

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 13TH DAY OF FEBRUARY 2015/24TH MAGHA, 1936

RPFC.No.320 of 2010 ()

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AGAINST THE ORDER IN MC 768/2008 of FAMILY COURT, MALAPPURAM
DATED 09-10-2009**

REVISION PETITIONER/RESPONDENT :

**SHAJAHAN, S/O.KUNHU MUHAMMED,
PUTHIYA VEETIL HOUSE, KOLAZHI, VIYYOOR
THRISSUR DISTRICT.**

BY ADV. SRI.RAJESH CHAKYAT

RESPONDENT/PETITIONER :

**MACHINGAL AMINA,
D/O.HAMSA, MACHINGAL HOUSE, KATTUNGAL
MUNDUPARAMBA, MALAPPURAM.**

**BY ADV. SRI.BABU S. NAIR
ADV. SRI.K.RAKESH**

**THIS REV.PETITION(FAMILY COURT) HAVING BEEN FINALLY HEARD
ON 13-02-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

VS

RPFC.No.320 of 2010 ()

APPENDIX

PETITIONER(S)' ANNEXURE :

**ANNEXURE 1 : CERTIFIED COPY OF ORDER IN M.C.NO.768/2008
DATED 9.10.2009.**

**ANNEXURE 2 : CERTIFIED COPY OF THE ORDER IN C.M.P.NO.217.2010 IN
M.C.NO.768/2008 DATED 18.5.2010.**

RESPONDENT(S)' ANNEXURE :

NIL

/TRUE COPY/

PA TO JUDGE

VS

K.HARILAL, J

R.P.(FC).No.320 of 2010

Dated this the 13th day of February, 2015

ORDER

The revision petitioner is the respondent in M.C.No.768/2008 of the file of Family Court, Malappuram, which was filed by the respondent, claiming maintenance allowance from the revision petitioner under Section 125 of the Code of Criminal Procedure. It is the case of the respondent/petitioner in the above maintenance case that, on 18.11.2007 they got married as per Muslim religious marriage custom and later due to matrimonial discordancy which culminated in physical and mental cruelty and harassment, she was forced to live separately. The revision petitioner filed a detailed counter refuting the said contention. But when the case was posted for evidence, due to the death of his mother, he sought for an adjournment. On the next posting date also, due to the omission in noting the posting date, he could not appear before the court and the court below set him ex parte. The ex parte order granting maintenance allowance to the

respondent was passed, directing him to pay maintenance allowance at the rate of Rs.4,000/-.

2. In the above context, the revision petitioner had filed C.M.P.No.217/2010 for setting aside the ex parte order. After considering the reasons for non appearance, the court below allowed the application on deposit of 60% of maintenance arrear accrued to the respondent under the impugned order, on or before 12 noon of 2.6.2010, without fail, failing which the C.M.P will stand dismissed with cost, without any further order, on expiry of said time limit. The legality of the said order imposing condition to pay 60% of the maintenance arrear is under challenge in this revision petition.

3. The learned Counsel for the petitioner advanced arguments challenging the imposition of condition to set aside an ex parte order. According to her, imposition of such a huge amount as condition to set aside exparte order is arbitrary and unreasonable. Per contra, the learned counsel for the respondent advanced arguments to justify the imposition of condition for setting

aside the ex parte order. The learned counsel for the respondent drew my attention to previous conduct also. The short question arises for consideration is, whether the court below can be justified in imposing the condition to pay 60% of the arrear, for setting aside the ex parte order.

4. Going by the impugned order, it could be seen that when the case was posted in the special list for evidence on 14.9.2009, the petitioner had filed an application to adjourn the case, on the ground of the death of his mother and got adjourned. Again the case was listed to 9.10.2009 for evidence. On that day also he didn't appear before the court and there was no representation and the case was decided ex parte, on the evidence of the respondent. The reasons stated in the present application for setting aside the ex parte order is that, he was laying ill during the relevant period and hence he could not appear before the court and so also he had forgotten the date to which the case was adjourned for evidence in the list. Hence he didn't appear before the court or inform his advocate.

5 The respondent contended that, the idea behind the filing of the CMP is only to protract the disposal of the case, so as to escape from the liability to pay maintenance allowance to her for the time being.

6. As rightly held by the court below, the burden is heavy on the petitioner to satisfy the court below that there was sufficient reason for his non appearance, when the case was posted for evidence in the list. But no evidence was adduced to probabalise the reason that he was laid up due to illness or had forgotten the date of posting of the case. He didn't enter the witness box, so as to swear the bonafides of the contentions in the application. No prescription or medical records were produced to show that he was laid up due to illness. Thus the petitioner miserably failed to satisfy the court that the reason for non appearance is genuine and bonafide. But the court below has taken a liberal approach by granting another opportunity to contest the MC on merits, provided that he should compensate his wife by paying some amount due to her under the order passed in

her favour. So I do not find fault with the court below for imposing condition.

7. Adjudication of a *lis* on merits is always desirable than dismissal on technicalities. When substantial justice and technical considerations are pitted against each other, substantial justice deserves to be preferred rather than disposal on technical considerations. At the same time, misplaced sympathy or considerations cannot be adopted without considering the grievances of the opposite party. So, if the petitioner is ready and willing to compensate the respondent in full, by paying entire arrear of maintenance allowance due to her under the impugned order passed against him, he can be given a further opportunity to contest the matter on merits. The respondent cannot be allowed to suffer for the laches or negligence of the petitioner.

8. In the above view, the impugned order under challenge will stand set aside, on condition that the petitioner shall deposit entire arrear due to the respondent up to 13.2.2015, within a period of three

months from today, failing which, the impugned order will stand in force as such and the respondent is at liberty to execute the same in accordance with law. Execution proceedings, if any, pending before the court below will stand postponed up to 13.5.2015.

9. If the said condition is complied within the specified time and the ex parte order is set aside, both parties will be given an opportunity to amend their respective pleadings, considering the long lapse of time.

This revision petition is disposed of accordingly.

Sd/-
K.HARILAL
JUDGE

/TRUE COPY/

PA TO JUDGE

VS