

**(1989) 01 MAD CK 0056**

**In the Madras High Court**

**Case No : Criminal R.C. No. 420 of 1938**

K.M.A. Haja Kudhbudin

APPELLANT

Vs

Thirumathy Moorshda Bhanu and son (not named)  
representing by the first Respondent

RESPONDENT

**Date of Decision : 12-01-1989**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 126(2), 61

**Citation : (1989) LW(Cri) 211**

**Hon'ble Judges : Arunachalam, J**

**Bench : Single Bench**

**Advocate : P. Kulandaivelu, for the Appellant; S. Shanmughavelayutham, for the Respondent**

## Judgement

Mr. Arunachalam, J.

2. A few facts need narration. The Respondents filed a petition u/s 125, CrI. P.C. before the Sub Divisional Judicial Magistrate. Valliyur against the

Respondent and the same was taken on file as M.C. No. 9 of 1988. The trial Magistrate issued summons u/s 61, CrI. P.C. to the Petitioner herein,

who had received it on. 21-5-1988. The date of hearing had been fixed in the summons as 25-5-1988.

3. On the date of hearing, the Petitioner did not appear in the trial court, but had engaged a counsel to appear on his behalf and file a vakalat and

take time for counter, after receiving a copy of the maintenance petition filed by the Respondents. The trial Court accepted the vakalat presented

by the counsel for the Petitioner, but chose to act u/s 126 of the CrI. P.C., setting him ex parte, on the view that the absence of the Petitioner was

wilful, though in fact he was represented by his counsel. The trial Magistrate has

observed in paragraph 4 of his order that the absence of the Petitioner in Court on 25-5-1988 was want on, and wilful avoidance. It is also further observed that no permission had been sought from the Court

for the absence of the Petitioner on 25-5-1988. This according to the Magistrate posed the need to pass an ex parte order in the main case itself.

4. I have heard Mr. P. Kulandaivadivelu, learned Counsel appearing for the Petitioner and Mr. Shanmuga Velayutham, learned Counsel appearing for the Respondents.

5. A perusal of the summons issued clearly postulates the appearance of the Petitioner before the trial Court either in person or by a pleader.

Respecting the summons issued, the Petitioner engaged a counsel and the counsel had not only appeared before the trial Court, but had filed his

vakalat, as well. The counsel had prayed for furnishing of a copy of the maintenance petition to facilitate his counter being filed. There appears to

be practically no need for the presence of the Petitioner at that stage in this proceeding. If the Magistrate was of the view that the presence of the

Petitioner was necessary, he could have directed the counsel for the Petitioner to see to it that the Petitioner appeared before the Court on the next

hearing date. There is no material on record for the Magistrate to arrive at the conclusion that the Petitioner was wilfully avoiding appearance

before the Court. That there could be no wilful avoidance is patent from the conduct of the Petitioner having engaged a counsel and filing his

vakalat, to get along with the proceedings. Even the summons issued permitted his appearance, "by pleader".

6. Mr. Shanmuga Velayutham, learned Counsel for the Respondents referred to Section 126(2), CrI. P.C. which deals with the recording of

evidence in proceedings initiated u/s 125, CrI. P.C. This postulates recording of the evidence in the absence of the husband when his personal

appearance is dispensed with, but that could be done only if the Magistrate is satisfied that the person against whom an order for payment of

maintenance is proposed to be made, was wilfully avoiding service or wilfully neglecting to attend the court. The stage has not reached yet in this

case. The case was at the threshold and was for the appearance of the Petitioner and the proceedings have not reached the stage as yet of

recording evidence. The exercise of judicial discretion must have dictated to the

trial Magistrate to give sufficient opportunity to the Petitioner to file his counter before proceeding further in this case. The order passed by the trial Magistrate is neither in consonance with law nor equity and is opposed to the fundamental Principles of natural justice.

7. The order of the trial Magistrate passing an ex parte order and awarding maintenance to the Respondents is set aside. The case records will be sent to the Chief Judicial Magistrate, Tirunelveli, who will take this case on his file and dispose it of in accordance with law after affording reasonable opportunity to both the parties to get along with the enquiry. The Chief Judicial Magistrate, Tirunelveli will dispose of the case as expeditiously as possible. The records are to be despatched to the Chief Judicial Magistrate within one week from to-day. The revision petition is ordered accordingly.