

[\(2023-1\)209 PLRIJ 043 \(Ker.\)](#)

KERALA HIGH COURT

Before: Mr. Justice A. Badharudeen, J

ASWATHI - Appellant,

Versus

RAJEESH RAMAN - Respondent.

Case No : Criminal Miscellaneous Petition No. 6566 Of 2022 And Original Petition (CRL.) NO. 549 Of 2022

Criminal Procedure Code, S. 125, 127, 128 - Whether a Court, which passed an order of maintenance under Section 125 and 127 of the Code of Criminal Procedure, is competent to execute the order against a person, who has been residing in a place outside the jurisdiction of the Court, which passed the order? - Whether it is mandatory to file an execution petition before the court at the place where the person, against whom the order may be enforced, has been residing - A harmonious and beneficial interpretation of the statutory wording would certainly throw light on the fact that as per the mandate of Section 128 of Cr.P.C, an order passed under Section 125 or 127 Cr.P.C can be enforced by the court in any place, where the person against whom the order is made and at the same time the court passed the order also could very well execute the order irrespective of the fact that the person against whom the order is made has been residing in a place, outside the jurisdiction of the court, which passed the order - Held, that even though an order of maintenance may be enforceable at the place where the person against whom it is made, the court which passed the order also retains power to execute the order, outside the jurisdiction where the respondent has been residing.

[Para 16, 17]

Held, it is necessary in the interests of justice to visualise the plight of poor wife and children or the parents, as the case may be, if a view taken to the effect that each and every execution proceedings to enforce order of maintenance obtained by the wife, children and parents at the place where the person against whom the order was made. If such a proposition is declared, a clever husband or son or daughter, as the case may be, could very well shift their residence, outside the jurisdiction of the court where the order of maintenance sought to be executed, so as to defeat the enforcement of the order. No doubt, it may be easy for them to shift their residence periodically, to defeat the enforcement of the maintenance order.

[Para 14]

JUDGEMENT

A.Badharudeen, J. - (10th January, 2023) -

1. The legal question emerges in these matters is, whether a Court, which passed an order of maintenance under Section 125 and 127 of the Code of Criminal Procedure, is competent to execute the order against a person, who has been residing in a place outside the jurisdiction of the Court, which passed the order?

2. Crl.M.C.No.6566 of 2022 has been filed under Section 482 of the Code of Criminal Procedure (hereinafter referred to as `Cr.P.C' for short) challenging Annexure-A3 order of the Family Court, Malappuram. As per Annexure-A3 order dated 16.08.2022 in the form of an endorsement in an unnumbered CMP (Execution)/2022 in M.C.No.64/2019, the Family Court returned the execution petition with the following endorsement:

“ As the respondent is a resident of Tamil Nadu State as per Section 128 Cr.P.C, the Court order is to be executed at the place of residence of the respondent. Hence the petition is returned for presentation before the proper Court.”

3. In O.P(Crl.).No.549 of 2022, similarly the Family Court, Malappuram returned CMP (Execution)/2022 in M.C.No.392/2016 for the same reason.

4. Heard the learned respective counsel for the petitioners as well as the learned counsel appearing for the respondents and the learned Public Prosecutor.

5. It is argued by Advocate K.M.Sathyanatha Menon appearing for the petitioner in Crl.M.C.No.6566 of 2022 that the learned Magistrate went wrong in passing an order returning the execution petition on the ground that the order has to be executed at the place of residence of the respondent. According to the learned counsel, as per Section 128 of Cr.P.C, the word used is `may' and, therefore, the power of the Court to execute an order passed under Section 125 and 127 of Cr.P.C shall not cease in cases where the respondent has been residing outside the jurisdiction of the court. The learned counsel placed an unreported decision of the Delhi High Court dated 17.12.2021 in Crl.R.P.No.614/2018, *Asha Devi & Ors. v. Muneshwar Singh @ Munna*, ¹ to substantiate the said point. It is argued by the learned counsel Sri Sathyanatha Menon further that in the said decision, the Delhi High Court took the view that an order passed by the Family Court can be executed against a respondent, who is residing outside the jurisdiction of the Court.

6. Sri Sathyanatha Menon has placed a Division Bench decision of this Court reported in [2021 (1) KLJ 843], *Anoop Vijay v. Arunima P.T.*, ² where this Court dealt with Section 18 of the Family Courts Act also in support of his contention. In this decision, this Court held that when we appreciate Section 18 of the Act, it can be understood that though the manner of executing the decree of a Family Court, is as prescribed in the CPC, the court that has to execute the decree or order is primarily the Family Court which passed the decree or order. The “other Family Court or ordinary civil court to which it is sent for execution” is secondary in nature. It arises only after an application by the decree holder to send the decree for execution is made and the Family Court which passed the decree or order, directs sending of the decree for execution to the other Court. The words “ by the other Family Court or ordinary civil court” in Section 18(3) of the Act is controlled and guided by the words “ to

which it is sent for execution". If it is not sent, undoubtedly the jurisdiction to execute the decree will continue to vest or remain with the Family Court that passed the decree or order. Such an interpretation arises on account of the overriding effect of the Family Courts Act in Section 20 and also due to the necessity of having certainty of laws. If the court of execution is a fluctuating one, depending on wherever the judgment debtor resides, an unscrupulous judgment debtor could easily circumvent or delay execution by repeatedly shifting his place of residence.

