

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.04.2018

CORAM:

THE HON'BLE Dr. JUSTICE S.VIMALA

Criminal Revision Case No.1144 of 2017
& Crl.M.P.No.10869 of 2017

M.Velusamy

... Petitioner/Respondent

..VS..

1. Revathi

2. Minor. Divya

3. Minor. Vasanthamani

(Respondents 2 and 3 represented by
their natural guardian and next friend,
Mother Revathi, R-1) ... Respondents/Petitioner

Prayer: Criminal Revision Case filed under Sections 397 and 401 of the Criminal Procedure Code against the order made in M.C.No.20 of 2013 on the file of the learned Judicial Magistrate, Dharapuram, dated 17.06.2017.

For Petitioner : Mr. A.Saravanan

For Respondents : Mr. Ma.Pa.Thangavel

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O R D E R

When the husband has substantially participated in the enquiry proceedings, i.e., by filing counter and by cross-examining witnesses and by adducing his own evidence, whether it is open to the husband to contend that the order passed by the learned Magistrate is an exparte order and that it should be remanded for further enquiry?

2. When the husband who is legally as well as morally bound to maintain the children, especially the daughter suffering from Cancer, omitted and neglected to maintain her even after the Court passing the order giving indulgence by ordering payment by instalments, whether he is entitled to prosecute the Revision Petition filed by him?

3. Challenging the alleged exparte order, dated 17.06.2017 passed by the learned Judicial Magistrate, Dharapuram, in M.C.No.20 of 2013, wherein the petitioner herein / husband was directed to pay monthly maintenance amount of Rs.20,000/- (Rs.10,000/- to the first respondent / wife, Rs.5,000/- to the second respondent / daughter and Rs.5,000/- to the third

respondent / daughter), from the date of petition, i.e., from 29.07.2013, this Criminal Revision Case has been filed by the petitioner / husband.

4. Throughout, the petitioner is referred to as the husband and the respondents 1 to 3 are referred to as wife and children. Brief facts:-

5. The marriage between the petitioner and the first respondent was solemnized on 12.03.1995 at Dharapuram Eswaran Koil, according to Hindu Rites and Customs. Out of the wedlock, respondents 2 and 3 were born. It is averred that the first respondent suffered physically and mentally, therefore, she was not acted as a dutiful wife. However, the petitioner adjusted with the problems made by the first respondent and living along with the respondents. In such circumstances, the first respondent went to her mother's home with children at Kottapatti Palayam, Udayam Nagar, Dharapuram.

5.1. The husband alleged that the wife involved herself in illegal activities and maintained relationship with other parties and when the same came to the knowledge of the husband, he advised to mend her ways. But inspite of several requests and demands to the wife to return back and to unite with the husband, the wife failed and neglected to restore the conjugal rights to the husband.

5.2. In such circumstances, the Maintenance Case in M.C.No.20 of 2013 came to be filed by the wife. During pendency of the above case, the husband filed a petition for restitution of conjugal rights in HMOP No.118 of 2013 against the wife and the said case was contested by her.

5.3. In the Maintenance Case, wife (Revathi) was examined as P.W.1 and the daughter (Minor Divya) was examined as P.W.2 and both of them have been cross-examined on the side of the husband (M.Velusamy).

6. At this stage, whether it is open to the husband to seek remand of the order, contending that it is an exparte order. On this point, both sides were heard.

7. The learned counsel appearing for the petitioner / husband would contend that the learned Magistrate has passed the order, without going into the merits or otherwise of the case, and therefore, it is an exparte order and it should be set-aside.

7.1. The learned counsel appearing for the respondents / wife and children (claimants) would contend that the order passed by the learned Magistrate is an order passed on merits, after considering the evidence of both sides, and hence it cannot be contended that it is an exparte order.

8. When the matter was taken up for hearing on 06.10.2017, it was represented that one of the daughters of the petitioner is suffering from cancer. Therefore, both parties were directed to appear before this Court, on 11.10.2017. On 11.10.2017, when the case was called, the learned counsel for both sides were present, but the husband was absent. However, the medical records pertaining to the treatment for cancer to the third respondent / daughter was produced before this Court. This Court perused the documents and adjourned the matter to 13.10.2017 for appearance of the husband / petitioner herein. On 13.10.2017, the petitioner, respondent and their respective counsels were present and this Court heard them in detail and posted the matter to 24.11.2017 for ordering some interim payment.

