

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 1778 OF 2017

Anil Sampatrao Kothawale ...Petitioner

versus

Pushpabai Anil Kothawale and others ...Respondents

.....
Mr. Mukul S. Kulkarni, advocate for the petitioner
Mr. H.P. Randhir, avocate for respodent No. 1 and 2
Mr. V.M. Kagne, A.P.P. for respondent No.3-State
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CORAM : V. K. JADHAV, JJ.

**Date of Reserving
the Order :06.10.2018**

**Date of pronouncing
the Order :16.10.2018**

ORDER :-

1. By way of this writ petition, the petitioner is challenging the judgment and order of conviction and sentence dated 25.9.2017 passed by the learned Judicial Magistrate First Class (Court No.2), Shirpur in Criminal Misc. Application No. 245 of 2017 and also the judgment and order dated 3.11.2017 passed by the learned Additional Sessions Judge, Dhule in criminal appeal No. 103 of 2017, thereby confirming the period of sentence, as awarded by the learned Magistrate.

2. Brief facts giving rise to the present writ petition are as follows:-

a) Respondent No.1 is the wife of petitioner. Their marriage was solemnized on 07.05.1981 and respondent No.2 is their daughter born out of the wedlock. After marriage, respondent No.1 resided with the petitioner for one and half year at Nashik. During that period, respondent No.1 was subjected to domestic violence. In the year 1983, the petitioner drove respondent No.1 out of house. In the year 1984, the father and brother of respondent No.1 took her to the house of petitioner, however, the petitioner did not allow her to reside with him and asked for divorce. The petitioner had performed second marriage with one Sunita. Respondent No.1 had issued notice on 3.6.1985 to the petitioner for restitution of conjugal rights. However, the petitioner did not respond to the said notice. The respondent No.1 therefore, had filed criminal misc. application No. 160 of 1985 for grant of maintenance. The said application was allowed. The appeal preferred against the order of Magistrate thereby granting maintenance, before the learned Sessions Judge was also dismissed. So as to avoid payment of maintenance, the petitioner compromised the dispute in the year 1999. Petitioner admitted to reside with respondent No.1 at Shirpur and to pay her Rs.4000/- per month as maintenance. Respondent No.1 gave birth to respondent No.2 on 4.3.2002.

b) After some period, the petitioner started to ignore respondent nos. 1 and 2. On 12.7.2009, respondent No.1 and her aunt had been to Dhule for shopping. At that time, the petitioner and two others stopped them on the way and petitioner abused respondent No.1 and demanded divorce. The petitioner also threatened respondent No.1. It is with these premises, respondent Nos. 1 and 2 have filed Criminal M.A. No. 343 of 2009 against the the petitioner under the provisions of The Protection of Women from Domestic Violence Act, 2005 (hereinafter for the sake of brevity referred to as “the Act of 2005”).

c) The petitioner appeared in the application and strongly opposed the same by filing say at Exh.9. The petitioner has denied all the allegations made by the respondents. The petitioner has also denied that the respondents were subjected to domestic violence. It was contended by the petitioner that respondent No.1 used to abuse him by saying that her marriage was performed against her wish. Respondent No.1 went to her parents house at her own and did not return and on the contrary, obtained *ex-parte* maintenance order. The petitioner has also denied paternity of respondent No.2 as he has no concern with her.

d) The learned J.M.F.C. (Court No.3), Dhule, after hearing the parties and framing necessary points for consideration, by judgment and order dated 14.8.2015 granted amount of Rs.5000/- per month to

respondent Nos. 1 and 2 for the purpose of paying rent towards residence. The learned J.M.F.C. further granted monthly maintenance of Rs.3000/- to the respondent No. 1 and Rs.1000/- per month to respondent No. 2. It was also directed to the petitioner to pay an amount of Rs.50,000/- each to respondent Nos. 1 and 2 within three months from the date of the order.

e) Since the petitioner was in arrears of maintenance amount, the respondent Nos.1 and 2 herein filed Cri. M.A. No. 245 of 2017 for grant of arrears of maintenance amount of Rs.1,71,000/-. It was also prayed that the petitioner be directed not to commit domestic violence against respondent Nos. 1 and 2 and punish him in view of Section 32 of the Act of 2005.

