

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.09.2020

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.No.4538 of 2020
and
Crl.M.P.No.2599 of 2020

Dhanapal

...Petitioner

.Vs.

1.Priya
2.Minor Raghavi
3.Minor Dheeksha

Respondents 2, 3 represented by Next friend and guardian Priya

...Respondents

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records relating to the order dated 11.06.2019 in C.M.P.No.65 of 2019 in M.C.No.23 of 2012 on the file of the Family Court, Namakkal, and the consequential order setting the petitioner ex-parte and issuing bailable warrant against the petitioner on 04.10.2019 in the said C.M.P set-aside the same.

For Petitioner : Mr.S.Kalyanaraman

For Respondents : M/s.Deepan for R1

सत्यमेव जयते
O R D E R

This petition has been filed to call for the records relating to the order dated 11.06.2019 in C.M.P.No.65 of 2019 in M.C.No.23 of 2012 on the file of the Family Court, Namakkal, and the consequential order setting the petitioner ex-parte and issuing bailable warrant against the petitioner on 04.10.2019 in the said C.M.P and to set-aside the same.

2.The learned counsel for the petitioner would submit that the petitioner is the husband of the first respondent and the father of the minor children i.e., second and third respondents. The respondents filed Maintenance Case in M.C.No.23 of 2012

claiming maintenance before the Chief Judicial Magistrate, Namakkal. By an order dated 12.08.2013 the trial Court ordered maintenance as against the petitioner at Rs.1500/- each to the respondents herein, totally Rs.4500/- per month. The petitioner did not comply with the said order and as such the first respondent filed petition in C.M.P.No.65 of 2019 under Section 128 of Cr.P.C., seeking arrears of the maintenance amount. The Family Court, Namakkal, by an order dated 11.06.2019 directed the petitioner to pay the arrears of the maintenance amount of Rs.3,55,500/- for the period of 79 months within the period of 30 days from the date of the order. The petitioner could not appear before the Family Court, Namakkal and as such the Family Court, Namakkal, issued bailable warrant on 04.10.2019 against the petitioner herein. He further submitted that the Family Court, Namakkal, without considering the mandatory provision under Section 125(3) of Cr.P.C., issued bailable warrant as against the petitioner. In terms of Section 125(3) of Cr.P.C., the Court can issue warrant to levy the amount due. The Application should be filed to levy such amount within the period of one year from the date on which it became due. Though the respondents claimed arrears for the period of 79 months, according to the proviso to Section 125(3) of Cr.P.C., they can claim only for the period of one year. He further submitted that though the petitioner has arrears for the period of 79 months, the Family Court, Namakkal, can issue only distraint warrant as against the petitioner and there is absolutely no power to issue bailable warrant as against the petitioner. In support of his contention the learned relied upon the Judgment of this Court in W.P.No.11372 of 2005 dated 19.11.2010 as follows:

"9. A glance through the above provisions would show that under Section 125(3) of the Code, there is a limitation to entertain the petition and under Section 128 of the Code, there is no such limitation provided for enforcing the order. The limitation provided under Section 125(3) is one year. Therefore, the petition can be filed under Section 125 of the Code only in respect of arrears for a period of 12 months. But, in the given case, the petition was filed to recover the arrears for a period of 13 months. That was the reason why, probably, the petitioner had thought it fit to file the same under Section 128 of the Code, for which, there is no limitation period. Therefore, it is crystal clear that the wife of the petitioner had consciously filed the petition under Section 128 of the Code for recovery of the amount due for a period of 13 months. Of course, it is true that the petitioner was absent on 23.05.2005 and he did not

make any payment, and thus, he committed default. While dealing with a petition under Section 128 of the Code, in such an event, the next course to be adopted by the Magistrate is to issue a "Distrainment Warrant" as provided under Sections 421 and 431 of the Code either for attachment and sale of any movable property belonging to the petitioner or to issue a warrant to the Collector of the District, authorizing him to realise the amount as arrears from the movable or immovable property or both of the petitioner."

Therefore, he prayed for setting-aside the order dated 11.06.2019 and also the consequential order dated 04.10.2019, thereby issued bailable warrant against the petitioner.

3. Per contra, the learned counsel for the respondents would submit that the petitioner did not appear before the Family Court, Namakkal. When the petition filed by the respondents under Section 128 of Cr.P.C., claiming arrears of maintenance came up for hearing. Therefore, the trial Court, by an order dated 12.08.2013 in M.C.No.23 of 2012, awarded maintenance as against the petitioner and directed to him pay the maintenance of Rs.1500/- to each of the respondents herein totalling a sum of Rs.4500/-. Even till date, the petitioner did not make any payment to the respondents herein. Even as per the contention of the petitioner as per the proviso to Section 125(3) of Cr.P.C., the application can be made to the Court to levy such amount within the period of one year from the date on which it became due. Therefore, the one year period is to be calculated when the amount is due. Even as on date there is due and the petitioner never paid any amount, as awarded by the trial Court, as maintenance to the respondents herein. He further submitted that during the entire proceedings under Section 128 of Cr.P.C., the petitioner never appeared before the Family Court, Namakkal, and as such, only to pass appropriate orders the Family Court, Namakkal, issued bailable warrant for his appearance. Therefore, he sought for dismissal of the petition.

