

Court No. - 84

Case :- APPLICATION U/S 482 No. - 8718 of 2021

Applicant :- Mohammad Usman Alias Bhai Lal

Opposite Party :- State Of U.P. And 6 Others

Counsel for Applicant :- Triloki Nath

Counsel for Opposite Party :- G.A.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri T.N. Tiwari, learned counsel for the applicant and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing along with Ms. Sushma Soni, learned Additional Government Advocate for the State-opposite party.

2. The present application under section 482 of the Code of Criminal Procedure, 1973¹ has been filed seeking to quash the proceedings of Execution Case No. 47 of 2018 (Shahar Bano Vs. Usman alias Bhai Lal) under Section 128 of the Code, Police Station-Sarai Mamrej, District Allahabad along with orders dated 13.02.2021/15.02.2021 passed by learned Additional Principal Judge, Family Court, Court No.-1, Allahabad.

3. The facts of the case as per the pleadings in the affidavit are to the effect that an application under section 125 of the Code filed by the opposite party no. 2 was allowed by means of an ex parte order dated 06.08.2015 with a direction to make payment of a monthly allowance of Rs. 1,000/- for life to the opposite party no. 2, and monthly allowance of Rs. 500/- each to the opposite party nos. 3, 4, 5 and 6, till they attain majority.

4. Proceedings for enforcement of the aforesaid order of maintenance under section 128 of the Code were initiated pursuant to an application dated 14.9.2018, registered as

1 the Code

Execution Case No. 47/2018 wherein a prayer was made for recovery of the amount.

5. The order sheet of the execution proceedings, which has been placed on record, indicates that pursuant to a recovery warrant issued in the execution proceedings, the applicant appeared before the court and filed an application expressing his willingness to deposit fifty per cent of the amount due and pursuant thereto an order dated 13.12.2019 was passed directing that fifty per cent of the amount due i.e. Rs. 77,000/- be deposited and the remaining amount be deposited in instalments. It appears that in respect of recovery of the balance amount, an order dated 13.02.2021/15.02.2021 was subsequently passed. It is at this stage, that the present application under section 482 of the Code has been filed seeking quashing of the order dated 13.02.2021/15.02/2021 and also the entire proceedings of the Execution Case.

6. The principle ground which has been sought to be canvassed on behalf of the applicant to assail the proceedings of the Execution Case are that the order under section 125 (1) having been passed on 06.08.2015, the proceedings for enforcement of the order initiated under section 128 of the Code pursuant to the application dated 14.09.2018 would be barred by limitation being beyond the period of one year from the date of order under section 125(1). In this regard, he has sought to place reliance upon the proviso to sub-section (3) of section 125.

7. Learned Additional Government Advocate-I submits that the limitation prescribed under the proviso to sub-section (3) of section 125 would be applicable in respect of proceedings to be initiated under section 125(3) and would not apply to proceedings for enforcement of the order under section 128 of

the Code, and accordingly quashment of the proceedings of the Execution case cannot be sought on this ground.

8. The ambit and scope of the powers to be exercised under Section 125(3) of the Code and the question as to whether the limitation prescribed under proviso to Section 125(3) would be applicable in respect of proceedings under Section 128 of the Code, fall for consideration in the present case.

9. In order to appreciate the rival contentions, the scheme provided under the Code for making orders for maintenance of wife, children and parents under Chapter IX would be required to be adverted to. The relevant provisions under Sections 125 to 128 are being extracted below:-

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

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means :

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.- For the purposes of this Chapter,-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(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 extend 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 or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

126. Procedure.—(1) Proceedings under section 125 may be taken against any person in any district—

- (a) where he is, or
- (b) where he or his wife, resides, or
- (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

127. Alteration in allowance.—(1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—

- (a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;
- (b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order—
 - (i) in the case where such sum was paid before such order, from the date on which such order was made;
 - (ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance

or interim maintenance, as the case may be, after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance for the maintenance and interim maintenance or any of them has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of the said order.

128. Enforcement of order of maintenance.—A copy of the order of maintenance or interim maintenance and expenses of proceeding, as the case may be, shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be, is to be paid; and 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.”

10. The object of the provisions contained under Chapter IX of the code is to provide a speedy and effective remedy against persons, who neglect or refuses to maintain their dependent wife, children and parents.

