

Allahabad High Court
Madan Lal vs State on 1 June, 2018
Bench: Chandra Dhari Singh

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. - 55

Case :- JAIL APPEAL No. - 2497 of 2008

Appellant :- Madan Lal

Respondent :- State

Counsel for Appellant :- From Jail, Abida Syed, Dr Abida Syed A.C

Counsel for Respondent :- A.G.A..

Hon'ble Chandra Dhari Singh, J.

01. Heard Dr. Abida Syed, learned Amicus Curiae for the appellant and learned A.G.A. for the State.
02. The instant jail appeal has been filed against the judgment & order dated 12.03.2008 passed by the Additional Sessions Judge, court no.8, Bareilly by which the appellant was convicted under Section 8/19 N.D.P.S. Act and sentenced for imprisonment of ten years R.I. and fine of Rs.1 lac and in default of payment of fine he shall undergo further two years simple imprisonment.
03. On 30.10.2017 this Court passed following order:-

"Dr. Abida Syed, Amicus Curiae on behalf of the applicant-accused and learned AGA for the State are present.

Heard and perused the record of S.T. No.1961 of 2005 (State vs. Madan Lal), under Sections 8/19, 8/26 NDPS Act, Central Bureau of Narcotics, District Bareilly, decided on 12.3.2008 by the Additional Sessions Judge, Court No.8, Bareilly.

Superintendent District of Jail Bareilly, is directed to submit detailed report in regard to the detention period of the aforesaid applicant-accused within three weeks.

CJM, Bareilly is also directed to submit compliance report within the aforesaid period.

List this matter after two weeks alongwith the office report.

When the case is next listed, name of Dr. Abida Syed, Amicus Curiae be shown as learned counsel for the applicant."

04. In compliance of the aforesaid order C.J.M., Bareilly has submitted a report on 27.11.2017, in which it is stated that the appellant has already served the sentence imposed by the court below vide order dated 12.03.2008 but he could not pay the amount of fine of Rs.1 lac, therefore, in default of payment of fine the court below ordered the appellant to undergo simple imprisonment for two years. He is in jail. Now he has already undergone 11 months 21 days on 27.11.2017.

05. Learned Amicus Curiae submitted that the appellant is a very poor person and he is the sole bread earner of his family. She further submitted that on the facts and circumstances of the case that the part of the order may be set aside. Liberal view may be taken directing release of the appellant.

06. Learned A.G.A. appearing on behalf of the State has no objection in releasing the appellant from jail as he has already undergone about 11 years & six months.

07. Thus, an important and debatable question which arises for consideration is whether a Court of law can order a convict to remain in jail in default of payment of fine? It is true that Section 18 of the Act does not expressly say so. It merely provides for imposition of sentence as also payment of fine. The said section, as it stood at the relevant time, read thus;

"18. Punishment for contravention in relation to opium poppy and opium. Whoever, in contravention of any provision of this Act, or any rule or order made or condition of licence granted thereunder cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter- State or uses opium shall be punishable, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

08. In the case of Shantilal vs. State of M.P. (2007) 11 SCC 243 the Hon'ble Supreme Court has held :-

"20. In our opinion, however, even in absence of specific provision in the Act empowering a Court to order imprisonment in default of payment of fine, such power is implicit and is possessed by a Court

administering criminal justice. In this regard, it may be appropriate to consider the relevant provisions of the Penal Code (IPC) and the Code of Criminal Procedure, 1973 [Cr.P.C.] Section 40 I.P.C. defines offence. Section 41 and 42 explain special law and local law respectively. Chapter III IPC prescribes various punishments. Few Sections are relevant which deal with imposition of fine and imprisonment in default of payment of fine. They are Sections 63 to 70 and read thus;

63. Amount of fine where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

64. Sentence of imprisonment for non-payment of fine In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

65. Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

66. Description of imprisonment for non-payment of fine- The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

67. Imprisonment for non-payment of fine, when offence punishable with fine only- If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

68. Imprisonment to terminate on payment of fine-The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

69. Termination of imprisonment on payment of proportional part of fine- If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

70. Fine leviable within six years or during imprisonment. Death not to discharge property from liability- The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

21. Section 30 Cr.P.C. provides for sentence of imprisonment in default of fine. It is also relevant and reads as under;

"30. Sentence of imprisonment in default of fine.- (1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided that the term-

(a) is not in excess of the powers of the Magistrate under section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 29.