4. Heard Mr.S.Kalyanaraman, the learned counsel for the petitioner and M/s.Deepan, the learned counsel for the first respondent.

5. It is seen that the petitioner got married the first respondent and gave birth to the second and third respondents herein. Due to misunderstanding, they got separated and as such, the respondents herein filed maintenance case in M.C.No.23 of 2012. The trial Court awarded maintenance at the rate of Rs.1500/- each to the respondents herein, totally a sum of Rs.4500/- per month, by an order dated 12.08.2013. Admittedly,

the petitioner did not pay any single paise to the respondents herein as awarded by the trial Court. Therefore, the respondents filed the petition under Section 128 of Cr.P.C., claiming arrears of maintenance. The petitioner did not appear before the Family Court, Namakkal, in the petition filed under Section 128 of Cr.P.C. Even after receipt of notice, the petitioner did not appear before the Family Court, Namakkal. After giving opportunity to the petitioner, the Family Court, Namakkal, passed an order dated 11.06.2019 thereby directed the petitioner to pay the sum of Rs.3,55,500/- as arrears for the period of 79 months from the date of the maintenance order. Even then, the petitioner did not comply the same and as such, the Family Court, Namakkal issued bailable warrant on 04.10.2019 as against the petitioner. Only because of his non appearance, the Family Court, Namakkal, issued bailable warrant. Further, Section 125(3) of Cr.P.C., contemplates that if any person did not comply with the order passed by the Magistrate under Section 128 of Cr.P.C., bailable warrant can issued for levying such amount due. The proviso says that the application to be made for levying such amount within the period of one year from the date on which it became due. Here the petitioner did not pay any amount to the respondents from the date of the award of the maintenance. Therefore, as on date, the amount became due and payable by the petitioner. The Judgment cited by the learned counsel for the petitioner is not connected with the case on hand.

6.Further, only because of the non appearance, the Family Court, Namakkal, has now issued bailable warrant as against the petitioner. The petitioner can very well go before the trial Court and seek for recalling the warrant. Instead of doing so, the petitioner has challenged the orders passed by the Family Court, Namakkal, before this Court on different grounds which is not permissible. Therefore, this petition is devoid of merits and the same is liable to be dismissed.

7.With the above observations, this Criminal Original Petition is dismissed. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rna

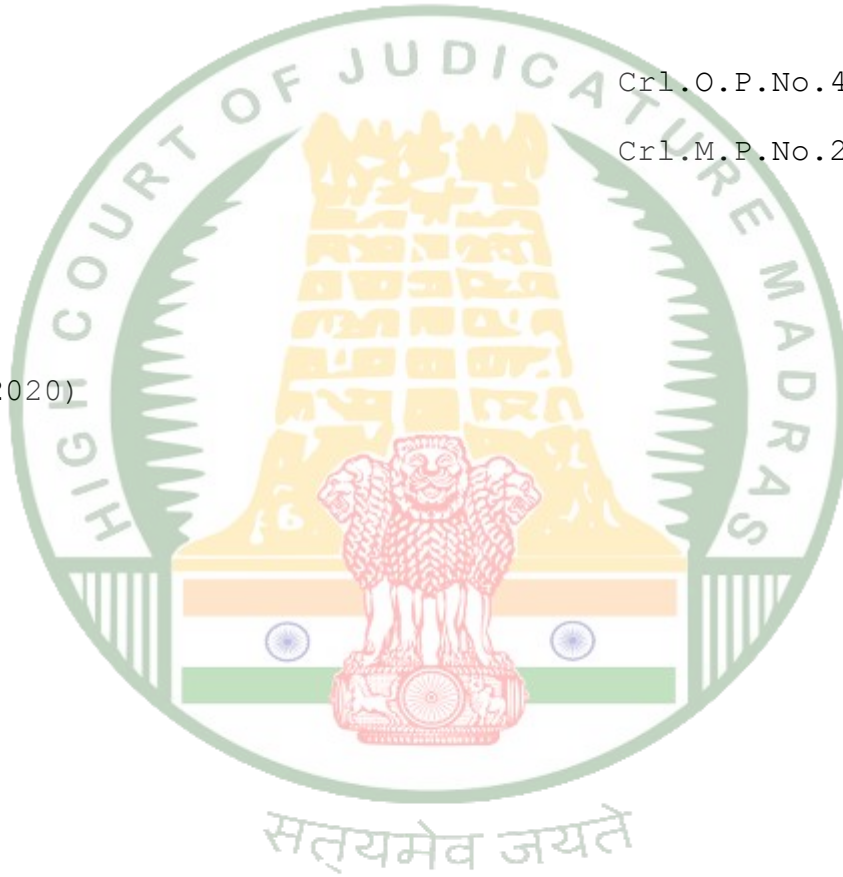
To

The Family Court,
Namakkal.

+lcc to Mr.S.Kalayanaraman, Advocate, SR.No.31443/2020

CrI.O.P.No.4538 of 2020
and
CrI.M.P.No.2599 of 2020

AJS (CO)
RN (20/10/2020)



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