11. The provisions with regard to grant of maintenance under Section 125 Cr.P.C. and the duty of the husband towards the wife in regard thereof, came up for consideration in the case of **Bhuvan Mohan Singh vs. Meena & others**², and referring to the earlier decisions in **Smt. Dukhtar Jahan v. Mohammed Farooq**³, **Vimala (K.) v. Veeraswamy (K.)**⁴ and **Kirtikant D. Vadodaria v. State of Gujarat**⁵ it was held that the proceedings are summary in nature and they intend to provide a speedy remedy and achieve a social purpose. The observations made in the judgement in this regard are as follows :-

"7. We are obliged to reiterate the principle of law how a proceeding under Section 125 of the Code has to be dealt with by the court, and what is the duty of a Family Court after establishment of such courts by the Family Courts Act 1984. In

2 (2015) 6 SCC 353

3 (1987) 1 SCC 624

4 (1991) 2 SCC 375

5 (1996) 4 SCC 479

Smt. Dukhtar Jahan v. Mohammed Farooq (1987) 1 SCC 624, the Court opined that: (SCC p. 631, para 16)

“16.Proceedings under Section 125 of the Code, it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner.”

8. A three-Judge Bench in *Vimala (K.) v. Veeraswamy (K.) (1991) 2 SCC 375*, while discussing about the basic purpose under Section 125 of the Code, opined that: (SCC p. 378, para 3)

"3. Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife.

9. A two-Judge Bench in *Kirtikant D. Vadodaria v. State of Gujarat (1996) 4 SCC 479*, while advertng to the dominant purpose behind Section 125 of the Code, ruled that: (SCC p. 489, para 15)

“15. ... While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation.”

12. The legal position that the provisions under Chapter IX of the Code are in the nature of a beneficent legislation and the liability to pay maintenance under Section 125 of the Code is a continuing one, was reiterated in recent decisions of this Court in **Alakhram v. State of U.P. and Another**⁶ and **Mithilesh Maurya v. State of U.P. and Another**⁷.

13. The distinction between the mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other, in the context of the provisions under Sections 125(3) and 128 of the Code, fell for consideration in the case of **Smt. Kuldip**

6 2021 (114) ACC 750

7 2021 (114) ACC 761

Kaur v. Surinder Singh And Another⁸, and it was held that sentencing a person to jail as per terms of Sections 125(3) of the Code is a 'mode of enforcement' and not 'mode of satisfaction' of the liability, which can be satisfied only by making actual payment of the arrears. The observations made in the judgement with regard to the scope of the powers to be exercised under Sections 125(3) and 128 of the Code, are being extracted below:-

“5. The scheme of the provisions embodied in Chapter IX of the Code comprising of Sections 125 to 128 which constitutes a complete code in itself requires to be comprehended. It deals with three questions, viz.: (1) adjudication as regards the liability to pay monthly allowance to the neglected wife and child etc., (2) the execution of the order on recovery of monthly allowance, and (3) the mode of execution of an order for monthly allowance. Now, one of the modes for enforcing the order of maintenance allowance with a view to effect recovery thereof is to impose a sentence of jail on the person liable to pay the monthly allowances.

6. A distinction has to be drawn between a mode of enforcing recovery 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 refuses 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. Be it also realised that 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 would indeed be strange to hold 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 not support such a construction. From where does the Court draw

inspiration for persuading itself that the liability arising under the order for maintenance would stand discharged upon an effort being made to recover it? The order for monthly allowance can be discharged only upon the monthly allowance being recovered. The liability cannot be taken to have been by sending the person liable to pay the monthly allowance, to jail. At the cost of repetition it may be stated that it is only a mode or method of recovery and not a substitute for recovery. No other view is possible. ...”

14. While considering the scope of powers to be exercised under Section 125(3) of the Code in **Shahada Khaton And Others v. Amjad Ali And Others**⁹, it was held that the aforesaid sub-section 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. In respect of subsequent defaults in payment of maintenance, it was held, that the wife could approach the Magistrate again for similar relief.

15. In **Shantha Alias Ushadevi And Another v. B. G. Shivananjappa**¹⁰, it was stated that Section 125 of the Code is a measure of social legislation and accordingly, is to be construed liberally for the welfare and benefit of the wife and the children. In the context of the provisions contained under Section 125(3), first proviso, prescribing limitation of one year to seek recovery of arrears of maintenance, it was observed that the liability to pay the maintenance as per the orders passed under Section 125(1) being a continuing liability, it was unreasonable to insist on filing successive applications. The relevant observations made in the judgement are as follows:-

“**8.** ... 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.”

