

1989 APLJ 2 41 . 1990 CRILJ 2506 . 1989 ALT 2 295 . 1989 SCC ONLINE AP 66 . 1989 AP LJ 2 41 .
1989 ALT NRC 2 8 .

Jangam Srinivasa Rao v. Jaagam Rajeshwari And Another

Andhra Pradesh High Court (Mar 31, 1989)

CASE NO.

CrI. P. No. 1320 of 1988

ADVOCATES

JUDGES

Jagannadha Raju, J.

Important Paras

1. 7. Point No. 1 : In these proceedings the Magistrates who dealt with CrI.M.P. 1088/86 passed orders which are beyond their powers. When petition for execution of maintenance order was filed under Section 125(3), Cr.P.C. one fails to understand how the Magistrate could cancel the order maintenance though he might be justified in refusing the execute it while exercising his powers under Section 125(3) Cr.P.C. As can be seen from the Sessions Judge's order the Magistrate dismissed CrI.M.P. 2386/85 which was filed for arrest but he also passed an order cancelling the maintenance order. Of course that order of the Magistrate passed on 23-7-86 was set aside by the Sessions Judge in CrI.R.P. No. 1/87 on 4-1-88. In between 23-7-86 and 4-1-88 another peculiar order was passed when the 2nd Addl. Judl. First Clause Magistrate Sri. Y. Prabhakara Sarma dealt with CrI.M.P. No. 1988/86 which was filed under Section 125(3), Cr.P.C. for attachment of 1/3rd salary of the husband. The Magistrate came to the conclusion that as the earlier application was dismissed and as the earlier application cancelled the maintenance order, the present petition i.e. CrI.M.P. No. 1088/86 is not maintainable and he further added in the end portion of the order that is is clear that the maintenance order is cancelled under Section 125(5), Cr.P.C. and, therefore, once again in this CrI.M.P. No. 1088/86 the order of maintenance in M.C. 18/84 d/- 8-10-85 is cancelled in view of my findings as stated in the above paras. If the Magistrate had seen the provisions of the Code this sort of mistakes would not have arisen. Section 125(3), Cr.P.C. does not give any powers to

the Magistrate to cancel an order of maintenance which he is asked to execute. At best acting under the second proviso to Section 125(3), Cr.P.C. he may refuse to execute the order if he finds that the grounds of refusal to live with the husband given by the wife are not satisfactory. Only sub Section (5) of Section 125, Cr.P.C. gives the power to the Magistrate to cancel the order of maintenance. Similarly while exercising powers under Section 127, Cr.P.C. he can cancel the order of maintenance. Under Section 125(4), Cr.P.C. the wife is only disentitled to receive maintenance if she is living in adultery, or if, without any sufficient reason she refuses to live with her husband, or if she is living separately by mutual consent. Even Section 125(4) does not strictly give a right to cancel the maintenance order. It only disentitles the wife to receive maintenance under specified circumstances. If judicial authority is needed for this proposition, we have the pronouncement of the Supreme Court in Bhupinder Singh v. Daljit Kaur, . The Supreme Court observed at page 443 (of AIR) : (at p. 199 of Cri LJ) as follows :

Summary

1. The Magistrate found that there was sufficient cause for not complying with the provisions of Section 125(3), Cr.P.C. Against that order revision petition No. 1/87 was filed in the Court of the Sessions Judge.
2. 3. Subsequent to the revision being allowed by the Sessions Court, the wife filed CrI.M.P. No. 397/88 for realisation of maintenance due to her.
3. The Sessions Judge and the Magistrate are perfectly justified in holding that the order of maintenance in M.C. 18/84 is subsisting.
4. As can be seen from the Sessions Judge's order the Magistrate dismissed CrI.M.P. 2386/85 which was filed for arrest but he also passed an order cancelling the maintenance order.
5. Y. Prabhakara Sarma dealt with CrI.M.P. No. 1988/86 which was filed under Section 125(3), Cr.P.C. for attachment of 1/3rd salary of the husband. The Magistrate came to the conclusion that as the earlier application was dismissed and as the earlier application cancelled the maintenance order, the present petition i.e. CrI.M.P. No. 1088/86 is not maintainable and he further added in the end portion of the order that it is clear that the maintenance order is cancelled under Section 125(5), Cr.P.C. and once again in this CrI.M.P. No. 1088/86 the order of maintenance in M.C. 18/84 d/- 8-10-85 is cancelled in view of my findings as stated in the above paras.

