

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

TUESDAY, THE 17TH DAY OF MARCH 2015/26TH PHALGUNA, 1936

RPFC.No. 293 of 2007 ()

MC 5/2005 of FAMILY COURT, KASARAGOD

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REVISION PETITIONERS/PETITIONERS:

- 1. SAFURA, D/O.MOHAMMED, RESIDING AT
HOUSE NO.VII/469, ERIYAL, P.O.KUDLU,
KASARAGOD DISTRICT.**
- 2. NAFESATH BUSTHANA, AGED 10 YEARS.**
- 3. BUSTHAN KHADIR, AGED 9 YEARS.**
- 4. ABDUL HAKKIM, AGED 6 YEARS.**
- 5. FATHIMA, AGED 4 YEARS,
(PETITIONERS 2 TO 5 ARE MINORS, REPRESENTED
BY THEIR MOTHER IST PETITIONER.
ALL ARE RESIDING AT HOUSE NO.VII/469, ERIYAL
P.O.KUDLU, KASARAGOD DISTRICT.)**

**BY ADVS.SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR**

RESPONDENT(S)/RESPONDENT:

**MOHAMMED KUNHI (BEVI), S/O.B.KHADER,
HOUSE NO.VIII/233 A, AKKIM II, BEVINJE,
BERKA, P.O.CHENGALA, KASARAGOD DISTRICT.**

R1 BY ADV. SRI.I.VPRAMOD

**THIS REV.PETITION(FAMILY COURT) HAVING BEEN FINALLY HEARD ON
17-03-2015, ALONG WITH RPFC. 382/2007, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:**

OKB

K.HARILAL, J.

R.P(FC). Nos.293 & 382 of 2007

Dated this the 17th day of March, 2015.

O R D E R

These revisions are filed challenging the order passed in M.C. No.5/2005 on the files of the Family Court, Kasaragod. R.P (FC).No.293/2007 was filed by the first petitioner and R.P(FC). No.382/2007 was filed by the respondent, in the above M.C. The parties are referred to as in the original petition. The first petitioner is the wife and the petitioners 2 to 5 are the children of the respondent in the above M.C. They filed the above M.C. claiming maintenance allowance under Section 125 of the Code of Criminal Procedure, from the respondent herein. The marriage of the first petitioner with the respondent was solemnised on 12.9.1993 and the petitioners 2 to 5 are the children born out of that wedlock. All of them lived together up to 2002. According to the first petitioner, the respondent began to behave cruelly and he ill-treated her demanding more dowry and gold ornaments from the very beginning of the marriage, but she was constrained to suffer the same considering the future of the children. The

respondent was leading an immoral life and had been engaged in the business of contraband articles. Ten months prior to the petition, the respondent had left the first petitioner at her house at Eriyal and he went away with the children. Thereafter, as per order in C.M.P.No.4969/2002 the court entrusted the custody of the children to the first petitioner as per order dated 19.9.2002. Thereafter, the petitioners 2 to 5 are in the custody of the first petitioner. After 2002 the respondent has neglected to maintain the petitioners and refused to pay maintenance allowance to them. The first petitioner has no job or income; whereas the respondent has sufficient means to pay maintenance allowance to the petitioners. He is conducting an STD booth. After all, his brothers are in Gulf countries. His monthly income is not less than Rs.20,000/-. That apart, the respondent has married a lady by name Asurabi and he is now living with her. Now all the petitioners are depending upon the brother of the first petitioner. Hence the petitioners claimed maintenance allowance @ Rs.2,000/- each per month.

2. The respondent filed a counter statement admitting the marriage with the first petitioner and the paternity of the respondents 2 to 5. According to him, he had divorced her by

pronouncing Talak on her and this fact was made known to her also. The first petitioner is not entitled to get maintenance allowance from him. The respondent further contended that the petitioners 2 to 5 are residing along with him and he has been looking after the children. The entire day-to-day expenses of the children are being met by him. He denied the allegation that the custody of the children was given to the first petitioner by the court. It is also contended that he met with an accident on 29/9/1991 and his right leg had been amputated above the knee. So he is unable to do any manual work and not even able to walk without a walking aid. In such circumstances, after the departure of the first petitioner from the matrimonial home, as the result of deliberation with the relatives he was constrained to marry another lady so as to get physical as well as mental help to live forward. He received a compensation of Rs.2,49,000/- for the permanent disability sustained, due to the accident and spending that money, he purchased a property and constructed a house in the joint names of the first petitioner and the respondent. The first petitioner falsely implicated him in a prosecution under Section 498A of the IPC and caused to suffer incarceration. He further asserted that all the children are living along with him and

he has been maintaining all the children, who are studying in different standards. It is also contended that the first petitioner is doing tailoring works and earning Rs.1,500/- per month. The first petitioner was examined as P.W.1 and R.Ws.2 to 5 were examined for the respondent. Exts.B1 to B113 were also marked for the respondent. After considering the evidence on record, the court below rejected the claim for maintenance raised by the first petitioner and found that all the children except the 5th petitioner are being maintained by the respondent and there is no need to pay maintenance allowance to other children who are in the custody of the respondent. The respondent is directed to pay maintenance allowance at the rate of Rs.1,000/- to the fifth petitioner alone. The legality of the denial of maintenance allowance to the first petitioner is under challenge in these revisions.

