

Yoosuf Rawther Vs. Ashref and Another

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Court : Chennai

Decided On : Apr-03-1997

Reported in : 1998(1)ALT(Cri)298

Judge : M. Karpagavinayagam

Appeal No. : Crl. Revn. Case No. 463 of 1996

Appellant : Yoosuf Rawther

Respondent : Ashref and Another

Advocate for Def. : Ms. K.M. Vatsala, Adv. for ;K.S. Kumar

Advocate for Pet/Ap. : M. Ravindran, Sr. Counsel for ;V. Viswanathan

Judgement :

ORDER

1. This case relates to a sorry state of affairs, wherein a Muslim minor son, who was left in lurch by both his father and mother, has been fighting with his father for the past 13 years, claiming arrears of maintenance due to him, in pursuance of the order passed in his favour in the maintenance proceedings in M.C. No. 27 of 1984, on the file of Judicial First Class Magistrate, Kuzhithurai, Kanyakumari District, without getting a pie from him, till date.

2. The father is the petitioner herein. The minor son is the respondent. On 12-11-1984, one Nabeesa, the divorced wife of the petitioner herein, the mother of the minor son, respondent herein, filed a petition under S. 125, Cr. P.C., in M.C. No. 27 of 1984, on the file of the Judicial First Class Magistrate, Kuzhithurai, Kanyakumari District, claiming maintenance for herself and for her minor son who was aged 4 years then. After evidence was taken, by order dated 24-2-1986, the learned Magistrate directed the petitioner to pay a sum of Rs. 500/- per month each towards maintenance for his divorced wife and minor son (respondent herein).

3. The petitioner herein challenging this order, filed a revision in Crl. R.C. No. 243 of 1986, before this Court, and obtained a stay of the operation of the order of the lower Court in Crl. M.P. No. 3457 of 1986 on 15-4-1986. Thereafter, both divorced wife and minor son filed a petition in Crl. M.P. No. 12693 of 1986, to vacate the stay granted in Crl. M.P. No. 3457 of 1986, in the main revision. On hearing both the parties, this Court on 22-12-1986, passed the following order :-

'1. That on condition of the petitioner in Crl. M.P. No. 3457 of 1986 paying future maintenance commencing from 15-1-1987 at half rate, namely Rs. 500/- (rupees five hundred only) and also paying 1/3rd of the arrears within four weeks from this date, the interim stay granted in and by the order of this Court dt. 15-4-1986 and made in Crl. M.P. No. 3457 of 1986, shall be made absolute, and that all further proceedings in pursuance of the order passed by the Judicial First Class Magistrate, Kuzhithurai in M.C. No. 27 of 1984 dated 24-2-1986 shall continue to be stayed pending Crl. R.C. No. 243 of 1986, on the file of this Court;

2. That the wife-1st respondent in Crl. M.P. No. 3457 of 1986 shall be at liberty to withdraw the amount after such deposit as directed in clause (1) supra; and

3. That if the deposit is not made within the date specified in clause (1) supra, the stay granted shall stand vacated.'

Though the petitioner herein was heard before passing of the above order, the said conditional order was not complied with by the petitioner.

4. During the pendency of the above revision, on 24-6-1987, the divorced wife Nabeesa got remarried with some other person. The unfortunate minor son was neither taken care of by the divorced wife of the petitioner, nor by the petitioner, who also got remarried. The pitiable minor son was driven to take shelter under his maternal grand-father.

5. When the revision in Crl. R.C. No. 243 of 1986, came up for final disposal on 14-12-1990, before this Court, it was represented by the petitioner, that during the pendency of that revision, the divorced wife, 1st respondent therein got married again, and therefore, she could not claim maintenance, and that since the minor son was being taken care of by the second husband, he would also not entitle to claim maintenance.

6. However, this Court dismissed the said revision, with an observation, that it would be open to the petitioner to take steps under S. 127 Cr. P.C., for the cancellation of the maintenance awarded, on these grounds before lower Court, and the learned Magistrate, in the event of such a petition being filed, would dispose of it, on its inherent merits. However, the petitioner did not choose to file any such application under S. 127, Cr. P.C., before the lower Court, to cancel the order of maintenance earlier passed to the minor son, nor did make any payment towards maintenance.

