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C.R.P. (PD) No.1643 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.06.2022

CORAM

THE HONOURABLE MS. JUSTICE R.N.MANJULA

C.R.P. (PD) No.1643 of 2022

and

C.M.P.Nos.8192, 8191 & 9505 of 2022

Mr.Siddarth Selvakumar,
S/o. Dr.S.Selva Kumar

... Petitioner

Versus

1. Dr. S.Selvakumar
S/o. Dr.A.B. Selvarangan

2. Mrs. Savithri Selvakumar
W/o. Dr. S. Selva Kumar

... Respondents

Prayer:- Civil Revision Petition has been filed under Art. 227 of Constitution of India, praying to set aside the docket order dated 26.04.2022 in H.M.O.P. No.2357 of 2015 on the file of Principal Family Court, Chennai.

For Petitioner : Mr.Subbu Ranga Bharathi

For Respondents : Mr. Ganesh for
M/s. S.Namasivayam for R1



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ORDER

This Civil Revision Petition has been preferred challenging the docket order passed by the learned Principal Family Court, Chennai dated 26.04.2022 in H.M.O.P. No.2357 of 2015.

2. The Revision Petitioner is the respondent witness No.3. The 1st respondent is the husband and the 2nd respondent is the wife. The original petition in H.M.O.P. No. 2357 of 2015 was filed by the 1st respondent husband against the 2nd respondent wife for dissolution of marriage. During the enquiry on the side of 2nd respondent wife, three witnesses were examined. This Revision Petitioner was examined as R.W.3. He was examined in chief on 20.10.2021, 22.10.2021, 26.10.2021, 30.10.2021, 18.11.2021, 06.12.2021, 16.12.2021, 28.12.2021, 29.12.2021, 01.03.2022 and 10.03.2022. On 10.03.2022, the matter was adjourned to 21.03.2022 for further cross-examination of R.W.3. Since the courts were functioning through video conference, the examination of witnesses was not taken place for some time and the cases were being adjourned. On 26.04.2022, a docket

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order was passed to issue witness warrant to R.W.3/Revision Petitioner for his non-appearance. Aggrieved over that, this Civil Revision Petition has been filed.

3. The learned counsel for petitioner submitted that for conduction of the cases before the Family Court, generally, the provisions of Civil Procedure Code is applicable. Hence, the learned Family Court does not have any powers to issue witness warrant to a witness for his non-appearance. The learned counsel for petitioner drew the attention of this court to Order XVI Rule 5 and submitted that the procedure contemplated under Order XVI Rule 10 should be observed, if the witness does not attend the court without any lawful excuse. In support of his above submissions, he also cited the decision rendered by the **High Court of Madhya Pradesh** in a **Writ Petition No.2039 of 2006 in the case of Vinod Tiwari vs. Employees Provident Fund Organisation and others**. In the said judgment, the High Court of Madhya Pradesh has held as follows:-

“In the absence of any provision in either the Act or the Civil Procedure Code for detention of the petitioner in civil prison



for failure to produce the records summoned to be produced, the impugned order dated 17.04.2006 passed by the Assistant Commissioner is without the authority of law. Since the petitioner's right to personal liberty under Art.21 of the Constitution has been grossly violated by the impugned order, we quash the impugned order in so far as it directs detention of the petitioner in civil prison for failure on his part to produce the records summoned.”

By citing the above judgment, the learned counsel for the petitioner further submitted that only when the witness deliberately avoids to make his appearance before the court, the coercive steps contemplated under Order XVI Rule 12 can be resorted to.

4. The learned counsel for respondent also conceded the fact that as per the procedure contemplated under Sec. 10 of the Family Court Act, the Family Court Judge is expected to adopt the Civil Procedure Code while conducting enquiry in the H.M.O.P. proceedings.

5. The Family Court Judge is not empowered to issue witness warrant



for the default of a witness in making his appearance for examination. The procedure to be followed by the Family Court for conducting the case before the Family Court is set out under Sec.10 of the Family Court Act and it reads as under :-

"Sec. 10 of the Family Court Act

Procedure generally.-(1) *Subject to the other provisions of this Act and rules, the provisions of the Code of Civil Procedure, 1908(5 of 1908), and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973(2 of 1974), before a Family Court and for the purpose of the said provisions of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court.*

(2) *Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), or the rules made thereunder, shall apply to the proceedings under Chapter IX of the Code before a Family Court.*

(3) *Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."*



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6. Even though the Family Court has got the selective powers to follow the provisions of Code of Criminal Procedure, that can be adopted only when the proceedings under Chapter IX of Criminal Procedure Code are conducted before the Family Court. Admittedly, for the enquiry proceedings in H.M.O.P. No.2357 of 2015, Civil Procedure should be followed.

