



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.03.2017

CORAM

THE HON'BLE MR.JUSTICE G.CHOCKALINGAM

Crl.O.P. (MD) No.534 of 2017

and

Crl.M.P (MD) Nos.484 and 485 of 2017

S.Sivakumar : Petitioner/Respondent

-vs-

S.Nirmala : Respondent/Petitioner

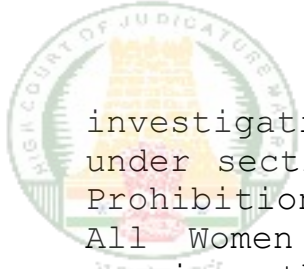
Prayer : Criminal Original Petition filed under Section 482 of the Criminal Procedure Code, to call for the records in respect of the petition in Crl.M.P.No.8924 of 2016 on the file of the Judicial Magistrate Court No.II, Virudhunagar and to quash the same as illegal.

For Petitioner : Mr.G.Marimuthu

O R D E R

This petition has been filed to call for the records in respect of the petition in Crl.M.P.No.8924 of 2016 on the file of the Judicial Magistrate Court No.II, Virudhunagar and to quash the same.

2.The learned counsel appearing for the petitioner would submit that the petitioner is working as a Headmaster in the Panchayat Union Primary School, Kottampatti Village and that the petitioner was affected with AIDS (HIV positive) and that the hospital authorities have conducted counseling to the husband and wife and intimated the news of action to the Government Head Quarters Hospital, Virudhunagar for further course and that on 22.04.2010, the respondent went to her parental house and refused to lead a life with the petitioner and she lodged a complaint before the All Women Police Station, Virudhunagar and thereafter, the respondent filed a complaint under Section 156(3) Cr.P.C before the Judicial Magistrate Court No.II, Virudhunagar and the same was forwarded to the All Women Police Station, for



investigation and a case in Crime No.2 of 2014 was registered under sections 406, 417, 498(A) IPC and Sections 3 and 4 of Dowry Prohibition Act, 1961 and thereafter, the case was transferred to All Women Police Station, Melur, for investigation and after enquiry, they have also filed a final report and now, the case is pending before the Judicial Magistrate, Melur, for trial. It is further submitted that the respondent filed a petition in M.C.No.4 of 2011 before the Judicial Magistrate Court No.II, Virudhunagar, for the relief of protection from Domestic Violence, Rs.15,000/- per month as maintenance Rs.20,00,000/- as compensation, Rs.10,000/- towards arrears in the dowry amount Rs.10,000/- towards marriage expenses and that after hearing both sides, the trial court granted the relief of protection from the Domestic violence and awarded a sum of Rs.8,000/- per month as a maintenance and the petitioner was directed to pay the said amount from the date of the petition and the trial court dismissed the petition in respect of other reliefs and that the petitioner and the respondent have preferred an appeal in Crl.A.Nos.29 and 30 of 2015 before the Additional District and Sessions Judge, Virudhunagar, challenging the order of the trial court and both the appeals were dismissed and thereafter, the respondent filed a petition in Crl.M.P.No.8994 of 2016 to execute the order passed by the trial court in M.C.No.4 of 2011 and that the trial court issued summons and now, the case is posted for filing counter. It is further submitted that the order passed under the Protection of Women from Domestic violence Act, 2005 cannot be enforced using the provision of section 128(3) Cr.P.C and that the proceedings initiated under section 128(3) is illegal and is liable to be quashed.

3.Heard the learned counsel appearing for the petitioner and perused the materials available on record.

4.It is seen from the records that the respondent has filed a petition in M.C.No.4 of 2011 under section 12 of Protection of Women from Domestic Violence Act, 2005. The trial court, after considering the oral and documentary evidence has granted the relief of protection from the Domestic Violence and awarded a sum of Rs.8,000/- per month as a maintenance and the petitioner was directed to pay the said amount from the date of petition, which comes to Rs.4,22,000/-. The trial court has dismissed the petition in respect of the other reliefs sought for by the respondent. Against the order of the trial, both the petitioner and respondent have preferred appeal in Crl.A.Nos.29 of 30 of 2015 respectively before the Additional District and Sessions Judge, Virudhunagar and both the appeals were dismissed by the appellate court on 28.09.2016. The respondent has filed a petition under Section 128 (3) Cr.P.C before the Magistrate Court No.II, Virudhunagar, in Crl.M.P.No.8994 of 2016 to execute the order passed by the trial court in M.C.No.4 of 2001 and in that petition, summon was issued to the petitioner and now, the case is posted for filing counter.



5. At this junction, it is relevant to extract sections 125 and 128 Cr.P.C, which read as follows:-

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"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 of 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 re-married.

[(2) Any such allowance for the maintenance or interim maintenance and expenses for 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.

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].

6. From the reading of the above sections, the order passed under section 125 Cr.P.C can be enforced u/s 128 Cr.P.C and the order passed under the Protection of Women from Domestic Violence Act, 2005 cannot be enforced by using the provision of Section 128 (3) Cr.P.C. However, the respondent has to take proper steps to execute the order passed against the petitioner.

<https://hcservices.ecourts.gov.in/hcservices/>

7. In the result, this petition is **allowed** with liberty to the respondent to execute the order passed under the Protection of



Women from Domestic Violence Act 2005, in the manner known to law.
Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(Records)

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/True copy/

Sub Assistant Registrar

To,

The Judicial Magistrate Court No.II,
Virudhunagar.

+1 cc to Mr.G.Marimuthu , Advocate in SR.No. 15176

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Cr1.O.P. (MD) No.534 of 2017
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