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**Mohandas Vs. Jayanthi and Others**

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**SooperKanoon Citation** : sooperkanoon.com/947610

**Court** : Kerala

**Decided On :** Jun-15-2012

**Reported in** : 2012(3)KLT43; 2012(3)KLJ374

**Judge** : C.T. Ravikumar

**Appeal No.** : RPFC.No. 43 of 2012

**Appellant** : Mohandas

**Respondent** : Jayanthi and Others

**Judgement** :

A convict, who is undergoing the sentence of imprisonment on account of the default committed in paying the maintenance ordered under section 125 Cr.P.C. in M.C.No.775 of 2007 by the Family Court, Malappuram has filed this revision petition. In fact, it has been sent from jail. As per order dated 21.12.2007 the said M.C was allowed and the revision petitioner herein was directed to pay monthly maintenance at the rate of Rs.1,000/- to the first petitioner and Rs.500 each to petitioners 2 to 4 therein from the date of filing of the said M.C. and the first petitioner therein was authorised to receive/collect it. For enforcing the order of maintenance, the petitioners therein filed a petition under section 128 of the Code of Criminal Procedure. Subsequently, the respondent therein/the revision petitioner herein was arrested and was produced before the Court. He was sentenced to undergo imprisonment for one year as per the impugned order

passed thereon.

2. As this petition has been sent from jail Adv. Jaishankar V. Nair has been appointed as the State Brief to conduct the case of the revision petitioner. Notice has been ordered to the respondents herein/petitioners therein. They entered appearance through counsel.

3. I have heard Adv. Jaishankar V. Nair, learned State Brief for the revision petitioner and also Adv.P.Shamsudeen, learned counsel for the respondents.

4. As noticed earlier, the revision petitioner was directed to pay maintenance at the rate mentioned above by the Family Court, Malappuram as per order dated 21.12.2007 in M.C.No.775 of 2007. Pursuant to the impugned order, the petitioner has been sent to jail and he has been there from 31.11.2011. The learned counsel for the revision petitioner raised many a legal questions including whether on a single petition under section 128 Cr.P.C. alleging default in payment of the maintenance for a long period the defaulter can be sentenced to undergo imprisonment for a period of more than one month holding that the liability of the husband arising out of an order passed under Section 125 Cr.P.C. to make payment maintenance is a continuing one. The learned counsel attempted to undo the order with the support of the decision of the Hon'ble Apex Court in Shahada Khatoon v. Amjad Ali reported in 2000 KHC 128. Per contra, the learned counsel for the respondents submitted that a sentence in terms of the provisions under section 125(3) Cr.P.C. for a term exceeding even one year is possible in view of the decision of this Court in T.K.Ramakrishnan v. Subhadra reported in 2009 (1) KLT 813. The learned counsel for the revision petitioner further submits that the impugned order is liable to be set aside on another ground as well. It is submitted that in the light of the decision of this Court in Abdulrahiman v. State of Kerala and others (2011 (3) KHC 931) the impugned order being one mechanically made, without any application of mind, is liable to be set aside. In that case, this Court held that in awarding a punishment for committing default in complying with the order of maintenance under section 125(3) Cr.P.C. the court has to exercise its jurisdiction having regard to the facts and circumstances of the case. At any rate, sentencing cannot be mechanical and the court has to apply its mind while fixing

the term of imprisonment. I am of the considered view that the other legal questions need be considered only if the impugned order survives the consideration in the light of Abdulrahiman's case (supra). Therefore, firstly, I may consider the sustainability of the impugned order in the light of Abdulrahiman's case (supra). In this context, it is to be noted that the aforesaid view in Abdulrahiman's case (supra) is supported by an earlier decision of this Court in Mohammed Kutty v. State of Kerala reported in 1985 (1) Crimes 702 (Ker.). It was held therein that a month's imprisonment for every default is not the rule and sentencing cannot be mechanical.

5. In the case on hand the impugned order reads thus:-

"Petition filed under section 128 of the Code of Criminal Procedure.

