

Misc. Execution Case No. 13/2022

Order dated 29.09.2023

Today is fixed for passing order.

Both sides file hazirahs through their Ld. Advocates.

The case record is taken up for passing order.

The petitioner has filed the present Misc. (Execution) Case u/s. 128 of the Criminal Procedure Code on 11.05.2022 for enforcing the order of maintenance allowance passed by this Court u/s. 125 of the Criminal Procedure Code in c/w. the Misc. Case being No. 41/1998 for the period from 01.10.2016 till 11.05.2022.

The respondent is contesting the instant case by filing written objection denying therein all the material allegations made out in the petition by contending *inter alia* that the petitioner has filed the instant Misc. Execution Case claiming the maintenance allowance from the respondent beyond the period of one year in contravention of the first proviso to section 125(3) of the Criminal Procedure Code and the respondent is ready to pay to the petitioner a sum of Rs.8,400/- in compliance with the order dated 16.08.2022 passed by this Court and therefore, the petitioner is not entitled to receive the payment of maintenance allowance from the respondent since 16.10.2016.

During the course of hearing, the Ld. Advocate for the petitioner has contended that the petitioner is entitled to receive the payment of maintenance allowance from the respondent since 16.10.2016 under section 128 of the Code of Criminal Procedure and in support of his contention, he has filed one ruling of **Hon'ble Allahbad High Court** in the matter of **Usman @ Bhailal vs. State of U.P.**

The case record reflects that this Court has directed the respondent, through the order dated 27.04.2001, to pay to the petitioner a sum of Rs.1,000/- per month towards the maintenance allowance for the petitioner to the extent of Rs.700/- per month and for her minor son to the extent of Rs.300/- per month in c/w. Misc. Case being No. 41/1998. This is the admitted position of the case that the son of the petitioner has attained the age of majority even prior to date of 01.10.2016 and the petitioner has brought the present Misc. Execution Case on 11.05.2022 by claiming the maintenance allowance for herself as well as her son since

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01.10.2016 and therefore, I find that the petitioner is not at all entitled to get any amount of maintenance allowance for her major son from the respondent under this case.

The first proviso clause attached with section 125(3) of the Criminal Procedure Code contemplates 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.*" Section 128 of the Code of Criminal Procedure provides the authority to the Judicial Magistrate for the 'enforcement of order of maintenance' by stating *inter alia* that "*such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non payment of the allowance, or as the case may be, expenses due.*" Therefore, it appears that the provision of section 128 of the Code of Criminal Procedure does not prescribe any period of limitation for filing any application for the enforcement of the order of maintenance or interim maintenance.

The wordings of the first proviso to section 125(3) of the Criminal Procedure Code do not also create any bar on the petitioner to claim maintenance allowance against the respondent beyond the period of one year. It merely creates a bar to issue a warrant for levying the amount due in the manner provided for levying fines. However, this is fact that the instant Misc. Execution Case has been filed u/s. 128 of the Criminal Procedure Code seeking the enforcement of the order of maintenance allowance beyond the period of one year payable by the respondent.

The Ld. Advocate for the petitioner has filed the ruling of the **Hon'ble Allahbad High Court** in the matter of **Usman @ Bhailal vs. State of U.P.**, wherein the Hon'ble Court has observed that the first proviso to section 125(3) of the Criminal Procedure Code would have to be held to be confined within the section, which precedes it and the limitation of one year provided in terms thereof would have to be read in relation to issuance of warrant for recovery of the amount due in terms of an order of maintenance passed u/s. 125(1) of the Criminal Procedure Code and therefore, the aforesaid limitation of one year under the first proviso to section 125(3) of the Criminal Procedure Code cannot be held to travel beyond or stretch to an extent so as to being within its ambit the powers relating

to the enforcement of an order of maintenance under section 128 of the Criminal Procedure Code. The aforesaid findings of the Hon'ble Allahbad High Court is appearing justified in the situation. Further, the **Hon'ble Supreme Court** in **Shantha @ Ushadevi & Anr vs. B.G.Shivananjappa** reported in **A.I.R. 2005 S.C. 2410** has been pleased to observe that -
"It must be borne in mind that Section 125 Cr. P.C. is a measure of social legislation and it has to be construed liberally for the welfare and benefit of the wife and daughter. It is unreasonable to insist on filing successive applications when the liability to pay the maintenance as per the order passed under Section 125(1) is a continuing liability."

The provisions contained under Section 125(3) of the Code and the first proviso thereto has again come up for consideration before the Hon'ble Supreme Court in **Poongodi vs. Thangavel** reported in **(2013) 10 S.C.C. 618** and **A.I.R. 2014 S.C. 24**, wherein the Hon'ble Apex Court has held that the first proviso to Section 125(3) does not create any bar or fetter on the entitlement of the claimant to arrears of maintenance and it neither extinguishes nor limits the entitlement of the claimant to arrears of maintenance.

In the case in hand, no other application filed by the petitioner for the enforcement of the order of maintenance allowance is pending before this Court for consideration, save and except the instant application u/s. 128 of the Criminal Procedure Code filed by the petitioner. Since the adjudication of the application u/s. 125 of the Criminal Procedure Code and the proceedings brought thereunder are *quasi* civil in nature, the provision of the Limitation Act is applicable in the present situation. According to the provision of the Limitation Act, the period of limitation for recovery of money due is 03 years from the date, when it has become due. Therefore, I find that the petitioner is entitled to recover the amount due for the period from 12.05.2019 to 11.05.2022 amounting to Rs. 25,200/- from the respondent under the present execution case u/s. 128 of the Criminal Procedure Code filed by the petitioner in view of the above mentioned observations of the Hon'ble Supreme Court as well as the Hon'ble Allahbad High Court.

At this juncture, the question comes, whether this Court is empowered to recall or modify its own order dated 16.08.2022 directing the respondent to pay only a sum of Rs. 8,400/- under the instant execution case. The case

record reflects that the order dated 16.08.2022 is in the hand-writing of the former Bench Clerk-I bearing the initial signature of my Predecessor in Chair and there is no endorsement in the order as 'D/C' meaning thereby 'dictated and corrected' by the Presiding Officer. In this context, I opine that no stereotype order passed in a mechanical manner would stand in the way of advancing substantial justice between the parties. The **Hon'ble Supreme Court** in **K.M. Mathew vs. State Of Kerala and Anr.** reported in **1992 S.C.C. (1) 217** has been pleased to direct that the Judicial Magistrate is empowered to modify or recall its own order for the ends of justice, if the order does not dispose of the case pending before it finally. It is needless to record that the present case is not disposed of by virtue of this order and the case will be pending unless and until the respondent makes the payment.

In the light of the above mentioned guidelines of the Hon'ble Supreme Court and Hon'ble Allahbad High Court, the respondent is directed to pay to the petitioner a sum of Rs. 25,200/- under the present Misc. Execution Case u/s. 128 of the Criminal Procedure Code filed by the petitioner in terms of the order dated 27.04.2001 passed by this Court in c/w. the Misc. Case being No. 41/1998. In result, the written objection filed by the respondent against the instant Misc. Execution Case is disposed of accordingly.

To **08.11.2023** for payment by the respondent.

D/C.

Sd./-

A.C.J.M. Rnp.

Sd./-

Addl. Chief Judicial Magistrate,
Raghunathpur, Purulia