
(2012) 08 KL CK 0140
In the High Court Of Kerala
Case No : O.P. (FC) No. 2013 of 2012

Reshma

APPELLANT

Vs

Jayan

RESPONDENT

Date of Decision : 22-08-2012

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(3), 127, 128, 407
Family Courts Act, 1984 — Section 7(2)

Citation : (2013) 1 ILR (Ker) 251 : (2012) 4 KLJ 22 : (2012) 4 KLT 200

Hon'ble Judges : M.L. Joseph Francis, J;K.T. Sankaran, J

Bench : Division Bench

Advocate : E.N. Vishnu Namboodiri, N.N. Elayath and S.P. Suresh Kumar, for the Appellant; M.P. Sreekrishnan as Amicus Curiae, for the Respondent

Final Decision : Allowed

Judgement

M.L. Joseph Francis, J.—This Original Petition (Family Court) is filed under Art 227 of the Constitution of India seeking the following reliefs;

(i) Direct the Family Court, Kannur to transfer the necessary records of M.C. No. 425/2005 and M.C. No. 458/2011 to Family Court, Kasaragod or any other Court at Kanhangad for realizing the amount standing due from the respondent towards the petitioner and her children.

(ii) Allow the petitioner for her behalf and on behalf of her two minor children to realize the amount now due and may become due in future by initiating necessary legal proceeding before the Family Court, Kasaragod or any other Court at Kanhangad.

The facts of the case are briefly as follows: The petitioner herein is the first petitioner in M.C. No. 425 of 2005 on the file of the Family Court, Kannur. The petitioners 2 and 3 in the M.C. are the children born in the wedlock between the petitioner and the respondent. Their marriage took place on 25.3.2002. It is

alleged that after the marriage the respondent treated the petitioner with cruelty for a period of five years and thereafter, deserted her even without paying maintenance. Therefore, she was compelled to file M.C. No. 425 of 2005 before the Family Court, Kannur for maintenance to her and her children from the respondent, who was working in Army. On 22.3.2007, the Family Court allowed me M.C. ex parte by providing Rs. 800/- per month to the petitioner and Rs. 600/- each per month to the children. C.M.P. No. 492 of 2011 filed under S. 125(3) of the Code of Criminal Procedure (for short, "the Cr.P.C.") is pending before the Family Court, Kannur to realize the amount due from the respondent for the period from 26.7.2010 to 25.7.2011, as per the order in M.C. No. 425 of 2005. In the year 2011, the petitioner and her minor children filed M.C. No. 458 of 2011 before the Family Court, Kannur under S. 127 of the Cr.P.C. The matter was settled before the Principal Counselor and as per the settlement, the Family Court allowed the M.C. and directed the respondent to provide maintenance to the petitioner and her children at the rate of Rs. 1,000/- each per month since December, 2011. The maintenance amount from 25.7.2011 is due from the respondent During the pendency of M.C. Nos. 425 of 2005 and 458 of 2011, the petitioner and her minor children were living at Paralam Village of Kozhummal Desom, Taliparamba Taluk, Kannur District. Later, their residence was shifted to Kanhangad, Kasaragod District". The petitioner's children are studying at Kanhangad. Petitioner's aged mother and grandmother, who are laid up due to various ailments are also residing with the petitioner under the care and protection of the petitioner. Petitioner is also suffering from rheumatic complaints. She is not in a position to travel from Kasaragod to Kannur, on every posting date of the case. Her children are minors and there is nobody to look after them in the house in her absence since her mother and grandmother are laid up. Moreover, the petitioner needs travelling expenses for her travel from Kasaragod to Kannur. Considerable portion of the maintenance amount is to be spent towards advocate fee and travelling expenses if execution of orders in M.C. Nos. 425 of 2005 and 458 of 2011 is carried out in Kannur District. At the Kanhangad Court premises there is sitting of Family Court, Kasaragod twice in a month and the said Court is very near to the petitioner's residence. One of her close relatives is practicing at Kasaragod Bar. If further execution proceedings are allowed to be carried out under the jurisdiction of the Family Court, Kasaragod, it would be convenient to the petitioner.

2. Though notice was served on the respondent, there was no appearance for the respondent. Heard the learned counsel for the petitioner and Adv. Sri. M.P. Sreekrishnan, who assisted this Court as amicus curiae.

