* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

\+ Writ Petition No.19958 of 2018

% Date: 05-7-2018

\# Dr. Eunice Lalnunmawii Chawngthu,
D/o Mr. C.Dothanga, IPS, Aged 35 years,
Temporarily residing without address at Hyderabad
... Petitioner

Vs.

$ The Additional Family Court Judge, City Civil Courts
at Hyderabad, S/o Unknown to the petitioner,
Aged 50 years, City Civil Courts, Hyderabad-500 002
... Respondents

! Counsel for Petitioner: Appeared in person

Counsel for Respondent: ---

< Gist:

> Head Note:

? Cases referred:
Nil.

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

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Order: (per V.Ramasubramanian, J.)

The petitioner has come up with the above writ petition seeking the issue of a Writ of *mandamus* to issue appropriate directions to the Additional Family Court Judge, City Civil Courts, Hyderabad. Since the prayer made in the writ petition is little different from and out of the routine, we feel it better to extract the prayer made in the writ petition as follows:

> "Hence it is prayed that this Hon'ble Court may be pleased to issue a Writ of mandamus to direct the respondent to follow the procedure established by law, more specifically the Ministry of External Affairs, India, in arresting an Indian citizen located in USA, in Crl.M.P.No.37/2017 in Crl.M.P.No.23/2016 in M.C.No.51/2008, send the concerned the requirements deemed fit and necessary by them, as per the letter addressed to them dated 06-5-2018, vide N.B.W dated 06-4-2018 expeditiously within a specific time period, award costs and pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. Heard the petitioner appearing in person.

3. The petitioner filed M.C.No.51/2008 against her husband by name Mr. Timothy T. Gonmei, under Section 125 of the Code of Criminal Procedure seeking maintenance. The petition was allowed by the Family Court, Secunderabad, on 07-6-2010. Subsequently, the petitioner sought enhancement of maintenance, by filing a miscellaneous petition in Crl.M.P.No.23/2016, in the main petition

M.C.No.51/2008. The petition for enhancement was also allowed by an order dated 11-4-2016.

4. On the ground that the petitioner's husband was avoiding payment of arrears of maintenance, the petitioner filed Crl.M.P.No.9/2018, seeking attachment of his salary from the employer of her husband. The same was also allowed.

5. Claiming that the employer was not complying with the order of attachment and also claiming that her husband has gone to the United States of America, the petitioner filed Crl.M.P.No.37/2017, seeking recovery of arrears of maintenance and also seeking the issue of a Non-Bailable Warrant of arrest against her husband. On 09-02-2018, the Additional Family Court, City Civil Court, Hyderabad, issued a Non-Bailable Warrant against the petitioner's husband. But the Non-Bailable Warrant was returned by the Delhi Police on the ground that they cannot execute the Warrant against a person residing in the United States of America.

6. Thereafter, the petitioner insisted upon a fresh Non-Bailable Warrant and the Additional Family Court passed an order on 06-4-2018, directing the issue of a fresh Non-Bailable Warrant with a further direction to send the same to the Ministry of External Affairs, New Delhi. Such an order was passed by the Additional Family Court on 06-4-2018, on the basis of a Memo filed by the petitioner

together with a copy of the letter dated 03-4-2018 addressed by her to the Under Secretary to the Government of India.

7. It appears that the Ministry of External Affairs sent a reply to the petitioner, in response to her E-Mail dated 03-4-2018. It was stated in the said reply E-Mail that a Non-Bailable Warrant issued by a competent Indian Court cannot be executed in a foreign country in a manner similar to that within India. The Ministry of External Affairs pointed out in the said reply E-Mail that there exists an Extradition Treaty between India and the United States of America and that the Ministry of External Affairs will be able to take appropriate steps when a formal request for extradition is received, in respect of the person wanted for trial in India. Along with the reply E-Mail, dated 23-5-2018, the Ministry of External Affairs also sent a copy of the document titled "Suggestion for Drawing up Extradition Requests".

8. Contending that the Additional Family Court failed to take steps as per the communication received from the Ministry of External Affairs, the petitioner has come up with the above writ petition seeking the issue of a Writ of *mandamus*, of the nature that we are extracted in the first paragraph.

9. On 15-6-2018, when the writ petition came up for orders as to admission, we passed an order directing the Additional Family Court to send a copy of the letter allegedly received by them directly from the Ministry of External

Affairs. By the next date of hearing viz., 25-6-2018, no communication was received from the Additional Family Court. Therefore, we adjourned the matter to today viz., 02-7-2018.

