

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

FRIDAY, THE 27TH DAY OF OCTOBER 2023 / 5TH KARTHIKA, 1945

RPFC NO. 400 OF 2023

AGAINST THE ORDER IN MC 68/2022 OF FAMILY COURT, PALA

REVISION PETITIONER/PETITIONER:

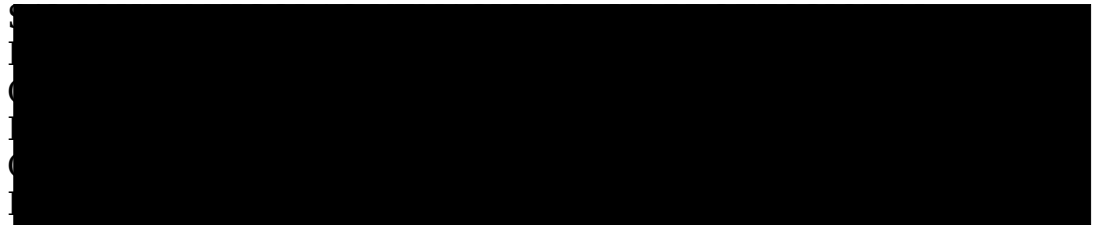
ELON CHRIST STEPHEN
(MINOR, AGED 1 YEARS) REPRESENTED BY HIS MOTHER



BY ADV ANITHA MATHAI MUTHIRENTHY

RESPONDENT/RESPONDENT:

STEAPHEN ANTONY VENASIOUS
AGED 37 YEARS



THIS REV.PETITION(FAMILY COURT) HAVING COME UP FOR
ADMISSION ON 27.10.2023, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

“C.R”

Dated this the 27th day of October, 2023

ORDER

Can an application filed under Section 125 of the Code of Criminal Procedure be dismissed for default?

2. The revision petitioner, through his mother, had filed M.C.No.68/2022 before the Family Court, Pala, against his father — the respondent — under Section 125 of the Code of Criminal Procedure (‘Code’ for short) for an order of maintenance. The revision petitioner has averred in the application that he was born on 1.4.2023 in the wedlock between the respondent and his mother. Due to the cruelty meted out to his mother by his father, his mother was compelled to leave the matrimonial home in her advanced stage of pregnancy with the revision

petitioner. The respondent has willfully refused to maintain the revision petitioner since his birth. Hence, the revision petitioner was constrained to file the application for maintenance.

3. Along with the application, the revision petitioner had filed a miscellaneous application for interim maintenance. The Family Court allowed the miscellaneous application and ordered the respondent to pay the revision petitioner interim maintenance @ Rs.12,000/- per month. Yet, the respondent refused to pay maintenance, and the revision petitioner filed an application to execute the order. On 1.7.2023, when the application came up for consideration, the Family Court, by the impugned order, dismissed the application on the ground that there was no representation for the revision petitioner.

4. It is assailing the legality and propriety of the order; the revision petition is filed.

5. Heard; Smt. Anitha Mathai, the learned counsel

appearing for the revision petitioner. Even though notice was served on the respondent, there is no appearance for him.

6. The revision petitioner is the minor son of the respondent. The revision petitioner has alleged that his father has refused to maintain him. The records reveal that the Family Court had directed the respondent to pay the revision petitioner interim maintenance. Still, he refused to comply with the order, and the revision petitioner had filed an application to execute the interim order. It was at that stage that the Family Court dismissed the application for default.

7. Chapter IX of the Code of Criminal Procedure, encompassing Sections 125 to 128, deals with orders for the maintenance of wives, children and parents. The Chapter is a Code in itself in the Code of Criminal Procedure, which defines a minor, a wife, the persons who are entitled and liable to pay maintenance, the

grounds which entitle and disentitle a person from claiming maintenance, the procedure to deal with applications filed under the Chapter, alteration and the enforcement of orders passed under the Chapter etc.

8. The concept of “maintenance” covered by Chapter IX of the Code is deeply rooted in the principles of social justice to prevent the destitution of women and children, who fall within the constitutional sweep of Article 15 (3) and reinforced by Articles 21 and 39 of the Constitution of India. The Chapter aims to prevent the vagrancy of women and children, who are deserted into destitution, and to ensure their dignity is upheld in society.

9. In an illuminating judgment, the Hon’ble Supreme Court in **Bhuvan Mohan Singh v. Meena** [(2015) 6 SCC 353] observed as under:

“2. Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons

provided in the provision so that some suitable arrangements can be made by the court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape route unless there is an order from the court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds".