7. On 8-10-1991, since the original order of the Magistrate was not complied with, the 1st respondent minor son through his grand-father filed a petition in Crl. M.P. No. 5727 of 1991 in M.C. No. 27 of 1984, under S. 125(3), Cr. P.C., before the Judicial Magistrate No. 1, Kuzhithurai, by way of execution proceedings, for realisation of the entire amount of arrears. The cause title given in the said application is as follows :-

'Before the Court of Judicial Magistrate-I, Kuzhithurai

Crl. M.P. No. 5727 of 1991 in M.C. No. 27 of 1984

Petitioner : Ashref son of Yoosuf Rawther Pawathu Veedu, Kadayalumoodu, Kaliyal Village, Vilavancode Taluk

(Minor)

(represented by guardian-grand-father Hameed Rawther of do do)

-2nd Petitioner in M.C. No. 27/84

Respondent : Yoosuf Rawther, son of Hassan Rawther, Kochuthadikkathu, Panamattam, Koorili, Kottayam District, Kerala State.'

8. This petition was contested by the petitioner/father by filing a counter, stating that the grand-father of the minor, could not maintain the said petition under S. 125(3), Cr. P.C., as the grand-father could not be the legal guardian for the minor under Mohammedan Law, and the said petition was filed beyond the period of limitation. During the course of enquiry on this petition, the minor Asharef, who completed 11 years of age then, was examined as P.W. 1. Though counter was filed by the petitioner, the father, he did not choose to examine himself in the said enquiry.

9. The lower Court by its order dated 23-3-1992, dismissed the said petition under S. 25(3), Cr. P.C., holding that under Mohammedan Law, the maternal grand-father, not being the legal guardian, is not competent to file the petition, as guardian of the minor grandson, and that the said application was also not filed within the period of limitation.

10. Challenging this order, the respondent, minor son filed a revision before the Sessions Court, Kanyakumari District at Nagercoil, in Crl. R.C. No. 51 of 1995. After hearing both parties, the learned Principal Sessions Judge, allowed the revision preferred by the minor son, on 22-2-1996, holding that though the grand-father, during the life time of the father could not claim to be the legal guardian of the minor grandson, according to the Mohammedan Law, even without a guardian, the minor son himself could file an application for recovery of the arrears from his father, against whom the order of maintenance had been passed, and that the application under S. 125(3), Cr. P.C., filed on 8-10-1991, i.e., within the period of limitation, as it was within a year from the date of disposal of the revision by the High Court, viz. on 14-12-1990. With these findings, the learned Sessions Judge,

remanded the case to the lower Court to get the proceedings in Crl. M.P. No. 5727 of 1991, restored and directed to proceed further in accordance with law.

11. Being aggrieved over this impugned order, the petition/father filed the present revision in this Court.

12. When the revision came up for admission on 8-7-1996, this Court ordered notice of motion for three weeks. On 30-7-1996, when counsel for both parties appeared before the Court, this Court passed the following order :-

'This petition coming on for orders as to admission on this day upon perusing the petition, and the order of the Lower Courts, and the records in the case, and upon hearing the arguments of Mr. Ravindran, senior counsel for the petitioner, and of Mr. K. M. Vatsala, Advocate for the 1st respondent, and of Mr. P. Kumaresan, Government Advocate for the Public Prosecutor on behalf of the State second respondent the Court made the following order :-

Before hearing further and granting time to file counter on behalf of the respondent I am informed that the arrears of maintenance to be paid to the minor boy has accumulated to a considerable extent and for the reasoning that a plea has since been taken in this revision that the grand-father of a minor boy is not entitled to claim the maintenance, I am inclined to direct the revision petitioner to deposit the entire admitted arrears of maintenance due to the boy alone before the trial Court within a period of three weeks from today onwards and report the compliance of this order after three weeks. Post the case on 20-8-1996. Counter if any to be filed by then.'

13. However, this order also had not been complied with by the petitioner/father. When the matter came up for hearing on 20-8-1996, request was made before this Court, to adjourn the matter by two weeks. Accordingly the matter was adjourned. When the matter again came up for hearing on 4-9-1996, it was represented by counsel for the 1st respondent that the order of this Court dated 30-7-1996 was not complied with.

14. On 4-9-1996, this Court passed the following order :-

'It is stated that the order passed by this Court on 30-7-1996 has not been complied with. There was no representation on behalf of the petitioner. Learned counsel for the respondent reminded the above facts. Call the matter on 11-9-1996.'

Then it was periodically adjourned to several dates. On 29-11-1996, it was represented that the matter was likely to be settled and so, it could be adjourned by two weeks. Accordingly the matter was adjourned to several dates. Finally, the matter was taken up for final hearing, since there was no settlement.

