

**Assya Vs. State of Kerala**

**Assya Vs. State of Kerala**

**SooperKanoon Citation :** [sooperkanoon.com/732016](http://sooperkanoon.com/732016)

**Court :** Kerala

**Decided On :** Oct-13-2003

**Reported in :** 2004(3)KLT54

**Judge :** R. Basant, J.

**Acts :** Muslim Women (Protection of Rights on Divorce) Act, 1986 - Sections 3, 3(1), 3(2), 3(4) and 4; ;Code of Civil Procedure (CPC) ; Code of Criminal Procedure (CrPC) - Sections 421

**Appeal No. :** Crl.M.C. No. 4174 of 2003

**Appellant :** Assya

**Respondent :** State of Kerala

**Advocate for Def. :** P.M. Jacob, Public Prosecutor

**Advocate for Pet/Ap. :** Manjeri Sunderraj, Adv.

**Disposition :** Petition allowed

**Judgement :**

ORDER

**R. Basant, J.**

1. Does the Criminal Court exercising jurisdiction under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short 'the Act') have the powers to direct interim conditional attachment of properties belonging to the respondent/ divorced husband when there is apprehension that he may dispose off his properties to frustrate the attempts of his divorced wife to claim and recover amounts from him under Section 3 of the Act? This is the crucial question that arises for consideration in this case.

2. According to the petitioner, there was a valid marriage between her and the respondent. That marriage was dissolved under the provisions of the Dissolution of the Muslim Marriage Act by order dated 31.5.2002 passed by the Family Court, Kozhikode. A copy of that order is produced as Annexure-I. The petitioner complains that, amounts due under the provisions of the Act have not been paid to her. This obliged her to approach the learned Judicial Magistrate of First Class, Kozhikode-V. She filed M.C. No. 2/2003. A copy of that petition is produced as Annexure-II. Attempts to get the notice served on the respondent did not succeed. In these circumstances, the petitioner filed C.M.P. No. 463/2003 in M.C. No. 2/03. The petition was supported by an affidavit. In the affidavit it was averred that the petitioner has come to know from specified persons that the respondent was attempting to dispose off specific immovable property belonging to him in an attempt to defeat the petitioner and to frustrate her rights to recover the amounts due under the Act. In these circumstances, she prayed that there may be an interim conditional attachment of immovable property scheduled in the petition belonging to the respondent. The respondent could not be served even when this petition for interim conditional attachment came up for hearing.

3. The learned Magistrate passed the impugned order dated 3.3.2003, a copy of which is produced as Annexure-IV dismissing the petition with a one line order which reads as follows:

'Since there is no enabling provision, this petition is dismissed'.

4. The learned counsel for the petitioner Mr. Manjeri Sunderraj submits that the learned Magistrate had too easily and willingly thrown his hands up in despair. The learned Magistrate must have taken note of the purpose, reasons and objects of

the statute. The compassion of the legislature in favour of the weaker section of the polity is reflected in and underlies the provisions of the Act. The Court must have shown a commitment to the purpose and objects of the statute. Courts are not to be committed to individuals or ideologies. But they must certainly be committed to the constitutional humanism reflected in its preamble and which runs through the entire Constitution. A Court called upon to implement the legislative mandate cannot afford to ignore or overlook the statutory rationale, compassion and humanism reflected in and underlying a welfare legislation like the Act. Instrumentalities called upon to translate the legislative vision and mission must imbibe the legislative compassion. They must have a commitment to implementation of the statutory scheme. They must vibrate to the resonance of the constitutional philosophy and the humane sentiments underlying such a welfare legislation.

5. The inadequacies of the legislative draftsman shall also have to be overcome by purposive interpretation. It is easy to throw one's hands up in despair and lament that there is no specific provision in the statute. Such an approach belies an unwillingness to play an active role in the translation of the legislative mandate into tangible benefits to the target group. The draftsman is, of course, human. He may not have contemplated all the contingencies. Myriad are the fact situations in which the legislative provisions will have to be applied and if the draftsman has not specifically foreseen the eventuality and made specific provision to meet such eventuality the Court should not hesitate to draw appropriate inference about the intendment of the legislature. The shortcomings of the draftsman cannot prompt a court to throw its hands up in helplessness.

6. The proceedings under the Act are essentially civil in nature. Making amounts due to a divorced woman available to her is the statutory mission. Sentencing a defaulter in violation of the order is only a method to enforce compliance. That is not the purpose of the statute. The primary purpose is to make the amounts due available to the hapless woman. If law has no teeth to overcome obstacles and enforce such a direction, the legislative dream and vision cannot be translated into the tangible assistance to the woman. The learned counsel for the petitioner, in these circumstances, submits that the learned Magistrate must have read into the

provisions under Section 4 of the Act by necessary intendment and implication, the power/authority to order conditional attachment and thus ensure the legislative mandate. In not doing the same, the learned Magistrate has erred, it is urged.