9. On 24.11.2017, one Mr.A.Saravanan, the learned counsel represented that he is filing vakalat on behalf of the petitioner / husband and requested time for making some interim payment. Accepting his request, matter was posted to 14.12.2017. On 14.12.2017 also, similar request was made and accepting the same, the matter stands adjourned to 15.12.2017.

10. In the meantime, the husband was directed to pay all the arrears of maintenance in ten monthly equal instalments, i.e., at the rate of Rs.1,00,000/- per month. Thereafter, compliance was not reported. It was made clear that if the interim order is not complied with, the husband would not be given the right of audience to argue the matter on merits.

11. A proviso to Section 126 of the Criminal Procedure Code provides for circumstances under which the learned Magistrate may make an exparte order. The Magistrate can pass an exparte order on two stages: (i) willfully avoiding service; and (ii) willfully neglecting to attend the court after service. The decision reported in AIR 1971 Calcutta 244 (paragraph 8 and 10) (Hemindra v. Archana) provides that the learned Magistrate must record the satisfaction that the opposite party is willfully avoiding to attend the Court. Therefore, even though the husband has fully participated in the proceedings he has willfully avoided attending the Court during arguments. Hence, technically speaking he has been set exparte. But the husband has taken the opportunity of participating in the entire proceedings excepting for arguments and therefore, there is no necessity to remand it.

12. The exparte order may be set-aside provided: (a) the opposite party makes an application within a period of three months of the order; (b) if he shows the good cause for his absence, which read with the first part of the proviso means that he was not willfully avoiding service or willfully neglecting to attend the Court (Kalika v. Jagdei) 1975 Crl.L.J.

465, paragraph 2.

13. So far as this case is concerned, though the application is filed within a period of three months from the date of order the application did not show the good cause for the absence. Per contra the circumstances indicate that the husband was willfully neglecting to attend the Court with a malafide intention of protracting the proceedings. Therefore, there is no ground made out to set-aside the order of maintenance, though for different reasons, this Court deems it fit to interfere.

14. Reverting back to the original contention that the order is an exparte order, this Court is of the view that though the order has been passed after evidence was taken on both sides, still, the order is bereft of reasons, on some aspects. For example, the order does not discuss anything regarding the salary details and the capacity of the husband to pay the amount.

15. The order also did not discuss anything about the evidence given by the husband as R.W.1. The list of documents did not show the salary certificate filed as Ex.P-4. However, in order to ascertain the salary as on now, this Court directed the husband to produce the salary slip, but the husband has produced the account-sheet and has contended that the carry home salary of December 2016 was Rs.1,067/- and therefore, he will not be in a position to pay anything to the wife and children.

16. A perusal of the account-sheet reveals that the Salary as on 17.08.2017 was Rs.25,300/-, recovery was shown as Rs.5,767/- and carry home salary was Rs.19,533/-. Medical expenses from 19.12.2016 was Rs.5,422/-. Rent paid in the Bank was Rs.4,000/-. Amount paid towards loan recovery was Rs.6,044/-. Amount of maintenance paid to the mother in M.C.No.7 of 2017 was Rs.3,000/-. Total was Rs.18,466/-.

To summarize, income	-	Rs.19,533/-
Expenditure	-	Rs.18,466/-

Balance	-	Rs. 1,067/-

17. Here is the husband who has given accounts, which is apparently unreliable and cooked-up. The said statement was given only to deprive the wife and children from receiving the payment of maintenance.

18. This Court has seen several husbands, who have resigned the job or showing as if they have resigned the job, in order to deprive the wife and children of their right to maintenance. In other words, to evade payment of maintenance, such dilly-dallying used to be done.

19. To cope up with such situations, the relevant legislation in Foreign countries provide remedies for payees who find themselves in such situations. The Federal Child Support guidelines allow a court to impute income to a spouse; in this context, "impute" means to attribute income to, whether income is actually being earned or not. The relevant section reads as follows:-

"Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

(b) the spouse is exempt from paying federal or provincial income tax;

(c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust".