15. Mr. M. Ravindran, learned senior counsel appearing for the petitioner strenuously contended that the application under S. 125(3), Cr. P.C., could not be maintained by the grand-father as legal guardian of the respondent, the minor son of the petitioner, and as such, the order of Sessions Court, setting aside the dismissal order the learned Judicial Magistrate suffers from infirmity. He referred Purohit's Mohammedan Law, and pointed out Rule 156.

16. Learned senior counsel also referred Mulla's Principles of Mahomedan Law and pointed out Rules 352, 353, 355 and 357, and contended that after the age of seven years of a minor, the father alone could be the legal guardian and the maternal grand-father would not include in the categories of persons who are entitled to the custody of the person of a minor. He would also further contend that in the year 1991 itself, in the counter filed by the petitioner, the father, in CrI. M.P. No. 5727 of 1991, the petition under S. 125(3), Cr. P.C., filed by the minor son, petitioner stated that he was willing to take custody of his minor son. He would also point out during the course of his submission, that the petitioner already filed a petition claiming custody of the minor son, in the year 1992, in O.P. No. 87 of 1992, in the Civil Court, and the same is still pending.

17. Mr. M. Ravindran, learned senior counsel also submitted that the petitioner is ready to pay the arrears of maintenance from the year 1987, in which the year his divorced wife got remarried, and up to the month of December, 1991, when he filed the counter expressing his willingness to take the minor son into his custody. In so far as the limitation point is concerned, learned senior counsel fairly conceded that since the said application under S. 125(3), Cr. P.C., was filed on 8-

10-1991, well within the period of one year from the date of final disposal of the earlier revision, viz., on 14-12-1990, it must be taken to mean, that the petition was within time.

18. Per contra, Ms. Vatsala, learned counsel appearing for the respondent minor son, would submit that though it was mentioned in the petition filed under S. 125(3), Cr. P.C., the grand-father as the guardian, the cause title of the said petition would show that the minor alone was the petitioner, and that he alone was examined as P.W. 1 in the enquiry, and that therefore, the application could be maintained by the minor son himself, claiming arrears u/S. 125(3), Cr. P.C.

19. Learned counsel for the 1st respondent also cited a decision of the Andhra Pradesh High Court in Gulam Mustafa v. Tahara Begum 1980 CLJ 124 which was referred to by the Sessions Court, in its order, to show that minor himself is competent to file an application under S. 125, Cr. P.C., even without guardian. She further contended that when the application u/S. 125(3), Cr. P.C., was filed on 8-10-1991, the arrears of maintenance was about Rs. 41,500/-, and now it has swelled up to Rs. 68,500/-, out of which even a pie had not been given despite the orders of the Court.

20. Though this Court is called upon to go into the sustainability of the order of the Sessions Court, allowing the revision by setting aside the order of the Magistrate, who rejected the application under S. 125(3), Cr. P.C., on the ground of maintainability, several questions of law, which have been incidentally raised in this case have got to be answered.

21. Before going into the said questions of law, let me at the outset express my agony and anguish towards the attitude of the petitioner, who had never care to comply with the interim orders passed by this Court, first with the order passed on 22-10-1986 in the first round in the earlier revision, and the second with the order passed on 30-7-1996, in the second round in the present revision. It is quite amazing to see as to how the petitioner, the father has cleverly dragged on the proceedings from 1984 to 1997, nearly for 13 years, without paying a single pie to an orphan, like unfortunate minor son, the respondent herein, in spite of orders of this Court in 1986 and in 1996.

22. There is no dispute regarding the fact that the respondent/minor son was born out of the wedlock between the petitioner and the divorced wife Nabeesa. As referred earlier, the age of the minor son, at the time of filing of the application under S. 125, Cr. P.C., in M.C. No. 27 of 1994, in the year 1984 was only four years.

23. Under relevant provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, up to the age of two years only, the custody of the child shall be with the mother. Subsequent to that, it is settled law that on certain requirements being fulfilled, father has got a right to claim the custody of child. In the instant case, there was no such attempt on the part of father, for taking custody of the child, even after the divorced wife and minor son filed the petition claiming maintenance under S. 125, Cr. P.C., in M.C. No. 27 of 1984.