10. Section 126 of the Code lays down the procedure to deal with applications filed under the Chapter. Section 126 reads as follows:

"126. Procedure -(1) Proceedings under section 125 may be taken against any person in any district —

(a) where he is; or

(b) where he or his wife resides; or

(c) where he last resided with his wife, or as the case maybe, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

PROVIDED that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

11. On a careful analysis of the above provision, it can be deciphered that the Parliament has consciously conferred only powers on the Magistrate to proceed, hear and determine a case *ex parte* against a person who is likely to suffer an order and is willfully avoiding service or neglecting to attend the Court. On the contrary, the Parliament, in its wisdom, has omitted to

grant implicit power to the Magistrate to dismiss an application for default. Under the Code, only complaints can be dismissed under Section 256. An application under Chapter IX is not a complaint falling within the purview of Section 2 (d) of the Code. The failure to maintain the wife, children or parents is not punishable under Chapter IX, but only when there is failure to comply with the order the punitive part comes into play. As long as there is no specific provision in the Code, the Magistrate has no implicit power to dismiss an application filed under Chapter IX for default summarily. The mindful exclusion of such power on the Magistrate is to achieve the benevolent intention of the legislation, which is to keep the body and soul of the neglected together.

12. In **Badshah v. Urmila Badshah Godse** [(2014) 1 SCC 188], the

category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from “adversarial” litigation to social context adjudication is the need of the hour”.

13. In **Vijay Kumar Prasad v. State of Bihar** [(2004) 5 SCC 196], the

“24. Section 125 Cr.PC uses the expression "as the Magistrate from time to time direct". The use of expression 'from time to time' has purpose and meaning. It clearly contemplates that with regard to order passed under Section 125(1) Cr.PC, the Magistrate may have to exercise jurisdiction from time to time. Use of expression 'from time to time' in its exercise of jurisdiction of Magistrate in a particular case. Advanced Law Lexicon by P Ramanatha Aiyar, 3rd edition defines time to time as follows-

"Time to time. As occasion arises"

25. The above Legislative Scheme indicates that Magistrate does not become functus officio after passing an order under Section 125 Cr.PC, as and when occasion arises the Magistrate exercises the jurisdiction from time to time. By Section 125(5) Cr.P.C., Magistrate is expressly empowered to cancel an order passed under Section 125(1) Cr.PC, on fulfillment of certain conditions

26 Section 127 Cr.PC also discloses the legislative intent where the Magistrate is empowered to alter an order passed under S. 125 Cr.PC. Sub-section (2) of S 127 Cr.PC also empowers the Magistrate to cancel or vary an order under S 125. The Legislative Scheme as delineated by Ss.125 and 127 Cr.PC as noted above clearly enumerated the circumstances and incidents provided in the Code of Criminal Procedure where Court passing a judgment or final order disposing the case can alter or review the same. The embargo as contained in S.362 is, thus, clearly relaxed in proceeding under S 125 Cr.P.C. as indicated above.

27. The submissions which have been pressed by the learned counsel for the appellant were founded only on embargo of Section 362 and when embargo of Section 362 is expressly relaxed in proceeding under Section 125 Cr.P.C., we are not persuaded to accept the submission of counsel for the

appellant that the Family Court was not entitled to set aside and cancel its order dated 06.05.2017 in facts and circumstances of the present case”.

16. The Calcutta High Court in **Sk. Alauddin alias Alai Khan v. Khadiza Bibi alias Mst. Khodeja Khatun and Others** [1991 KHC 1557] and the Allahabad High Court in **Kusum Devi v. Ram Chandra Maurya and Another** [(2003) SCC Online All 1197]] have held that the Magistrates have the power to restore an application filed under Section 125 of the Code which is dismissed for default.

17. An analysis of the scheme of the Code and the provisions under Chapter IX leads this Court to the inevitable conclusion that an application for maintenance filed under Chapter IX is guided and governed by the procedure laid down under Section 126 of the Code. In the absence of implicit power to dismiss an application for default, the Family Court has gone wrong in dismissing the instant application. In light of the above conclusions, I hold that the impugned order is

erroneous and is liable to be set aside.

In the result:

- (i) The impugned order passed is set aside;
- (ii) M.C.No.68/2022 is restored to file.
- (iii) The Family Court is directed to dispose of the application on its merits and in accordance with law.

Sd/-

C.S.DIAS, JUDGE