

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.04.2016

Pronounced on : 29.04.2016

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

Crl.R.C.No.624 of 2016

and

Crl.M.P.No.4357 of 2016

V.B.Kamalanathan

... Petitioner/Respondent/
Respondent/Respondent

Vs.

1.K.Jayasree

2.Minor K.Chandra Bommi

3.Minor K.Chandra Lakshmi

Minors 2 and 3 rep. By their mother
and natural guardian 1st Respondent

... Respondents/Petitioners/
Petitioners/Petitioners

Prayer: Criminal Revision Petitions filed under Section 397 r/w
401 of the Code of Criminal Procedure, 1973 against the order
dated 17.03.2016 made in M.P.No.198 of 2016 in M.P.No.495 of
2012 in M.C.No.145 of 2012 on the file of the II Additional
Family Court, Chennai.

For Petitioner : Mr.A.S.Narasimhan

For Respondents : Mr.V.Raghavachari

ORDER

The Petitioner/Husband has focussed the instant Criminal
Revision Petition as against the order dated 17.03.2016 in
M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012
passed by the Learned II Additional Family Court Judge, Chennai.

2.The Learned Learned II Additional Family Court Judge, Chennai, in the impugned order dated 17.03.2016 in M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012, had observed and ordered the following:

"Petitioner/Wife - Present
Respondent/Husband - Present
Payment is not made. Wife insisted that
arrest may be made.
Arrest by 31.05.16."

3.According to the Learned Counsel for the Petitioner, the trial Court had failed to grant time to file counter to M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 on the second hearing date itself. Also, it is represented on behalf of the Petitioner that as per Section 125 Cr.P.C., if the Petitioner is willing to take back the wife, there is no need for payment of any maintenance.

4.The Learned Counsel for the Petitioner projects a legal plea that the Court concerned has got power only to order arrest for non- payment of maintenance for one month alone.

5.The Learned Counsel for the Petitioner submits that the Petitioner is paying every month a sum of Rs.7,500/- towards maintenance by means of Demand Draft, which the Petitioner could have brought to the notice of the Court below, if only he was provided with an opportunity to file counter.

6.The Learned Counsel for the Petitioner brings it to the notice of this Court that the trial Court while passing orders in M.P.No.495 of 2012 had failed to take into account that the 1st Respondent/Wife had admitted that she is receiving a payment of Rs.200/- per day on the date of filing this petition and thereafter, it will be increased to Rs.250/-.

7.The Learned Counsel for the Petitioner takes a stand that the Petitioner/Husband being a practising Junior Advocate met with an accident which has resulted in head injuries resulting in slow activities which do not enable him to earn more.

8.Continuing further, the Learned Counsel for the Petitioner submits that in Execution Petition, a sum of Rs.30,000/- only can be claimed, but in M.P.No.198 of 2016, the Respondents had claimed a sum of Rs.9,30,000/- for 30 months. Moreover, it is also represented on behalf of the Petitioner that in M.P.No.198 of 2016, the Respondents as Petitioners at Column No.12 had averred and claimed the following:

12	Amount claimed in this petition	1. Direct the Respondent to pay Interim maintenance of Rs.10,000/- each per month to the EACH (Three) Petitioners and; from 01.08.2012 to 31.07.2013 (12 months x Rs.30,000) = Rs.3,60,000/- from 01.08.2013 to 31.07.2014 12 months x Rs.30,000 = Rs.3,60,000/- from 01.08.2014 to 30.04.2015 9 months x Rs.30,000 = Rs.2,70,000/- Total 30 months = Rs.9,30,000/-
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9.The Learned Counsel for the Petitioner refers to Section 125(3) of the Criminal Procedure Code which runs as under:

"125 (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:"

10.Lastly, it is contended on behalf of the Petitioner that the Revision Petitioner/Husband had dispatched the Demand Draft for Rs.7,500/- together with covering letter dated 31.03.2016 towards the April month maintenance sum.