24. In fact, it was contested by the petitioner on the ground that they were not entitled to maintenance and however, the lower Court allowed the maintenance application, and directed the petitioner herein to pay Rs. 500/- per month each to the divorced wife and the minor son, by order dated 24-2-1986. Even then, there was no move on the part of the petitioner, to claim for the custody of the child. Instead the petitioner filed a revision before this Court in Crl. R.C. No. 243 of 1986, challenging the above order of maintenance passed in favour of the claimants in the maintenance case, including the minor son.

25. Even during the pendency of the revision, no step had been taken to claim custody of the minor son by the petitioner/father. To make it further worse, the petitioner did not even care to comply with the order of this Court dated 22-12-1986, directing him to pay 1/3rd of the arrears within four weeks, and to pay half of the maintenance amount viz. Rs. 500/- commencing from 15-1-1987 as future maintenance. As referred earlier, when the said matter came up for final disposal on 14-12-1990, it was represented on behalf of the petitioner, that the divorced wife got remarried. Even during that time, there was no offer made by the petitioner for the custody of the minor son. Instead, it was represented that the minor son was in the care and custody of the second husband of the divorced wife.

26. As pointed out by learned counsel for the petitioner, under Rule 156(1)(d) of the Purohit's Mohammedan Law, father alone is the legal guardian for the son above 7 years of age. Admittedly, in the year 1990, when the revision came up for final disposal on 14-12-1990, the age of the minor son was 10 years. If the petitioner was really interested in the welfare of his minor son, as a legal guardian, he should have immediately taken steps, by filing necessary application before the Court, seeking for custody of the minor son, moreso, when he knew that the divorced wife got remarried. This was not done. There is no explanation for this.

27. At the time of final disposal of Cr. R.C. No. 243 of 1986, this Court, on 14-12-1990, in fact gave liberty to the petitioner to file a petition under Section 127, Cr. P.C., for the cancellation of the earlier order of maintenance passed in M.C. No. 27 of 1984, by the lower Court, on the ground that the divorced wife got remarried, and the minor son was taken care of by the second husband of the said divorced wife. This was also not done by the petitioner. There is no explanation for this also.

28. The respondent, when he was 11 years old and while he was under the care of his grandfather, filed a petition in CrI. M.P. No. 5727 of 1991, before the Judicial Magistrate No. 1, Kuzhithurai, on 8-10-1991, under Section 125(3), Cr. P.C. It was only at that stage, the petitioner, in his counter, while opposing the application on the ground of maintainability stating that the maternal grandfather could not be the legal guardian of his minor son, incidentally referred that he was willing to take the custody of the minor son.

29. In the enquiry under this application, the minor son himself, who claimed maintenance arrears was examined as P.W. 1. In his deposition, he would state that he was abandoned by father and then by his mother, which led him to take shelter under his maternal grandfather. He would also further state that he would not incline to go with his father, as he had not taken any care about him till date.

30. Learned counsel for the 1st respondent/minor son would point out, that the counter filed in the year 1991, by the petitioner herein, expressing his willingness to take the custody of the minor son and the petition in O.P. No. 87 of 1992, claiming custody of the minor son, filed only in the year 1992, were all only with a view to avoid the payment of arrears of maintenance, which the minor son is

entitled to.

31. When all these factors are taken into consideration in the proper perspective, it is fairly apparent that the petitioner, the father, who is now living happily with his second wife and children, had never taken any care or interest either for taking custody of the minor son born through his first wife or for paying maintenance arrears due to him.

32. But the quite disturbing feature is the non-deposit of the amount by the petitioner in the Court, despite the two interim orders of this Court, as indicated earlier. Atleast in the earlier order passed by this Court on 22-12-1986, the specific observation was made that 'if the deposit is not made within the date specified clause (1) supra, the stay granted shall stand vacated'. But the specific direction in the second order dated 30-7-1996, was that 'the revision petitioner shall deposit the entire admitted arrears of maintenance due to the boy alone before the trial Court within a period of three weeks from the date of the order.' There is no reference about the default clause, in this order. Even then, he never had any inclination to show any respect to this Court.

33. The above factors would bring forth two aspects :-

(i) The failure of the petitioner, the father, calling himself as the legal guardian of the minor son, the respondent herein, in taking any step to get the custody of the latter from the beginning shows his disinterestedness, in the welfare of the minor son, though he knew that the divorced wife, the mother of the minor son got remarried, to some other spouse in the year 1987 itself.

(ii) The non-compliance of the orders of this Court dated 22-10-1986 and 30-7-1996, by the petitioner, by not depositing the arrears of maintenance due to the minor son into Court reflects his recalcitrant attitude against the legal process and the orders of the highest forum of judiciary in the State.

