

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

OP(Crl.).No. 130 of 2015 (Q)

**AGAINST THE COMMON ORDER IN CMP NO. 418/2014 AND CMP NO. 419/2014
IN MC NO. 91/2013 OF FAMILY COURT, THIRUVANANTHAPURAM**

PETITIONER :

**PRAKASH Y.,
S/O. YASODHARAN, KINNARUVILA VADAKKATHIL
OPP. S.R.P. MARKET, KUTTIPURAM, THAZHAVA VILLAGE
KARUNAGAPPALLY, KOLLAM.**

BY ADV. SRI.B.MOHANLAL

RESPONDENT(S) :

- 1. DHANYA RAJAN
D/O. RAJAN, AMBADI
RAJ BHAVAN, TC 79/2338 (2) KARIKKAKOM, BEACH P.O.,
THIRUVANANTHAPURAM – 695 007.**
- 2. AKASH
MINOR, 9 YEARS, REPRESENTED BY MOTHER AND GUARDIAN
DHANYARAJAN, D/O. RAJAN, AMBADI
RAJ BHAVAN, TC 79/2338(2) KARIKKAKOM, BEACH P.O.,
THIRUVANANTHAPURAM – 695 007.**
- 3. ARJUN,
MINOR, 3 YEARS,
REPRESENTED BY MOTHER AND GUARDIAN
DHANYARAJAN, D/O. RAJAN, AMBADI, RAJ BHAVAN
TC 79/2338(2), KARIKKAKOM, BEACH P.O.,
THIRUVANANTHAPURAM – 695 007.**

R1 BY ADV. SRI.G.SUDHEER

**THIS OP (CRIMINAL) HAVING BEEN FINALLY HEARD ON 12-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Mn

OP(Crl.).No. 130 of 2015 (Q)

APPENDIX

PETITIONER(S)' EXHIBITS :

EXHIBIT P1: THE TRUE COPY OF THE M.C. NO.91/2013 OF THE FAMILY COURT, THIRUVANANTHAPURAM.

EXHIBIT P2: THE TRUE COPY OF THE CMP NO.418/2014 IN MC NO. 91/2013 ON THE FILE OF THE FAMILY COURT, THIRUVANANTHAPURAM.

EXHIBIT P3: THE TRUE COPY OF THE COMMON ORDER DATED 26.3.2015 IN C.M.P. NO.418/2014 ABD C.M.P. NO.419/2014 IN M.C. NO. 91/2013 OF THE FAMILY COURT, THIRUVANANTHAPURAM.

EXHIBIT P4 : THE TRUE COPY OF THE RECEIPT DATED 30/4/2015 ISSUED BY THE SHRISTADAR, FAMILY COURT, THIRUVANANTHAPURAM TO THE PETITIONER.

RESPONDENT(S)' EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE

Mn

K.RAMAKRISHNAN, J.

=====

O.P.(Crl.) No.130 OF 2015

=====

Dated this the 12th day of November, 2015

JUDGMENT

This is an application filed by the petitioner who is a counter petitioner in MC No.91/2013 on the file of the Family Court, Thiruvananthapuram for setting aside the Ext.P3 order passed by the Family Court under Article 227 of the Constitution of India.

2. The case of the petitioner in the petition was that respondents herein are the wife and children of the petitioner and the marriage of the petitioner with 1st respondent was solemnised on 15.7.2002 and in that wed lock respondents 2 and 3 were born. Due to some misunderstanding between them, they started living separately and the children were with the 1st respondent. Since the petitioner did not provide maintenance, respondents filed MC No.91/2013 before the Family Court, Thiruvananthapuram under Section 125 of the Code of Criminal Procedure (hereinafter referred to as the Code),

claiming maintenance for the 1st respondent herself and also on behalf of respondents 2 and 3 as their guardian evidenced by Ext.P1 petition. Since the petitioner did not appear, the family court passed an ex-parte order of maintenance directing the petitioner herein to pay maintenance of Rs.3,000/- per month to the 1st petitioner and Rs.2,500/- each per month to petitioners 2 and 3 from 29.4.2013 onwards. The petitioner filed Ext.P2 petition to set aside the ex-parte order along with delay condonation of 115 days delay in filing the application and after considering the evidence, the court below allowed the application on condition that the petitioner has to deposit 50% of Rs.1,52,000/- found to be arrears of maintenance as ordered by the court within 30 days from the order as per Ext.P3. This order is being challenged by the petitioner by filing this petition.