11.Per contra, it is the submission of the Learned Counsel for the Respondents that the Revision Petitioner had filed Criminal Revision Petition No.516 of 2015 before this Court as

against the order dated 02.03.015 in M.P.No.495 of 2012 in M.C.No.145 of 2012 passed by the Learned II Additional Family Court Judge, Chennai, and this Court, at paragraph 2, had observed as follows:

"2. Considering the facts and circumstances of the case, there shall be an order of interim stay on condition that the petitioner pays the arrears amount as on date, at the rate of Rs.7,500/- p.m. (Rupees Seven Thousand Five hundred only), for each totalling to Rs.22,500/- per month within a period of two weeks from today directly to the first respondent. The petitioner shall also continue to pay the maintenance amount at the rate of Rs.7,500/- p.m. payable to all the respondents, totalling to Rs.22,500/-, every month, on or before 5th of every succeeding English Calendar, till the disposal of the revision. If the petitioner fails to comply with any one of the above conditions, the interim stay granted shall stand automatically vacated without any further reference to the Court."

12.The Petitioner is duty bound to comply with the order passed by this Court, but he had not obeyed the order. That apart, as on date, the main CrI.R.C.No.516 of 2015 filed by the Petitioner is pending before this Court.

13.At this juncture, this Court relevantly points out that ordinarily a Court of Law before passing an order for arrest and detention of the person concerned must be satisfied that he, despite having sufficient means has with a malafide intention, evades payment.

14.One cannot brush aside an important fact that before a Court of Law issues a notice or warrant of arrest against a concerned person, it must primordially satisfy subjectively as to whether the concerned person is liable to be arrested or not. Prior to the ordering of arrest of a person, the concerned Court/trial Court is having a discretion to issue notice to the aggrieved/affected by providing an opportunity to him requiring him to appear before the Court within the time fixed. In fact, it is not a prudent exercise of judicial discretion for a Court of Law to issue a warrant and notice simultaneously as per decision Puna Mahton V. Emperor, AIR 1932 Pat 315.

15.It is an axiomatic principle in Law that until the initial/original order for maintenance is modified or annulled or varied or vacated, the same is enforceable. Also that, mere sentencing a person to imprisonment does not erase/wipe out the outstanding arrears of maintenance sum.

16.At this stage, this Court aptly points out in the decision Ram Chandra V. Tulsi Bai and others, 1991 (3) Crimes 38 (Raj.) (D.B.), it is held that 'the Court should first issue a notice to a person against whom the order of payment is so made to show cause why he is not making the payment and after Enquiry, the warrant of attachment should be issued'. Also, in the decision K.Nithiyanandan V. B.Radhamani and another, 1980 Cri.L.J. 1191(Ker.),it is observed that 'Notice to the defaulter shall be issued before the issuance of warrant of arrest'.

17.Further, in the decision of the Hon'ble Supreme Court in Jolly George Vargese and another V. The Bank of Cochin, (1980) 2 Supreme Court Cases 360, it is held that 'earlier income of judgment-debtor is immaterial and that the Court should enquire his present financial position'.

18.Indeed, the Court is bound to enquire into the reasons for non-compliance of the order and to issue a warrant for levying the amount due, as per decision in Hamir Singh V. Mst Gurdian Kaur (1955) Patiala 449.

19.Besides the above, this Court worth recalls and recollects the decision in Mohammed Kutty V. State of Kerala, 1985 (1) Crimes 702 (Ker) wherein it is observed and held that 'the Court has to apply its mind, consider the circumstances of each case and then decide about the quantum of punishment having regard to the statutory limit of the maximum punishment of one month for each default'.

20.It may not be out of place for this Court to make a relevant mention that the limitation period of one year is inapplicable in case of maintenance order in favour of minors, by virtue of the ingredients of Section 3, 6 and 29(2) of the Limitation Act as per decision in Laxmi and others V. Nakka Narayan Goud and another, 1994 (1) Crimes 239(AP).