9 (1999) 5 SCC 672

10 (2005) 4 SCC 468

16. The provisions contained under Section 125(3) of the Code and the first proviso thereto again came up for consideration in **Poongodi And Another v. Thangavel**¹¹, and it was held that the first proviso to Section 125(3) does not create any bar or fetter on claiming arrears of maintenance and it neither extinguishes nor limits entitlement to arrears of maintenance. It was stated thus:-

“4. A reading of the order dated 21.4.2004 passed by the High Court would go to show that the proviso to Section 125(3) CrPC has been construed by the High Court to be a fetter on the entitlement of the claimants to receive arrears of maintenance beyond a period of one year preceding the date of filing of the application under Section 125(3) CrPC. Having considered the said provision of the Code we do not find that the same creates a bar or in any way affects the entitlement of a claimant to arrears of maintenance. What the proviso contemplates is that the procedure for recovery of maintenance under Section 125(3) CrPC, namely, by construing the same to be a levy of a fine and the detention of the defaulter in custody would not be available to a claimant who had slept over his/her rights and has not approached the Court within a period of one year commencing from the date on which the entitlement to receive maintenance has accrued. However, in such a situation the ordinary remedy to recover the amount of maintenance, namely, a civil action would still be available.”

17. Referring to the earlier decisions in the case of *Kuldip Kaur* (supra), *Shahada Khatoon* (supra) and *Shantha Alias Ushadevi* (supra), it was observed as follows:-

“5. The decision of this Court in *Kuldip Kaur v. Surinder Singh*, (1989) 1 SCC 405, may be usefully recalled wherein this Court has held the provision of sentencing under Section 125 (3) to be a “mode of enforcement” as distinguished from the “mode of satisfaction” of the liability which can only be by means of actual payment. ...

6. In another decision of this Court in *Shantha alias Ushadevi and Another v. B.G. Shivananjappa*, (2005) 4 SCC 468 it has been held that the liability to pay maintenance under Section 125 CrPC is in the nature of a continuing liability. The nature of the right to receive maintenance and the concomitant liability to pay was also noticed in a decision of this Court in *Shahada Khatoon & Ors. v. Amjad Ali*, (1999) 5 SCC 672. Though in a slightly different context, the remedy to approach the court by means of successive applications under Section 125(3) CrPC highlighting the

11 (2013) 10 SCC 618

subsequent defaults in payment of maintenance was acknowledged by this Court in Shahada Khatoon.

7. The ratio of the decisions in the aforesaid cases squarely apply to the present case. The application dated 05.02.2002 filed by the appellants under Section 125(3) was in continuation of the earlier applications and for subsequent periods of default on the part of the Respondent. The first proviso to Section 125(3), therefore did not extinguish or limit the entitlement of the appellants to the maintenance granted by the learned trial court, as has been held by the High Court.”

18. The provisions for making orders for maintenance of wives, children and parents are contained in Chapter IX of the Code. The subject matter of the provisions contained under the Chapter though essentially of a civil nature, the justification for their inclusion in the Code, is to provide a more speedy and economical remedy than that available in civil courts for the benefit of the persons specified therein.

19. The proceedings for maintenance under Section 125 of the Code are of a summary nature and the purpose and object of the same is to provide a simple and speedy remedy, and to ensure that the deserted wife, children and parents are not left destitute and without any means for subsistence. An application under Section 125 of the Code can be moved by the wife on fulfilment of two conditions :- (a) the husband has sufficient means and; (b) he neglects or refuses to maintain his wife, who is unable to maintain herself. The Magistrate, in such a case, may direct the husband to pay such monthly sum of the money, as he may deem fit, taking into consideration the financial capacity of the husband and other relevant factors.

20. Section 125 of the Code is in the nature of a benevolent provision having a social purpose with the primary object to ensure social justice to the wife, child and parents, who are unable to support themselves so as to prevent destitution and vagrancy.

21. In terms of Section 125(3) of the Code, if any person fails with sufficient cause to comply with the order made under Section 125(1) for maintenance, the Magistrate may, for every breach of the order, issue a warrant for levying the amount due 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 execution of the warrant to imprisonment for a term which may extend to one month or until payment, if sooner made.

22. The provisions contained under sub-section (3) of Section 125, as aforesaid, would indicate that the issuance of warrant or the imprisonment of the person concerned, is only a mode of recovery of the amount due in terms of the order made under sub-section (1) to Section 125 for payment of monthly allowance. The mode of recovery by issuance of a warrant or by imprisonment of the person as per terms of Section 125(3), has been held distinct from actual satisfaction of the liability.