f) The learned Magistrate, after hearing, by order dated 25.9.2017 allowed the Criminal M.A No. 245 of 2017 and the petitioner was sentenced to suffer S.I. for one year as per Section 125(3) of Cr.P.C. It was directed that he shall be released forthwith if he paid Rs.1,71,000/- to the concerned jail authorities or deposit such amount in the court.

g) Being aggrieved by the order dated 25.09.2017 passed by the learned J.M.F.C. Shirpur, in Criminal M.A. No. 245 of 2017, the petitioner preferred criminal appeal No. 103 of 2017 in the Sessions

Court at Dhule. The learned Additional Sessions Judge, Dhule by the judgment and order dated 3.11.2017, partly allowed the appeal. The order dated 25.9.2017 passed by the learned Magistrate is modified in terms that the petitioner shall suffer S.I. for a term of 12 months covering the period from 25.4.2016 to 24.4.2017 or until payment of Rs.1,08,000/- if sooner made. The order of imprisonment continues from 25.9.2017. Hence, this writ petition.

3. Learned counsel for the petitioner submits that the Magistrate has committed an error in sentencing the petitioner for 12 months of imprisonment by invoking the power under Section 125 (3) of Cr.P.C. and has also erred in reading and applying the said provisions to the present case. The order passed by the learned Magistrate is without jurisdiction. The learned Magistrate has not considered the ratio laid down by the Supreme Court in the case of **Shahada Khatoon and others vs. Amjad Ali and others**, reported in **(1999) 5 SCC 672**. Learned counsel submits that the learned Sessions Judge has partly accepted the contention of the petitioner that the amount of arrears of past one year are only recoverable, however, failed to further appreciate the contention of the petitioner that he ought not to have been sentenced to one year imprisonment. Thus, the continuation of the petitioner in custody will amount to illegal detention, since the sentence imposed upon him is in excess of the period provided by

law. The learned Additional Sessions Judge, instead of remanding the matter for fresh consideration to the learned Magistrate, has committed an error in deciding the matter and thereby the petitioner has lost the chance to agitate the point of sentence before the trial court. The petitioner is in custody for more than one month. The maximum sentence would be imposed for one month and since the same is already over, he is required to be released forthwith. Thus, now the detention of the petitioner will violate his right to life since he cannot be detained for more than one month. Learned counsel for the petitioner thus submits that the petition may be allowed.

Learned counsel for the petitioner, in order to substantiate his submissions, placed reliance on the following judgments:-

- i) ***Poongodi and anther vs. Thangavel***, reported in (2013) 10 SCC 618;
- ii) ***Laljee Yadav vs. State of Bihar and others***, reported in (2011) 4 PLJR 248;
- iii) ***Shahada Khatoon and others vs. Amjad Ali and others***, reported in (1999) 5 SCC 672.
- iv) Judgment of this court (Nagpur Bench) dated 04.09.2017 in Criminal writ petition No. 264 of 2015 (***Mohd. Aarif Pathan s/o Ibrahim Pathan vs. State of Maharashtra and others***).

4. Learned counsel for respondent Nos. 1 and 2 submits that the petitioner has willfully deserted respondent No.1 and he has

performed second marriage with one Sunita. In spite of issuance of notice for restitution of conjugal rights, the petitioner has not responded to the said notice. Learned counsel submits that even at one point of time, the petitioner had obstructed respondent No.1 on the way, when she was proceeding alongwith her aunt and insisted for divorce and also threatened her. It is in these premises, the respondents have initiated proceedings for grant of maintenance etc. as respondent No.1 wife was subjected to domestic violence. The learned Magistrate, after hearing the parties and taking into consideration the facts of the case, has awarded maintenance amount to respondent Nos. 1 and 2. Learned counsel thus submits that the Magistrate has power to direct imprisonment to the extent of one month for each month's default. Furthermore, since application for recovery of maintenance could be filed before expiry of 12 months from the date on which it falls due, the outer limit for sentence would be of 12 months maximum. Thus, the ratio is that the court can award 12 months imprisonment in default of 12 months arrears. In other words, 12 monthly defaults can be clubbed together and imprisonment for 12 months is the outer limit. The learned Additional Sessions Judge has rightly confirmed the said order passed by the Magistrate to that extent and there is no error committed by the appellate court. Learned counsel for respondent nos. 1 and 2 thus submits that the petition may be dismissed.