Respondent arrested and produced before court. No payment. Hence he is send to Central Jail, Kannur for One year."

At the very outset, it is to be noted that the provisions under section 125 (3) of Cr.P.C., obviously, cannot be regarded as a means of punishment whilst it is only a means of enforcement of payment. It cannot be regarded as an order of punishment for contempt of court. This has to be borne in mind while passing an order sentencing for imprisonment especially in view of the decision in Muhammed Kutty's case (supra) that a month's imprisonment for every default is not the rule and the said position is very much evident from a bare perusal of section 125(3) of Cr.P.C. as well. Before passing an order under section 125(3) of Cr.P.C. it is the bounden duty of the court to consider whether the non-payment of maintenance is the result of a willful negligence on the part of the defaulter. A perusal of section 125(3) Cr.P.C. would reveal that the Magistrate may, for every breach of the order, issue a warrant for levying the amount in the manner provided for levying fines. The first proviso to section 125(3) Cr.P.C. makes it mandatory for the court to see whether the application has been made within prescribed time. During such consideration the court has also to look into the fact whether the application is made for maintenance awarded in favour of the minors as in the case of minors the provisions under sections 3(6) and 29 of the Limitation Act may become applicable. In terms of the said proviso an application shall be presented by the

person entitled to maintenance under an order of the court under section 125 Cr.P.C. within one year from the date on which the amount becomes due. When that be the provision, there cannot be any doubt that while considering an application under section 128 Cr.P.C. for enforcement of the order of maintenance the court is bound to look into the period covered by the application and whether there was any willful negligence on the part of the defaulter. Going by section 125(3) Cr.P.C. a recourse to attachment and sale of property under section 421 Cr.P.C. can also be resorted to. Above all, it is to be noted that the proviso under section 125(3) Cr.P.C. is virtually intended to prevent a person entitled to maintenance from being negligent and allowing arrears claimable until the recovery to become a great hardship or impossibility. Bearing in mind all the aforesaid aspects and also the decisions of this Court in Abdulrahiman's case (supra) and Muhammed Kutty's case (supra) the sustainability or otherwise of the impugned order has to be tested. It is not discernible from the impugned order as to what was the period of arrears covered by the concerned application, whether the application was filed within the time and, if not, whether there was any reason for condoning the delay in filing the application by virtue of any provision of law. So also, there was no consideration as to where non-payment of the maintenance awarded was the result of a willful negligence on the part of the revision petitioner. Nothing is discernible from the order as to whether prior to the passing of the sentence of imprisonment the prescribed procedures have been followed or not. If the warrant of arrest was issued straightway there must be conclusive materials before the court to arrive at a conclusion regarding the non-possession of any property by the defaulter. All these aspects, evidently, do not seem to have been considered by the Family Court before passing the impugned order. In the said circumstances, I have no hesitation to say that in the light of Abdulrahiman's case (supra) and Muhammed Kutty's case (supra) the impugned order was passed mechanically without any application of mind. In the result, the impugned order of the Family Court is set aside. Since the revision petitioner is undergoing sentence he is now, to be released. As noticed earlier, there was nothing on record to reveal the real period covered by the application submitted by the respondents that led to the sentence of imprisonment of the revision petitioner. If the period covered by the application in question that led to the issuance of the impugned order is more

than the period which could be covered by the term of imprisonment undergone by the revision petitioner, then, the Family Court will take up the application and pass appropriate orders after considering the application afresh. For deciding on such issues, the parties shall appear before the Family Court on 28.6.2012. On such appearance, the aforesaid questions shall be considered, in accordance with law, and if a fresh consideration of the application is required, in view of this order, the Family Court shall pass appropriate orders in accordance with law and taking into account the observations made hereinbefore. Needless to say that, before passing any such order proper opportunities shall be afforded to both parties. Before parting with the case I may hasten to add that whenever an order of sentence of imprisonment is to be passed under section 125(3) of Cr.P.C. it is incumbent on the court to pass a reasoned order. This is because such an order is revisable.

The revision petition is disposed of accordingly.

The Registry shall communicate this order forthwith.

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