22. We may as well refer to Section 25 of the General Clauses Act, 1897 which states;

25. Recovery of fines.- Sections 63 to 70 of the Indian Penal Code (45 of 1860) and the provisions of the Code of Criminal Procedure (5 of 1898) for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law unless the Act, Regulation, rule, or bye-law contains an express provision to the contrary.

23. From the above provisions, in our opinion, it is clear that if a person commits any offence under IPC he can be punished and when such offence is punishable with substantive sentence and fine, or substantive sentence or fine, or fine only, in default of payment of fine, he can be ordered to undergo imprisonment. Section 30, CrPC prescribes maximum period for which a Court may award imprisonment in default of payment of fine."

09. In Queen-Empress v. Yakoob Sahib, ILR (1899) 22 Mad 238, the accused was convicted for an offence under Section 3(10) of the Towns Nuisances Act (Madras), 1889 (Act III of 1889) and was ordered to pay a fine of rupees eight and in default of payment, to undergo simple imprisonment for one week. The relevant provision of law empowered the Court to award fine not exceeding Rs. 50 or imprisonment of either description not exceeding eight days.

10. Benson, J. observed that the question was whether the award of a week's imprisonment in default of payment of fine was legal. His Lordship considered the relevant provisions of IPC and stated;

'The question is whether the award of a weeks imprisonment in default of payment of the fine is legal, or whether the term of imprisonment in default is limited by Section 65 Penal Code, to one-fourth of the term (eight days) of imprisonment awardable for the offence under Section 3 of Act III of 1889, i.e., to two days in the present case. Section 67 Penal Code, has obviously no application to the case. It refers solely to the cases in which the offence is punishable with fine only. The present case is punishable with imprisonment or with fine at the option of the Magistrate, though not with both. Section 65 Penal Code, however, in my opinion, is applicable to such a sentence. The words punishable with imprisonment as well as fine in that Section must be understood in the same sense as those words bear in Section 64. The wording of Section 64, it must be admitted, is not happy, but I am of opinion that the Legislature intended by it to provide for the award of imprisonment in default of payment of fine in all cases in which fine can be imposed. Those cases the section divides into three classes, viz., offences (1) punishable with imprisonment as well as fine, (2) punishable with imprisonment and fine and (3) punishable with fine only. The first of these classes in my opinion includes two classes, viz., (a) offences like the present punishable with imprisonment or fine in the alternative, and (b) offences punishable, as most of those under the Penal Code are, with imprisonment, or fine, or both, cumulatively. Grammatically it would seem also to include the second class viz., offences punishable with imprisonment and fine, but this class is separately mentioned, probably because reference was intended to cases in which a substantive sentence of imprisonment must be awarded, the fine, if any, being only in addition thereto. The Legislature, by Section 64, having given the general power to impose imprisonment in default of payment of fine, then proceeded to lay down limits to that power. Section 65 limited the power in the first class of cases, Section 67 in the third class. If the second class is, as I think it is, included in the first, then Section 65 applies to it also; but, in any case, Section 33 Criminal Procedure Code, imposes the same limit in unmistakable terms. It seems to me unreasonable to suppose that the Legislature did not intend to include cases like the present in the first class since the result would be that, in such cases alone, there would be no limit save that of the general power of a Magistrate, and a first-class Magistrate in a case like the present could award two years rigorous imprisonment in default of payment of a petty fine, though in all other classes of cases his power is strictly limited.'

11. From the above provisions, in my opinion, it is clear that if a person commits any offence under IPC, he can be punished and when such offence is punishable with substantive sentence and fine, or substantive sentence or fine, or fine only, in default of payment of fine, he can be ordered to undergo imprisonment. Section 30 Cr.P.C. prescribes maximum period for which a Court may award imprisonment in default of payment of fine.

12. But more important issue is whether the above statutory provisions would apply to special laws and offences committed by a person not covered by IPC. In the present case, I am concerned with the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 which is a special law. There is no express power in a Court to order imprisonment in default of payment of fine. But to me, the law is well-settled and it has been held since more than a century that such an order can be

passed by a competent Court of law having power to impose fine as one of the punishments.