7. The respondent/husband has not been served. Notices issued to him have returned with the endorsement that the respondent has left and is not available for service. In these circumstances, this Court has proceeded to reckon service as sufficient for the purpose of this CrI.M.C. and had proceeded to hear the learned counsel for the petitioner.

8. I agree with the learned counsel for the petitioner that first of all the nature of the proceeding has to be ascertained. Though Magistrate is the authority, specified under the Act to enforce the statutory stipulations and in spite of the fact that enquiry is to be conducted in the manner prescribed for trial of summary offences under the Cr.P.C. the fact remains that the proceedings are essential civil in nature. A Full Bench of this Court had considered an identical question in *Balan Nair v. Valsalama*, 1986 KIT 1378. In para 16 of the said decision, it is clearly observed as follows:

'16. The relief given, as we have indicated, is essentially of a civil nature and the proceedings are essentially civil proceedings and not criminal proceedings. The proceedings have been described in some decisions as of a quasi-criminal nature or quasi-civil nature. But we are of opinion that they are essentially of a civil nature. The fact that the provisions occur in the Code of Criminal Procedure and not the Code of Civil Procedure and the fact that the recalcitrant opposite party who suffers the order of maintenance and does not obey the order may have to go to prison, will not change the nature of the proceedings from civil to criminal. The provisions have been incorporated in the Code of Criminal Procedure only with a view to expedite the proceedings, as it was thought that the Magistrate could better deal with the matter in a summary manner'.

The Full Bench was considering the provisions under Section 125 in Chapter IX of the Cr.P.C. The above decision must squarely apply to the proceedings before the Magistrate under the Act. It is, thus, very evident that the proceedings are essentially of a civil nature.

9. But the C.P.C. is not in terms applicable. In the Cr.P.C. there is no specific provision for a conditional attachment of the property to ensure that the relief of the claimant is not frustrated. Under Section 3(4) of the Act, it is stipulated that the procedure for levying fines under the Cr.P.C. has to be followed. Fines have to be recovered in the manner specified in Section 421 of the Cr.P.C. Section 421 shows that amounts due can be recovered in the manner in which arrears of land revenue is recovered. To ensure such recovery, attachment is perfectly possible.

10. We now come to the general principle of law that when substantive power is conferred on an authority to perform an act and achieve a result, it must be presumed that all incidental and ancillary powers to make the initial conferment of the substantive power effective and efficient must be presumed to have been conferred. This general principle of law is too well recognized to require specific reference to any precedents. I shall advert only to one decision. The Supreme Court of India in *Savitri v. Govind Singh*, AIR 1986 SC 984, had clearly accepted this principle. Even though under the Cr.P.C. as it then stood there was no provision to direct payment of interim maintenance pending disposal of a claim under Section 125 of the Cr.P.C. their Lordships of the Supreme Court held that such power can be read into the provisions of Section 125 of the Cr.P.C. This conclusion has been reached from the principle referred above that every Court must be deemed to possess by necessary intendment all such incidental and ancillary powers as are necessary to make its orders effective. There can hence be no doubt whatsoever on this crucial and vital proposition.

11. A reading of Sections 3 and 4 of the Act clearly shows that unless the Court is able to actively and dynamically interpret the provisions, the purpose of the statute would be defeated. An example can be considered. Under Section 3(1)(d) it is declared that a divorced woman shall be entitled to all the properties given to her before or at the time of marriage or after marriage by her relatives or friends or husband or any relatives of the husband or his friends. Section 3(2) of the Act mandates that the order to be passed by the Magistrate can include a direction for the delivery of such properties referred to in Clause (d) to Sub-section (1) of the Act. Under Section 3(4) while specifying the method for enforcement of the order all that is mentioned is that the Magistrate may issue a warrant for levying the

amount of maintenance or mahr or dower due in the manner provided for levying fines under the Cr.P.C. If it is not paid, he can be sentenced to imprisonment. There is no specific provision for directing payment in lieu of the properties referred to in Section 3(1)(d). There is no specific provision for enforcing a direction for delivery of properties specifically. If a very literal interpretation were to be resorted to, the mandate of Section 3(1)(d) of the Act can never be enforced. I have adverted to this only to show that a real, reasonable, meaningful and purposive interpretation has got to be adopted to make the provisions of the Act work effectively and achieve the intended result.

12. Section 3(3) of the Act mandates that the proceedings must be disposed of within a period of one month. More often than not, Courts with the infrastructural facilities which they are possessed of find themselves unable to comply with this mandate. The petition under Section 3 of the Act in this case is seen filed on 27.12.2002. The petition for conditional attachment is seen filed on 3.2,2003. The impugned order is seen passed on 3.3.2003. It is transparently evident that compliance with the legislative mandate of disposal of the claim within one month has been found to be impossible in this case also. Even on the date of the impugned order the respondent has not entered appearance.

