

Part 3 S.T. Prabhakar v. The Secretary to Government, Home Department 355  
(S. Nagamuthu, J.)

**2011 (1) CTC 355**

**IN THE HIGH COURT OF MADRAS  
(Madurai Bench)**

**S. Nagamuthu, J.**

W.P.(MD) No.11372 of 2005 and W.P.M.P. No.12096 of 2005

19.11.2010

S.T. Prabhakar

.....*Petitioner*

Vs.

1. The Secretary to Government, Home Department, Fort St. George, Chennai-600 009. 2. The Sub-Inspector of Police, Kodaikanal Police Station, Kodaikanal, Dindigul District. 3. The Head Constable (HC-838), Kodaikanal Police Station, Kodaikanal, Dindigul District  
.....*Respondents*

**Code of Criminal Procedure, 1973 (2 of 1974), Sections 125 & 128 — Difference between — Section 125(3) prescribed limitation for filing Application while there is no limitation prescribed in Section 128 for enforcing order passed under Section 125 — Magistrate acting under Section 125 can either (a) issue Dstraint Warrant for attachment and sale of movable property, or (b) issue warrant to Collector of District authorizing him to realize amount as arrears from movable or immovable property of defaulter or both — Magistrate can issue Warrant of Imprisonment only if Petition is filed under Section 125(3) and that too on being satisfied that defaulter had failed to comply with order without sufficient cause — If defaulter shows sufficient cause then imprisonment cannot be ordered — Order for arrest in Petition under Section 128 treating it as one under Section 125 and that too without recording reasons for being satisfied that defaulter has no sufficient cause against it and issuing warrant of arrest is illegal — Arrest warrant did not specify period of detention and was for indefinite period.**

**Words and Phrases — “Dstraint Warrant” and “Distress Warrant” — Dstraint Warrant is for attachment of property of defaulter and Distress Warrant is for arrest of defaulter.**

**Facts :** Wife filed maintenance Petition against husband and same was allowed. Husband did not pay amount so ordered. Wife filed an Application under Section 128 of Code of Criminal Procedure. Husband appeared and paid some amount and did not pay thereafter and on a particular hearing did not even appear and his Counsel also did not appear. Magistrate issued Dstraint Order and on same day issued warrant to Inspector of Police to arrest husband. Husband was arrested and he filed Bail Application and he was released on bail. Husband underwent 8 days' imprisonment in the process. The arrest warrant did not specify the period of detention. Husband filed Writ Petition claiming compensation for illegal detention.

Court considered the illegalities in the order but did not order compensation as the Police had obeyed the order of Magistrate and gave liberty to husband to claim damages in accordance with law.

*Held* : 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. Of course, it is true that the Petitioner was absent on 23.05.2005 and he did not make any payment, and thus, he committed default. While dealing with a Petition under Section 128 of the Code, in such an event, the next course to be adopted by the Magistrate is to issue a “Distraint Warrant” as provided under Sections 421 and 431 of the Code either for attachment and sale of any movable property belonging to the Petitioner or to issue a warrant to the Collector of the District, authorizing him to realise the amount as arrears from the movable or immovable property or both of the Petitioner. [Para 9]

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. [Para 12]

As I have already stated, when there is no judicial finding by the learned Judicial Magistrate that the failure to pay the amount was without sufficient cause and without there being any order imposing imprisonment, it was illegal on the part of the Magistrate to issue the warrant of imprisonment in Form No.18 and to order him to be detained in prison. A perusal of the warrant issued would go to show that the learned Judicial Magistrate had not even mentioned the period of imprisonment, which the Petitioner was to undergo. The warrant authorized the detention of the Petitioner in prison for an indefinite period. But, for his release on bail, he would have been detained in prison for years together, thereby his fundamental rights would have been very seriously infringed. This is yet another illegality committed by the learned Judicial Magistrate. [Para 14]

**Code of Criminal Procedure, 1973 (2 of 1974), Section 436 — Person detained pursuant to order of detention passed in Petition under Section 128 or 125 of Code of Criminal Procedure — Aggrieved party can only challenge it before higher Court and get order of suspension — Magistrate, releasing such person on bail Petition, committed error in law.**

Part 3 S.T. Prabhakar v. The Secretary to Government, Home Department 357  
(S. Nagamuthu, J.)