10. The Additional Family Court has now sent a copy of the letter bearing No.T-413/01/2018, dated 01-5-2018, received from the Ministry of External Affairs. The contents of the letter may be usefully extracted as follows:

> "Please refer your letter Lr. Dis.No.315/AFC-HYD/2018 dated 21st April, 2018 enclosing a Non-Bailable Warrant for service on Mr. Timothy T. Gonmei in M.P.No.37/2017 in M.P.No.23/2016 in M.C.No.51/2008 on the file of your Court.
>
> 2. As Mr. Timothy T. Gonmei is stated to be located in U.S.A., it may be mentioned that execution of non-bailable warrant against a person located outside India will have the effect of extradition which is negotiated on the basis of established international legal principles.
>
> 3. There exists an Extradition Treaty between India and the U.S.A. The Ministry of External Affairs could take appropriate steps if a formal request for extradition in respect of the person, supported by warrant of arrest and other documents is forwarded to this Ministry through the Ministry of Home Affairs, New Delhi. (*Address: Deputy Legal Advisor, IS-II Division/Legal Cell-I, 2nd Floor, Major Dhyan Chand National Stadium, India Gate, New Delhi-110 001*).
>
> 4. A copy of the guidelines for preparation of extradition request is attached herewith. The text of the extradition treaty between India and USA can be accessed online for which the link is the following:-
>
> http://www.mea.gov.in/Images/CPV/leta/USA.pdf
>
> 4. The Non-Bailable Warrant of Arrest received with your letter mentioned above is returned herewith."

11. To the aforesaid letter, a copy of the procedure for making extradition requests, under the caption "Suggestion

for Drawing up Extradition Requests" is also enclosed. The same is also extracted as follows:

> "**Extradition request for an accused/fugitive can be initiated after charge sheet has been filed before an appropriate Court and said court having taken cognizance of the case has issued orders/directions justifying accused/fugitive's committal for trial on the basis of evidence made available in the charge sheet and has sought presence of the accused/fugitive to face trial in the case.**
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> All extradition requests should be supported by documents and information enumerated below:
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> 1. It should be in spiral bound and contain an index with page numbers.
>
> 2. The request should be supported by a self-contained affidavit executed by the Court by whom the fugitive is wanted or by a Senior Officer in charge of the case (not below the rank of Superintendent of Police of the concerned investigating agency) sworn before a judicial Magistrate (of the court by which the fugitive is wanted for prosecution). The affidavit should contain brief facts and history of the case, referring at the appropriate places the statements of witnesses and other documentary evidences. Criminal's description establishing his identity; provision of the law invoked etc. so that a prima facie case is made out against the fugitive criminal.
>
> (i) Paragraph 1 of the affidavit should indicate the basis/capacity in which the affidavit is executed.
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> (ii) The affidavit should indicate that the offences for which the accused is charged in India.
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> (iii) The affidavit should also indicate that the law in question was in force at the time of Commission of offences and it is still in force, including the penalty provisions.
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> (iv) The affidavit should also indicate that if the accused is extradited to India, he would be tried in India only for those offences for which hisextradition is sought.
>
> (v) The affidavit should also indicate that the offences are not barred by the period of limitation.

(vi) The affidavit should also include references to documents and information that would establish the offences for which extradition is sought, together with a detailed written statement setting out the acts or omissions which are alleged against the accused in respect of **each** offence for which his extradition is sought.

3. Copy of First Information Report (FIR), duly countersigned by the competent judicial authority, should be enclosed with the request.

4. Competent authority should countersign copy of charge sheet, which is enclosed with the documents.

5. **A letter/order from the concerned court justifying accused person's committal for trial on the basis of evidence made available in the Charge sheet, with a direction seeking accused person's presence in court to stand trial in said court from the country of present stay.**

6. Warrant of arrest should be in original and open dated indicating clearly only those offences for which the accused is charged and Court has taken cognizance with relevant sections thereof.

7. Nationality, identity and address of the accused including his photograph should be made available with the request.

8. The photograph and finger print **(if available)** of the accused person should be identified through an affidavit in the request.

9. Copy of the relevant provisions under which the accused is charged along with the provisions of the relevant laws indicating that the maximum sentence prescribed for the offence for which the accused is charged or convicted.

10. If any CD/floppy is enclosed with the documents for establishing the crime, transcript of the CD/floppy should also be enclosed with the extradition dossier duly countersigned by the competent judicial authority.

11. The extradition request is to be made in quadruplet (four copies - one original + three copies).

12. All the documents should be very clear, legible and in presentable form as they are to be presented to the sovereign Governments of Foreign Countries.

13. Original documents in national languages should be sent along with certified English translation of each such document from authorized translators.

14. Extradition requests/documents to the country where English is not first language should be submitted along with duly translated copy in host country's local language. The Court issuing warrant should certify such translated copy.

15. **All the pages** in the original as well as photocopies (and in translated copies, where applicable) should be counter-signed by the competent judicial authorities.

After completion of necessary formalities, the request for extradition should contain a letter/note from a Senior Official (not below the rank of Joint Secretary) or the concerned State Government indicating the **correctness** of the case/material with a request to the Central Executive to forward it to the Government of the concerned foreign country.

N.B.: If the concerned court is requesting for extradition of a person, the request in the form of an affidavit should be in first person, i.e. by the Hon'ble Magistrate/ Judge himself/herself. (Such requests are usually received from Court Masters or other court officials writing in third person on behalf of the Court. Requested States object to it)".