34. Whatever it may be, this Court, instead of delving deep into the conduct of the petitioner further, could now go into the interesting questions of law, that have been raised in this case.

(i) Learned senior counsel for the petitioner would vehemently contend that the grandfather, who filed the petition under Section 125(3), Cr. P.C., on behalf of the minor son could not maintain the same, since he could not be the legal guardian under Mohammedan Law.

(ii) Rule 156 of the Purohit's Mohammedan Law provides kinds of guardians of person :-

'Subject to the provisions of the Guardian and Wards Act, 1890, the following persons are entitled to the custody of the person of a minor or lunatic :-

(i) Under the Hanafi Law, in the case of a son below 7 years of age and of a daughter below puberty (whether married or unmarried),

(a) to the following female relations in order :

(1) Mother

(2)

.....

(11) Mother's father

(iii) Section 352 of the Mulla's Mahomedan Law provides thus :-

'RIGHT OF MOTHER TO CUSTODY OF INFANT CHILDREN :- The mother is entitled to custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.'

(iv) Section 353 of the Mulla's Mahomedan Law deals with Right of Female relations in default of mother :- 'Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below :-

(1) Mother's mother;

(2) Father's mother;

.....

.....

(10).....

(v) Section 355 of the said Act reads thus :-

'RIGHT OF MALE PATERNAL RELATIONS IN DEFAULT OF FEMALE RELATIONS :- In default of the mother and the female relations mentioned in Section 353, the custody belongs to the following persons in the order given belows :-

(1) the father;

(2) nearest paternal grandfather;

.....

.....

(10)

(vi) Section 357 of the said Act runs as follows :-

'RIGHT OF FATHER AND PATERNAL MALE RELATIONS TO CUSTODY OF BOY OVER SEVEN AND OF GIRL WHO HAS ATTAINED PUBERTY :- The father is entitled to the custody of a boy over seven years of age and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal relations in the order given in Sec. 355 above, and subject to the proviso to that section.

If there be none of these, it is for the Court to appoint a guardian of the person of the minor.'

(v) The above provisions would make it clear that the right of custody of a boy below 7 years, vests with the mother. In default of mother, the custody of the boy belongs to the female relations of the mother. In default of female relations, the right of custody vests with the father. So, under these provisions, the father also could come as a legal guardian, even when the boy was below 7 years, in certain contingencies, as referred above. But, after the boy attaining the age of 7 years, automatically, father stands first to be the legal guardian for the boy and for the entitlement of the boy's custody. Therefore, the right of the father, as a legal guardian of the boy above 7 years cannot be disputed.

(vi) In the instant case, the maintenance application was filed by both mother and minor son, the 1st respondent herein in the year 1984, claiming maintenance from the petitioner. At that point of time, the mother was the legal guardian for the minor son, since the minor had not completed seven years of age.

35. But, now the present question that crops up for consideration is whether the maternal grandfather on behalf of the minor grandson could claim maintenance arrears, under Section 125(3), Cr. P.C. As referred earlier, in the light of the various provisions contained in Purohit's Mohammedan Law, and Mulla's Principles of Mohomedan law, there is no difficulty in arriving at a conclusion that the maternal grandfather could not, at all, be considered to be a legal guardian of the minor grandson.

36. In this context, it would be relevant to throw light to some of the provisions contained in Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as Act 25 of 1986), with reference to the entitlement of right of children to claim maintenance :

(i) Section 3 of the Act 25 of 1986 reads as under :-

'3. Mahr or other properties of Muslim Woman to be given to her at the time of divorce :-

(i) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to

(a)

(b) Where she herself maintains the children born to her before or after her divorce a reasonable and fair provision and maintenance to be made and paid by her former husband to the children for a period of two years from the respective dates of birth of such children.'

(ii) Of course that Section 3(1)(b) of the Act 25 of 1986, deals with non-obstante clause 'notwithstanding anything contained in any other law for the time being in force', and clause (b) provides that 'divorced women shall be entitled to the payment of maintenance for her children from her former husband for a period of two years, from the date of birth of such children, where she maintains such children.'

(iii) As such, the divorced woman alone in her own right is entitled to claim or receive payment of maintenance for the children maintained by her for a period of two years as contemplated in Section 3(1)(b) of the Act 25 of 1986.