If once a person is detained under warrant of imprisonment on failure to pay maintenance, question of granting him bail does not arise at all. The remedy for such a person is either to challenge the order before the higher Court and to get an order of suspension of the imprisonment or to pay the entire amount and to get the imprisonment terminated. But, curiously, in this case, the Petitioner filed a Petition under Section 436 of the Code for bail as though either pending investigation or pending trial for any bailable offence, he was in judicial custody. It is needless to point out that the Petition was highly misconceived and the same was not maintainable. However, the learned Judicial Magistrate entertained the same. *[Para 15]*

It is not understandable as to how the learned Judicial Magistrate had come to the conclusion that the Petitioner was an offender and that the offence committed by him is bailable. This only shows the total non-application of mind on the part of the learned Judicial Magistrate, who had not apprised himself that the defaulter in the maintenance case to pay the maintenance is not at all an offender and he is imprisoned by a judicial order imposing sentence of imprisonment as provided in Section 125(3) of the Code, which is a final order. *[Para 17]*

**Constitution of India, Article 226 — Law of Torts — Arrest and detention of defaulter pursuant to order of arrest issued by Magistrate cannot give cause of action to prisoner to claim compensation under Article 226 as Police could not have tested order of arrest issued by Magistrate — Liberty given to prisoner to claim damages under law.**

In view of the above legal position, I am of the considered view that it would be in the interest of justice to give liberty to the Petitioner to resort to his remedy under law for the purpose of claiming damages. *[Para 22]*

**Code of Criminal Procedure, 1973 (2 of 1974), Section 125(3), Second Schedule, Forms 18 & 44 — Form 44 is for issue of warrant for recovery of fine — Form 18 is warrant for detention — Magistrate exercising powers under Section 125(3) can impose punishment of period not exceeding 12 months — Magistrate has to give reasons for arrest that failure to pay amount ordered by Court was not for sufficient cause.**

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. *[Para 11]*

**CASES REFERRED**

<i>Elumalai v. State of Tamil Nadu</i> , 1984 (1) MLJ (CrI) 246 .....	20
<i>Hussain v. State of Kerala</i> , 2000 SCC (CrI) 1468 .....	21
<i>Thangappan v. Secy., State of Tamil Nadu</i> , 2010 (6) MLJ 25 .....	20

**C. Mayilvahana Rajendran, Advocate for Petitioner.**

**D. Sasikumar, Government Advocate for Respondent.**

**W.P. DISMISSED — NO COSTS — M.P. CLOSED**

*Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying for a Writ of Mandamus to direct the First Respondent to pay a sum of ₹ 1,00,000/- as compensation for the illegal custody and wrongful restrain of the Petitioner by the second and Third Respondent from 27.05.2005 to 30.05.2005.*

**JUDGMENT**

1. Seeking compensation to the tune of ₹1,00,000/- for the alleged illegal detention in prison during the period between 23.05.2005 and 30.05.2005, the Petitioner has come up with the present Writ Petition.

2. The events leading to his detention are as follows:

Seeking maintenance, the Petitioner's wife R. Uma Mary filed M.C. No.4 of 2003, on the file of the learned District Munsif *cum* Judicial Magistrate, Kodaikanal, under Section 125(1)(a) of the Code of Criminal Procedure, [hereinafter referred to as "the Code"] and the same was allowed by the learned Judicial Magistrate directing the Petitioner herein to pay a sum of ₹750/- per month. But, the Petitioner did not pay the same. Therefore, R. Uma Mary filed CrI.M.P. No.2589 of 2004 before the learned District Munsif *cum* Judicial Magistrate, Kodaikanal, under Section 128 of the Code for recovery of a sum of ₹9,750/-, which had fallen in arrears for a total period of 13 months. The Petitioner appeared before the learned Judicial Magistrate on 10.01.2005. After few hearings, on 25.04.2005, he paid a sum of ₹ 750/- and the case was adjourned to 16.05.2005. On 16.05.2005, he did not make any payment, and therefore, the case was adjourned to 23.05.2005, as a last chance for payment of substantial amount. On 23.05.2005, the Petitioner neither appeared before the Court nor he made any payment. His Counsel was also not present. Therefore, the learned Judicial Magistrate ordered issuance of "Distrain Warrant" and adjourned the matter to 13.06.2005.

3. On the same day, *i.e.*, on 23.05.2005, the learned Judicial Magistrate issued a warrant to the Inspector of Police, Kodaikanal Police Station for arrest of the Petitioner. This distress warrant was issued purportedly as per the order dated 23.05.2005 made in CrI.M.P. No.2589 of 2004. In execution of the said warrant, the Petitioner was arrested by the police and produced before the learned Judicial Magistrate, on the same day. The learned Judicial Magistrate issued a "warrant of imprisonment on failure to pay maintenance" and sent him to the Sub-Jail, Kodaikanal. Accordingly, he was detained in Sub-Jail from 23.05.2005 onwards.

