BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 28.08.2025

PRONOUNCED ON : 20.11.2025

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

CRL RC(MD)No.804 of 2023

Alxxxxxxxxxxxx ... Petitioner

Vs.

1. Maxxxxxxxxxxxx

2. Dxxxxxxxxxxxx ... Respondents

PRAYER: Criminal Revision Petition is filed under Section 397 r/w 401 of Cr.P.C., to call for the records pertaining to the order passed in Crl.M.P.No.800 of 2023 in M.C.No.4 of 2016 dated 13.07.2023 by the learned Judicial Magistrate No.1, Kovilpatti, and set aside the same.

For Petitioner : Mr.G. Karuppasamy Pandiyan

For Respondent : Mr.B. Rajesh Saravanan

ORDER

Prologue:

This Criminal Revision Case is directed against the order dated

13.07.2023 passed by the learned Judicial Magistrate No.I, Kovilpatti in Crl.M.P.No.800 of 2023 in M.C.No.4 of 2016, whereby the learned Judicial Magistrate, in the course of execution of a maintenance order, issued a Non-Bailable Warrant (NBW) against the revision petitioner/husband for alleged wilful default in payment of arrears of maintenance. The petitioner confines the challenge to the legality and propriety of the issuance of NBW, asserting that the same was passed in violation of procedural safeguards and contrary to settled legal principles under the Code of Criminal Procedure, 1973.

2. The grievance of the petitioner is not against the maintenance order *per se* which stands independently challenged before the learned Sessions Court, Thoothukudi, in Crl.R.No.14 of 2022 but solely against the coercive step of issuing NBW, which, according to him, was done mechanically and without following the mandated sequence of summons, bailable warrant, and only thereafter, non-bailable warrant.

Gist of the impugned order of the learned Trial Court:

3. The first and second respondents (wife and daughter of the petitioner) filed Crl.M.P.No.800 of 2023 seeking enforcement of the

maintenance order passed in M.C.No.4 of 2016. The learned Judicial Magistrate No.I, Kovilpatti, by order dated 26.07.2022, had directed the petitioner-husband to pay maintenance of Rs.6,000/- (Rupees Six Thousand only) per month to the first respondent (wife) and Rs.4,000/- (Rupees Four Thousand only) per month to the second respondent (daughter) till she attained majority, besides arrears within stipulated time.

4. As the petitioner failed to comply with the said order, the respondents moved the execution petition claiming arrears of Rs. 5,14,000/- (Rupees Five Lakhs and Fourteen Thousand only) comprising Rs.4,26,000/- (Rupees Four Lakhs and Twenty Six Thousand only) for 71 months due to the wife and Rs.88,000/- (Rupees Eighty Eight Thousand only) for 22 months due to the daughter. The petitioner, despite service of summons, failed to clear the arrears or appear consistently before the Court.

5. The learned Magistrate, held that under Section 125(3) Cr.P.C., 1973, imprisonment up to one month can be imposed for each month of default, and that a common application covering several months'

arrears is maintainable. Observing that the petitioner had willfully defaulted for more than a year despite having means, the learned Magistrate issued a Non-Bailable Warrant to secure his presence.

Grounds of Revision:

6. The learned Trial Court's order is contradictory, as the respondents claimed arrears for 71 months, but the Magistrate issued NBW referring only to non-payment for one year, making the relief claimed and granted irreconcilable. The learned Magistrate failed to appreciate the distinction between Section 125(3) and Section 128 Cr.P.C., 1973. While the former limits execution for one year's arrears, the latter allows unlimited recovery through distraint warrant. The learned Magistrate issued a distress warrant under Section 125(3) without clarifying the provision invoked.

7. The impugned order is silent about the section under which it was passed. Instead of issuing a distraint warrant under Section 128 Cr.P.C., 1973, the learned Magistrate wrongly issued a distress warrant under Section 125(3) Cr.P.C., 1973, vitiating the proceedings. The maintenance order was not from the date of petition but from the date

of order. The correct arrears for the wife were Rs.72,000/-, (Rupees Seventy Two Thousand only) and for the daughter were Rs. 88,000/- (Rupees Eighty Eight Thousand only). Thus, the issuance of NBW for alleged higher arrears is erroneous.