7. The proceedings under Chapter IX of Criminal Procedure Code refers about the proceedings conducted under Sec.125 to 128 Cr.P.C. in connection with the claim maintenance. During such proceedings, the Family Court is vested with the power to follow the Criminal Procedure Code and issue warrant for the absence of the witness under Sec. 87 of Cr.P.C. But, for the proceedings conducted by the Family Court by adopting Civil Procedure Code, if a witness fails to turn up for examination, the only course open to the Family Court Judge is to invoke the procedure contemplated under Order XVI Rule 12 of C.P.C. Order XVI Rule 12 reads



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as under :-

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12. Procedure if witness fails to appear— [191][(1)] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to the attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs to such attachment, together with the amount of the said fine, if any:

Provided that, if the person whose attendance is required pays into Court the Costs and fine aforesaid, the Court shall order the property to be released from attachment."

The above Rule also would empower the courts to impose a fine not exceeding Rs.500/- or attach his property for non-payment. Even these coercive steps can be taken only after issuing proclamation as stated under Order X Rule 2. So, even according to Order XVI Rule 10, the warrant cannot be issued without issuing a proclamation. In the situation dealt with the case in hand, not even summons is issued, and the witness was produced by the 2nd respondent herself. Only if the Civil Court summons the witness



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for giving evidence or to produce any documents, the Civil Court can compel the attendance of any person by issuing a warrant for his arrest in compliance of Sec.32 of Code of Civil Procedure.

8. In the case in hand, R.W. 3 appeared himself and no court summons was issued for his attendance. Even if a court summons issued, but the witness fails to make his appearance, the issuance of warrant cannot be an automatic outcome. The person concerned should be given with the opportunity by giving notice as to why coercive steps should not be resorted against him. In the case in hand, it is seen that R.W.3 has filed his chief affidavit on 11.10.2021 and thereafter, he was called for cross-examination on 20.10.2021, 22.10.2021, 26.10.2021, 30.10.2021, 18.11.2021, 06.12.2021, 16.12.2021, 28.12.2021, 29.12.2021, 01.03.2022 and 10.03.2022. The learned counsel for petitioner submitted that on all these dates, R.W.3 was put to a very lengthy cross-examination. It is also stated that he was asked with several unnecessary questions irrelevant to the purpose of the case.



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9. The learned Trial Judge without appreciating the earlier presence of R.W. 3 for several hearing and without issuing any notice, had issued the witness warrant, which is not legal. Even if the R.W.3's absence is wanton, the Court has to deal the situation only in accordance with Sec.32 and Order XVI Rule 16 and not otherwise. Since the learned Trial Judge has issued the witness warrant unmindful of the procedure, that has to be adopted during enquiry proceedings in the Original Petition filed in the Family Court, the impugned order is liable to be set aside and the witness warrant should be recalled.

10. In the result, this Civil Revision Petition is allowed and the order of the learned Principal Family Court Judge, Chennai dated 26.04.2022 in H.M.O.P. No.2357 of 2015 is set aside and the warrant issued, if any, stands recalled. However, R.W.3 shall make his appearance before the Principal Family Court, Chennai on 30.06.2022 and on his appearance, the learned counsel for 1st respondent husband should complete the cross-examination on that day itself without making the witness to wait or to come



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again. The learned trial judge shall be proactive in not allowing irrelevant questions and see the cross is completed. The learned Trial Judge shall also dispose the proceedings in H.M.O.P. No. 2357 of 2015 as expeditiously as possible taking into consideration of the earlier direction given by Hon'ble Supreme Court in Special Leave to Appeal (C) No.34249 of 2017. Consequently, the connected Civil Miscellaneous Petitions are closed.

23.06.2022

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To

Principal Family Court Judge,
Chennai.



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R.N.MANJULA, J.

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