23. Sentencing a person to jail as a 'mode of enforcing' has been held to be not a 'mode of satisfaction' of the liability, which can be satisfied only by making actual payment of the arrears. The very purpose of imprisonment is to require a person who refuses to comply with the order without sufficient cause to obey the order and to make payment of the monthly allowance. The purpose of imprisonment would not be to wipe out the liability which he has refused to discharge; the imprisonment of the person concerned being in no way a substitute for the recovery of the amount of monthly allowance which has fallen in arrears.

24. Sentencing to jail can only be seen as a means of recovering the amount of arrears and not a mode of discharging

liability. The liability for payment of monthly allowance can be discharged only upon the amount being recovered and not by imprisonment alone of the person liable to pay monthly allowance which can only be held to be a mode or method of recovery and not a substitute for discharge of the liability.

25. Section 125(3) of the Code 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 first proviso to Section 125(3) prescribing limitation of one year to seek recovery of arrears of maintenance, is only in respect of the procedure for recovery of maintenance as per terms of the sub-section, by construing the same to be a levy of fine.

26. The first proviso to Section 125(3) of the Code cannot be construed to be a fetter on the entitlement of the claimant to receive arrears of maintenance beyond a period of one year preceding the date of filing of the application under Section 125(3) nor can it be held to extinguish or limit the entitlement to claim maintenance granted by the court under Section 125.

27. Section 128 of the Code provides for enforcement of the order of maintenance against the person against whom the order of maintenance has been made. The enforcement of the order of maintenance under Section 128 can only be made upon the liability being satisfied by making actual payment of the amount of maintenance which is due. The entitlement to claim enforcement of the order of maintenance under Section 128 by seeking discharge of the liability as per terms of the order of maintenance granted under Section 125, therefore cannot be held to be extinguished in terms of the one year limitation prescribed under the first proviso to Section 125(3).

28. Even otherwise, a plain reading of the first proviso to Section 125(3) would show that the limitation of making an application within a period of one year from the date on which it becomes due would only be applicable in case of issuance of a warrant for recovery of any amount due under the section, and it does not contain any restriction on a claim to be made for enforcing the order of maintenance for which the provision is made under Section 128.

29. While considering the scope of the proviso to sub-section (3) of Section 125 of the Code and as to whether the limitation of one year under the proviso can be extended to enforcement of the order of maintenance under Section 128 of the Code, it would be relevant to bear in mind that the language of a proviso, even if in general, is normally to be construed in relation to the subject matter covered by the section to which the proviso is appended.

30. Considering the scope of a proviso as an internal aid to interpretation of statutes in **Dwarka Prasad v. Dwarka Das Saraf**¹², it was held that a proviso must be limited to the subject matter of the enacting clause and must be read and considered in relation to the principal matter to which it is a proviso. Referring to the earlier decisions in **Commissioner of Income-tax v. Indo-Mercantile Bank Ltd.**¹³, **M/s. Ram Narain Sons Ltd. v. Asst. Commissioner of Sales Tax**¹⁴, **Thompson v. Dibdin**¹⁵, **Rex v. Dibdin**¹⁶ and **Tahsildar Singh v. State of U.P.**¹⁷, it was stated as follows:-

“18. ...The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the

12 (1976) 1 SCC 128

13 AIR 1959 SC 713

14 AIR 1955 SC 765

15 1912 AC 533, 541

16 1910 Pro Div 57, 119, 125

17 AIR 1959 SC 1012

principal matter to which it is a proviso. It is not a separate or independent enactment. ...”

31. The following observations in the case of **Thompson v. Dibdin** (supra) were referred to and the same are being extracted below:-

“18. ... Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context. ...”

32. Taking a similar view it was held in **Mackinnon Mackenzie & Co. Ltd vs Audrey D'Costa & Anr**¹⁸, that the proviso does not travel beyond the provision to which it is a proviso and its ambit cannot be stretched beyond the main provision.