20. The list of circumstances in Section 19 is not exhaustive, meaning that there could be many other situations in which a court will impute income to a payer. The courts take a very dim view of parents who try to evade their child support obligations, and will not hesitate to impute income to a parent when there is evidence that the parent is trying to decrease their income (such as working fewer hours, or quitting), hiding

their income (like by getting paid "under the table" and not declaring it), or disguising their income (for example when they opt to get paid through methods that have different income tax treatments, and attract a lower tax rate).

21. In some cases, courts have even imputed income to an unemployed payer where the payer insisted that their employment was completely out of their control. This kind of legislation is lacking in India and it is time for the legislature to come out with suitable legislation to curtail the injustice being done.

22. As a dramatic turn, after the wife and children filing application for maintenance, the mother also has sought for maintenance in M.C.No.7 of 2017 against her son. In all probability, as a counter blast, to avoid payment of maintenance to the wife and children, the Revision Petitioner herein should have used the mother as a tool to get the application for maintenance filed. This suspicion gets strengthened when the order reads that the Revision Petitioner did not contest the petition filed by the mother. It is evident that the order passed in favour of the mother ordering the petitioner herein / son to pay a sum of Rs.3,000/- per month, in M.C.No.7 of 2017, on 04.08.2017, i.e., an order passed after the order passed in M.C.No.20 of 2013, on 17.06.2017. Obviously this is an order obtained under collusion between the son and the mother. Under Section 44 of the Indian Evidence Act, when the evidence indicates that the order is obtained by coercion, fraud or collusion, the order is null and void. Section 44 reads as under:-

"Section 44 in The Indian Evidence Act, 1872:

44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.—Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

23. Therefore, the husband cannot decline maintenance on the ground that he has to maintain the mother.

24. The next contention is that all along, the husband has been looking after the wife and the children and that he took participation while the wife suffered removal of uterus and the daughter was getting treatment at Government Hospital, Royapettah, Chennai, for cancer.

24.1. The liability of the husband / father is a continuing liability and therefore it is not an answer for the father to contend that at some point of time, he was looking after the

daughter and that he would not look after the daughter for the remaining period. This Court is of the opinion that the contention raised that the petitioner has the balance of Rs.1,067/- by producing manipulated accounts would amount to neglect and refusal to maintain.

25. Yet another contention of the petitioner / husband is that he has purchased the property (an extent of 3,100 sq.ft.,) in the name of his wife, by way of the sale deed, dated 03.01.2011 and therefore, the wife is in a position to maintain herself and in support of the same, a copy of the sale deed has also been produced.

25.1. Even in paragraph 4 of the Maintenance Case, the wife has stated that there was a demand for property by the husband and therefore, the mother-in-law of the husband executed the document, dated 03.01.2011, and that the document is not an income yielding property.

25.2. The husband has stated in paragraph 7 of the counter that only in that property, a house has been built up, where-under his wife and children are living with his mother-in-law and therefore, he had to take residence in a rented house. From this statement, it is evident that even though there is no income from the property there is savings of expenditure from the property.

26. Under normal circumstances, this Court would have granted an opportunity to the husband to prove his case by remanding the matter by imposing appropriate conditions and costs. However, in this case, when the daughter is suffering from a killer disease, the husband / father, despite persuasion by this Court, is not even inclined to pay her daughter, if not the wife. Moreover, the effort to get the exparte order set-aside seems to be with an intention to drag on the proceedings and not with an intention to disprove the case of the petitioner. Even otherwise, if the petition for restitution of conjugal rights is decided, that would have an impact upon this application for maintenance.

27. Under the stated circumstances, the Revision Petition is partly-allowed, by reducing the monthly maintenance amount payable to the wife from Rs.10,000/- to Rs.7,000/- with effect from date of filing of this Revision Petition, i.e., from 18.08.2017. In all other aspects, the order of the lower court stands confirmed.