21.It is to be pertinently pointed out that Section 14 of the Family Courts Act, 1984 refers to 'Application of Indian Evidence Act, 1872'. Further, Section 14 of the Act, the Family Court is competent to receive documents which though marked were not proved by any witness as per decision in Mohammed Shaheryarkhan V. Humaria Khan, (1996) 3 A.L.D. 816 (A.P.) (D.B.). Also, Section 15 of the Act speaks of 'Record of oral

evidence'. Section 16 of the Act deals with 'Evidence of formal character on affidavit'. Section 18 of the Act deals with 'Execution of decrees and orders'.

22.It is to be borne in mind that when execution of maintenance orders also forms part of Chapter IX of the Criminal Procedure Code, it cannot be said that Family Court cannot execute an order of maintenance passed by the Magistrate under Section 125(3) of the Criminal Procedure Code. Also, in the proceedings instituted under Section 125 Cr.P.C., the Family Court has to follow the procedure specified in regard to the maintenance proceedings as specified in the Criminal Procedure Code and the Rules made thereunder, of course subject to the provisions of the Act and Rules.

23.Apart from that, in the decision Rajesh Shukla V. Smt.Meena Shukla reported in 2006(1) Civil Law Journal 595 (MP), it was observed and held that 'Where revision petition was filed against order of Family Court relating to the maintenance to wife and children in an application under Section 125 of the Cr.P.C., the Family Court having exercised powers of Judicial Magistrate First Class, so revision petition under sub-section (4) of Section 19 of the Family Courts Act should be registered as criminal revision petition and not as a civil revision petition'.

24.Also, in the decision Baiju V. Valsala reported in 2007 (2) Civil LJ 760 (Ker), it is held that 'In view of the statutory exclusion of revision except in the case of an order under Chapter IX of Cr.P.C. regarding maintenance, no revision shall be in any Court in respect of orders either interlocutory or final passed by the Family Court'.

25.As far as the present case is concerned, the Learned II Additional Family Court Judge, Chennai in M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 after marking the presence of the 1st Respondent/Wife and the Petitioner/Husband had stated that 'Payment is not made. Wife insisted that arrest may be made' and therefore, ordered arrest of the Revision Petitioner by 31.05.2016, which, in the considered opinion of this Court, is per se not correct in the eye of Law. Just because the 1st Respondent/Wife had insisted for the arrest of the Revision Petitioner/Husband, the same cannot be ordered by the Learned II Additional Family Court Judge, Chennai in M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 either as a matter of routine or as a matter of course. Unfortunately, on 17.03.2016, straight away an order was passed by the trial Court to the effect that 'Payment was not made. Wife insisted that arrest may be made' and obviously only upon

the insistence of the 1st Respondent /Wife seeking the arrest of the Petitioner/Husband, the same was complied with by the trial Court in ordering the arrest of the Petitioner by 31.05.2016.

26.To put it succinctly, there is no indication in the impugned order that the trial Court was satisfied that the Revision Petitioner/ Husband despite having sufficient means had wilfully evaded the payment of arrears of maintenance amount in question. Also that, it is for the 1st Respondent/Wife to prove the means/resources of the Petitioner/Husband and in this regard, after enquiry, a finding has to be recorded by the trial Court. Unfortunately, in the instant case, in M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012, when the impugned order was passed on 17.03.2016 ordering the arrest of the Petitioner/ Husband by 31.05.2016, no such exercise was resorted to. As such, on this score alone, the impugned order of the trial Court dated 17.03.2016 in M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 bristles with material irregularities and patent illegalities in the eye of Law. Therefore, this Court, to prevent an aberration of Justice and to promote substantial cause of Justice, interferes with the said order dated 17.03.2016 in M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 and sets aside the same. Consequently, the Criminal Revision Petition succeeds.

