

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2017
CORAM

THE HONOURABLE Dr.JUSTICE S.VIMALA

Crl. O.P. No. 26607 of 2011

V.Ponnusamy

... Petitioner

Vs.

1. Selvanayagam

2. Minor P.Sujitha

(Rep. By her mother and
natural guardian Mrs.Selvanayagam

.... Respondents

Prayer : Criminal Original Petition filed under Section 482 Cr.P.C., to call for the records and to set aside the order dated 06.06.2011 in C.R.P.No.27 of 2011 passed by the Additional District and Sessions and Fast Track Court-III, Coimbatore confirming the order dated 27.01.2011 passed in M.C.No.5 of 2010 on the file of the Judicial Magistrate-II, Udumalpet.

For Petitioner : Mr. S. Saravanan
For Respondents : Ms. P.V.Rajeswari

ORDER

This Criminal Original Petition is filed under section 482 of the Criminal Procedure Code, by the petitioner/husband, challenging the order of maintenance passed by the learned Judicial Magistrate No.II, Udumalpet, in M.C.No.5 of 2010, which was confirmed by the learned Additional District and Sessions Judge, Fast Track Court-III, Coimbatore, in C.R.P.No.27 of 2011.

2. The learned counsel for the petitioner submits that the order of maintenance passed by the learned Judicial Magistrate and as confirmed by the learned District and Sessions Judge, suffers from infirmity, as the mandatory procedure contemplated u/s 251 of the Code of Criminal Procedure has not been followed. Further, there being no sufficient compliance of the procedure contemplated U/s 251 Cr.P.C., much prejudice has been caused to the petitioner/husband.

3. In order to appreciate the contentions raised, it is necessary to consider whether non compliance of procedure as contemplated under Section 251 of Cr.P.C. would deprive the petitioner/husband of substantial justice.

4. For better appreciation of the issue, the relevant Sections viz., 251 to 253 Cr.P.C., are extracted hereunder :-

"251. Substance of accusation to be stated.
When in a summons case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or 926 has any defence to make, but it shall not be necessary to frame a formal charge.

252. Conviction on plea of guilty. If the accused pleads guilty, the Magistrate shall record the plea as nearly as possible in the words used by the accused and may, in his discretion, convict him thereon.

253. Conviction on plea of guilty in absence of accused in petty cases.

(1) Where a summons has been issued under section 206 and the accused desires to plead guilty to the charge without appearing before the Magistrate, he shall transmit to the Magistrate, by post or by messenger, a letter containing his plea and also the amount of fine specified in the summons.

(2) The Magistrate may, in his discretion, convict the accused in his absence, on his plea of guilty and sentence him to pay the fine specified in the summons, and the amount transmitted by the accused shall be adjusted towards that fine, or where a pleader authorised by the accused in this behalf pleads guilty on behalf of the accused, the Magistrate shall record the plea as nearly as possible in the words used by the pleader and may, in his discretion, convict the accused on such plea and sentence him as aforesaid."

5. A perusal of Section 251 Cr.P.C. reveals that the learned Magistrate, on the appearance of the accused in the summons case, is expected to state the offence of which he is accused of and the accused shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge. Further, if the accused pleads guilty, the learned Magistrate shall record the plea as nearly as possible in the words used by the accused and may, in his discretion, convict the accused. This is the procedure being followed/practiced and as is envisaged under Section 251 Cr.P.C.

6. The procedure as contemplated under Section 126 Cr.P.C. does not envisage compliance of procedure u/s 251 Cr.P.C. For better clarity, Section 126 Cr.P.C., is extracted hereunder :-

"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 in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proceed 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."

7. A reading of Sec.126 (2) of the Code of Criminal Procedure makes it clear that while recording the evidence, the procedure prescribed in the summons case ought to be followed. From a perusal of the averments as also the submissions advanced on behalf of the petitioner, it is clear that it is not the case of the petitioner that the procedure for recording of evidence had not been followed.

8. The question of recording the plea of the accused does not arise, because the person, who is expected to respond to the claim for maintenance, cannot be termed as an accused. There is no allegation against him, excepting the fact that the allegation is limited to the extent of stating that the wife has got justifiable reasons to live away from the husband and nothing more than that. Therefore, the question of asking the person whether he admits the allegations or not, does not arise u/s 251 Cr.P.C.

9. Moreover, the basic principle in putting substantial allegation to the accused is only for the purpose of providing an opportunity to the person concerned to state his defence. In this case, the opportunity to put forward the defence has been provided to the accused, by providing an opportunity to file the counter, to cross-examine the petitioner's witnesses and to adduce his own evidence. Therefore, the contention that the procedure contemplated u/s 251 Cr.P.C. has not been followed cannot be accepted.