6. But until the original order for maintenance is modified or cancelled by a higher court or is varied or vacated in terms of S. 125(4) or (5) or Section 127, its validity survives.
7. Judged in the light of this decision the order passed by the Magistrate in CrI.M.P. No. 1088/86 is non est and it need not be set aside by any higher court.
8. "It is very much doubtful whether this court can cancel the order of maintenance granted by it is the application filed by the petitioner for execution of the maintenance order".
9. Magistrate who delay with CrI.M.P. No. 397/88 and the learned Sessions Judge who dealt with CrI.R.P. 94/88 correctly appreciated the situation.
10. Default of one month is punishable by one month's imprisonment and no more.
11. If the default is more than one month then the imprisonment can be for as many months of default subject to a maximum of 12 months That would indicate that at the most the wife could only accumulate twelve months' maintenance and no more and the Magistrate could give in such case at most twelve months' imprisonment and no more.
12. The 3rd application which took the default for more than one year was ordered.
13. 11. Considering the different views expressed by the various High Courts I prefer to follow the Division Bench decision of the Calcutta High Court reported in Moddari Bin v. Sukdeo Bin, (1967 Cri LJ 335).

JUDGMENT

ORDER

1. This is a petition filed under Section 482, Cr.P.C. to quash the order D/- 21-7-88 passed by the II Addl. Judicial First Clause Magistrate, Machilipatnam in CrI.M.P. No. 397/88 in M.C. No. 18/84 which was confirmed by the Sessions Judge, Machilipatnam in CrI.R.P. 94/88 on 14-11-88.
2. The facts pertinent for decision of this petition are that Jangam Rajeswari the wife filed M.C. No. 18/84 claiming maintenance against her husband J. Srinivasarao. That petition was allowed on 8-10-85 and she was granted maintenance at the rate of Rs. 130/- p.m. from the date of the application i.e. 7-12-83. The

husband did not pay the maintenance and hence the wife filed Crl.M.P. No. 2386/85 for realisation of the maintenance amount by arresting and sending the petitioner to jail. By an order D/- 23-7-86 the Magistrate dismissed the application on the ground that the wife refused to join her husband without any valid grounds. The Magistrate found that there was sufficient cause for not complying with the provisions of Section 125(3), Cr.P.C. Against that order revision petition No. 1/87 was filed in the Court of the Sessions Judge. In the meanwhile immediately after the dismissal of the petition i.e. Crl.M.P. No. 2386/85, the wife filed Crl.M.P. 1088/86 for realisation of the maintenance amount by attachment of 1/3rd salary of the husband. This petition was also dismissed on 3-10-86 on the ground that as the earlier application was dismissed and the maintenance order was cancelled this petition is not maintainable. Subsequently the Sessions Court allowed Crl.R.P. No. 1/87 and set aside the order dismissing Crl.M.P. No. 2386/85. No revision was filed against the dismissal order of Crl.M.P. No. 1088/86.

3. Subsequent to the revision being allowed by the Sessions Court, the wife filed Crl.M.P. No. 397/88 for realisation of maintenance due to her. The Magistrate by an order d/- 21-7-88 sentenced the petitioner to undergo R.I. for one week for each month's default and as there was default in payment of maintenance for a period of 50 months, he sentenced the husband to undergo R.I. for a total period of 350 days. Crl.R.P. 94/88 filed against this order was dismissed on 14-11-88 and the Magistrate's order was confirmed. Now the present petition is filed to quash the order in Crl.M.P. No. 397/88 which was confirmed in Crl.R.P. No. 94/88 on 14-11-88.

4. In these proceedings Sr. C. Padmanabha Reddy raised three arguments viz. (1) the order in Crl.M.P. No. 1088/86 clearly indicates that the order of maintenance in M.C. No. 18/84 has been cancelled. That order has not been challenged in revision and it has become final and hence the order in M.C. No. 18/84 no longer subsists. Hence the present petition Crl.M.P. 397/88 is not at all maintainable. (2) Assuming for a moment that the order of maintenance is subsisting under the Criminal P.C. no petition can be filed under Section 125(3), Cr.P.C. for realising the arrears accumulated for more than one year. The first proviso to Section 125(3), Cr.P.C. clearly puts an embargo on a wife accumulating arrears of maintenance beyond a period of 12 months. (3) The last argument is that during the pendency of these proceedings as result of the orders in Crl.M.P. No. 2707/88 the husband paid Rs. 3,250/-. This payment has necessarily to be appropriated to the amount that can be realised or collected by way of the warrant. Hence the petitioner is not entitled to any more amount by pursuing Crl.M.P. No. 397/88.