Submissions:

8. The learned counsel for the petitioner clarified that the challenge is confined only to the issuance of NBW, not to the maintenance order itself, which is under challenge before the learned Sessions Court. It was argued that under Section 87 Cr.P.C., 1973, the sequence of process is (i) summons, (ii) bailable warrant, and (iii) non-bailable warrant only if the previous two fail. The straightaway issuance of NBW is contrary to law and violates the principles of natural justice. Proceedings under Sections 125 and 128 Cr.P.C., 1973, and under the Domestic Violence Act, 2005, are quasi-civil /quasi-criminal. They primarily ensure maintenance and protection, not punishment. Hence, coercive criminal process like NBW must be exercised with restraint.

9. He further submitted that even assuming that NBW was properly issued, the Court had power to recall it under Section 70(2)

Cr.P.C., 1973. The learned Magistrate failed to exercise this discretion. The respondents claimed arrears for 71 months. Hence, Section 125(3), Cr.P.C., 1973, which allows imprisonment only for arrears up to one year, could not have been invoked. Only Section 128 Cr.P.C., 1973, permits recovery beyond one year by distraint warrant. The straight issuance of NBW without adherence to Section 87 Cr.P.C., 1973, amounts to deprivation of liberty without following due process, violating Article 21 of the Constitution. Since the maintenance order itself is under revision before the learned Sessions Court, initiation of coercive execution proceedings by the same Magistrate is improper and may result in multiplicity. Further, the learned counsel appearing for the petitioner contended that the actual arrears were only Rs. 1,60,000/-, (Rupees One Lakh and Sixty Thousand only) not Rs. 5,14,000/- (Rupees Five Lakhs and Fourteen Thousand only). The discrepancy in calculation demonstrates non-application of mind. In view of the above, he pressed for allowing the Criminal Revision case.

10. The learned counsel appearing for the respondents submitted that the petitioner's allegation is factually incorrect. Summons were issued and served; the petitioner appeared, filed a counter, and thereafter defaulted. The NBW was issued only after due notice and

hearing. The execution petition was under Section 128 Cr.P.C., 1973, which empowers the learned Magistrate to enforce maintenance orders passed under Section 125 Cr.P.C., 1973. Hence, issuance of warrant to secure the defaulter's presence is valid. He further submitted that despite having sufficient means, the petitioner failed to pay any amount for over one year. The learned Magistrate, on verifying the record, found the default deliberate.

11. Relying on ***Shantha v. B.G. Shivananjappa***[1] and ***Poongodi v. Thangavel***[2], it was contended that the one-year limitation under the proviso to Section 125(3)Cr.P.C., 1973, is not absolute, and the Court may enforce arrears beyond one year. The NBW was issued only to secure presence, not as punishment. The execution process under Section 125(3) Cr.P.C., 1973, is part of enforcement, not conviction. He further argued that the petitioner had made scandalous allegations against his wife, imputing an illicit relationship with her own son, which the learned Trial Court rightly held as valid justification for her living separately. The petitioner's conduct throughout the proceedings reflected obstinate disobedience. Hence, the respondents prayed for clarification that the maintenance order operates from the date of

1 (2005) 4 SCC 468
2 (2013) 10 SCC 618

application, as consistently held by the Hon'ble Supreme Court.

12. Heard the learned Counsel Mr.G.Karuppasamy Pandiyan for the petitioner, Mr.B.Rajesh Saravanan, the learned counsel for the respondents and carefully perused the materials available on record.

13. ***Points for Determination:***

(i) Whether the learned Magistrate was justified in issuing a Non-Bailable Warrant straightaway in the execution of maintenance order?

(ii) Whether the impugned order suffers from legal infirmity for non-compliance with Sections 87, 125(3), and 128 of the Code of Criminal Procedure, 1973?

(iii) Whether the issuance of NBW amounts to violation of the petitioner's personal liberty under Article 21 of the Constitution?

(iv) To what relief, if any, the petitioner is entitled?

Analysis:

14. The scope of interference under Section 397 Cr.P.C., 1973, is confined to correcting jurisdictional or procedural irregularities. The

Revisional Court is not expected to re-appreciate evidence or substitute its own findings on factual arrears.

15. In the present case, the maintenance order dated 26.07.2022 in M.C.No.4/2016 stands undisputed, save for its challenge before the learned Sessions Court. The execution petition was filed to recover admitted arrears by the wife under Section 125(3) read with 128 of the Code of Criminal Procedure,1973. However, it is pertinent to mention that, the wife cannot make an application for execution under Section 125(3) Cr.P.C., 1973, beyond a period of one year from the date of maintenance order. That is why she had preferred to file an application for execution of maintenance order under Section 125(3) r/w 128Cr..P.C., 1973. The records reveal that summons had been duly served upon the petitioner, and he had entered appearance by filing a counter. Thus, the contention that NBW was issued “at the first instance” does not hold merit.

