

(2023) 01 KL CK 0279

In the High Court Of Kerala

Case No : Original Petition (Crl.) No.497 Of 2021

A.P. Sindhu

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 03-01-2023

Acts Referred:

Constitution of India, 1950 — Article 32
Code of Criminal Procedure, 1973 — Section 125, 125(3), 128
Family Courts Act, 1984 — Section 18, 18(2)

Citation : (2023) 01 KL CK 0279

Hon'ble Judges : Mary Joseph, J

Bench : Single Bench

Advocate : Mohamed Jameel, Sanal P Raj, A.Dinesh Rao

Final Decision : Allowed

Judgement

Mary Joseph, J

1. Order passed by Family Court, Malappuram (for short 'the court below') on 20.01.2021 in Crl.M.P.(Ex) No.144/2020 was assailed in the petition on hand by the petitioner in M.C. No.999/2011.

2. By an order passed in the M.C. on 11.04.2018, Family Court, Malappuram has directed the 2nd respondent to pay monthly maintenance allowance at the rate of Rs.3,500/- to the petitioner from the date of the petition. The 2nd respondent failed to pay the monthly maintenance allowance as directed. Therefore, Crl.M.P. (Ex) No.144/2020 seeking for enforcement of the order passed in the M.C was filed by the petitioner before Family Court, Malappuram, true copy of which is produced alongwith the petition on hand as Ext.P1. Ext.P1 was returned by the court below for presentation before the proper court stating that it has no jurisdiction to execute the order, true copy of which is produced alongwith the petition on hand as Ext.P2. Crl.M.P (Ex) Nos.194/2018 and 82/2018 filed by the petitioner seeking for execution of order were also dismissed. Crl.M.P. No.01/2021 filed by the petitioner to review the orders of dismissal as above was

also dismissed, copy of which order is also produced alongwith the petition on hand as Ext.P3.

3. The court below heard on maintainability of the petitions seeking execution filed before it and upholding the argument of the learned counsel for the respondent and relying on the dictums in Vijay Kumar Prasad v. State of Bihar [2004 KHC 601] and Denny Antony and Another v. Marykutty Abraham [2007 KHC 5126] held that the execution petition is to be filed before the Family Court within whose jurisdiction the respondent is residing and therefore, returned it for presentation before the proper court. A petition seeking review was filed and the court below dismissed that also.

4. The relevant part of the impugned order being apposite reference is extracted hereunder:

"6. The mode of execution is issuing distress warrant for attachment and sale of the property of the respondent and on his failure by arrest and detention of respondent. The arrest and detention of the respondent is feasible only if the respondent is residing within the jurisdiction of the court executing the order. That is why it is provided in section 128 of the Cr.P.C that the order may be enforced by any Magistrate in any place where the person against whom it is made may be. The provision refers to the Magistrate having jurisdiction of the place of the respondent. This is the only provision which deals with execution of the order. Section makes it clear that the order is to be executed by the Magistrate within whose jurisdiction the respondent may be. The section doesn't say that it may be executed by the Magistrate who passed the order. The want of mention of the Magistrate which passed the order in Section 128 of the Cr.P.C will make it clear that only the Magistrate having jurisdiction over the place of the respondent can execute the order. The view that it can be executed either by the court which passed the order is not sustainable. It is well said that the words "may be" used in a statutory provision may mean "shall". In view of the omission in Section 128 of the Cr.P.C of the power of Magistrate which passed the order to execute the same, and the specific mention that it may be executed by the court within whose jurisdiction the respondent may be, it is apparently evident that section 128 of the Cr.P.C. confers jurisdiction for enforcement of the order only on the court within whose jurisdiction the respondent may be. The words "may be" appearing in the sentence "may be enforced by any Magistrate in any place where the person against whom it is made may be" is used in reference to various Magistrates within whose jurisdiction the respondent may be. It cannot be interpreted to mean that the order can be executed by the Magistrate who passed the order (even if respondent is not within his jurisdiction). In fact, s.128 of Code of Criminal Procedure enables only the Magistrate within whose jurisdiction the respondent is, to enforce the same. Specific mention of such Magistrates excludes the jurisdiction of other Magistrates including the one who passed the order unless respondent is within his jurisdiction. S.128 is the only provision dealing with execution of the order for payment of monthly allowance

for maintenance. Section 18(2) of Family Courts Act also provides that orders under Chapter IX of Cr.P.C. are to be executed in the manner provided therein."

The court below on the basis of Section 128 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') has arrived at a finding that the applications seeking execution are not maintainable.

5. Section 18 of the Family Courts Act, 1984 (for short 'the Act') reads:-

"18. Execution of decrees and orders.

(1) A decree or an order other than an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), passed by a Family Court shall have the same force and effect as a decree or order of a Civil Court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure, 1908 (5 of 1908) for the execution of decrees and orders.

(2) An order passed by a Family Court under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) shall be executed in the manner prescribed for the execution of such order by that Code .

(3) A decree or order may be executed either by the Family Court which passed it or by the other Family Court or ordinary Civil Court to which it is sent for execution." (Emphasis supplied)

Sub-section (2) of Section 18 of the Act specifically provides that an order passed by Family Court under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) shall be executed in the manner prescribed for execution of such order by that Code.

6. Chapter IX Cr.P.C makes provision for passing of an order granting maintenance allowance for wives, children and parents by a Magistrate of the First Class upon proof by any of the persons referred to, of neglect or refusal by any person maintaining the status as a husband, father or son, as the case may be, to maintain them.