3. The learned counsel for the first revision petitioner advanced arguments challenging the findings, whereby the court below rejected the claim for maintenance raised by the first petitioner. According to the learned counsel, in view of the aims and objects of the provision under Section 125 of the Cr.P.C., the denial of maintenance allowance to the first petitioner is illegal,

arbitrary and unsustainable. The finding of the Family Court that the first petitioner left the matrimonial home, without any reason, is absolutely incorrect. Due to the ill-treatment and harassment, she was constrained to leave the company of the respondent, and thereafter the respondent married again and he is living along with the second wife. It is also contended that though the respondent claimed that he had pronounced Talak and thereby he divorced the first petitioner, the court below found that the said claim of divorce is unfounded and false. His false claim of Talak itself is sufficient to show that he was not interested to live along with the first petitioner; but the court below has not considered these aspects in its correct perspective. So also the court below failed to note that a crime has been registered against the respondent for the offence under Section 498A of the IPC, based on a complaint filed by the first petitioner.

4. Per contra, the learned counsel for the respondent advanced arguments to justify the findings, whereby the court below denied maintenance allowance to the petitioners 1 to 4. According to him, the oral evidence given by R.Ws.1 and 2 unambiguously proves that the first petitioner left the house without sufficient reason and thereafter she was living separately.

She is not entitled to get maintenance allowance as she has refused to live along with the respondent without sufficient reasons. Exts.B1 to B113 show that the respondent has been looking after all the children except the fifth petitioner and their entire maintenance expenses including food, shelter, education, medicine etc. are being met by the respondent alone. No evidence had been adduced to show that the first petitioner had been looking after the children. So also, no documentary evidence has been produced to show that she had spent any amount towards their maintenance. Thus, both oral and documentary evidence are, in abundance, to show that the respondent has been looking after the petitioners 2 to 4.

5. In view of the rival submissions at the Bar, the short question that arises for consideration is whether there is any illegality or legal infirmity in the findings whereby the court below rejected the claim of the petitioners 1 to 4 for their maintenance allowance from the respondent.

6. Going by the impugned order it is seen that the claim of the first petitioner was denied on the ground that she has been living separately without sufficient reasons. Prima facie, I am unable to accept the said finding, in view of the admitted fact that

the respondent had married again and he has been living along with the second wife from 2002 onwards. That apart, it has come out in evidence that the respondent had been prosecuted for the offence under Section 498A of the IPC, alleging matrimonial cruelty and harassment. No evidence had been adduced to show that the respondent had attempted to reconcile matrimonial discordancy so as to resume the company of the first petitioner, before the second marriage.

7. In view of the fact that the respondent had married again as early in the year 2002, the first petitioner cannot be found with fault for living separately, without forfeiting her right to claim maintenance. That apart, the stand taken by the respondent was that the first petitioner is a divorced wife and he had pronounced Talak in the year 2002 itself. But after considering the evidence adduced by the respondent the court below itself found that his claim of divorce by Talak is absolutely false and unsustainable. Thus, the conduct of the respondent show that he was not interested to live along with the first petitioner. In the above view, the finding that the first petitioner is residing separately without sufficient reasons is unsustainable and, hence, is set aside. I find that the respondent is liable to pay maintenance allowance

to the first petitioner.

8. Coming to the claim for maintenance of the petitioners 2 to 4, as rightly found by the court below, both oral and documentary evidence are, in abundance, to prove that the respondent has been looking after them. The respondent has succeeded in proving that he has been looking after the children and the entire living expenses of the petitioners 2 to 4 are being met by him alone. Though the first petitioner claimed that she has been looking after the children, she miserably failed to prove the said claim, before the court. I find that the respondent is a father who has been carefully looking after the children, though he has neglected to pay maintenance allowance to their mother. Thus, the court below is fully justified in rejecting the claim raised by the first petitioner for maintenance of the petitioners 2 to 4, and there is no reason to interfere with the said findings.

9. Coming to the quantum of maintenance allowance which is liable to be paid to the first petitioner, it has come out in evidence that immediately after the departure of the first petitioner, the respondent married again and he has been living along with the second wife. If he has means to look after his second wife and all the children, certainly he has to find out

means to pay maintenance allowance to the first wife also. The first wife also has a right to live with the standard of life on par with that of the second wife and the respondent has a liability to treat both wives equally. It is also true that the respondent is a physically disabled person. Having regard to that fact also, he is directed to pay maintenance allowance at the rate of Rs.1,000/- per month to the first petitioner.

In the result, R.P(FC).No.293/2007 is allowed in part and R.P(FC).No.382/2007 is dismissed.

Sd/–
(K.HARILAL, JUDGE)

okb.