16. However, the learned Magistrate’s order is devoid of any specific reference to the section under which the warrant was issued. The expression “distress warrant” under Section 125(3) and “distraint warrant” under Section 128 have distinct connotations. The former is punitive, providing for imprisonment up to one month, per month of

default, while the latter is civil-enforcement-oriented, meant to attach property to recover arrears. The confusion between the two renders the order susceptible to ambiguity.

17. This Court has dealt with this aspect in the case of ***S.T.Prabhakar Vs Secretary to Government***[3] and the relevant portion of the same is extracted as follows:

> "*8. At the outset, I have to state that it is distressing to note that more than one illegality has been committed by the learned Judicial Magistrate. Indisputably, the petition for execution was filed only under Section 128 of the Code by the wife of the petitioner and not under Section 125(3) of the Code. It is needless to point out that there is much difference between the power of the Judicial Magistrate under Section 125(3) and 128 of the Code. At this juncture, it is worthwhile to extract Sections 125(3) and 128 of the Code.*
>
> *"125(3);- If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [allowance*

3 2011(2)MLJ 29

for the maintenance or the interim maintenance and expenses of proceeding, as the case may be], remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend one month or until payment if sooner made;

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 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].

9. A glance through the above provisions would show that under Section 125(3) of the Code, there is a limitation to entertain the petition and under Section 128 of the Code, there is no such limitation provided for enforcing the order. The limitation provided under Section 125(3) is one year. Therefore, the petition can be filed under Section 125 of the Code only in respect of arrears for a period of 12 months. But, in the given case, the petition was

filed to recover the arrears for a period of 13 months. That was the reason why, probably, the petitioner had thought it fit to file the same under Section 128 of the Code, for which, there is no limitation period. Therefore, it is crystal clear that the wife of the petitioner had consciously filed the petition under Section 128 of the Code for recovery of the amount due for a period of 13 months.

11. Unfortunately, from the records, it could also be seen that on the very same day, instead of issuing a warrant for recovery of fine, [Form No.44], the learned Judicial Magistrate issued a distress warrant as per Form No.18 in the schedule, which is the warrant of imprisonment on failure to pay maintenance. It is needless to point out that such a warrant of imprisonment could be issued only in a petition filed under Section 125(3) of the Code, that too, on getting satisfied that the defaulter had failed to comply with the order without sufficient cause. For any reason, if the defaulter is able to show sufficient cause, then the Magistrate shall not impose sentence of imprisonment. Under Section 125(3) of the Code, the Magistrate has got power to issue warrant for levy of fine [Form No.44] and in addition to that, he may impose a sentence of imprisonment and the said term shall not extend beyond 12 months period.

While deciding as to whether sentence of imprisonment can be imposed or not and while considering the petition under Section 125(3) of the Code, the Magistrate is required to give an adjudication as to whether failure to comply with the order is without sufficient cause or not. In the absence of any such finding, the Magistrate shall not impose sentence of imprisonment.

12. In this case, the learned Judicial Magistrate, first of all, did not deal with a petition filed under Section 125(3) of the Code, as the one, which was dealt with by him, was only under Section 128 of the Code. Secondly, there is no finding that there was no sufficient cause for the petitioner, which resulted in the failure to pay the amount. Thirdly, the order issued by him on 23.05.2005 was only for issuance of a "Distraint Warrant" and not for "Distress Warrant". Therefore, it is crystal clear that the issuance of "Distress Warrant" for the arrest of the petitioner by the learned Judicial Magistrate is illegal."

18. In yet another case, this Hon'ble Court in ***Priyanga and others vs. State***[4], while dealing with a case where NBW was issued at

4 MANU/TN/7236/2018

the first instance, this Court has held as follows:

"4. ...In M/s.Jeevan Emu Care Indian (P) Ltd., Vs. The State of Tamil Nadu 2015 (3) MWN (Cr.) 88 : 2015 (2) LW (Crl) 110, wherein in paragraphs 10 and 11, it is stated as follows:

"10.A perusal of the above judgments would make it ipso facto clear that since issuance of non bailable warrant involves interference into the personal liberty, which is the most precious right of an individual, the Courts have to be extremely cautious before issuing non bailable warrant. In this regard, I would state that the power to issue a warrant, either bailable or non bailable, is different from the necessity to exercise the said power. The Hon'ble Supreme Court in the above judgment has cautioned that before issuing a non bailable warrant, the Court should be extremely cautious to find whether there is absolute necessity to issue non bailable warrant without using the other tools of summons and bailable warrant to secure the attendance of such a person.

