
(1987) 10 GUJ CK 0010
In the Gujarat High Court

Chandrikaben Navnitlal Dave

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 01-10-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(3), 125(3), 247, 31, 31

Citation : (1988) CivCC 311 : (1988) 1 GLR 117

Hon'ble Judges : B.S. Kapadia, J

Bench : Single Bench

Judgement

B.S. Kapadia, J.—Both the above applications arise out of the common order passed by the learned Sessions Judge, Bharuch on 23-7-

1987 in Criminal Revision Applications No. 71 and 72 of 1986 against the orders passed by the learned Magistrate in Misc. Criminal Applications

No. 44 of 1987 and 278 of 1986 which were filed by the present petitioner Chandrikaben Navaitlal Dave, who is the wife of present opponent

No. 2 Harish Badrishanker Dixit. The learned Magistrate passed order on Misc. Criminal Application No. 44 of 1987 on 16-5-1987 directing the

opponent No. 2-husband to undergo imprisonment for 15 days per each month of arrears of maintenance i.e. total 60 days as he has failed without

sufficient cause to comply with the order of maintenance passed in Misc. Criminal Application No. 301 of 1982 dated 16-12-1982, The said

application was filed in respect of arrears of maintenance for the period from 16-9-1986 to 16-1-1987 i.e. for a period of four months.

2. In the second application which was filed by the present petitioner she has claimed enforcement of the aforesaid order for a period of seven

months from 17-2-1986 to 16-9-1986 and the learned Magistrate has passed the order directing the opponent-husband to undergo imprisonment

for 10 days each for each month of arrears of maintenance i.e. total 70 days.

3. In the revision applications filed by the present opponent No. 2-husband against the said orders the learned Sessions Judge has reduced the period of imprisonment and also held that both the above sentence to run concurrently and the opponent-husband was allowed to be free for the period of imprisonment undergone by the opponent No. 2.

4. Mr. A.D. Shah, the learned Advocate for the petitioner in both the aforesaid applications submits that the order passed by the learned Sessions Judge is totally erroneous firstly on the ground that the learned Sessions Judge has no powers to treat the orders of imprisonment passed u/s 125(3) of the Cr.P.C. to run concurrently and secondly on the ground that the learned Sessions Judge has exceeded jurisdiction in reducing the sentence without considering that the learned Magistrate has properly exercised discretion vested in him for imposing sentence of imprisonment.

5. In support of his contention Mr. Shah submits that the order of sending defaulting husband to jail for undergoing imprisonment is not on account of conviction of any offence and, therefore, the provisions of Section 31 of the Cr. P.C. would not apply in the present case. In support of this contention Mr. Shah has placed his reliance on the judgment in the case of Jaswantsinghji Fatehsinghji Thakore v. Kesuba Harisinh Dipsinhji reported in AIR 1955 Bombay 108 wherein it is observed as under :

.... The Criminal Procedure Code does not make failure to maintain the wife and children punishable. What is made punishable under the Code is failure without sufficient cause to carry out the order passed by a Magistrate for payment of maintenance....

In the said case it is further observed as under:

.... It is true that if an order for payment of maintenance u/s 488, Criminal Procedure Code is not complied with, the same may be executed by issue of a warrant for levying the amount due under the order in the manner provided for recovery of fines. The Magistrate who passes an order for payment of maintenance can also sentence the person ordered to pay maintenance, if he fails without sufficient cause to comply with the order to suffer rigorous imprisonment for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant. But the fact that the Legislature has made provision for enforcement of the order passed

u/s 488, Criminal Procedure Code for levying the amount due

under it in the manner in which fines are recovered, or by directing that the person who continuously disregards the order shall be liable to

punishment, does not convert an application for maintenance, into a charge for commission of an -offence" within the meaning of Clause (c) of

Section 4 Criminal Procedure Code.

