagale** (supra). The decision assists the case of the Petitioner. As regards the contention that the period of limitation does not apply to maintenance granted to minors, as held above, it is the power of Metropolitan Magistrate to impose imprisonment for period exceeding 12 months which is restricted.

22. The issue has already been settled by division bench of this Court

in the case of **Gorakshnath Khandu Bagal** (supra) and in one application 12 defaults can be clubbed together and after every 12 defaults a separate application will have to be filed, and as such, the Magistrate may impose imprisonment for term of 12 which is the outer limit. However, it needs to be noted that for the subsequent default, a separate application can be filed for which separate imprisonment can be imposed subject to the limitation prescribed by the proviso that the same is filed within a period of one year from date which it becomes due.

23. Now coming to the facts of the present case, upon query by this Court, learned Counsel for Respondent No. 2 submitted that the issuance of warrant was pursuant to the application dated 27th July, 2023 annexed at Page 57 of the Petition. Perusal of the application indicates that the pleading is that there is default of 59 months and the intermittent payments made by the Petitioner were set out. Considering the proviso to Section 125(3) of CR.P.C, it was incumbent upon the Metropolitan Magistrate to first consider whether the application has been filed in respect of default of monthly maintenance for period of 12 months preceding the application, which was not done. The impugned order does not indicate any finding on the aspect of period of default and it is only observed that there is default of 47 months when the application states that there is default of 59 months. The Petitioner has been sentenced to

simple imprisonment for period of 47 months for default of 47 months without noticing the outer limit on power of the Magistrate to impose sentence of imprisonment which is set out in the proviso to sub section (3) of Section 125.

24. Having regard to the discussion above, Petition succeeds and the impugned order dated 20th January, 2024 is quashed and set aside. Consequently, the Petitioner is directed to be released forthwith. It is clarified that the quashing of the impugned order does not restrict the Respondent No. 2 wife from filing fresh application for issuance of warrant for non payment of maintenance setting out the relevant details. It is open for the Respondent No. 2 wife to file separate applications for issuance of warrant subject to outer limit of 12 defaults being clubbed in one application. If such application is filed, the Metropolitan Magistrate to consider the same in accordance with the observations made herein. Rule is made absolute.

25. All concerned to act on authenticated copy.

(SHARMILA U. DESHMUKH, J.)