

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2348 OF 2015**

Sangeeta Santosh Shetty

Petitioner

Vs

Santosh Shetty

.. Respondent

Mr. Ghanshyam R. Mishra , Advocate for Petitioner.
Mr. Santosh Sankar Shetty Respondent present in-person.

CORAM : R.G.KETKAR,J.

DATE : 11/03/2015

PC:

1. Heard Mr. Ghanshyam Mishra, learned counsel for the petitioner and Mr. Santosh Shetty, respondent in-person.
2. By this Petition under Article 227 of the Constitution of India, the petitioner-wife has challenged the order dated 26.8.2014 passed by the learned Judge Family Court No.7, Mumbai, below Exhibit-58 in Petition No.A-577 of 2012. By that order, the Family Court rejected the application made by the petitioner under Order 39 Rule 11 of the Civil Procedure Code, 1908, (for short, 'C.P.C.') for striking out defence of the respondent.
3. In support of this Petition, Mr. Mishra submitted that as on 28.2.2015 the respondent is in arrears of Rs.37,000/-. He invited my attention to the impugned order and submitted that the respondent has paid amounts on various dates but he is still in arrears of maintenance of Rs.37,000/- as on February, 2015. The

respondent is not regularly making payment. In short, he submitted that the respondent is willfully disobeying the interim order of maintenance. The Family Court was, therefore, not justified in passing the impugned order. In support of his submission, he relied upon the decision of this Court in the case of Rekha Bhaskar Kadam Vs. Bhaskar Arjun Kadam, 2002 (2) ALL MR 642. In that case, it was observed in paragraph 3 as under :

“The power conferred by Order 39 Rule 11 is a salutary power which is vested in the court to strike out the defence if a breach of an order of the Court commanding the defendant to do or not to do a thing during the pendency of the suit or proceeding takes place. Similarly, where the breach is committed by the Plaintiff, the Court is empowered to dismiss the proceedings. The power to strike out the defence under Rule 11, is a drastic power and should be exercised where the default on the part of the party to do or not to do something which it was commanded to do or abstain from doing during the pendency of the suit is willful or contumacious. Ultimately, the facts of each case have to be scrutinised by the Court. Under sub-rule 2 of Rule 11, the Court is empowered to restore the suit or proceeding or to hear the defaulting party in defence, as the case may be, if the party that has been responsible for the default, contravention or breach as aforesaid makes amends for the default, contravention or breach to the satisfaction of the Court.”

It was observed that the power to strike out defence under Order 39 Rule 11 is a drastic power and should be exercised where the default on the part of the party to do or not to do something which it was commanded to do or abstain from doing during the pendency of the suit is **willful or contumacious**. In the present case, the Family Court recorded the finding that the respondent

had made payments of various amounts on different dates and these payments clearly show that he is not willfully disobeying the order.

4. The respondent has submitted that the respondent has paid Rs.5,000/- in the proceedings arising from Family Court and Rs.5,500/- in the proceedings arising under the Protection of Women from Domestic Violence Act, 2005. The respondent has paid Rs.2000/- in the Court to the petitioner which she acknowledges. The respondent further assures that within six weeks from today, he will clear the arrears of maintenance of Rs.37,000/-, as awarded by the Family Court, and also will go on regularly paying the maintenance as awarded by the Family Court. It was made clear to him that in case he fails to pay the arrears of maintenance of Rs.37,000/- within six weeks from today along with regular maintenance amount, his defence will stand struck out without further reference to the Court.

5. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. The Petition fails and the same is dismissed.

6. Before proceedings with the matter on merits, the Family Court will ensure that the respondent clears the arrears of maintenance within six weeks from today. Order accordingly.

(R.G.KETKAR, J.)