10. Even assuming the procedure contemplated u/s 251 Cr.P.C. has not been followed is accepted, opportunity to defend the case has been admittedly given and therefore, the petitioner

herein is not put to any disadvantage by not following the procedure as contemplated u/s 251 Cr.P.C.

11. The learned counsel appearing for the respondent submits that this petition is not maintainable, as the procedure for revision has already been made use of, and therefore, the second revision at the instance of the petitioner is not maintainable before this Court.

12. Per contra, learned counsel appearing for the petitioner submits that proceedings initiated before this Court is not one under section 399 (1) of the Cr.P.C., but it is one under section 482 of the Cr.P.C., which vests this Court with inherent power to interfere.

13. Section 399 (1) of the Code of Criminal Procedure substantially and unequivocally mandates that the order passed by the Sessions Court is final and no further proceedings can be taken.

14. Section 482 Cr.P.C., under which provision the present petition is claimed to be maintainable, is extracted hereinbelow for better clarity :-

"482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

15. Relying upon Section 482 Cr.P.C., it is the submission of the learned counsel for the petitioner that this Court is clothed with inherent powers to entertain the petition for the purpose of making such orders so as to give effect to the order and to prevent abuse of process for the purpose of securing the ends of justice. It is the further contention of the learned counsel for the petitioner that for the purpose of securing the ends of justice, the present petition has to be entertained under section 482 of the Cr.P.C. and that the petition cannot be termed to be one under section 399 (3) Cr.P.C.

16. Though contentions and counter contentions have been raised with regard to the maintainability of the criminal original petition before this Court, this Court is not inclined to decide the issue one way or the other at this distant point of time. The maintenance case before the Trial Court was laid in the year 2010 and against the order of maintenance, the revision/curative petition has been laid before the Sessions Court in the year 2011 and, thereafter, against the said order

of the Sessions Court, the present criminal original petition has been laid before this Court in the year 2011. Almost a period of six years having passed from the date of filing of the criminal original petition, it would not be prudent for this Court to address the issue on maintainability at this point of time. Suffice to deal with the issue relating to maintenance at this point of time, whereinafter, the parties can be left to their choice of continuing the matter one way or the other. Accordingly, this Court is not addressing itself on the issue of maintainability, rather, deals only with the merits of the issue relating to the award of maintenance.

17. In order to appreciate the award of maintenance as has been ordered by the Trial Court and confirmed by the Sessions Court, it is necessary to have a perusal of the claim made by the wife/1st respondent herein. The wife had claimed payment of maintenance at Rs.1500/- each, for herself and her eight year old child. It is the claim of the wife that the husband/petitioner herein is possessed of sufficient income for the purpose of paying maintenance. However, it is the contention of the husband/petitioner herein that he is not possessed of sufficient means to pay maintenance for the upkeep of his wife and child.

18. The Trial Court, on the basis of the evidence adduced on either side, found that the deposition of the husband/petitioner in chief and cross examination is contradictory in nature, went on to hold that the husband is possessed of properties and was possessed of sufficient means to maintain his wife and child and that the deposition relating to income earned by the 1st respondent herein has not been made out. The Trial Court went on to hold that the allegations with regard to the gainful employment of the wife/1st respondent herein has not been made out and that the petitioner/husband was in possession of the sufficient properties so as to provide maintenance to his wife and child. Considering the escalation in the cost of living and the necessity of the husband to maintain his wife and child, the Trial Court has ordered payment of maintenance at the rate of Rs.1,500/= per month each to the wife and child. The said order of the Trial Court has been confirmed by the appellate court. Under these circumstances, the grounds taken for interference of the above order u/s 482 are not sustainable. The Courts below have analysed the evidence threadbare and has come to the correct conclusion that the husband is duty bound to maintain his wife and child and that the maintenance ordered is also not so very excessive warranting interference.

19. Further, the inherent powers of the High Court under Section 482 Cr.P.C. clearly spell out the need to make such

orders as may be necessary to give effect to any order or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Such being the case, this Court is of the considered view, the order passed by the Courts below cannot be said to be erroneous and the grounds taken in this petition are liable to be dismissed.

20. For the reasons aforesaid, this criminal original petition, being devoid of merits, is liable to be dismissed and, accordingly, the same is dismissed.

Sd/-

Assistant Registrar(CS III)

//True copy//

Sub Assistant Registrar

msm/GLN

To

1. Additional District and Sessions Judge
Fast Track Court-III, Coimbatore.
2. Judicial Magistrate-II
Udumalpet.

+1cc to Mr.S.Saravanan, Advocate SR.No.40514

+1cc to Mr.P.V.Rajeswari, Advocate SR.No.40698

CrI.O.P.No.26607 of 2011

NA(CO)

GN(17/05/2018)

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