36A. From this it is clear, the application filed under Section 125, Cr. P.C., by the mother cannot be said to have been filed when she claims maintenance for the minor child in her own right, since the minor son attained the age of four years. It can be said that minor son can claim maintenance in his own right or through his mother. While referring about the independent right to claim maintenance by a minor child from its father, this Court in the case of *Rahmathulla v. Piyare* (1996) 1 M LW (Cri) 206 : (1996 Cri LJ 4322), observed as follows :- (Paras 31 and 33)

'The Act of 1986 is lamentably silent as to the future of the minor children who have crossed the age of two years. In a welfare society, it can never be the intention of the legislature that the minor children of a divorced muslim woman should be thrown into the dust bin or to the charity of the pedestrians for their survival. As there is no provision in the Act of 1986 in respect of the child of above two years the mother as a natural guardian of such a minor child shall have to necessarily fall back upon the all embracing and beneficial provisions of Section 125, Cr. P.C. Thus it is clear from the comparison of provisions of S. 125, Cr. P.C., and the provisions of Act 25 of 1986, a minor child which has crossed the age of

two years is not precluded from claiming maintenance from its father as the child is unable to maintain itself.

It is also evident to notice that the right of maintenance is enjoyed by a child under S. 125, Cr. P.C., in its own right, but under Section 3 of the Act 25 of 1986 maintenance of a child for two years by its father is not a right of the child, but is a part of the right of the divorced woman where she herself maintains of child. In other words maintenance for the child can be claimed under Section 125. Cr. P.C., from its father irrespective of the question as to who maintains the child Therefore, the right of the child to claim maintenance under Section 125. Cr. P.C., either by itself or through its mother, remains in tact, inspite of the right of the mother under Section 3 of the Act of 1986, to claim maintenance for the child for a period of two years from the date of its birth.'

37. In *Mst. Noor Jehan v. State of Maharashtra* 1995 CLJ 2154 the Nagpur Bench of Bombay High Court held as hereunder (at pp. 2156-57 of Cri LJ) :-

'It does not take away the right of the minor child to claim maintenance from his or her father even after his or her mother has been divorced. The right which is conferred on the minor child of claiming maintenance under Section 125 of the Cr. P.C., cannot be said to have been taken away by the provision contained in Section 3(b) of the Act of 1986 While Section 3(b) entitles the divorced Muslim Woman to claim maintenance for the children born to her before or after the divorce from her former husband for period of two years from the respective dates of birth of the children, the said section does not take away the right of the minor Muslim child or children to claim maintenance from his or her father even if the mother has been divorced and has attained the status of divorced Muslim woman.'

38. These decisions and the above discussion would make it clear, that the minor Muslim child, after two years could file the application, claiming maintenance under S. 125, Cr. P.C., from its father, either by itself or through its mother or any person who takes care of the child. In fact, in the instant case, the cause title of the original maintenance petition would show the minor son also was named as one of the petitioners. In both the revisions filed before this Court, the minor son was

named as one of the respondents. Even in the cause title of the petition filed u/S. 125(3), Cr. P.C., the name of the minor son was figured as the petitioner. In the revision filed before the Sessions Court, the minor son was named as petitioner. Therefore, it could be very well construed that the minor son himself had claimed maintenance, as well as the arrears of maintenance, in his own right, in this case.

39. Nodoubt, it is true that it is mentioned in the petition under Section 125(3), Cr. P.C., that the petition was presented on behalf of the minor represented by guardian grandfather. This would not in any way mean, the grandfather filed this petition as a legal guardian of the minor grandson, nor is it necessary that such petition could be presented on behalf of the minor grandson, only by the legal guardian. If that is the proposition, the legal guardian would be the father only, and as such, the petition must have been presented only by the father. The very grievance of the minor son is that he is not being maintained by his father, who is the legal guardian. If a restriction is put on the minor son, that the application could be presented only through his legal guardian, then the very purpose of the right to claim maintenance under Section 125, Cr. P.C., given to the minor son would get defeated. Therefore, even assuming for the argument sake that the petition was presented by the grandfather of the minor son, in the capacity of guardian, it would not in any way affect the right of the minor son from claiming the maintenance of arrears in his own right.

40. As indicated earlier, the right of claiming maintenance, had already been exercised by the minor son, even while filing the petition in M.C. No. 27 of 1984, on the file of Judicial First Class Magistrate, Kuzhithurai. That petition also was ordered by the trial Court, directing the father to pay maintenance at Rs. 500/- per month to the minor son, which was also confirmed by this Court in the earlier revision. That apart, during the course of enquiry on the petition filed under Section 125(3), Cr. P.C., the minor son examined himself as P.W. 1, and claimed arrears of maintenance.

