



2023:KER:76710

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

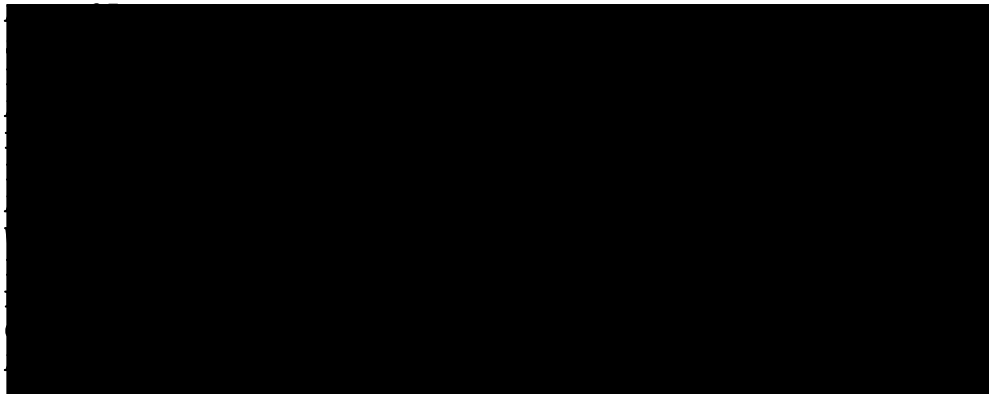
WEDNESDAY, THE 29TH DAY OF NOVEMBER 2023 / 8TH AGRAHAYANA, 1945

RPFC NO. 443 OF 2023

AGAINST THE ORDER DATED 24.07.2023 IN MC NO.142/2021 OF FAMILY COURT, MAVELIKKARA

REVISION PETITIONER:

PINCHU CHANDRAN,



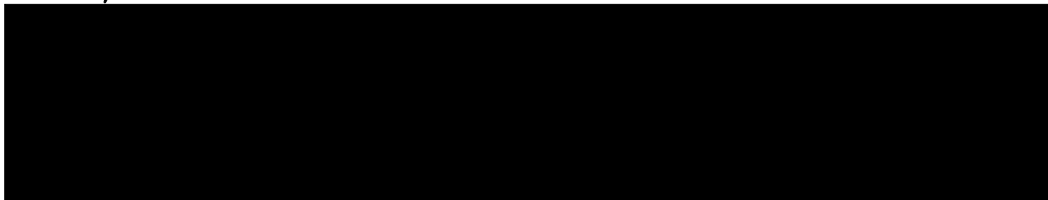
BY ADVS. S.SHANAVAS KHAN
S.INDU
KALA G.NAMBIAR

RESPONDENTS:

1 ARYA J.,
AGED 22 YEARS



2 PUNYA,



BY ADVS. V.VISAL AJAYAN
A.SREEPRIYA(K/001393/2000)

THIS REV. PETITION(FAMILY COURT) HAVING COME UP FOR ADMISSION ON 29.11.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



"CR"

Dated this the 29th day of November,2023

ORDER

The path of execution is not an easy-going highway; it does not provide short-cuts to the destination, observed this Court in ***Muraleedharan v. Jincy***¹ relying on the decision of the Calcutta High Court in ***Anita Karmokar v. Birendra Chandra Karmokar***².

2. Does the Family Court have the power to strike off the pleadings in a proceeding under Section 125 of the Code of Criminal Procedure,1973(for short, 'Code') on the failure to pay interim maintenance? is the question that emanates for consideration in this revision petition.

3. The respondents, the wife and child of the

1[2018(4) KHC 639]

2[AIR 1962 Cal.88]



revision petitioner, had M.C.No.142/2021 before the Family Court, Mavelikara, against the revision petitioner for an order of maintenance. The miscellaneous petition filed by the respondents' for interim maintenance was allowed by the Family Court, ordering the revision petitioner to pay the respondents' Rs.10,000/- per month. Subsequently, on the finding that the revision petitioner had failed to pay the interim maintenance, his defence in the proceeding was struck off, and the maintenance application was allowed by confirming the interim order.

4. The revision petitioner has contended that this Court in ***Sakeer Hussain T.P. v. Naseera and Ors.***³ and ***Hari B. v. Harsha S. & Anr.***⁴ has emphatically held that the defence of a respondent cannot be struck off on the failure to pay interim

3[2016 (5) KHC 167]

4[2021 KHC OnLine 60]



maintenance, as there is no enabling provision in the Code permitting such a course. Chapter IX of the Code lays down the procedure for executing an order of interim maintenance. The impugned order is improper and illegal. Hence, the revision petition.