3. During the pendency of this proceedings, the petitioner filed I.A. No. 10813 of 2012 to amend the Original Petition (FC) by incorporating a sentence in the last portion of paragraph 6 of the Original Petition, which reads as follows:

The respondent is now working at Kanhangad Police Station, Kasaragod District as a Home Guard.

That petition was allowed by this Court.

4. Chapter IX of Cr.P.C. deals with the procedure for ordering maintenance for wives, children and parents. S. 7(2) of the Family Courts Act, 1984 provides that an order passed by the Family Court under Chapter IX of the Cr.P.C. shall be executed in the manner prescribed for execution of such order by the Code. When the Family Court is exercising the powers and jurisdiction under Chapter IX of the Cr.P.C., it is a Criminal Court equivalent to the Court of the Magistrate of the First Class and therefore, High Court can transfer a case from one Family Court to another Family Court under S. 407 of the Cr.P.C. The necessary ingredients to invoke the jurisdiction of the High Court under S. 407 Cr.P.C. are; (1) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or (2) that some question of law of unusual difficulty is likely to arise; or (3) that an order under the Section is required by any provision of the Code; or (4) to suit the general convenience of the parties or witnesses; or (5) it is expedient for the ends of justice.

5. In the present case, inquiry in M.C. No. 425 of 2005 and 458 of 2011 was over and final orders were already passed in those cases. The final order in M.C. No. 425 of 2005 was passed on 22.3.2007 and the final order in M.C. No. 458 of 2011 was passed on 9.4.2012. The petitioners in M.C. No. 425 of 2005 have already filed C.M.P. No. 492 of 2011 before the Family Court, Kannur under S. 125(3) of the Cr.P.C. for execution of the order in M.C. No. 425 of 2005 on 25.7.2011. S. 125(3) of the Cr.P.C. refers to the enforcement of an order for maintenance passed under sub-s. (1) of S. 125 of the Cr.P.C. by execution of warrant against the person against whom such order is made. S. 128 of the Cr.P.C. deals with the procedure for enforcement of orders for maintenance, which reads as follows:

128. Enforcement of order of maintenance.-

A copy of the order of maintenance or interim maintenance and expenses of proceeding, as the case may be, shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be, is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance, or as the case may be, expenses, due.

Section 128 of the Cr.P.C. is supplementary to S. 125 of the Cr.P.C., which provides for enforcement of the order for maintenance.

An application for recovery of maintenance should be made either to the Magistrate who passed the original order or his successor or to a Magistrate having jurisdiction over the place where the person against whom the order is made resides. The conditions for enforcement of an order of maintenance are identity of the parties and non-payment of maintenance. In the present case, the

respondent is now working at Kanhangad Police Station as a Home Guard, which is within the jurisdiction of the Family Court, Kasaragod. In view of the provisions contained in S. 128 of the Cr.P.C., the petitioner can file an application for execution of a maintenance order in M.C. No. 425 of 2005 and M.C. No. 458 of 2011 directly before the Family Court, Kasaragod, within whose jurisdiction, now the respondent is residing for the purpose of employment. But in C.M.P. No. 492 of 2011 in M.C. No. 425 of 2005 on the file of the Family Court, Kannur, the petitioners are claiming arrears of maintenance for the period from 26.7.2010 to 25.7.2011 under S. 125(3) of the Cr.P.C. The petitioners cannot file a fresh application for the arrears of maintenance for that period before the Family Court, Kasaragod as that will become time barred in view of the first proviso to S. 125(3) of the Cr.P.C., which provides that no warrant shall be issued for the recovery of any amount due unless an application is made to the Court to levy such amount within a period of one year from the date on which it become due. Therefore, we are of the view that C.M.P. No. 492 of 2011 in M.C. No. 425 of 2005 pending before the Family Court, Kannur has to be transferred to the Family Court, Kasaragod for the purpose of enforcement of the order after incorporating the present official address of the respondent and the present address of the petitioner.

Accordingly, this Original Petition (Family Court) is allowed in part. C.M.P. No. 492 of 2011 in M.C. No. 425 of 2005 pending before the Family Court, Kannur is transferred to the Family Court, Kasaragod for the purpose of enforcement of the order. On receipt of that C.M.P., the Family Court, Kasaragod is directed to proceed with in accordance with law.