Learned counsel for respondent Nos. 1 and 2, in order to substantiate his submissions, placed reliance on the following judgments:-

- i) Judgment dated 30.9.2008 passed by the High Court of Gujarat at Ahmedabad in Criminal Reference No. 2 of 2008 [***Suo motu- Applicant(s) vs State of Gujarat- Respondent(s)***].
- ii) Order of this Court (Coram: Smt. Roshan Dalvi, J.) dated 13.01.2010 in Criminal Revision Application No. 616 of 2009 in the case of ***Manoj Markas Thorat vs. The State of Maharashtra and Anr.***
- iii) ***Gorakshnath Khandu Bagal vs. State of Maharashtra and others***, reported in ***2005 Cri.L.J. 3158***.

5. I have also heard the learned A.P.P. for respondent No.3-State.

6. According to the petitioner, the Magistrate has committed an error in sentencing the petitioner for 12 months of imprisonment by invoking the provision of Section 125(3) of Cr.P.C. and also erred in interpreting the said provision. The order passed by the learned Magistrate is without jurisdiction. Learned counsel for the petitioner has placed reliance on the judgment in the case of ***Shahada***

Khatoon (supra). Before advertng the ratio laid down by the Supreme court in the aforesaid case, it would be just and proper to reproduce herein below the provisions of Section 125(3) of Cr.P.C.:-

“125. Order for maintenance of wives, children and parents:-

- (1)
- (a) to (d)
- (2)
- (3) *If any person so ordered fails without sufficient cause to comply with the order, any such magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,) remaining unpaid after the execution of the warrant, to imprisonment for a term which may extent to one month or until payment if sooner made;*

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:

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.

Explanation.- If a husband has contracted marriage with

another woman of keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

7. In the case of ***Shahada Khatoon*** (supra), a short question that arose for consideration was whether the learned Single Judge of the Patna High Court correctly interpreted sub-section (3) of Section 125 of Cr.P.C. by directing that the Magistrate can only sentence for a period of one month or until payment, if sooner made. Learned counsel for the appellants in the above case contended that the liability of the husband arising out of an order passed under Section 125 of Cr.P.C. to make payment of maintenance is a continuing one and on account of non-payment there has been a breach of the order and therefore the Magistrate would be entitled to impose sentence on such a person continuing him in custody until payment is made. The Apex Court has not accepted the contention of the learned counsel for the appellants therein and held that the language of sub-section (3) of section 125 is quite clear and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. The Supreme court also observed that this power of the Magistrate cannot be enlarged and therefore, the only remedy would be after expiry of one month, for breach of non-compliance of the order of the Magistrate, the wife can approach again to the Magistrate for similar relief and by no stretch of imagination the Magistrate can be permitted to impose

sentence of more one month. Learned counsel for the petitioner, in the light of the aforesaid ratio laid by the Supreme court in the case of **Shahada Khatoon** (supra) has submitted that the Magistrate is not empowered to impose sentence for more than one month and as such, the order passed by the Magistrate and confirmed by the learned Additional Sessions Judge with certain modification is required to be quashed and set aside. It appears that the learned counsel for the petitioner has misinterpreted the provisions of section 125(3) of Cr.P.C. and also not correctly understood the ratio laid down by the Supreme court in the case of **Shahada Khatoon** (supra).

