

(1998) 06 MAD CK 0070

In the Madras High Court

Case No : Criminal O.P. No. 5909 of 1998 and Criminal M.P. no. 2857 of 1998

Shanmugam

APPELLANT

Vs

Family Court, Madurai and another

RESPONDENT

Date of Decision : 22-06-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125(1)(5), 127(2), 482

Citation : (1998) 2 CTC 738 : (1998) 2 DMC 596

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M. Karpagavinayagam, J.—This court in this application filed u/s 482, Cr.P.C. by the husband, the petitioner herein, has been given peculiar

opportunity to deal with the prayer which is quite preposterous and monstrous. The prayer is this:-

(a) to direct the first respondent Family Court to take my petition dated 5.6.97 presented u/s 125(5), Cr.P.C. in M.C.No.15 of 1984 into file and

dispose of it according to law;

(b) to direct the first respondent Family Court to forbear from passing orders to execute the order dated 7.2.97 passed in CrI.M.P.No.41 of 1996

filed in M.C.No. 15 of 1984 and to recall the warrant of arrest pending against me passed in CrI.M.P.No.44 of 1996 in M.C.No.15 off 1984 and

to pass such further or other orders as this Hon"ble Court may deem fit to pass.

2. At the outset, I may mention that I really do not understand the rationale behind the attitude of the petitioner to implead the Family Court which

passed the impugned order. The Registry also as usual without application of

mind, has numbered this petition by allowing the party to implead the Family Court as one of the parties. This practice is to be deprecated, since the Court which issued order cannot be the party to this proceedings.

3. The only way available for the petitioner to attack or to challenge the impugned order is to file a petition to set aside the said order giving legal and valid reasons to challenge the same by adding only the other party against whom he fought with. But, curiously the petitioner is under the impression that Family Court alone is the main party to be fought with. This is quite unfortunate.

4. Be that as it may, the prayer, in my view, is quite strange and cannot be granted. The petitioner is the husband of the respondent No.2 who is the unfortunate wife. In 1984 the respondent-wife filed an application for maintenance in M.C.No.15 of 1984. After enquiry, a sum of Rs.125 was awarded as maintenance in 1985. The petitioner filed a revision against this order of maintenance. However, the same was dismissed.

5. The wife, the second respondent herein also filed a revision before the Sessions Court for enhancing the maintenance from Rs.125 to Rs.200.

On considering the merits of the contention urged by the wife in that revision, the learned Sessions Judge, passed an order dated 11.10.1995

enhancing the maintenance from 125 to Rs.200.

6. Thereafter, the petitioner filed H.M.O.P.No.92 of 1986 claiming divorce before the Civil Court. Though it was contested by the wife, the

second respondent herein, the said petition was allowed on 29.2.1989. Challenging the said order, the wife, the second respondent herein filed an

appeal before the District Court and the same was dismissed on 20.2.1990, confirming the divorce ordered on 27.2.1989.

7. After six years, the wife, the second respondent herein filed a petition for enhancement in CrI.M.P.No. 41 of 1996 before the learned

Magistrate showing the change of circumstances under which the wife had to incur more expenditure for her livelihood. At that point of time, the

petitioner/husband filed a counter stating that already Civil Court passed a decree of divorce, as she herself deserted from the company of the

husband. However, this was considered by the learned Judicial Magistrate and passed an order enhancing the maintenance from Rs.200 to

Rs.400. It is stated that as against the said order, a revision has been filed

before this Court and since there is a delay, an application has been filed to condone the delay and the same is pending.

8. At this stage, on 5.6.1998 the petitioner filed an application before the learned Magistrate u/s 125(5), Cr.P.C. requesting the Court to cancel the earlier order passed in the year 1985 mainly on the ground that the Civil Courts have found that the wife herself deserted the company of the husband.

9. According to the counsel for the petitioner, this application has not been entertained. On the other hand, the said application has been returned on the question of maintainability. It was represented but there was no progress in the process of numbering it in the lower Court. At this stage, the petitioner has filed this petition requesting this Court to invoke the inherent power to direct Family Court to entertain the petition u/s 125(5), Cr.P.C. and to pass an order in accordance with law.

10. Another peculiar prayer made in this petition is to stay the proceedings in pursuance of the execution of the warrant of attachment of salary. In other words, the petitioner requests this Court to grant injunction restraining the Family Court which is made as one of the parties here, from proceeding further in the execution petition.

11. I am at pains to note that the husband, the petitioner herein admittedly has not paid any amount from the year 1990. It cannot be disputed that the order of maintenance passed in the year 1985 and the order in the execution petition passed in 1986 are still in existence which were not recalled either by the lower Court or by the revisional Court. Under these circumstances, it is clear that these proceedings have been initiated probably in order to avoid the payment of maintenance ordered by the Lower Court as confirmed by the Sessions Court.

12. Section 125(5), Cr.P.C. provides as follows:-

On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

13. The counsel for the petitioner would submit that the petitioner need not pay any amount of maintenance, as his case fails under the second

category out of three categories contemplated in sub-section (5) of Section 125, Cr.P.C., namely, the wife refused to live with the husband without any sufficient reason.

14. It must be noted that in the counter filed both in the execution application and in the application for enhancement, the very same point has been

urged by the petitioner/husband. These things have been considered in detail by the lower Court and the same were rejected. As against this,

according to the counsel for the petitioner, still the unnumbered revision is pending before this Court. So at this stage, the present application has

been filed before this Court seeking a direction to the lower Court to pass an order on entertaining the unnumbered application.

15. The main ground urged in the application is that the wife is not entitled to maintenance because the Civil Court has already found that the wife

deserted the company of the husband, by the decree dated 27.2.1989 which was confirmed by the lower appellate Court. This ground, according

to the counsel for the petitioner, has to be considered u/s 125(5), Cr.P.C. to cancel the earlier order passed u/s 125(1), Cr.P.C.

16. I am afraid that this submission lacks substance. Section 127(2), Cr.P.C. provides thus:-

Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made u/s 125 should be cancelled

or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

Instead of invoking the powers conferred u/s 127(2), Cr.P.C., immediately after the decree passed by the lower Court as has been confirmed by

the appellate court by the judgment dated 20.2.1990, the petitioner has now approached the Court in 1997 to cancel the order on the ground that

the finding of Civil Court is binding on the Family Court by entertaining the same, that too, not u/s 127(2), Cr.P.C., but u/s 125(5), Cr.P.C.

17. As indicated earlier, this ground urged by the petitioner was already considered by the lower Court and the final decision had been arrived at.

Instead of challenging that order and pursuing the proceeding thereunder, this application, I feel, has been filed before the lower Court u/s 125(5),

Cr.P.C. which is, in my view, not maintainable.

18. Therefore, in view of the above reasons, I do not find any ground to

entertain this petition and in my considered opinion that the application is misconceived and the same is liable to be dismissed and accordingly, it is dismissed. Consequently, Crl.M.P.No. 2857 of 1998 stands dismissed.

19. The lower Court is directed to dispose of the Execution petition in consonance with the observation made in this order and in accordance with law, as expeditiously as possible.