11.But, in the instant case, the learned Judge, without adhering to the above guidelines issued by the Hon'ble Supreme Court, in a casual manner, without assigning any reason, simply because he has got a power to issue non bailable warrant, has

issued the non bailable warrant. This practice deserves to be deprecated. Therefore, consider the above order passed by the Magistrate issuing Non-Bailable Warrant straight away deserves to be set aside."

9.In the opinion of this Court, in a case of this nature, the Magistrate ought not to have issued a Non-Bailable Warrant at the first instance. He should have issued summons to secure the presence of the accused and if they had failed to respond to the summons, then there would have been justification for the Magistrate to issue a warrant after recording the reasons."

19. Further, Section 87 Cr.P.C., 1973, mandates that a warrant of arrest may be issued only when a person fails to appear after service of summons, and ordinarily a bailable warrant must precede a non-bailable one. In proceedings under Section 125/128 Cr.P.C., 1973, which are primarily benevolent and quasi-civil, Courts must exercise this power with restraint. The Supreme Court in ***Inder Mohan Goswami v. State of Uttaranchal***[5] emphasized that issuance of NBW should be a last resort, after exhausting less intrusive measures.

5 (2007) 12 SCC 1

20. In the instant case, though the petitioner's persistent default is established, the record does not show that the learned Magistrate considered or issued a bailable warrant before resorting to NBW. The impugned order also lacks any recorded satisfaction as to why the petitioner's appearance could not be secured otherwise. That apart, the respondent wife herein had made the application for arrears of maintenance for a period of 22 months, which obviously would throw light on the fact that, the application has not been filed within a period of one year and hence, in an application filed beyond a period of one year, the learned Judicial Magistrate ought to have dealt with as mandated under Section 128 of Cr.P.C., 1973, and should have issued a distraint warrant and not a distress warrant.

21. At the same time, the petitioner cannot seek total immunity, as he has admittedly failed to comply with the subsisting order and has not demonstrated bona fides in payment. The pendency of the revision before the learned Sessions Court does not automatically stay execution and it is pertinent to note that no stay order was produced by the petitioner.

22. Hence, while the issuance of NBW without recording reasons is procedurally defective, the learned Magistrate's power to enforce maintenance cannot be doubted. The proper course would have been to issue a bailable warrant first, or to issue a distraint warrant under Section 128 Cr.P.C., 1973, for attachment of property, before considering arrest.

23. In view of the foregoing discussion, this Court holds that the impugned order dated 13.07.2023 in Crl.M.P.No.800 of 2023, in so far as it directing issuance of a Non-Bailable Warrant against the petitioner, is set aside for procedural irregularity.

24. The learned Judicial Magistrate No.I, Kovilpatti, shall instead issue a bailable warrant to secure the presence of the petitioner and proceed with execution in accordance with law.

25. The petitioner is directed to deposit 50% of the admitted arrears within four weeks from the date of receipt of a copy of this order before the learned Trial Court, without prejudice to his rights in the pending revision before the learned Sessions Court. The learned

Sessions Judge, Thoothukudi is directed to dispose of Crl.R.C.No. 14/2022 as expeditiously as possible within a period of 2 months from the date of receipt of a copy of this order.

26. Upon such deposit, the learned Magistrate shall continue the execution proceedings under Sections 125(3)/128 Cr.P.C., 1973, in accordance with law and expeditiously dispose of the same within a period of two months.

Epilogue:

27. The object of Section 125 Cr.P.C., 1973, is social justice to prevent destitution of neglected wives and children. Courts must ensure that maintenance orders are effectively implemented, while at the same time safeguarding the liberty of individuals from arbitrary arrest. The delicate balance between enforcement and fairness is the hallmark of criminal jurisprudence.

28. This case underscores the need for the learned Trial Courts to distinctly record under which provision warrants are issued, whether

punitive under Section 125(3) or coercive under Section 128, and to follow the statutory sequence under Section 87 Cr.P.C., 1973, before resorting to non-bailable warrants.

29. With these observations, this Criminal Revision Case is partly allowed in the above terms.

20.11.2025

NCC : Yes / No
Index : Yes / No
Internet : Yes
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To

1.The Judicial Magistrate No.1,
Kovilpatti.

2.The Sessions Judge,
Thoothukudi.

L.VICTORIA GOWRI, J.,

Sml

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