

(2005) 09 AHC CK 0298

Allahabad High Court

Case No: Criminal Miscellaneous Application No. 11212 of 2005

Dilshad

APPELLANT

Vs

State of U.P. and Smt. Hajra
Begum

RESPONDENT

Date of Decision: Sept. 12, 2005

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 125, 125(1), 125(3), 25(3), 482

Citation: AIR 2005 All 403 : (2005) CriLJ 228 : (2006) 1 DMC 461 : (2006) 1 RCR(Civil) 179

Hon'ble Judges: M.K. Mittal, J

Bench: Single Bench

Advocate: Nasiruzzaman, for the Appellant; A.G.A., for the Respondent

Judgement

M.K. Mittal, J.

This application u/s 482 Cr.P.C. has -been filed by Dilshad husband of Smt. Hazara Begum wherein he has challenged the order of the Learned Magistrate passed u/s 125(3) Cr.P.C. directing issuance of recovery warrant against the applleant for Rs. 22,500/-.

2. The brief facts giving rise to this application are that the opposite party No. 2 filed an application u/s 125 Cr.P.C. on 20.5.1999 against the applicant claiming maintenance for herself and her two children. The applications was allowed by an ex-parte order dated 27.7.2000 and total maintenance of Rs. 1500/- per month for three person was awarded from the date of the application. The applicant did not pay any maintenance and then an application u/s 125(3) Cr.P.C. was filed on 28.8.2000 and on that application recovery warrant was issued against the applicant for Rs. 22,500/-. Since the applicant did not pay the amount he was arrested and was sent to jail where he remained for one month. This amount referred to the period 20.5.1999 to 20.8.2004. The case remained pending and the opposite party No. 2 filed another application on 13.2.2004 claiming maintenance for the period

21.8.2000 to 20.1.2004 for 41 months for Rs. 61,500/- The applicant filed an objection on 21.7.2004 contending that the claim for Rs. 61,500/-- was beyond time as the application was filed after one year of its becoming due, that in the earlier execution application he was sent to jail and that matter could not be re-agitated and that he was willing to maintain his wife and children and to keep them with him. The learned Magistrate by the impugned order directed that the recovery warrant be issued against the applicant for the maintenance amount due for the period of fifteen months commencing from 20.5.1999 and ending on 20.8.2000 for Rs. 22,500/-. Against this order the applicant has come to this court u/s 482 Cr.P.C.

3. I have heard learned counsel for the applicant, learned A.G.A. for the state and perused the record.

4. The main contention of the learned counsel for the applicant is that the learned Magistrate directed for „ issuance of warrant without first deciding his objection filed under the proviso to Section 125(3) Cr.P.C. The second proviso to Section 125(3) Cr.P.C. reads as under:

"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."

5. The second proviso to sub Section 3 of Section 25 enunciates a salutary principle of courts having to consider the offer made by the husband to take back the wife and maintain her and if necessary uphold the wife's right to refuse such an offer only when the court is satisfied that there is just ground for so refusing. The intendment of this provision is for affording as many opportunities as possible by the Court for composing the differences between the husband and the wife. When such is the purpose, the duty cast upon the court to enquire into the matter arising out of such an offer or to state reasons for refusal of that offer should not be brushed aside merely on the ground that on earlier occasions or in original applications demanding maintenance such offer or offers have been considered. But the second proviso to sub Section 3 has been added in the interests of the wife and not the husband. It is to stop a Magistrate from too readily accepting the proposition that as soon as a husband offers to maintain his wife, if she lives with him, he ceases to "neglect" or to "refuse to maintain" his wife. It was a recognition of the principle that a woman is entitled to live with that amount of decency and dignity which prevails in her class and if the treatment of the husband towards his wife does not permit her to lead such a life, his conduct amounts to a "neglect" and "refusal to maintain" within the meaning of Section 125(1) such an offer is, therefore, to be carefully tested and if the wife gives adequate reasons for refusing to live with her husband, she is not to be deprived of her right to maintenance. It is only when her reasons are insufficient that her claim can be denied. This proviso gives another opportunity to the husband to make a genuine bonafide offer to

maintain his wife on condition of her living with him.

6. Therefore, in view of this position it was the duty of the learned Magistrate to have decided the objections as filed by the applicant husband u/s 125(3) Cr.P.C. Therefore, the learned Magistrate has erred in issuing the recovery warrant without deciding objections.

7. Learned counsel for the applicant has also contended that the accused had already been sent to jail for the period for which the recovery warrant has been issued and the learned Magistrate was not competent to issue recovery warrant for that period. But this contention of the learned counsel for the applicant cannot be accepted. It is not disputed that the applicant has not yet made any payment towards maintenance allowance to his wife and the children for the period he was sent to jail and therefore that liability has not yet been discharged. In the case of [Kuldip Kaur Vs. Surinder Singh and Another](#), it has been held by the Hon"ble Apex Court that a distinction has to be drawn between a mode of enforcing recovery of maintenance allowance on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is a mode of enforcement. It is not a mode of satisfaction of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refused to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. A person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance" without sufficient cause" to comply with the order. It cannot be said that a person who without reasonable cause refuses to comply with the order of the court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail. A sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail. Sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability. The section does not say so. The Parliament in its wisdom has not said so. Common sense does into support such a construction/""

8. Therefore it is within the power of the learned Magistrate to direct for recovery warrant against the husband for the period for which he had already been confined in jail.

9. Learned counsel for the applicant has further contended that the application as given by the opposite party for recovery of maintenance for 41 months on 13.2.2004

was barred by time as it was given after one year of the amount having become due. But this contention of the learned counsel for the applicant cannot be accepted in view of law as laid down by the Hon"ble Apex Court in the case of [Shantha @ Ushadevi and Another Vs. B.G. Shivananjappa](#) . In this case it has been held by the Hon"ble Apex Court that the bar of limitation of one year as given u/s 125(3) Cr.P.C. first proviso is not applicable in case of interim application given for recovery of maintenance allowance. It has also been held that insisting of filing successive application is only unreasonable since liability to pay maintenance is continuing liability.

10. In the instant case when the application was moved on 13.2.2004, the first application filed for recovery of maintenance on 28.08.2000 was still pending as the applicant has not paid any maintenance allowance.

11. Learned counsel for the applicant has filed the order sheet of case number 58 of 2004 and learned Magistrate has passed the order on 4.4.2005 regarding the recovery of maintenance amount for the period of 41 months. But in view of the judgement of the Hon"ble Apex Court as mentioned above, the finding as recorded by learned Magistrate is not correct.

12. In view of the above discussion, I come to the conclusion that the impugned order dated 8.6.2005 where by learned Magistrate directed for issuing recovery warrant against the applicant is to be set-aside and the case has to be remanded.

13. The application u/s 482 Cr.P.C. is allowed and the impugned order dated 8.6.2005 and order dated 4.4.2005 are set aside and the learned Magistrate is directed to first decide the objection as filed by the applicant Dilshad u/s 125(3) Cr.P.C, second proviso within a period of one month after the copy of the order is filed in his Court by the applicant. The applicant shall file the certified copy of the order in the trial court within seven days from today and shall cooperate in early disposal of the objections. If the learned Magistrate finds that the objections as filed by the applicant is not sustainable, learned Magistrate shall decide the applications dated 28.8.2000 and 13.2.2004 in the light of observations made above and shall pass suitable orders afresh after merging the files of miscellaneous case No. 58 of 2004, 59 of 2004 u/s 125(3) Cr.P.C.

14. Copy of this order be issued to the applicant within three days on payment of usual charges.