Part 3 S.T. Prabhakar v. The Secretary to Government, Home Department 359  
(S. Nagamuthu, J.)

4. Strangely, the Petitioner filed a Petition, through his Counsel, for bail under Section 436 of the Code in CrI.M.P. No.1150 of 2005. On the said Petition, the learned Judicial Magistrate passed the following order:

“Offence bailable. Hence, bail granted on his executing a bond for ₹3,000/- with two sureties and likesum.”

5. The said order came to be passed on 30.05.2005. Accordingly, the Petitioner executed a personal bond as well as sureties and in pursuance of the same, he was released on bail on 30.05.2005. Thus, he was in jail for eight days. According to the Petitioner, the said detention in prison for eight days is illegal and the same has infringed his fundamental rights guaranteed under Articles 19 and 21 of the Constitution of India, and therefore, he is entitled for compensation as prayed for by him in the Writ Petition.

6. The Second Respondent has filed a Counter, wherein he has stated that he obeyed the order of the learned Judicial Magistrate and executed the warrant, and therefore, he is not at fault in any manner. The First Respondent has not filed any Counter.

7. I have heard the learned Counsel appearing for the Petitioner, learned Government Advocate appearing for the Respondents and I have also perused the records carefully including the original records sent for from the learned Judicial Magistrate.

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 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. Of course, it is true that the Petitioner was absent on 23.05.2005 and he did not make any payment, and thus, he committed default. While dealing with a Petition under Section 128 of the Code, in such an event, the next course to be adopted by the Magistrate is to issue a “Distrain Warrant” as provided under Sections 421 and 431 of the Code either for attachment and sale of any movable property belonging to the Petitioner or to issue a warrant to the Collector of the District, authorizing him to realise the amount as arrears from the movable or immovable property or both of the Petitioner.

10. A perusal of the records would go to show that the learned Judicial Magistrate, by order dated 23.05.2005, directed issuance of only such a distrain warrant. Form No.44, as provided in the Second Schedule to the Code of Criminal Procedure is the warrant for recovery of fine. The learned Judicial Magistrate, while passing the order to issue a Distrain Warrant, he meant to issue Form No.44, viz., warrant for recovery of fine only. To this extent, the learned Judicial Magistrate had done everything in accordance with law.

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



Part 3 S.T. Prabhakar v. The Secretary to Government, Home Department 361  
(S. Nagamuthu, J.)

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 “Distrain 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.

13. On the part of the police, it is far beyond the scope of the power of the Police to test the correctness of the warrant issued by the Magistrate. The Police Officer to whom the warrant is issued is duty bound to simply execute the same and to produce the arrestee before the Magistrate. Therefore, in this case, the Respondents 2 and 3 have acted strictly in accordance with law, and therefore, there is no fault on their side. When the Petitioner was produced by the Police in execution of the warrant, at least, at that stage, the Magistrate would have obtained a bond as provided under Section 88 of the Code and to have set him at liberty. Instead, the learned Judicial Magistrate had committed yet another grave illegality to order him to be detained in prison under a warrant in Form No.18.

14. As I have already stated, when there is no judicial finding by the learned Judicial Magistrate that the failure to pay the amount was without sufficient cause and without there being any order imposing imprisonment, it was illegal on the part of the Magistrate to issue the warrant of imprisonment in Form No.18 and to order him to be detained in prison. A perusal of the warrant issued would go to show that the learned Judicial Magistrate had not even mentioned the period of imprisonment, which the Petitioner was to undergo. The warrant authorized the detention of the Petitioner in prison for an indefinite period. But, for his release on bail, he would have been detained in prison for years together, thereby his fundamental rights would have been very seriously infringed. This is yet another illegality committed by the learned Judicial Magistrate.

15. If once a person is detained under warrant of imprisonment on failure to pay maintenance, question of granting him bail does not arise at all. The remedy for such a person is either to challenge the order before the higher Court and to get an order of suspension of the imprisonment or to pay the entire amount and to get the imprisonment terminated. But, curiously, in this case, the Petitioner filed a Petition under Section 436 of the Code for bail as though either pending investigation or pending trial for any bailable offence,

he was in judicial custody. It is needless to point out that the Petition was highly misconceived and the same was not maintainable. However, the learned Judicial Magistrate entertained the same.

16. As I have already extracted, while granting bail, the learned Judicial Magistrate has stated that the offence is bailable. At the risk of repetition, it would be worthwhile to reproduce the words of the Magistrate in the order granting bail.