8. In the case of **Poongodi and another vs. Thangavel** (supra), the issue before the Supreme Court was altogether different. In the said case the High Court has held that the proviso to section 125(3) of Cr.P.C. is a fetter on the entitlement of the claimants to receive arrears of maintenance beyond period of one year preceding the date of filing of the application under Section 125(3) of Cr.P.C. The Supreme Court having considered the said provision of the Code, observed that the same does not create a bar or in any way affects the entitlement of a claimant to arrears of maintenance. Even in para 6 of the judgment, the Supreme Court by giving reference to the case of **Shahada Khatoon** (supra), observed that the successive

applications under Section 125(3) of Cr.P.C. highlighting the subsequent defaults in payment of maintenance was acknowledged by the Supreme Court in the case of **Shahada Khatoon**. The Supreme Court thus held that the first proviso to Section 125(3) therefore, does not extinguish or limit the entitlement of the appellants to arrears of maintenance granted by the learned trial court, as has been held by the High Court. The Supreme court has accordingly interfered with the order passed by the High Court. The Supreme court has made the observations as above, in the different context and it has hardly any application to the facts and circumstances of the present case and also the issue raised. However, on the other hand, the observations of the Supreme Court by referring the case of **Shahada Khatoon** (supra) supports the contention raised by the respondent-wife herein.

9. In the case of **Laljee Yadav vs. State of Bihar and others** (supra), relied upon by learned counsel for the petitioner, the Supreme Court in para 29 and 30, has made the following observations:-

“29. Again, this is significant inasmuch as the maintenance being a monthly payment, for each month's default, defaulter can be sentenced for a month's imprisonment. Now, we find there is a concept of one month as a unit. Here, we may refer to the

decision of the Apex Court in the case of since in the case of Shahada Khatoon & Others - Versus- Amjad Ali & Others, [(1999) 5 Supreme Court Cases 672]. That case went from this Court and a similar stand was taken on behalf of the wife before the Apex Court that so long as payment is not made, the husband would be liable to be detained and the person would continue in custody until payment is made. The Apex Court rejected the contention. Their Lordships referred to sub-section (3) of Section 125. The judgment of the Apex Court, as reported, is quoted hereunder:

"The short question that arises for consideration is whether the learned Single Judge of the Patna High Court correctly interpreted sub-section (3) of Section 125 of Cr.P.C. by directing that the Magistrate can only sentence for a period of one month or until payment, if sooner made. The learned counsel for the appellants contends that the liability of the husband arising out of an order passed under Section 125 to make payment of maintenance is a continuing one and on account of non-payment there has been a breach of the order and therefore the Magistrate would be entitled to impose sentence on such a person continuing him in custody until payment is made. We are unable to accept this contention of the learned counsel for the appellants. The language of sub-section (3) of Section 125 is quite clear and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. This power of the Magistrate cannot be enlarged and therefore the only remedy would be after expiry of one month. For breach or non-compliance with the order of the Magistrate the wife can approach the Magistrate again for similar relief. By no stretch of imagination can the Magistrate be permitted to impose sentence for more than one month. In that view of the matter the High

Court was fully justified in passing the impugned order and we see no infirmity in the said order to be interfered with by this Court. The appeal accordingly fails and is dismissed."

(Emphasis supplied)

30. Here, we may like to point out another aspect of the matter. As seen above, the maintenance is to be fixed on monthly basis. The sentence has, accordingly, been limited to a month maximum for each breach. Thus, as noticed by the Apex Court in the above referred to cases, there has to be separate sentencing upon separate and fresh application after considering the matter for each month or part thereof for which maintenance remains unpaid. Thus, by no stretch of imagination, can there be a continuous mechanical remand as in the present case."

10. Thus the ratio laid don by the Supreme court by referring the case of **Shahada Khatoon** (supra) also supports the contention raised by learned counsel for the respondents in the present case. In the case of **Suo Motu vs. State of Gujarat** in criminal reference No.2 of 2008 decided on 30.9.2008, the following question has been referred to the Full Bench of the Gujarat High Court:-

"In the light of the decision of the Supreme Court in the case of Shahada Ors. vs. Amjad Ali and Ors, (1999) 5 SCC 672, when a person is ordered to pay maintenance under sub-section (1) of Section 125 of the Code of Criminal procedure, 1973 fails without sufficient cause to comply with such order, whether the learned Magistrate, in exercise of powers under sub-section (3) of section 125 is empowered to sentence such person to imprisonment for a term exceeding one month."