3. Heard Shri B. Mohanlal, counsel appearing for the petitioner and Smt. Asha representing Shri.G. Sudheer

counsel for the respondent.

4. Counsel for the petitioner submitted that 1st respondent is working as a pharmacist and getting good income and the amount of maintenance awarded was beyond the capacity of the petitioner. According to him, he is prepared to take back the respondents and look after them properly provided if they come and live with him. According to him, 1st respondent deserted the petitioner and residing separately without any reasonable cause. So she is not entitled to get maintenance. He prayed for an opportunity to meet the case on merit.

5. On the other hand, the learned counsel for the respondents submitted that considering the capacity of both parties, court below had granted maintenance and court below had only fixed ½ of the arrears of maintenance due as condition for setting aside the ex- parte order which cannot be said to be excessive calling upon interference at the hands of this court invoking Article 227 of the Constitution

of India.

6. It is an admitted fact that 1st respondent is the wife of the petitioner and respondents 2 and 3 are children born to them in that wed lock. It is also in a way admitted that due to some difference of opinion between them, they are now residing separately.

7. The case of the petitioner was that 1st respondent is having good income and there is no liability for the petitioner to pay any maintenance to her. Further he is prepared to take back them and look after them, if they are prepared to come and live with him. So it is an offer made by the petitioner and whether that offer is bonafide or not etc. are to be considered by the Family Court on appreciation of evidence to be adduced before that court for which an opportunity has to be given to the parties.

8. It is settled law that court is entitled to impose condition for setting aside the ex-parte order and even in the given circumstances of the case directing a portion of

the amount awarded to be deposited as condition for setting aside the ex-parte order cannot be said to be without jurisdiction. But at the same time, if the quantum of maintenance itself is in dispute, then it is not proper to direct huge portion of amount to be deposited as condition for setting aside the ex-parte order. However, as far as the children are concerned merely because wife is having some income is not a ground for the father to get exonerated from payment of maintenance to the children especially when they are aged only 9 years and 3 years respectively. This court while staying the proceedings directed the petitioner to deposit 50% of the amount directed to be deposited by the court below as condition for setting aside the ex-parte order and it is conceded by both parties that the amount has been deposited. This court feels that apart from that amount, directing the petitioner to deposit the arrears of maintenance awarded to the children at the rate of 1,500/- per month will be sufficient and that will meet

the ends of justice as the dispute between the parties has to be decided on merit and the possibility of settlement also has to be looked into by the Family Court after the matter has been remitted to the court below. So the order passed by the court below is modified as follows:

The petitioner is directed to deposit 25% of the arrears of maintenance awarded to the 1st respondent herein and deposit arrears of maintenance at the rate of Rs.1,500/- each to respondents 2 and 3 and deposit this arrears within a period of one month. Further this court direct the petitioner to continue to pay the interim maintenance to the children at the rate of Rs.1,500/- each fixed by this court during the pendency of the proceedings in the lower court. If the amount already deposited as directed by this court will be given credit to the amount directed to be deposited as condition for setting aside the ex-parte order passed by the court below. The amount is deposited within one month from today, then the court below is directed to set aside the

ex-parte order passed by the court below and give an opportunity to the respondent to file counter and adduce evidence and dispose of the case as expeditiously possible, at any rate, within two months from the date of order restoring the petition for fresh disposal. In the mean time, court below is also directed to take earnest attempt to explore the possibility of settlement for a re-union between the petitioner and respondent as well.

With the above direction and observation, the petition is allowed and disposed of accordingly.

Office is directed to communicate this order by FAX immediately.

Sd/-

K.RAMAKRISHNAN, JUDGE

SKV