5. On behalf of the respondent it is contended that in a petition for arrest of the maintenance-payer there is no limit of 12 months and the court is justified in sentencing the petitioner for imprisonment for 350 days at the rate of one week for each default. It is further contended that the order of maintenance cannot be cancelled either in CrI.M.P. No. 2386/85 or in CrI.M.P. 1088/86. Those are applications under Section 125(3), Cr.P.C. and unless the order is cancelled in exercise of powers under Section 125(4), 125(5), or under Section 127, Cr.P.C. The Sessions Judge and the Magistrate are perfectly justified in holding that the order of maintenance in M.C. 18/84 is subsisting. The last argument is that there is default in payment of 50 months maintenance. The amount of Rs. 3,250/- paid by reason of the order d/- 8-12-88 will be appropriated to the first 25 months maintenance and for the subsequent months, the present petition for arrest is maintainable. There are no merits in the present petition under Section 482, Cr.P.C. The proceedings in CrI.M.P. 397/88 and CrI.R.P. 94/88 cannot be quashed.

6. The points for determination in these proceedings are (1) whether the order of maintenance passed in M.C. No. 18/84 stood cancelled ?

(2) Whether under Section 125(3), Cr.P.C. the wife can seek imprisonment of the husband for non-payment of maintenance accumulated beyond a period of 12 months ?

(3) Whether the payment of Rs. 3,250/- paid as per the directions of this court can be appropriated to the maintenance due for the first 25 months as claimed by the wife ?

7. Point No. 1 : In these proceedings the Magistrates who dealt with CrI.M.P. 1088/86 passed orders which are beyond their powers. When petition for execution of maintenance order was filed under Section 125(3), Cr.P.C. one fails to understand how the Magistrate could cancel the order maintenance though he might be justified in refusing to execute it while exercising his powers under Section 125(3) Cr.P.C. As can be seen from the Sessions Judge's order the Magistrate dismissed CrI.M.P. 2386/85 which was filed for arrest but he also passed an order cancelling the maintenance order. Of course that order of the Magistrate passed on 23-7-86 was set aside by the Sessions Judge in CrI.R.P. No. 1/87 on 4-1-88. In between 23-7-86 and 4-1-88 another peculiar order was passed when the 2nd Addl. Judl. First Class Magistrate Sri. Y. Prabhakara Sarma dealt with CrI.M.P. No. 1988/86 which was filed under Section 125(3), Cr.P.C. for attachment of 1/3rd salary of the husband. The Magistrate came to the conclusion that as the earlier application was dismissed and as the earlier application cancelled the maintenance order,

the present petition i.e. CrI.M.P. No. 1088/86 is not maintainable and he further added in the end portion of the order that it is clear that the maintenance order is cancelled under Section 125(5), Cr.P.C. and, therefore, once again in this CrI.M.P. No. 1088/86 the order of maintenance in M.C. 18/84 d/- 8-10-85 is cancelled in view of my findings as stated in the above paras. If the Magistrate had seen the provisions of the Code this sort of mistakes would not have arisen. Section 125(3), Cr.P.C. does not give any powers to the Magistrate to cancel an order of maintenance which he is asked to execute. At best acting under the second proviso to Section 125(3), Cr.P.C. he may refuse to execute the order if he finds that the grounds of refusal to live with the husband given by the wife are not satisfactory. Only sub Section (5) of Section 125, Cr.P.C. gives the power to the Magistrate to cancel the order of maintenance. Similarly while exercising powers under Section 127, Cr.P.C. he can cancel the order of maintenance. Under Section 125(4), Cr.P.C. the wife is only disentitled to receive maintenance if she is living in adultery, or if, without any sufficient reason she refuses to live with her husband, or if she is living separately by mutual consent. Even Section 125(4) does not strictly give a right to cancel the maintenance order. It only disentitles the wife to receive maintenance under specified circumstances. If judicial authority is needed for this proposition, we have the pronouncement of the Supreme Court in Bhupinder Singh v. Daljit Kaur, . The Supreme Court observed at page 443 (of AIR) : (at p. 199 of Cri LJ) as follows :

"We are concerned with a Code which is complete on the topic and any defence against an order passed under Section 125, Cr.P.C. must be founded on one provision in the Code. S. 125 is a provision to protect the weaker of the two parties, namely, the neglected wife. If an order for maintenance has been made against the deserter it will operate until vacated or altered in terms of the provision of the Code itself. If the husband has a case under Section 125(4), (5), or Section 127 of the Code it is open to him to initiate appropriate proceedings. But until the original order for maintenance is modified or cancelled by a higher court or is varied or vacated in terms of S. 125(4) or (5) or Section 127, its validity survives. It is enforceable."