In para 21 and 22 of the judgment, the full Bench of Gujarat High Court has answered the said question in following terms:-

“21 For the reasons already stated, we find that the Supreme Court in Shahada Khatoon's case did not lay down the ratio that regardless of the extent of default on the part of the husband in paying maintenance, the Magistrate can impose imprisonment of maximum of one month. We are in respectful disagreement with the view expressed by some of the High Courts to the contrary.

22. In the result, question is answered in following terms:

“Magistrate in exercise of powers under section 125 of the Criminal Procedure Code is empowered to sentence a defaulting person for a term upto one month (or until payment if sooner made) for each month of default subject of course to the limitation provided in proviso to sub-section (3) of section 125. In other words, it is open for the Magistrate to award sentence upto a maximum of one month for each month of default committed by the person ordered to pay maintenance and the maximum limit of sentence of one month referred to in sub-section (3) of section 125 will be applicable for each month of default. Magistrate can entertain separate applications from the person entitled to receive such maintenance or even entertain a common application for several months of default and pass appropriate order and, if found necessary, sentence a defaulting person upto a maximum one month fore each month of default. In all such cases, however, period of limitation provided in sub-section (3) of section 125 shall have to be borne in mind.”

In Special Criminal Application No. 897 of 2008, we may notice that for the unpaid maintenance for the period from 7.6.02 to 6.8.05, application under section 125(3) of the Criminal

Procedure Code was made on 1.7.06. We may, however, leave the factual aspects to the learned single Judge to work out and confine ourselves to answering the reference made to the Larger Bench.

Reference stands disposed of accordingly.”

11. Even the Division Bench of this court in the case of **Gorakshnath Khandu Bagal vs. State of Maharashtra and others**, (supra) relied upon by learned counsel for the respondents, while dealing with the similar issue, in para 7 and 9 has also taken a similar view as taken by the Full Bench of Gujarat High Court.

12. So far as the judgment of this Court (Nagpur Bench) in the case of **Mohd. Aarif Pathan s/o Ibrahim Pathan vs. State of Maharashtra and others (supra)**, relied upon by learned counsel for the petitioner is concerned, the ratio laid down by the Division Bench of this court in the case of **Gorakshnath Khandu Bagal vs. State of Maharashtra and others**, (supra) was not brought to the notice of learned Single Judge of this court. Thus, the judgment rendered by the learned Single Judge of this Court in the criminal writ petition No. 264 of 2015, as aforesaid, is *per incuriam*.

13. It is thus clear that the Magistrate, in exercise of the powers under Section 125 of Cr.P.C., is empowered to sentence the defaulting person for a term of one month for each month of default.

In other words, it is open for the Magistrate to award the sentence up to maximum one month for each month's default made by the person ordered to pay the maintenance. Thus, the maximum limit of sentence of one month referred to in Sub-section (3) of Section 125 of Cr.P.C. is applicable for each month of default. Even the Magistrate can entertain separate applications or even entertain a common application for several months of default and pass appropriate order. If there are arrears of more than one month, then the imprisonment exceeding the period of one month can be imposed.

14. In the instance case, in lieu of maximum 12 defaults, the Magistrate has imposed imprisonment for 12 months. However, the same is outer limit and lesser imprisonment can be imposed. Such imprisonment will be followed until the payment is made. In view of the same, I deem it appropriate to reduce the sentence to six months (15 days imprisonment for each month's default). Hence, the following order:-

ORDER

- I. Criminal writ petition is partly allowed.
- II. The impugned judgment and order dated 25.9.2017 passed by the learned Judicial Magistrate, First Class (Court No.2) Shirpur in Criminal Misc. Application No. 245 of 2017, which is confirmed with certain modification by the Additional Sessions

Judge, Dhule vide judgment and order dated 3.11.2017 passed in criminal appeal No. 103 of 2017, is hereby modified by reducing the sentence from simple imprisonment for one year to six months' simple imprisonment.

- III. Rest of the order as confirmed by the learned Additional Sessions Judge in criminal appeal stands confirmed.
- IV. Criminal Writ petition is accordingly disposed of.

(V. K. JADHAV, J.)

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