12. In the light of the contents of the letter dated 01-5-2018 sent by the Ministry of External Affairs to the Additional Family Court, the question that arises for consideration is as to whether the Additional Family Court is obliged and whether they can be compelled by way of a writ of mandamus, to make a request for extradition of the petitioner's husband from the United States of America or not.

13. The law relating to extradition of fugitive criminals is consolidated under the Extradition Act, 1962. Section 2(c) of the Act defines an "extradition offence" to mean an offence provided for in the Extradition Treaty, if it is in relation to a foreign State with whom India has a treaty. The definition reads as follows:

> "2(c) "extradition offence" means — (i) in relation to a foreign State, being a treaty State, an offence provided for in the extradition treaty with that State; (ii) in relation to a foreign State other than a treaty State an offence punishable with imprisonment for a term which shall not be less than one year under the laws of India or of a foreign State and includes a composite offence."

14. The United States of America is a country with which India has an Extradition Treaty, within the meaning of the expression "Extradition Treaty" under Section 2(d) of the Act. Therefore, the United States of America is a "Treaty State" and hence Clause (i) of Section 2(c) alone is applicable to cases of this nature. In other words, an extradition offence, in cases of this nature, is one, which is prescribed as such in the Extradition Treaty.

15. The Extradition Treaty between the Government of the Republic of India and the Government of the United States of America was signed at Washington, D.C. on 25-6-1997, in accordance with Article 23 of the Treaty Instruments of Ratification. Article 2 of the said Treaty defines extraditable offences. It reads as follows:

"1. An offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by deprivation of liberty, including imprisonment, for a period of more than one year or by a more severe penalty.

2. An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, aiding or abetting, counselling or procuring the commission of or being an accessory before or after the fact to, any offense described in paragraph 1.

3. For the purposes of this Article, an offense shall be an extraditable offense:

(a) whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology;

(b) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court; or

(c) whether or not it relates to taxation or revenue or is one of a purely fiscal character.

4. Extradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed.

5. If extradition has been granted for an extraditable offense, it shall also be granted for any other offense specified in the request, even if the latter offense is punishable by less than one year's deprivation of liberty, provided that all other requirements for extradition are met."

16. As can be seen from Article 2.1 extracted above, an offence will be an extraditable offence, only if it is punishable under the laws in both Contracting States, by deprivation of liberty, including imprisonment for a period of more than one year or by a more severe penalty.

17. In the case on hand, the grievance of the petitioner is that despite orders of the Additional Family Court, the maintenance as ordered by the Family Court under Section 125 Cr.P.C has not been paid. Therefore, it is necessary to see whether in the first instance such failure would invite the penalty of imprisonment for a period of more than one year in India and in the second instance whether such a failure would invite a similar penalty in the United States of America.

18. Section 125(3) Cr.P.C prescribes imprisonment for a term which may extent o one month, if the person against whom an order is passed fails without sufficient cause to comply with the order. Section 125(3) reads as follows:

> "(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 allowances 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."

19. As a matter of fact, Section 125(3) contemplates a 2-tier process. In the first instance, the Magistrate is obliged to issue a Warrant for levying the amount due, in the manner provided for levying fines. At the second stage, he may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the Warrant. There is also no provision under Section 125(3) to impose a penalty of imprisonment for a period of more than one year, by combining together the arrears of rent for a period of 12 months. The penalty prescribed is for every month's default and the same is not to exceed one month for every default.

20. Therefore, the offence in respect of which the Additional Family Court has issued a Non-Bailable Warrant against the petitioner's husband, is not punishable with imprisonment for a period of more than one year or by a more severe penalty, even in India. It is not known whether the offence complained of against the petitioner's husband is punishable with imprisonment for more than a year in the United States of America. Unless the offence complained of is punishable with imprisonment for more than one year both in India and in the United States of America, the offence charged against the petitioner's husband will not come within the

purview of "extraditable offence' in terms of Article 2.1 of the Extradition Treaty.

21. Hence, it is not possible to issue a Writ of *mandamus* as sought by the petitioner. It must be pointed out that the failure of a person to maintain his wife, children and parents, is *per se* not made a punishable offence. Section 125 Cr.P.C enables such persons to approach the Magistrate and seek orders for maintenance. It is only the failure of the person against whom an order is passed, to comply with the order that is made punishable under Section 125(3) of the Code. In other words, a civil liability is converted into a punishable offence, after the liability gets crystallized into an order of Court. Hence, the provisions of the Extradition Act, 1962 and the clauses contained in the Extradition Treaty cannot be pressed into service in cases of this nature.

22. In view of the above, a *mandamus* as sought for by the petitioner cannot be issued. Hence, the writ petition is dismissed. The interlocutory applications, if any, pending in this writ petition shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

KONGARA VIJAYA LAKSHMI, J.

05th July, 2018.
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