Judged in the light of this decision the order passed by the Magistrate in CrI.M.P. No. 1088/86 is non est and it need not be set aside by any higher court. In fact while dealing with CrI.M.P. No. 397/88 the Magistrate rightly remarked in paragraph No. 6 of his order as follows :

"It is very much doubtful whether this court can cancel the order of maintenance granted by it in the application filed by the petitioner for execution of the maintenance order". The Magistrate further remarked

that the order in Cr.M.P. 1088/86 is based upon the findings recorded in the earlier application CrI.M.P. No. 2386/85 and hence when one the order in CrI.M.P. 2386/85 is set aside in CrI.R.P. 1/87 the cancellation of maintenance order in CrI.M.P. No. 1088/86 also is deemed to be set aside. Assuming for a moment that the order in CrI.M.P. No. 1088/86 is not set aside by canvassing it in revision, even then as it is an order passed without jurisdiction it is non est in the eye of law. The learned Magistrate who delay with CrI.M.P. No. 397/88 and the learned Sessions Judge who dealt with CrI.R.P. 94/88 correctly appreciated the situation. I hold point No. 1 against the petitioner.

8. Point No. 2 : S. 25(3) P.C. contemplates issue of a warrant for every breach of the order and it also contemplates sentencing the defaulter to imprisonment of non-payment of each month's allowance. The term for each month's default may extend upto one month or until payment if sooner made. The first proviso to sub-section 3 of Section 125, Cr.P.C. reads as follows :

"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"

Sri Padmanabhareddy contends that this proviso applies both for the issue of the warrant for collecting the amount as well as for sending the defaulter to prison under the later limb of sub-section 3 of Section 125, Cr.P.C. As rightly pointed out by Mr. Padmanabhareddy there is a conflict of views regarding the interpretation of this proviso. The decision reported in Moddari Bin v. Sukdeo Bin, dealt with this question. The Division Bench dealing with the scope of S. 488(3) of the Code which is identical with the present Section 125(3), Cr.P.C. observed at page 139 that the order in this case under Section 488, Cr.P.C. is an order for maintenance and it is not an order for fine at all. Section 488(3) dealing with the enforcement of the order of maintenance only provides that the procedure laid down for warrants for levy of fine under Chapter XXVIII of the Cr.P.C. relating to execution should be followed. It is realisable only in the manner provided for levying fines. At page 140 in paragraph No. 14 dealing with the quantum of sentence the court observed as follows :-

"The maximum of one month, in our view, in this context and on proper interpretation of the language of the section is relatable to a period of the arrear for one month. In order words, default of one month is punishable by one month's imprisonment and no more. If the default is more than one month then the

imprisonment can be for as many months of default subject to a maximum of 12 months That would indicate that at the most the wife could only accumulate twelve months' maintenance and no more and the Magistrate could give in such case at most twelve months' imprisonment and no more. The whole idea is to provide a speedy and expeditious remedy. The idea is not to permit unnecessary accumulation of maintenance for the simple reason that maintenance is a current necessity and is not to be used for making a claim in lump after a long delay." Their Lordships quoted a number of decisions in support of their view. A single Judge of the Patna High Court gave a contrary interpretation and in the decision in *Iftekhhar Husain v. Hameeda Begum*, 1980 Cri LJ 1212 (All) Sri P. N. Bakshi, J. observed as follows :

"The proviso to sub-section (3) of S. 125, Cr.P.C. places a restriction upon the issue of warrant for the recovery of any amount due and that restriction is that the application should be made to the Court within a period of one year from the date it becomes due".

Then His Lordship observed at page 1213 as follows :

"In other words recovery by attachment and sale of the movable and immovable property of the applicant can only be made to satisfy the claim of arrears of maintenance for a period of one year prior to the filing of the application But there is no such limitation prescribed in sub-section (3) of Section 125 Cr.P.C. which limits the power of the Magistrate to sentence the defaulter for the whole or any part of each month's allowance remaining unpaid, after the execution of the warrant, to imprisonment for a term which may extend to one months or until payment if made sooner. In other words, though the property of the defaulter can be attached and sold for the realization of arrears of maintenance for a maximum period of one year from the date of application, yet the defaulter can be sentenced to imprisonment for recovery of arrears, which may extend beyond this period."

From a reading of the decision it is quite clear that the decision reported in *Moddari Bin v. Sukdeo Bin*, (1967) Cri LJ 335 (Cal) was not brought to the notice of His Lordship.

