

(2010) 01 MAD CK 0165
In the Madras High Court
Case No : Criminal R.C. No. 1045 of 2009

Periyasamy

APPELLANT

Vs

Lakshmi

RESPONDENT

Date of Decision : 29-01-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(3), 128

Citation : (2010) 1 LW(Cri) 751

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : N. Manokaran, for the Appellant; S. Lakshmanasamy, for the Respondent

Final Decision : Allowed

Judgement

S. Nagamuthu, J.—The Petitioner is the husband of the Respondent. On a petition in M.C. No. 9 of 2007 filed by the Respondent herein u/s 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code"), the learned Judicial Magistrate, Bhavani, Erode District passed an order directing the Petitioner herein to pay a sum of Rs. 1,000/- per month to the Respondent herein as maintenance.

2. On the ground that the Petitioner failed to pay the maintenance amount for 37 months, the Respondent filed CrI.MP. No. 2971 of 2008 before the learned Magistrate u/s 128 of the Code for execution. On appearance, the Respondent requested the learned Magistrate to grant time to pay the amount. Though time was granted, the Petitioner did not pay the amount. Finally, the learned Magistrate by order dated 25.03.2009 imposed a sentence of 12 months of Rigorous Imprisonment. Challenging the same, the Petitioner is now before this Court with this revision.

3. I have heard the learned Counsel appearing for the Petitioner and the learned Counsel appearing for the Respondent. I have also perused the records carefully.

4. Admittedly, the petition which culminated in the impugned order was filed only to enforce the order of maintenance as provided in Section 128 of the Code and it was not filed u/s 125(3) of the Code. It is well settled that u/s 128 of the Code while enforcing an order of maintenance, the learned Magistrate is not empowered to impose any sentence on the defaulter. The learned Magistrate is empowered only to enforce the same as provided for recovery of fine in the Code. But, the learned Magistrate has passed an order of sentence as though she was dealing with a petition u/s 125(3) of the code. It is needless to say that u/s 125(3) of the Code, there are various constraints like, the limitation, etc., to entertain a petition; whereas u/s 128 of the Code, obviously, there is no such limitation provided for enforcing the order. It is not as though a wrong provision has been quoted by the Respondent. Even during the argument, it was understood by the parties that the petition was filed only u/s 128 of the Code, which is evident from the impugned order itself. The learned Magistrate relying on a judgment of this Court in *Udayasuriyan v. Lakshmi and Ors.*, 2006 (2) L.W. (Cri.) 709 has to come to the conclusion that such sentence can be imposed on the defaulter. But, the learned Magistrate has omitted to notice that in the said case, the petition was filed u/s 125(3) of the Code and not u/s 128 of the Code. The powers of the Magistrate under Sections 125 and 128 of the Code are distinguishable. Therefore, a petition filed u/s 128 of the Code cannot be treated as a petition filed u/s 125 of the Code. Now, the learned Magistrate has allowed the petition thereby put an end to the further proceedings. The order impugned in this revision petition not only has caused prejudice to the Petitioner, but also deprives the Respondent inasmuch as she has claimed arrears of maintenance for 37 months, whereas the order relates only to 12 months. Thus, the Respondent also stands to lose the arrears of maintenance for 25 months. Thus, the impugned order is not at all sustainable.

5. In view of the above, the revision petition is allowed; the order impugned in this revision is set aside; and Cri.M.P. No. 2971 of 2008 is remitted to the learned Judicial Magistrate, Bhavani, Erode District to enforce the order as provided in Section 128 of the Code of Criminal Procedure.