7. Whereas Advocate K.N.Prabhu, who appeared for the respondent in O.P(CrI).No.549/2022, raised a specific contention that since Section 128 of Cr.P.C provides that an order of maintenance 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. In order to buttress this point, the learned counsel placed a decision of the Karnataka High Court reported in [1985 KHC 839 : 1985 CriLJ 152], *Ananth Gopal Pai v. Gopal Narayan Pai*³. The learned counsel would argue that in the said decision in paragraph No.13 it has been held as under, to substantiate the said view:

"13. xxxx xxxx xxxx xxxx The order that Court may make would be enforceable against the son wherever he is and that is clear from S.128 of the Code. It says that "such an 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 due." Taking any other view of the matter would make these beneficial provisions absolutely futile and meaningless. xxxx xxxx xxxx"

8. It is argued by Advocate Prabhu further that the word used in Section 128 as 'may' shall be understood as 'shall' and therefore, execution of orders passed under Section 125 or 127 of Cr.P.C shall be done by the Court, where the person against whom the order is made. He has placed a decision reported in [1963 KHC 592 : AIR 1963 SC 1088], *Ramji Missar & anr. v. State of Bihar*⁴ in support of this contention. In this decision while interpreting Section 11(1) of the Probation of Offenders Act, 1958 r/w Section 6(1) of the Act, it has been held in para.16 as under:

"Though the word "may" might connote merely an enabling or permissive power in the sense of the usual phrase "it shall be lawful", it is also capable of being construed as referring to a compellable duty, particularly when it refers to a power conferred on a court or other judicial authority. As observed in Maxwell on Statutes:

"Statutes which authorise person to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall', if they think fit, or, 'shall have power', or that 'it shall be lawful' for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have - to say the least - a compulsory force." The fact that the power is conferred on a Court might militate against the literal interpretation of "may" suggested by the

respondent. This apart, the power conferred by S.11(1) is to pass “an order under the Act” and the question arises as to the precise import of these words, and in particular whether these words would not imply that the order to be passed would be subject to the same limitations or conditions as the orders under what might be termed the primary provisions of the Act. Thus S.3 empowers a court to release certain offenders on probation of good conduct after due admonition, and it lays down certain tests as a guidance or the basis upon which that discretion is to be exercised: (1) that no previous conviction should have been proved against him, and (2) that the court by which the person is found guilty should be of the opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender it is expedient so to do. Similarly, S.4 empowers a court to release certain offenders on probation of good conduct. The criteria laid down there and the guidance set out is that the court by which the person is found guilty should be of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, with a proviso that the power is not to be exercised unless the court were satisfied that the offender or his surety has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.”

9. The learned Advocate Prabhu has also placed decision reported in [1997 KHC 1445 : 1997 (9) SCC 132], *Mohan Singh & Ors. v. International Airport Authority of India & Ors.*⁵ to contend that the distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect. The distinction reflected in the use of the word “shall” or “may” depends on conferment of power. In the present context, “may” does not always mean may. May is a must for enabling compliance of provision but there are cases in which, for various reasons, as soon as a person who is within the statute is entrusted with the power, it becomes duty to exercise. In this case the Apex Court held so while dealing with Section 4(1), 6(1) and 6(2) of the Land Acquisition Act, 1894.

10. The learned counsel placed another decision of the Apex Court reported in [1963 KHC 665 : AIR 1963 SC 1618], *State of U.P v. Jogendra Singh*,⁶ to contend that there is no doubt that the word “may” generally does not mean “must” or “shall”. But it is well settled that the word “may” is capable of meant, “must” or “shall” in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word “may” which denotes discretion should be construed to mean a command. In this decision the Apex Court held so while dealing with sub rule (2) of Rule 4 of the Civil Services (Classification, Control Appeal) Rules, 1930.

11. Similarly, another decision reported in [1968 KHC 366 : AIR 1968 SC 1 : 1968 CriLJ 82], *A.C.Aggarwal, Sub Divisional Magistrate, Delhi & anr. v. Mst. Ram Kali*⁷ has been relied on by the learned counsel Sri Prabhu, wherein the Apex Court, while dealing with Sections 18, 3 and 7 of the Suppression of Immoral Traffic in Women and Girls Act, 1956, held in paragraph 13 as under:

“13. xxxx xxxx xxxx xxxx Bearing in the mind the purpose of these provisions as well as the

scheme of the Act and on a harmonious construction of the various provisions in the Act, we are of the opinion that in cases like those before us the magistrate who is also a court as provided in S.22 must at the first instance proceed against the persons complained against under penal provisions in S.3 or 7 as the case may be, and only after the disposal of those cases take action under S.18 if there is occasion for it. Under S.190(1)(b) of the Code of Criminal Procedure, the Magistrate is bound to take cognizance of any cognizable offence brought to his notice. The words “may take cognizance” in the context means “must take cognizance”. He has no discretion in the matter, otherwise that section will be violative of Art. 14. xxxx xxxx xxxx xxxx”

12. The learned counsel appearing for the respondent in CrI.M.C.No.6566/2022 Advocate Sri Sumodhi Madhavan Nair also supported the contention raised by Advocate Prabhu.