7. Sub-section (3) of Section 125 Cr.P.C. provides:

"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."

As per Sub-section (2) of Section 18 of the Act an order passed by Family Court under Chapter IX Cr.P.C. shall be executed in the manner prescribed for the execution of such order by that Code.

8. Section 128 Cr.P.C. reads:

"128. Enforcement of order of maintenance.- A copy of the order of maintenance or interim maintenance and expenses of proceeding, 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 enforced 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."

Under Sub-section (3) of Section 125 Cr.P.C., its provisos and Section 128 Cr.P.C., the reference is to 'any Magistrate'.

9. Under Section 128 Cr.P.C an order of maintenance or interim maintenance and expenses of the proceedings, as the case may be, be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied about the identity of the parties and the non payment of the allowances or as the case may be, expenses, due. (Emphasis supplied)

10. The words emphasised would indicate that an order granting monthly maintenance allowance or monthly allowance for interim maintenance may be enforced by any Magistrate within whose jurisdiction the respondent may be, provided the court is satisfied about the identity of the parties and non payment of maintenance allowance. Therefore, any Magistrate within whose jurisdiction, the respondent resides or is available at the relevant time when the order is sought to be enforced, will have jurisdiction to enforce an order granting monthly maintenance allowance or interim monthly allowance, as the case may be.

11. Sub-section (2) of Section 18 of the Family Courts Act, 1984 makes Sub-section (3) of Section 125 Cr.P.C and Section 128 Cr.P.C applicable to Family Courts also. Therefore, any Family Court within whose jurisdiction the respondent is or may be found at the relevant time when the order granting maintenance allowance, interim or final, as the case may be, is taken for enforcement could enforce the order on being convinced from materials produced for its consideration that the parties in the execution petition are one and the same as in the maintenance case and also that the party responsible to pay the same

under the order, failed to pay it.

12. It does not follow from the above provisions that a Family Court which passed an order for maintenance allowance, interim or final, is not empowered to execute the order as held by the court below in the impugned order. Petition to execute an order granting maintenance allowance can be filed before the court which passed it and the order can be enforced by any Family Court within whose jurisdiction the respondent is or whereto, he had shifted 'his stay' on account of his change of residence or by virtue of transfer of place of employment.

13. If the person directed to pay fails to pay maintenance allowance ordered by a Family Court, as provided under Sub-section (3) of Section 125 Cr.P.C without any sufficient cause the court can issue a warrant for levying the amount due as if fine imposed under the Code is realised and may also sentence such person for the arrears remaining unpaid in full or in part. Under Section 128 Cr.P.C, enforcement as above can be by a Family Court within whose jurisdiction the person responsible for such payment of allowance has shifted and maintained a residence later to the passing of the order granting maintenance allowance. Or in otherwords, the Family Court which passed the order granting monthly maintenance allowance can get it's own order enforced or given effect to through a Family Court within whose jurisdiction the respondent is, at the relevant time when it was enforced.

14. Section 128 Cr.P.C is meant to safeguard the interest of women, children and parents, who are stakeholders under Section 125 Cr.P.C. The words 'may be' shall not be taken to have an imperative meaning as 'shall' as held by the court below in the impugned order.

15. If the word 'may' is taken to have the impact of 'shall' as held by the court below, it undoubtedly would impair the meaning given by the Parliament to a benevolent provision like Section 125 Cr.P.C. Section 128 Cr.P.C cannot be read to have the meaning that petition to execute an order granting maintenance allowance shall only be moved in a Family Court within whose jurisdiction the person responsible for such payment is found. Or in otherwords, due to change of address of the person responsible for paying the maintenance allowance to a place away from the jurisdiction of the Family Court which passed the order granting maintenance allowance, the original Family Court will be ousted from jurisdiction to entertain an execution petition. Such a construction would only be against the true intent and spirit of the Union Parliament and the court below is erred and unjustified in passing the impugned order returning the execution petition as not maintainable before it, for want of jurisdiction. It ought to have entertained the petitions filed before it for execution of it's order granting maintenance allowance and ought to have enforced it by getting the warrant issued to the respondent executed by the Family Court within whose territorial jurisdiction the respondent in the M.C resides at the relevant time.

16. The view taken is fortified by the following dictums. The Hon'ble Supreme

Court in *Mst. Jagir Kaur & Another vs. Jaswant Singh* [1964 (2) SCR 73] 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."

The Hon'ble Madras High Court has held in *Muthuvel vs. Nalini* [LAWS(MAD)-2015-9-94] as follows:

"9. 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....."

Hon'ble Supreme Court in *Bhaskar Lal Sharma and another vs. Monica & Others* [(2014) 3 SCC 383] has been observed:

"16. 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 vs. Thangavel* wherein reference has been made to several earlier decisions on the issue.

17. 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 lives 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-298/2011 as expeditiously as possible....”

17. The impugned orders suffer in view of the discussions made hereinabove and is liable to be reversed.

In the result, Original Petition (Crl.) is allowed. Orders passed by Family Court, Malappuram and appended to the petition on hand as Exts.P2 and P3 are set aside. Family Court, Malappuram shall consider Crl.M.P.(Ex) Nos.194/2018 and 82/2018 and 144/2020 pending on it's file and shall issue appropriate processes to execute it's order granting maintenance allowance as if itself is empowered by law.