“Offence bailable. Hence, bail granted on his executing a bond for ₹3,000/- with two sureties and likesum.....”

17. It is not understandable as to how the learned Judicial Magistrate had come to the conclusion that the Petitioner was an offender and that the offence committed by him is bailable. This only shows the total non-application of mind on the part of the learned Judicial Magistrate, who had not apprised himself that the defaulter in the maintenance case to pay the maintenance is not at all an offender and he is imprisoned by a judicial order imposing sentence of imprisonment as provided in Section 125(3) of the Code, which is a final order.

18. Thereafter, the Petitioner also duly executed the bond as well as sureties, and so, he was released on bail. After the Petitioner was granted bail, which itself is illegal, what happened to the imprisonment, as per the warrant of imprisonment, is not known. The records would further go to show that subsequently, the Petitioner paid the entire amount and the Petition also came to be closed. It is, in these circumstances, the Petitioner states that his detention is illegal, and therefore, he is entitled for compensation.

19. The narration of the events and the discussion, made above, would make it manifestly clear that the learned Judicial Magistrate has committed more than one illegality, which has resulted in the deprivation of the personal liberty of the Petitioner. At this juncture, the next question to be decided is as to whether the Petitioner is entitled for compensation for the same.

20. The learned Counsel for the Petitioner would place reliance on an order of this Court in *Thangappan v. Secy., State of Tamil Nadu*, 2010 (6) MLJ 25, wherein a learned Single Judge of this Court [Hon`ble Mr. Justice S. Manikumar], has ordered payment of compensation to the Petitioner therein as damages to compensate him. In the said case, a person, who was totally unconnected with a Criminal case, was arrested and produced before the Magistrate and he was remanded to judicial custody by the learned Judicial Magistrate in a mechanical fashion without having regard to the principles stated in *Elumalai v. State of Tamil Nadu*, 1984 (1) MLJ (CrI) 246 and various other Judgments and that was the reason why, the learned Judge ordered for payment of damages. But, in the given case, it is not so. It is not as though the Petitioner was totally unconnected with the case. The



Part 3 S.T. Prabhakar v. The Secretary to Government, Home Department 363  
(S. Nagamuthu, J.)

learned Judicial Magistrate, in ignorance of all the legal positions, has committed certain illegalities, and therefore, even assuming that the Petitioner is entitled for compensation from the State for the deprivation of his personal liberty, his remedy lies elsewhere and not before this Court under Article 226 of the Constitution of India.

21. In this regard, I may usefully refer to a Judgment of the Hon'ble Supreme Court in *Hussain v. State of Kerala*, 2000 SCC (Cr1) 1468, wherein, after having held that the accused, in the said case, was unlawfully deprived of his personal liberty for such a long period of five years on account of overlooking the facts and the legal positions, the Hon'ble Supreme Court, while acquitting the accused, only gave liberty to the accused to resort to his remedies under law for that purpose. In Paragraph Nos.12 and 13, the Hon'ble Supreme Court has held as follows:

12. It is unfortunate that the aforesaid points have not been put forward before the Trial Court or the High Court. We feel that the conviction and sentence imposed on this Appellant were without the sanction of law. The Appellant is unlawfully deprived of his personal liberty for such a long period of five years on account of overlooking the aforesaid facts and the legal position.

13. We, therefore, allow this Appeal and quash the Judgment of the High Court as well as the Sessions Court. We acquit the Appellant and direct him to be set at liberty forthwith. In this case, we are not considering the question of awarding compensation to the Appellant, but he is free to resort to his remedies under law for that purpose."

22. In view of the above legal position, I am of the considered view that it would be in the interest of justice to give liberty to the Petitioner to resort to his remedy under law for the purpose of claiming damages.

23. Before parting with this case, I would express my anguish that despite several Judgments from this Court as well as from the Hon'ble Supreme Court and various other High Courts distinguishing the power of the Magistrate under Sections 125(3) and 128 of the Code and though the Judicial Officers are apprised of the legal position that the personal liberty and right to life are the life line of our Constitution and such fundamental rights cannot be deprived of in a mechanical fashion, in the case on hand, the learned Judicial Magistrate has acted in such a way in ignorance of all the above legal positions. I am hopeful, at least in future, the learned Judicial Magistrate, while remanding or imprisoning any person, will have due regard to the above legal position and then act according to law.

In the result, the Writ Petition is dismissed with liberty to the Petitioner to work out his remedy in the manner known to law. No costs.

Consequently, connected Miscellaneous Petition is closed.

**BV**