41. As a matter of fact, as discussed earlier, the minor son who was aged about 11 years then, explained to the Court, through his deposition, as to how he was abandoned by both his father and thereafter by his mother, and driven to take

shelter under his grandfather. In these circumstances, I find that the respondent/minor son has got his own right to claim maintenance by filing an application under Section 125, Cr. P.C., as well as to file execution petition claiming arrears of maintenance under S. 125(3), Cr. P.C. When the right to claim maintenance exists with the minor son, there would not be any barring provision in the Code of Criminal Procedure, for approaching the Court on his own. Therefore, the claim of arrears by the minor son cannot be rejected on the ground that being a minor, he is not competent to maintain the action, through his grandfather who is not a legal guardian.

42. If the Legislature intended that a minor child should not be permitted to start proceedings under Section 125, Cr. P.C., against its father, it would have certainly made the necessary provision therefor in that section itself, as in the case of certain other proceedings covered by the Code.

43. Section 198, Cr. P.C., dealing with prosecution for offences against marriage, lays down that where the aggrieved person happens to be under the age of 18 years, or is an idiot or a lunatic or is from sickness or infirmity unable to make a complaint, or is a woman who according to the local customs and manners, ought not to be compelled to appear in public, and that some other person may, with the leave of the Court, make a complaint on his or her behalf.

44. There is also similar provision in Section 199, Cr. P.C., which deals with prosecution for defamation. According to that section, no Court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code except upon a complaint made by some person aggrieved by the offence : provided that where such person is under the age of 18 years, some other person may, with the leave of the Court, make a complaint on his or her behalf.

45. A persual of these sections would go to show, that the Legislature which has taken care to provide for representation for certain categories of persons by others in proceedings under Sections 198 and 199, Cr. P.C., would have done the same thing even in the case of applications under Section 125 or Section 125(3), Cr. P.C. But the conspicuous absence of any such embargo on a minor child, against applying for relief under Section 125 or Section 125(3), Cr. P.C., is, in my opinion,

sufficient to hold that the minor child is entitled by itself either to apply for maintenance under Section 125, Cr. P.C., or to claim arrears of maintenance under Section 125(3), Cr. P.C. This view of mine is fortified by the Andhra Pradesh High Court in its decision reported in 1980 C LJ 124. (Gulam Mustafa v. Tahara Begum).

46. Therefore, in my considered opinion, both the applications filed under Section 125, Cr. P.C., in M.C. No. 27 of 1984 and the application in CrI. M.P. No. 5727 of 1991, under Section 125(3), Cr. P.C., must be taken to mean that the minor son himself, in his own right, filed the same, in exercising such a right contemplated under Section 125, Cr. P.C. Such being the situation, the argument submitted by learned senior counsel for the petitioner, that the grandfather, not being the legal guardian could not claim the arrears of maintenance, cannot at all be considered to be a sound one. The mere presentation of the petition either under Section 125, Cr. P.C., or under Section 125(3), Cr. P.C., through some other person, who is not a legal guardian would not invalidate the claim of maintenance or arrears of maintenance by the minor son.

47. At this stage, I must refer about the submission made Mr. M. Ravindran, learned senior counsel for the petitioner, that the petitioner is ready to pay the arrears of maintenance from 1987, the year in which his divorced wife got remarried, till the month of December, 1991, when he filed his counter, expressing his willingness to take the custody of the minor son, and that he is not liable to pay any maintenance subsequent to December 1991, because thereafter he filed an O.P., in Civil Court, claiming custody of the minor son.

48. Mere filing of the counter, expressing his willingness before the Court below, in the petition filed by the minor son under Section 125(3), Cr. P.C., and filing O.P., in Civil Court, claiming custody of the minor son, would not at all absolve the liability of the petitioner, of maintaining the minor son, especially when he has not chosen to file an application under Section 127, Cr. P.C., to cancel the earlier order passed by the lower Court, granting maintenance to the minor son, though liberty was given to him by this Court in the first revision.

49. Furthermore, we are only concerned with the legality of the order of the Sessions Court, which held that the minor son could claim arrears of maintenance, in pursuance of the order of maintenance awarded in his favour. Moreover, the entitlement of the minor son to the maintenance, as held by the lower Court was confirmed by this Court, in the earlier revision, by order dated 14-12-1990.