5. Heard; Smt. Kala G. Nambiar, the learned counsel appearing for the revision petitioner and Sri. V. Visal Ajayan, the learned counsel appearing for the respondents.

6. The learned counsel appearing for the revision petitioner reiterated the contentions in the memorandum. She argued that Chapter IX of the Code is a self-contained Code. The remedy of the respondents was to file an application under Section 128 to execute the order and not a petition to strike off the defence. The Family Court ought not to have hastily struck off the valuable defence of the revision



petitioner. The order is perverse and is liable to be set aside.

7. The learned counsel for the respondents defended the impugned order and submitted that the Family Court was justified in striking off the defence of the revision petitioner on his wilful failure to pay the interim maintenance to the respondents. He relied on the judgments of the Hon'ble Supreme Court in ***Kaushalya v. Mukesh Jain***⁵ and the Division Benches of this Court in ***Mahesh v. Roopa***⁶ and ***Muraleedharan***¹. He urged that the revision petition be dismissed.

8. The materials on record reveal that the respondents' application for interim maintenance was allowed, and the revision petitioner had failed to pay the ordered amount. Consequentially, the Family Court

5[2020 KHC 6766]

6[2017 KHC 598]



struck off the defence of the revision petitioner in the proceeding and allowed the application by the impugned order.

9. Section 125 (1) of the Code reads as follows::

“Section 125 – Order for maintenance of wives, children and parents.- (1) If any person having sufficient means neglects or refuses to maintain-

(a)his wife, unable to maintain herself, or

(b)his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c)his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d)his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Provided further that the Magistrate may,



during the pendency of the proceeding regarding monthly allowance for the maintenance under this Sub-Section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct;

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.”

[Emphasis given]

10. The second and third provisos to sub-section (1) of Section 125 empower the Courts to direct the opposite side to pay interim maintenance to the applicants during the pendency of the main proceeding, and such application is to be disposed of within sixty days from the date of service of notice on the opposite side.

11. Sub-section (3) of Section 125 lays down the procedure for enforcement of maintenance orders,



including an order of interim maintenance.

12. In ***Sakeer Hussain T.P.***³, this Court, after referring to various judgments on the point of striking off the defence, has held that the extreme step of striking off the defence is not contemplated under the Code, especially when there is an effective remedy available for enforcement of an order of interim maintenance.

13. Later, in ***Mahesh***⁶, a Division Bench of this Court, while considering the question as to whether the defence of the respondent in a divorce petition can be struck off on his failure to pay maintenance ordered under Section 125 of the Code, has observed that the invocation of the power under Section 151 of the Code of Civil Procedure is a threat held out to unscrupulous litigants who do not respect the majesty of the Court and they will be doing so at their peril. Accordingly, the



Division Bench upheld the order of the Family Court striking off the defaulter's defence in a collateral matrimonial proceeding.

14. In ***Muraleedharan v. Jincy***¹, another Division Bench of this Court, after referring to ***Mahesh***⁶ and ***Sakeer Hussain T.P.***³, reiterated the law in ***Mahesh***⁶ but with a caveat that the courts should exercise due care and caution before striking off the defence because it is a drastic action in law and should be the last resort and not the first resort. It is further observed that there should be a specific pleading in the petition, that there is arrears of maintenance, that there is contumacious conduct on the part of the respondent, that the husband should be given an opportunity to be heard and that the court should be satisfied there is arrears of maintenance before an order to strike off the pleadings is passed.



15. Subsequently, another learned single Judge of this Court in ***Hari B.***⁴, after referring to ***Sakeer Hussain T.P.***³, ***Mahesh***⁶, and ***Muraleedharan***⁷ has held that the Family Court has no power to strike off the defence in an application under Section 125 on the failure of the husband to pay interim maintenance under Section 24 of the Hindu Marriage Act.

16. It is pertinent to point out that even before the decision in ***Hari B.***⁴ was rendered, the Hon'ble Supreme Court in ***Kaushalya***⁵, while disposing of an appeal from the order of the Madras High Court in a proceeding arising under Section 125, upheld the remand order of the High Court on condition that the husband continues to pay maintenance as per the ex-parte order, which was treated as an order of interim maintenance, and held that on the husband's failure to pay interim maintenance, the wife has the right to get



his defence struck off.

