

## Sambunayagi, Pragadeeswaran and Divyasri Vs S.K. Manickam

**Court:** Madras High Court

**Date of Decision:** March 28, 2011

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€” Section 125(3), 128

**Citation:** (2011) 4 RCR(Civil) 458 : (2011) 4 RCR(Civil) 458 : (2011) 4 RCR(Criminal) 366 : (2011) 4 RCR(Criminal) 366

**Hon'ble Judges:** G.M. Akbar Ali, J

**Bench:** Single Bench

**Advocate:** B. Ezhilarasan, for the Appellant;

**Final Decision:** Allowed

### Judgement

@JUDGMENTTAG-ORDER

G.M. Akbar Ali, J.

By consent of both sides, the matter has been taken up for final hearing. The petition has been filed seeking a direction to the Family Court, Salem to take on file the petition in C.M.P. Sr. No. 2044 of 2010 in M.C. No. 3 of 2004.

2. Petitioner is the wife who filed M.C. No. 3 /2004 against the Respondent husband claiming maintenance before the Family Court, Salem. The

Family Court passed an order directing the Respondent to pay a sum of Rs. 2000/- to Petitioners 2 and 3 by order dated 18.8.2005. Since the

Respondent failed to pay, the Petitioner filed CMP 193 of 2005 and as the Respondent paid a sum of Rs. 96,000/- as arrears, the said petition

was not pressed. The Respondent is liable to pay maintenance from 22.11.2005 to 22.11.2007. The Petitioner filed C.M.P. No. 50 of 2007 and

it is pending. For the period 22.11.2008 to 22.11.2009 the Respondent has to pay a sum of Rs. 48,000/-. Therefore, for the said period of 12

months, the Petitioner filed a petition before the Court and the learned family Judge returned the petition stating that it is filed beyond limitation

period prescribed u/s 125(3) Code of Criminal Procedure

3. The Petitioner re-submitted the petition citing a judgment of this Court reported in 2010 (1) LW CrI 574 (P. Vaithi v. Kanagavalli), wherein this

Court has held that for a petition u/s 128 of Code of Criminal Procedure, there is no limitation. The family court again returned the petition stating

that the judgment is applicable for an attachment for non payment of maintenance and not for the relief of distress warrant. Aggrieved by this, the

Petitioners are before this Court.

4. Mr. D. Ezhilarasan, learned Counsel for the Petitioner would submit that the learned Judge is wrong in returning the petition and again relied on

2010 (1) LW CrI 574 (cited supra). The case under the consideration before the learned Single Judge was an order of the family court, Salem

directing the husband to pay the maintenance amount wherein it also cautioned the husband that an order of attachment would be passed in the

event of failure to pay. That order was passed by Family Court, Salem in an application filed u/s 128 Code of Criminal Procedure The husband

had challenged that order stating that u/s 125(3) the limitation is one year and this Court differentiated the provision u/s 128 and held that there is

no limitation for proceeding u/s 128 Code of Criminal Procedure

5. 128 Code of Criminal Procedure reads as follows:

128. Enforcement of order of maintenance.

A copy of the order of maintenance shall be given without payment to the person favour it is made, or to his guardian, if any, or to his guardian, if

any, or to the person to whom the allowance 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 due.

6. Section 128 deals with enforcement of order of maintenance. Section 125(3) deals with issue of warrant on failure of complying with an order

or maintenance. Since in the prayer paragraph, the Petitioner has mentioned issue of distress warrant the family court has taken the case u/s 125(3)

Code of Criminal Procedure. However, the petition has been filed u/s 128 Code of Criminal Procedure for enforcement of the order. For

enforcement of the order, the court can pass an order on failure to make payment cautioning the husband that order of attachment or distress

warrant could be passed in the event of failure.

7. Therefore, the petition is one filed u/s 128 Code of Criminal Procedure and covered by the judgment reported in 2010 (1) LW CrI 574 (P.

Vaithi v. Kanagavalli) (cited supra)

8. In the result, the criminal original petition is allowed. The Petitioner is directed to re-present the petition and on such presentation, the Family

court, Salem is directed to take it on file and pass suitable orders.

9. Registry is directed to return the original application to the Petitioners.