50. As far as the point of limitation is concerned, Mr. Ravindran, learned senior counsel fairly admitted that application under Section 125(3), Cr. P.C., was filed well within the time, as the same could be filed only after the disposal of the revision by this Court. Therefore, I fully concur with the view and verdict given by the Sessions Court in its order dated 22-2-1996, setting aside the order of learned Judicial Magistrate, dismissing the application under Section 125(3), Cr. P.C., holding that the petition under Section 125(3), Cr. P.C., filed by the minor son was maintainable, and the same was filed well within the period of limitation.

51. However, I may point out one infirmity in the Sessions Court's order. The learned Sessions Judge, having held that the minor son is entitled and he could claim the entire arrears of maintenance, and allowed the revision, unnecessarily remanded the matter to the lower Court, to proceed further. Instead, the Sessions Court could, as well, direct the petitioner herein, father of the 1st respondent, to pay the arrears of maintenance up to the date of its order. The order of remand, in my view, would not serve any purpose, because the entire evidence was already recorded by the lower Court, which forms part of the record before the Sessions Court. Therefore, I am of the view, the remand order would pave the way to cause further delay in the realisation of the arrears of maintenance.

52. With reference to the arrears of maintenance amount, it is held in Shanmugham v. Andal 1989 MLW (Cri) 513, by this Court, that if the application filed under Section 125(3), Cr. P.C., claiming arrears of maintenance is within the period of limitation, the Court can pass an order directing payment of the entire arrears of maintenance up to the date of such an order.

53. TO SUM UP :

(a) Under the Act 25 of 1986, the minor children shall be under the custody of the divorced Muslim woman, up to its age of 2 years. In this period, the divorced woman alone, in her own right, is entitled to claim and receive payment of maintenance for the said children.

(b) The minor son, after the age of two years in his own right, through his mother or through any other person, can claim maintenance from his father, under Section 125, Cr. P.C., as the minor is unable to maintain himself, irrespective of the question as to who maintains such minor son.

(c) Under the relevant provisions of Mohammedan Law, in the case of a son below 7 years of age, mother is the legal guardian. During this period, if the divorced Muslim mother remarries, the father is entitled to the custody of the minor child. In default of the mother, the custody of the boy under the age of 7 years should belong to the mother's female relations. In default of the mother's female relations, then the custody belongs to the father of the boy, even when the boy is of below 7 years. After the age of 7 years of the boy, the father alone could come as a legal guardian and entitle to custody. The maternal grandfather cannot be construed as a legal guardian.

(d) The presentation of the petition on behalf of the minor son by the grandfather would not affect the right of the minor son from claiming the arrears of maintenance, in his own right, as it must be taken to mean, the minor son himself has claimed such a right before the Court.

(e) There is no bar for a minor child to start proceedings under Section 125, Cr. P.C., against its father, as in the case of prosecution for offences against marriage and for defamation, as contemplated in Sections 198 and 199, Cr. P.C., which provide for representation for certain categories of persons, like minor etc. by other adult persons.

(f) In view of the fact that the application under Section 125(3), Cr. P.C., was filed within the period of limitation, viz. one year from the date on which it became due, the Court is empowered to direct for the payment or recovery of maintenance amount, till the date of final order.

(g) Mere filing of petition claiming custody would not absolve the liability of the father to pay maintenance to minor son, since he is entitled for maintenance till the custody is given to father or till the minor son attains majority, as per the provisions of Sec. 125, Cr. P.C.

54. In that view of the matter, though the remand over has not been challenged by the 1st respondent herein, I set aside the order of remand alone, since I could correct the irregularity by invoking the revisional jurisdiction of this Court.

In other respects, I fully concur with the findings and conclusions arrived at by the Sessions Court. Accordingly, I hold that the 1st respondent/minor son is entitled to the entire arrears of maintenance, which comes about Rs. 68,500/- as pointed out by learned counsel for the 1st respondent, and the petitioner is directed to pay the entire arrears of maintenance to the 1st respondent.

55. With these observations, the revision is dismissed.

M. K. V. J.

When the Order is pronounced today, learned counsel for the petitioner requested time for payment and he would say that the petitioner would pay the entire arrears of maintenance within eight weeks from today. Accordingly eight weeks' time is granted for payment of entire arrears of maintenance of Rs. 68,500/-. For reporting compliance post the matter on 12-6-1997.

56. Petition dismissed.