13. In this case, the crucial question raised for consideration is whether it is mandatory to file an execution petition before the court at the place where the person, against whom the order may be enforced, has been residing. In this context, it is relevant to extract Section 128 of Cr.P.C. The same is as under:

“128. *Enforcement of order of maintenance:* A copy of the order of maintenance 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 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.”

14. Before addressing the legal issue, it is necessary in the interests of justice to visualise the plight of poor wife and children or the parents, as the case may be, if a view taken to the effect that each and every execution proceedings to enforce order of maintenance obtained by the wife, children and parents at the place where the person against whom the order was made. If such a proposition is declared, a clever husband or son or daughter, as the case may be, could very well shift their residence, outside the jurisdiction of the court where the order of maintenance sought to be executed, so as to defeat the enforcement of the order. No doubt, it may be easy for them to shift their residence periodically, to defeat the enforcement of the maintenance order.

15. It is the settled law that in cases where statute provides the word ‘may’, the Apex Court consistently held that in certain circumstances the word ‘may’ has to be read as ‘shall’. At the same time, the Apex Court held that in certain cases the word ‘shall’ has to be read as ‘may’. No doubt, while interpreting a provision of law, the legislative intent and the impact of the provision of laws are decisive factors. In Section 128 of Cr.P.C, it has been provided that any order of maintenance ‘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 due. But the statute vigilantly avoided the word ‘shall’, deemed to be with intention to retain the jurisdiction of the Family Court, which passed the order also in the matter of enforcement of the order. In this connection, a decision of the Apex Court reported in [(2014) 3 SCC 383], *Bhaskar Lal*

*Sharma & anr. v. Monica & Ors.*⁸ is relevant. In the said decision, the Apex Court considered an execution petition filed before the court which passed the order and the matter considered was whether the court which passed the order had jurisdiction to execute the order outside the territory of India. In the said order, the Apex Court in paragraph 17 observed as under:

“17. When the enforcement and execution of an order passed under a statute is contemplated by the statute itself, normally, an aggrieved litigant has to take recourse to the remedy provided under the statute. In fact the petitioner has initiated a proceeding for execution of the order of maintenance granted in her favour. The fact that the husband (respondent herein) against whom the order of maintenance is required to be enforced lives outside the territory of India, in our considered view, cannot be a reasonable basis for invoking the extraordinary remedy under Article 32 of the Constitution inasmuch as the provisions of the Code i.e. Section 105 makes elaborate provisions for service of summons in case the person summoned by the court resides outside the territory of India. Comprehensive guidelines have been laid down by the Government of India with regard to service of summons/notices/judicial process on persons residing abroad. In view of the remedy that is available to the petitioner under the Code and having regard to the fact that resort to such remedy has already been made, we decline to invoke our jurisdiction under Article 32 of the Constitution in the facts of the present case. Instead, we direct the Family Court, No.2, Saket, New Delhi to pass appropriate final orders in Petition No. M-298 of 2011 as expeditiously as possible. We would also like to make it clear that in the event it is found so necessary the learned Family Court may transfer the case to the competent criminal court whereafter the criminal court concerned will make all endeavour to bring the proceeding to an early conclusion.”

16. The law emerges from the above discussion is that when the statute uses the word ‘may’, whether the same is to be understood as ‘shall’ or the statute makes it as ‘mandatory’ or ‘discretionary’ shall have to be understood with reference to the context in which the legislation was enacted and the consequence of reading the provisions as ‘mandatory’ or ‘discretionary’. In the instant case, a harmonious and beneficial interpretation of the statutory wording would certainly throw light on the fact that as per the mandate of Section 128 of Cr.P.C, an order passed under Section 125 or 127 Cr.P.C can be enforced by the court in any place, where the person against whom the order is made and at the same time the court passed the order also could very well execute the order irrespective of the fact that the person against whom the order is made has been residing in a place, outside the jurisdiction of the court, which passed the order.

17. Therefore, it has to be held that even though an order of maintenance may be enforceable at the place where the person against whom it is made, the court which passed the order also retains power to execute the order, outside the jurisdiction where the respondent has been residing. Accordingly, the orders impugned shall stand set aside. Family Court, Malappuram is directed to receive the respective Execution Petition filed by the petitioners, where the impugned orders were passed, and proceed to enforce the respective orders, in accordance with law.

These petitions are allowed accordingly.

R.M.S.

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Petition allowed.