9. With utmost respect I may also indicate that the first proviso to Section 125(3), Cr.P.C. would apply to both the limbs or both the methods of recovery contemplated under sub-section 3 of Section 125, Cr.P.C. It cannot be said that the proviso would apply to the first mode of recovery i.e. by issue of a warrant for levying fines and that it would not apply too the 2nd mode of execution viz., by arresting and sending him to jail. A harmonious construction and interpretation requires that the proviso should be applied to both the

limbs of Section 25(3), Cr.P.C.

10. The decision in *G. Pratap Reddy v. G. Vijayalakshmi*, (1982) 1 APLJ (HC) 461 : (1982 Cri LJ 2365) is a single Judge's decision of A. P. High Court where His Lordship Jayachandrareddy following the decision in *K. R. Chawda v. State of Bombay*, a Full Bench decision, sentenced the defaulter to serve imprisonment at the rate of 9 days for default of each month and imposed a total sentence of 180 days where there is a default of payment of maintenance of 20 months. There is no discussion regarding the effect of the proviso to sub-section 3 of Section 125, Cr.P.C. The Bombay Full Bench decision upheld the order of the Magistrate sentencing the husband to the imprisonment for a term of 15 days in respect of each month for which the allowance remained unpaid. From a reading of the decision we do not know whether the total period of default was more than 12 months or not in the Bombay case. In the decision reported in *Kirparam v. Smt. Kalibai*, a single Judge dealing with the scope of proviso to Section 488(3), Cr.P.C. observed that a second application made for recovery of arrears of maintenance when the first application was dismissed for default has to be treated as a continuation of the original application and the Judge observed as follows (paras 4 and 5) :

"The dismissal for default in appearance of an application praying for issue of a warrant cannot, in my opinion, render the application non-existent even for the purposes of satisfying the condition as to limitation laid down in the aforesaid proviso. All subsequent application must, in my opinion, be deemed, for the purpose of the question of limitation, to be in continuation of the first."

Therefore, the 3rd application which took the default for more than one year was ordered.

11. Considering the different views expressed by the various High Courts I prefer to follow the Division Bench decision of the Calcutta High Court reported in *Moddari Bin v. Sukdeo Bin*, (1967 Cri LJ 335). The other decisions are judgments or single Judges. In my humble opinion the contraction put forward by the Division Bench of the Calcutta High Court is harmonesus construction and interpretation of the proviso making the proviso applicable to both the limbs of procedure contemplated under sub-section 3 of Section 125, Cr.P.C. I hold on point No. 2 that the wife the maintenance-holder cannot accumulate the maintenance for a period beyond 12 months. No application for execution of the maintenance order can be entertained for a period exceeding 12 months immediately preceding the date of application. I hold this point in favour of the petitioner. In this context I make it clear that they remedy provided under S. 125(3),

Cr.P.C. is a speedy and expeditious remedy. By virtue of the order of maintains granted in M.C. 18/84 the right vested in the wife to receive maintenance from the date of the application i.e. 7-12-83. She may not be able to recover the earlier arrears by resorting to an application under Section 126(3), Cr.P.C., but still she would certainly be entitled to claim those arrear by filing a civil suit on the basis that the amount is due to her by virtue of the court order. But at the same time it should be remembered that under civil laws also her claim should be within the period of limitation. For instance, for the maintenance payable for the period 7-12-83 to 7-1-84 she should file a suit on or before 7-1-87. At the most she can recover arrears of maintenance for 3 years by resorting to a civil suit. Unfortunately in this case the right to file a civil suit for the earlier arrears is also barred by time.

12. Point No. 3 : In view of my finding on point No. 2, the maximum period for which she can claim maintenance under the procedure contemplated under S. 125(3) is one year. Hence the amount of Rs. 3,250/- paid in pursuance of the orders of this court in CrI.M.P. No. 2707/88 would cover payment of maintenance for 25 months. This amount cannot be appropriate for the earlier arrears. It can only be appropriated to the amount recoverable under S. 125(3), Cr.P.C. and hence 12 months arrears which are sought to be recovered by filing CrI.M.P. No. 397/88 have been paid. In fact another 13 months' maintenance also has been paid. In the present proceedings nothing more can be recovered as her claim is fully satisfied.

13. In view of the various findings recorded by me there is no need to quash the proceedings in CrI.M.P. 397/88 which are confirmed in CrI.R.P. No. 94/88. I make it clear that the amount recoverable under the CrI.M.P. has been recovered. The petition is closed.

14. Order accordingly.