In the said case all the different facts have been considered about the essential civil nature as also the right of the opponent-husband in the original

application u/s 340 of old Cr. P.C. of giving evidence. It is important to note that even in the Criminal Procedure Code of 1973 there is similar

provision in Section 315(2) which provides that any person against whom proceedings are instituted in any Criminal Court u/s 98 or Section 107,

or Section 108 or Section 109 or Section 110 or under Chapter IX or under Part-B Part-C or Part-D of Chapter X, may offer himself as a

witness in such proceedings. It is important to note that the proviso to Section 315(2) of the Cr. P.C. refer to Sections 108, 109 and 110 for the

effect of failure of such person to give evidence but to it does not effect the failure of giving evidence by the opponent in the case under Chapter IX

of the Cr. P.C. Therefore, no failure of giving evidence may be made the subject of any comment by any of the parties or the Court or give rise to

any presumption against himself or any person charged together with him at the same inquiry. Even on reading Sub-section (3) of Section 125 of

the Cr. P.C. it is clear that the opponent-husband can certainly say that he had no sufficient means and he could not pay up the amount of

maintenance as per the order of the Magistrate. He can also offer to maintain his wife on the condition of her living with him and if such a defence is

raised the Court may consider about the genuineness thereof or when the wife refuses to live with him after the offer is made by the husband the

learned Magistrate can pass the order notwithstanding such offer. Even after the new Criminal Procedure Code, 1973 came into force the

provisions are substantially the same as they were in the Criminal Procedure Code of 1898 and the aforesaid judgment of the parent-High Court is

equally binding to this Court.

6. Subsequently then nature of the application for maintenance u/s 125 of the Cr. P.C. came to be considered by this Court in the case of

Jugatambalal J. Gandhi v. State of Gujarat XVII GLR page 335. In the said case after referring to various provisions of the Code as also the

judgment in the case of Nandlal Misra Vs. K.L. Misra, , this Court held that Section 488 of the old Code and Section 125 of the present Code do

not contemplate preliminary enquiry before issuing a notice but lay down that all evidence under that chapter should be taken in the presence of the

respondent or his pleader, indicating thereby that one inquiry only should be held after notice.

7. In view of the aforesaid decisions it is settled law that the Court does not make the failure to maintain wife and children a punishable offence and

person proceeded against in such proceeding is not an accused. Chapter IX of the Cr. P.C. serves the social purpose and Section 125 prescribes

an alternative forum to get relief. The proceedings are of a civil nature even though they are in the criminal trial and the remedy is a summary one.

The inquiry under Chapter IX is a quasi-criminal one and admission made in the pleading can be taken into consideration and acted upon. The

order passed in the application u/s 125 is a summary order which does not finally determine the rights and obligations of the parties thereto.

Looking to the context in which punishment is provided u/s 125(3) of the Code, it cannot be an offence within the meaning of Section 2(n) of the

Cr. P.C.

8. In that view of the matter the question would be whether the Sessions Judge would have right to give direction to run the sentences of

imprisonment concurrently in the above applications. The said power is under Sections 31 and 247 of the Cr. P. C, but the said Sections refer to

conviction of an offence. When there is no offence there is no question of conviction of the accused for an offence and, therefore, the provisions of

said two Sections cannot come into play when the order under Sec, 125(3) is passed. In that view of the matter the order passed by the learned

Sessions Judge is erroneous and illegal.

9. It is true that Section 125 of the Cr. P.C. gives discretion to the Magistrate for imposing sentence of imprisonment for a term which may extend

to one month or until payment, when the person without sufficient cause fails to comply with the order. The question is that the learned Sessions

Judge should have considered whether the learned Magistrate has properly

exercised the discretion or not. The learned Sessions Judge has not given any reason for the same, but the reason given by the learned Sessions Judge to modify the order of the learned Magistrate is that if the period of imprisonment is reduced perhaps he would earn money and pay to the original applicant-wife. It may be otherwise also, if he is kept in the jail for a long period within the permissible limit u/s 125(3) when the defaulting husband against whom the order is passed and/or any of his relatives may come and pay up the arrears of maintenance amount. It is, therefore, clear that the reasonings given by the learned Sessions Judge cannot be the sound reasoning on which the order passed by the learned Magistrate can be modified.

10. In result both the Criminal Revision Applications are allowed. The orders passed by the learned Sessions Judge, Bharuch in Criminal Revision

Applications No. 71 of 1986 and 72 of 1986 are hereby set aside. The orders passed by the learned JMFC, Jamboosar in Misc. Criminal

Applications No. 44 of 1987 and 278 of 1986 are restored. Rule is accordingly made absolute in both the applications.