17. Immediately after that, in a landmark judgment in ***Rajnish v. Neha***⁷ the Honourable Supreme Court has laid down comprehensive guidelines to deal with applications filed for maintenance under different statutes, including applications filed for interim maintenance under Section 125. After referring to ***Kaushalya***⁵ and a catena of decisions of the various High Courts, it is observed as follows:

“120.Striking off the Defence

(i) Some Family Courts have passed orders for striking off the defence of the respondent in case of non - payment of maintenance, so as to facilitate speedy disposal of the maintenance petition.

121. In *Kaushalya v. Mukesh Jain* (5), the Supreme Court allowed a Family Court to strike off the defence of the respondent, in case of non-payment of maintenance in accordance with the interim order passed.

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xxx

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130. Discussion and Directions on Enforcement of



Orders of Maintenance

The order or decree of maintenance may be enforced like a decree of a Civil Court, through the provisions which are available for enforcing a money decree, including civil detention, attachment of property, etc. as provided by various provisions of the CPC, more particularly S.51, S.55, S.58, S.60 read with Order XXI.

131. Striking off the defence of the respondent is an order which ought to be passed in the last resort, if the Courts find default to be wilful and contumacious, particularly to a dependant unemployed wife, and minor children.

132. Contempt proceedings for wilful disobedience may be initiated before the appropriate Court.

18. With the pronouncement of ***Kaushalya***⁵ and ***Rajnish***⁷, the law has crystallised that the defence of the respondent can be struck off in a proceeding under Section 125 as the last resort if he willfully and contumaciously fails to pay interim maintenance to his dependent wife and minor child. Thus, the decision in ***Sakeer Hussain T.P.***³ is no longer good law.

19. The intention of the Parliament that an



application for interim maintenance is to be disposed of within sixty days is to provide succour to the dependent wife, children and parents during the pendency of the main proceedings. Although Section 125 (3) lays down the procedure to enforce an order of interim maintenance, the stark truth and reality are that it takes months, if not years, to get the order enforced, by this time, the main proceeding may be disposed, rendering the benevolent purpose of the legislation otiose and leaving the vagrant in the lurch. Perhaps, it is keeping in mind the bottlenecks in the procedure and to uphold the majesty of the Court, the Honourable Supreme Court in the afore-cited precedents has held the defence of the erring husband/father/son can be struck off in a proceeding under Section 125, as a last resort, on his failure to pay interim maintenance.



20. The judgment in ***Hari.B***⁴ was pronounced by this Court on 20.1.2021, and the judgments in ***Kaushalya***⁵ and ***Rajnesh***⁷ were pronounced on 24.07.2019 and 04.11.2020, respectively. The later decision was rendered without adverting to ***Kaushalya***⁵ and ***Rajnesh***⁷. Therefore, the judgment in ***Hari. B***⁴ is per incuriam.

21. In the present case, this Court finds that the Family Court has failed to provide the revision petitioner an opportunity to pay the arrears of interim maintenance before resorting to the extreme step of striking off his defence, which is not in consonance with the law laid down in ***Rajnesh***⁷ and ***Muraleedharan***¹. Therefore, I am of the view that the revision petitioner is to be given one last opportunity to pay the arrears of interim maintenance, and if he does so, he be permitted to contest the application on its



merits, which would do complete justice to both sides.

22. In the result,

- (i) The order in M.C. No.142/2021 will stand set aside on condition that the revision petitioner deposits before the Family Court the entire arrears of interim maintenance due as per the order in C.M.P. No.218/2021 from the date of application till today, within sixty days from today.
- (ii) If the amount is deposited, the Family Court shall release the amount to the respondent in accordance with law.
- (iii) If the revision petitioner complies with the direction No. (i), M.C. No.142/2021 will stand revived, and the Family Court shall afford both sides an opportunity to let in evidence and be heard, and then dispose of the application in accordance with law.
- (iv) The Family Court shall direct the parties to file



their affidavits of disclosure of assets and liabilities as laid down in ***Rajnes*** ⁷.

- (v) As the application is of 2021, the Family Court shall dispose of the same as expeditiously as possible.
- (vi) Needless to mention, if the revision petitioner fails to comply with direction No. (i), the impugned order shall stand confirmed, and the respondents would be at liberty to execute the order in accordance with law.

Sd/-

C.S.DIAS,JUDGE

DST/29.11.23

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P.A. To Judge