13. A similar question came up for consideration before the Hon'ble Supreme Court before fifty years in *Bashiruddin Ashraf v. State of Bihar*, 1957 SCR 1032. There a mutawalli was charged for violating the provision of Section 58 of the Bihar Wakfs Act, 1947 for not discharging the obligation enjoined upon him as a mutawalli. He was, therefore, convicted under Section 65(1) of the Act by the Divisional Magistrate, Patna and was ordered to pay a fine of Rs. 100 and in default to undergo simple imprisonment for 15 days. Section 65(1) read thus;

"65 (1) If a mutawalli fails without reasonable cause, the burden of proving which shall be upon him, to comply with any order or direction made or issued under clauses (i), (o) or (q) of sub-section (2) of section 27 or under section 56, to comply with the provisions of sub-section (1) of section 57, sub-section (1) of section 58, section 59 or section 60, or to furnish any statement, annual account, estimate, explanation or other document or information relating to the waqf of which he is mutawalli, which he is required or called upon to furnish under any of the other provisions of this Act, he shall be punishable with fine which may extend, in the case of the first, offence, to two hundred rupees and, in the case of second or any subsequent offence, to five hundred rupees."

It was contended on behalf of the mutawalli that Section 65 did not provide for imprisonment in default of payment of fine. He was, however, ordered to suffer 15 days simple imprisonment in default of payment of fine which was illegal. The Hon'ble Supreme Court considered Section 33 of the Code of Criminal Procedure, 1898 (similar to Section 30 of the present Code of Criminal Procedure, 1973) and Sections 40 and 67 I.P.C. and held that the contention had no force and it was open to the Court to order imprisonment of the accused in default of payment of fine.

14. Though Section 25 of the General Clauses Act, 1897 was not referred to in *Bashiruddin Ashraf*, in my opinion, bare reading of the said provision also makes it explicitly clear and leaves no room for doubt that Sections 63 to 70, IPC and the provisions of Cr.P.C. relating to award of imprisonment in default of payment of fine would apply to all cases wherein fines have been imposed on an offender unless the Act, Regulation, Rule or Bye-law contains an express provision to the contrary. In my opinion, in absence of a provision to the contrary, viz. that no order of imprisonment can be passed in default of payment of fine, such power is explicit and can always be exercised by a Court subject to the relevant provisions of IPC and CrPC.

15. The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or otherwise. A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.

16. I am mindful and conscious that the present case is under the NDPS Act Section 18 quoted above provides penalty for certain offences in relation to opium. Minimum fine contemplated by the said provision is rupees one lakh (fine which shall not be less than one lakh rupees). It is also true that the appellant has been ordered to undergo substantive sentence of rigorous imprisonment for ten years which is minimum. It is right that clause (b) of sub-section (1) of Section 30 Cr.P.C. authorizes the Court to award imprisonment in default of payment of fine up to one-fourth term of imprisonment which the Court is competent to inflict as punishment for the offence. But considering the circumstances placed before me on behalf of the appellant-accused that he is very poor; he is only earning member of the family; he has to maintain his family; because of his poverty, he could not pay the heavy amount of fine (rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. I am, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if I retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo simple imprisonment for one year instead of two years as ordered by the trial court.

17. Since the appellant has already undergone about 11 years and six months, therefore, the present jail appeal is partly allowed, conviction recorded and sentence imposed on the appellant to undergo rigorous imprisonment for ten years is confirmed. An order of payment of fine of rupees one lakh is also upheld. But an order that in default of payment of fine, the appellant shall undergo simple imprisonment for two years is reduced to simple imprisonment for one year. To that extent, the appeal filed by the appellant is allowed. Since the appellant has already undergone 11 years and six months, he shall be set at liberty forthwith unless he is required in any other offence.

18. The Registry is directed to send a certified copy of the judgment with all original documents to the concerned court below for compliance.

19. The learned Amicus Curiae Dr. Abida Syed shall be paid Rs.10,000/- for providing active assistance to the Court from the fund of State Legal Services Authority.

Order Date :- 1.6.2018 Asha (Chandra Dhari Singh,J.)