13. If the matter drags on for whatever reason a recalcitrant respondent would get sufficient time to dispose of his properties to frustrate the claim of his wife. It is no consolation for the wife that her former husband can be sent to jail if he does not pay the amount. She is interested not in sending him to prison, but only in ensuring that she gets her legitimate dues. In these circumstances, if the husband were permitted to dispose of his properties during the pendency of the claim under Section 3 of the Act, that would certainly frustrate the effective relief which the claimant is entitled. Her cause cannot be left to suffer because the Court is not in a position to comply with the legislative mandate of disposing of the claim within one month, for whatever reasons -- of infrastructural inadequacy or otherwise.

14. Thus, there is a duty on the Court to ensure that effective relief is given to the woman. The Court is not able to dispose of the claim within one month. The final disposal may take some more time. If the respondent, as apprehended by the

claimant, were to dispose of his properties before a final order is passed, that would effectively deny and deprive the woman of relief under Section 3 of the Act. In these circumstances, I am of opinion that the learned Magistrate must have acted effectively assuming that powers have been conferred on him impliedly and by necessary intendment to meet the situation. The mandate is to ensure that the woman gets the amount which is her due. Anything done by the respondent which would frustrate the remedy has to be effectively prevented. The Code of Criminal Procedure does not bar conditional attachment of the property of the divorced husband, if available. What is not specifically barred and what is essential for effective grant of relief guaranteed under the statute can certainly be presumed to have been conferred impliedly and by necessary intendment. I am satisfied that a more dynamic and not merely literal interpretation is called for.

15. The respondent has not entered appearance. But the possible arguments do occur to me. If conferment of such powers by necessary implication were assumed, there will be no fetters -- no guidelines. The Courts may act arbitrarily. Attachment may be ordered for the amounts which are not really due. This may work out prejudice and hardship to the respondent. All these possible arguments are seen considered by the Supreme Court in para-6 of the decision referred above (in Savitri's case). I need only extract the relevant portion in para-6. All possible doubts which arise in my mind are seen answered in the following passage which I extract:

'6. In view of the foregoing it is the duty of the Court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. It is quite common that applications made under Section 125 of the Code also take several months for being disposed off finally. In order to enjoy the fruits of the proceedings under Section 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order

for payment of interim maintenance is passed by the Court. Every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim *ubi aliquid conceditur et id sine quo res ipsa esse non potest* (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist). Vide Earl Jowitt's Dictionary of English Law. 1959 Edn. P.1797). Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties. The Magistrate may, however, insist upon an affidavit being filed by or on behalf of the applicant concerned stating the grounds in support of the claim for interim maintenance to satisfy himself that there is a *prima facie* case for making such an order. Such an order may also be made in an appropriate case *ex parte* pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the respondent is heard. If a civil Court can pass such interim orders on affidavits, there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying *prima facie* proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is sustainable. Having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a

reasonable sum by way of interim maintenance subject to the other conditions referred to the pending final disposal of the application'.

16. The learned Magistrate must certainly be careful and circumspect while passing the order. The question whether the claim is maintainable prima facie will have to be considered anxiously. Appropriate prima facie conclusion about the possible quantum of amount due for which security should be demanded and conditional attachment ordered will also have to be reached. It will certainly have to be considered whether the apprehension entertained by the claimant that the respondent may dispose off the properties to frustrate the claim raised in the petition is real and reasonable. Before demanding security and directing the conditional attachment the principles which are well delineated under Order 38 Rule 5 of the Code of Civil Procedure will have to be borne in mind, though the provisions may not in terms apply. Considering all that, an appropriate order will have to be passed.

17. As to how such a conditional order of attachment can be executed, there can be no problem. An appropriate warrant of conditional attachment can be issued to the District Collector who shall, in turn, effect the attachment in the manner in which attachment is effected of immovable property while recovering arrears of land revenue. The manner of execution of the conditional attachment order need not also hence pose any problem.

18. It follows from the above discussions that the impugned order does warrant interference. I take the view that in an appropriate case the learned Magistrate must necessarily be held to be invested with the powers to order conditional attachment of property if security is not furnished for the amount to be specified by the learned Magistrate which in his judgment will be due prima facie if the claim were allowed.

19. The learned counsel for the petitioner concedes and I am satisfied that it is sufficient if the above observations are made and impugned order is set aside with directions to the learned Magistrate to dispose of the petition afresh.

20. In the result :

(a) This petition is allowed.

(b) The impugned order is set aside.

(c) The learned Magistrate is directed to dispose of C.M.P. No. 463/03 in M.C.No. 2/03 afresh in the light of the observations made above within 7 days from the date on which a copy of this order is received.

21. Issue a copy of this order free of cost to the learned counsel for the petitioner for production before the learned Magistrate immediately.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**