33. In **Ali M.K. And Others v. State of Kerala and Others**¹⁹, it was reiterated that the proviso qualifies or carves out an exception to the main provision, and referring to earlier judgments in **Mullins v. Treasurer of Surrey**²⁰, **Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha**²¹, **Calcutta Tramways Co. Ltd. v. Corporation of Calcutta**²², **West Derby Union v. Metropolitan Life Assurance Co.**²³, **A.N. Sehgal v. Raje Ram Sheoran**²⁴, **Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal**²⁵, **Kerala State Housing Board v. Ramapriya Hotels (P) Ltd.**²⁶, **R. v. Taunton, St James**²⁷ and **Lord Esher in Barker, Re**²⁸, the law on the point was summarized as follows:-

“10. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As

18 (1987) 2 SCC 469

19 (2003) 11 SCC 632

20 (1880) 5 QBD 170

21 AIR 1961 SC 1596

22 AIR 1965 SC 1728

23 1897 AC 647

24 AIR 1991 SC 1406

25 AIR 1991 SC 1538

26 (1994) 5 SCC 672

27 (1829) 9 B&C 831

28 (1890) 25 QBD 285

was stated in *Mullins v. Treasurer of Surrey* [(1880) 5 QBD 170], (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha* (AIR 1961 SC 1596) and *Calcutta Tramways Co. Ltd. v. Corporation of Calcutta* (AIR 1965 SC 1728), when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso. ..." said Lord Watson in *West Derby Union v. Metropolitan Life Assurance Co.* (1897 AC 647). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. [(See *A.N. Sehgal and Ors. v. Raje Ram Sheoran* (AIR 1991 SC 1406), *Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal* (AIR 1991 SC 1538) and *Kerala State Housing Board and Ors. v. Ramapriya Hotels (P)Ltd.* (1994) 5 SCC 672].

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant." (*Coke upon Littleton* 18th Edn., p. 146.)

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" [Per Lord Wrenbury in *Forbes v. Git* (1922) 1 AC 256].

11. A statutory proviso "is something engrafted on a preceding enactment" [*R. v. Taunton, St James*, (1829) 9 B&C 831].

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances." [Per Lord Esher in *Barker, Re* (1890) 25 QBD 285].

12. A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso [See *Jennings v. Kelly*, (1940) AC 206].

34. In “**The Construction and Interpretation of the Laws**” by **Henry Campbell Black**²⁹ it has been stated as a rule of construction that a proviso will be confined to that which directly precedes it, or to the section to which it is appended. The legal proposition has been stated as follows:-

“The natural and appropriate office of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it. Hence it is a rule of construction that it will be confined to that which directly precedes it, or to the section to which it is appended, unless it clearly appears that the legislature intended it to have a wider scope.”

35. The foregoing discussion would go to show that the language of a proviso is normally to be construed in relation to the subject matter covered by the section to which it is appended and a proviso would not travel beyond the section to which it is a proviso. It has consistently been held as a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision.

36. As a logical corollary it may be stated that the proviso would assume the tenor and colour of the substantive enactment and the correct way to understand the proviso is to read it in a context and not in isolation. The proviso can be held to operate within the ambit of the section to which it is a proviso and it cannot deal with any other field than the field which the section itself deals with.

37. It would be the duty of the Court while construing a proviso to give it a meaning so as to bring it within the ambit and purview of the section itself, by reading it in a manner so as to confine it to the section which precedes it.

38. Applying the aforesaid principles of statutory construction, the proviso to sub-section (3) of Section 125

²⁹ The Construction and Interpretation of the Laws; Henry Campbell Black; p. 273 (West Publishing Co.)

would have to be held to be confined to the section which precedes it. The limitation of one year provided in terms thereof would have to be read in relation to issuance of a warrant for recovery of an amount due in terms of an order of maintenance passed under sub-section (1) of Section 125. The aforesaid limitation of one year under the proviso to Section 125 (3) cannot be held to travel beyond or stretch to an extent so as to being within its ambit the powers relating to enforcement of an order of maintenance under Section 128 of the Code.

39. It may, therefore, be deduced that the scope of Section 125(3) and 128 of the Code being different and the first proviso to Section 125(3) creating an interdict only on issuance of warrant for recovery under Section 125(3), the said period of limitation of one year cannot be held to create a fetter on the right to claim enforcement under Section 128.

40. The proceeding for enforcement of the order under Section 128, therefore, cannot be assailed on the ground that the same would be barred by limitation as provided under the proviso to Section 125(3) of the Code.

41. This being the only ground on the basis of which the proceedings of the execution case have been sought to be challenged, the present application under Section 482 of the Code, thus fails and is accordingly **dismissed**.

Order Date :- 31.8.2021

Kirti

(Dr. Y.K. Srivastava, J)