27.In the result, the Criminal Revision Petition is allowed. The order dated 17.03.2016 in M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 passed by the trial Court is set aside by this Court for the reasons assigned by this Court in this Revision. The Learned II Additional Family Court Judge, Chennai is directed to take up the M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 and to pass a reasoned speaking order afresh, in a qualitative and quantitative terms in a dispassionate manner and that too with an open mind by adhering to the Principles of Natural Justice, within a period of four weeks from the date of receipt of copy of this order. Liberty is granted to the Petitioner/Husband to file counter to M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 and the trial Court shall upon taking the counter of the Petitioner/Husband on its file and to take into account of the same and to pass orders afresh in M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 within the time stipulated supra. It is open to the parties to adduce oral and documentary evidence in M.P.No.198 of 2016 in M.P.No.495 of 2012 in M.C.No.145 of 2012 if they so desire/advised. It is also open to the parties to raise all factual and legal pleas [including the quantum of payment of maintenance already paid by the Petitioner /Husband] before the trial Court at the time of fresh hearing of M.P.No.198 of 2016 in M.P.No.495 of 2012 in

M.C.No.145 of 2012. Before parting with the case, this Court makes it abundantly clear that it has not traversed upon the merits of the matter. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

Sgl

To

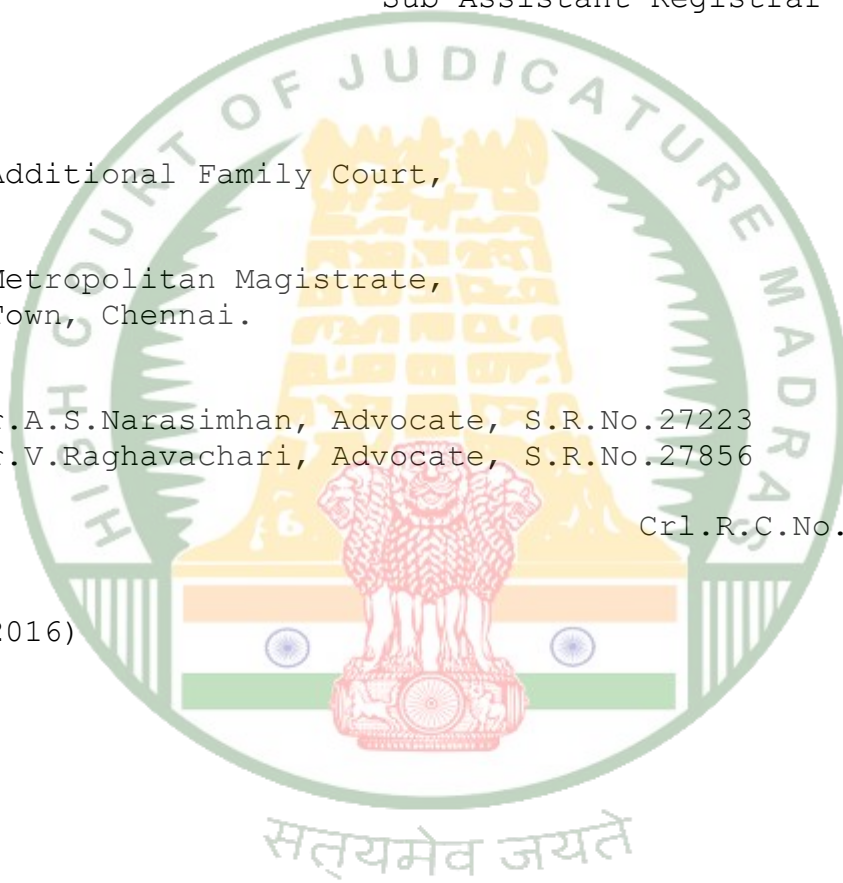
- 1.The II Additional Family Court,
Chennai.
- 2.The XV Metropolitan Magistrate,
George Town, Chennai.

+1cc to Mr.A.S.Narasimhan, Advocate, S.R.No.27223

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.27856

Cr1.R.C.No.624 of 2016

GJ II(CO)
CA(18/05/2016)



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