28. The husband has admitted that his monthly salary as per Ex.P-4 was Rs.32,390/- (Ex.P-4) (December 2016). Under the pay commission, the salary would have been more now (apart from his yearly increments). There is an admission by the husband during cross-examination before the learned Magistrate that he is prepared to maintain his children by providing cloth, education,

food and other expenditure towards maintenance. Considering the seriousness of the disease that the daughter is suffering from and other circumstances, the Managing Director, Tamil Nadu State Transport Corporation (Coimbatore) Limited, Coimbatore, is hereby directed to deduct a sum of Rs.17,000/- (Rupees seventeen thousand only) and pay sums of Rs.7,000/-, Rs.5,000/- and Rs.5,000/- to the savings bank account(s) of the respondents 1, 2 and 3 herein, respectively, from the salary payable from May 2018 payable to the petitioner herein, until the cancellation/modification of this order by any other competent court. The petitioner / husband is hereby given ten months from the date of receipt of a copy of this order, to pay the arrears of maintenance amount.

28.1. An apprehension is expressed that to avoid payment of maintenance, the husband may opt for the voluntary retirement and that in the event of the husband receiving all the retirement benefits, the respondents will not have the ability to collect the arrears of maintenance and therefore, they must be put on notice before disbursement of retirement benefits. The conduct of the Revision Petitioner throughout the proceedings is pointed out, in support of the contention.

28.2. Therefore, if the Revision Petitioner opt for Voluntary Retirement, the Managing Director, Tamil Nadu State Transport Corporation (Coimbatore) Limited, Coimbatore, or any other competent authority, shall give a notice to the respondents herein, before disbursement of retirement benefits to the petitioner.

28.3. This order shall not be treated as a precedent since this order is passed considering the peculiar facts and circumstances of this case.

29. With the above directions, this Civil Revision Case is partly-allowed. No costs. Consequently, the connected Crl.M.P. is closed.

सत्यमेव जयते
sd/-

Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

To

1. Judicial Magistrate, Dharapuram.

2.The Managing Director,
Tamil Nadu State Transport
Corporation (Coimbatore) Limited, Coimbatore

3.The Public Prosecutor,
High Court, Madras.

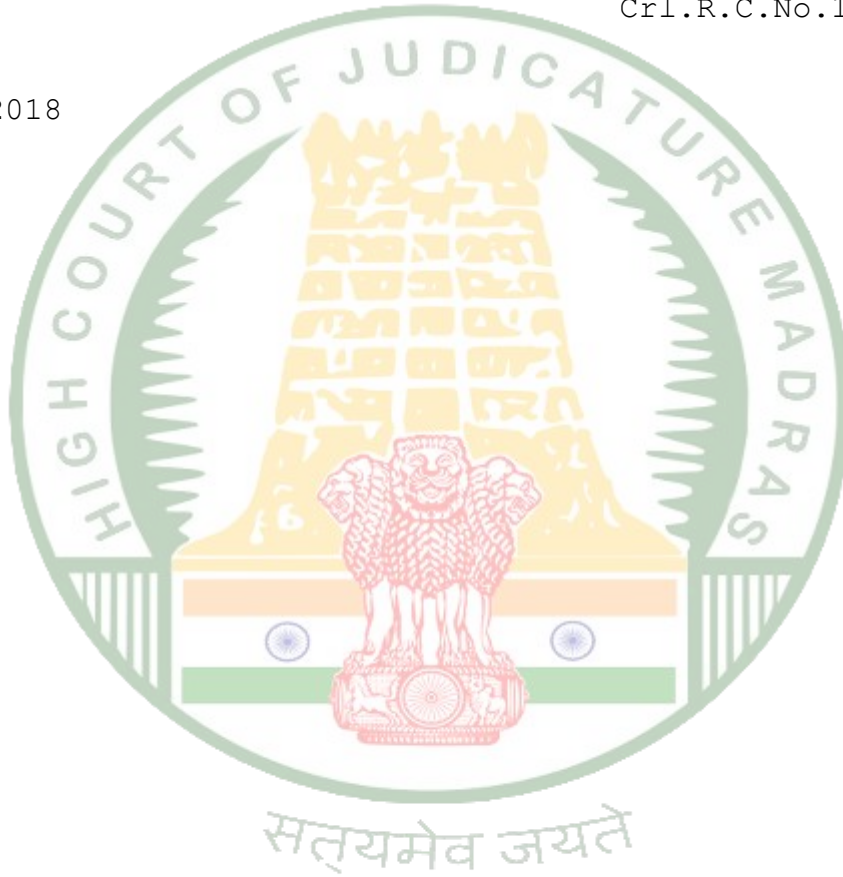
Copy to:

The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Mr.A.Saravanan, Advocate sr.no.26462

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