

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.343 of 2010 ()

AGAINST THE ORDER IN MC 58/2009 of FAMILY COURT, THODUPUZHA

REVISION PETITIONER(S)/COUNTER PETITIONER :

SHYJU, S/O.SREEDHARAN, AGED 29 YEARS,
PARACKAL HOUSE, ELLUMPURAM KARA, MUTTOM VILLAGE
THODUPUZHA TALUK.

BY ADVS.SRI.M.POLY MATHAI
SRI.K.C.CHARLES
SRI.VIMAL K.CHARLES
SRI.P.CHELLAPPAN
SMT.A.T.RENJU

RESPONDENT(S)/PETITIONERS:

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1. NISHA, D/O.KARUNAKARAN, AGED 29,
THANNICKAL HOUSE, KARIPPILANGADU KARA
ARAKKUNNAM VILLAGE, THODUPUZHA TALUK.
 2. SHRESHTA, D/O.NISHA, AGED 6 1/2 YEARS,
THANNICKAL HOUSE, KARIPPILANGADU KARA
ARAKKUNNAM VILLAGE, THODUPUZHA TALUK.

R1 & R2 BY ADV. SRI.GEO PAUL
ADV. SRI.SANU MATHEW
ADV. SRI.C.R.PRAMOD
ADV. SRI.S.ASHOK KUMAR.
ADV. SRI.NOEL JOSEPH
ADV. SRI.M.B.SANDEEP
ADV. SRI.K.V.REJANISH

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

VS

K.HARILAL, J

R.P.(F.C)No.343 of 2010

Dated this the 13th day of February, 2015

ORDER

The petitioner herein is the respondent in M.C.No.58/2009 of Family Court, Thodupuzha, and the respondents herein are the petitioners therein. The above MC was filed by the respondents herein claiming maintenance allowance at the rate of Rs.2,000/- and Rs.1,000/- respectively for the respondents 1 and 2. The marriage between the petitioner and the first respondent was on 10.2.2002, and the second respondent was born on 15.1.2003 in that wed lock. According to the first respondent, they lived together up to December 2007 and thereafter, the petitioner deserted them and refused to pay the maintenance allowance to them. According to her, she has no job or income, and she is unable to maintain herself and the second respondent. The second respondent was aged 6 ½ years and studying in the primary school. On the other hand, the petitioner had an Autoriksha and thereafter, he had sold away the same and

purchased an omni van. He is getting monthly income of Rs.15,000/- from the bakery business. He is a driver also and by using the said vehicle for taxi services, he is earning Rs.15,000/- per month. Thus according to the first respondent, the petitioner is having a total income of Rs.30,000/- per month. She claimed maintenance allowance at the rate of Rs.3,000/- to her and Rs.2,000/- to the second respondent.

2. The petitioner filed a counter statement admitting the marital status of the first respondent as his wife and paternity of the second respondent. But he denied the averment in the petition that, he owns a Bakery and Omini Van. According to him, his mother is having a Bakery and he is working as an employee in that Bakery. He was a driver for a short period and due to the surgery conducted for hernia and appendicitis, he is unable to continue his profession as a driver. Whereas, the first respondent is having 60 cents of Rubber plantation with an average yield of 5 rubber sheets per day. First respondent is also working as a cashier in a

hotel belongs to his father. In short, first respondent is able enough to maintain herself and second respondent from her own income and the petitioner has no means to pay maintenance allowance to them.

3. The petitioner was examined as RW1 and his mother was examined as RW2. D1 to D3 were produced and marked for the petitioner. The first respondent was examined as PW1. No documentary evidence had been produced by the respondents. After considering the oral as well as documentary evidence on record, the learned Judge passed the impugned order directing the petitioner to pay maintenance allowance at the rate of Rs.2,000/- to the first respondent and Rs.1,000/- to the second respondent, on a findings that the first respondent is unable to maintain herself and the second respondent and the petitioner has means to pay monthly maintenance allowance to the respondents at the rates as referred above. The legality of the entitlement of maintenance allowance and correctness of the determination of the quantum of maintenance allowance are under challenge

in this revision petition.

4. The learned Counsel for the petitioner advanced arguments assailing the findings of the court below that the first respondent is unable to maintain herself and the second respondent. The learned Counsel contends that, it has come out in the evidence that, the first respondent owns 61 cents of property with a house and having rubber plantations, from where she is getting 5 rubber sheets per day. So the income from the landed property is sufficient to maintain the respondents. It has also come out in evidence that, he had undergone surgery for appendicitis and hernia, and thereafter he is unable to work, so as to earn livelihood for his family. But the learned Judge miserably failed to appreciate the aforesaid evidence in its correct perspective. Thirdly Ext.D1 license produced by the petitioner shows that, the bakery belongs to the mother of the petitioner. But the court below arrived at an erroneous finding that the petitioner has sufficient income from the said bakery, despite the fact that, he is an employee only in that bakery. Per contra,

the learned Counsel for the respondents advanced arguments to justify the findings in the impugned order whereby, the court below found that the first respondent is unable to maintain herself and the second respondent and the petitioner has sufficient means to pay maintenance allowances to the respondents.

5. In view of the submissions at bar, the questions is to be considered are

(i) whether there is an illegality or impropriety in the finding that the respondents are entitled to get maintenance allowances from the petitioner.

(ii) whether there is any illegality or error in the determination of the quantum of maintenance allowance payable to the respondents.

6. Going by the pleadings, it could be seen that a marital status of the first respondent as wife and the paternity of the child are admitted. It was also admitted that, after the marriage, the petitioner was residing in the house of the first respondent and he left away from the company of the respondents in the year 2007. He has no

case that, he had paid any maintenance allowance to the respondents after December 2007. His only contention is that, the first respondent is able enough to maintain herself and the second respondent, whereas he has no means to pay maintenance allowance to them.

7. It is the case of the petitioner that, the first respondent owns 61 cents of property having rubber plantations and she is getting 5 rubber sheets per day, and the said income from the property is sufficient for livelihood of the respondents. He has no case that, the first respondent has any job or income or any other sources of income. So the point to be considered is, whether the petitioner succeeded in proving that the first respondent has 61 cents of property having yield of 5 rubber sheets per day. No documentary evidence had been produced to show that the said property is planted with rubber trees. The first respondent admitted that, she owns 61 cents of property, but it is her case that the said property was planted with rubber saplings only. While they were living together, the petitioner himself has given

the aged rubber trees stood there for slaughter tapping and thereafter the rubber trees were removed, planted rubber sapling, and now the rubber saplings are aged only 6 months. So she is not getting any income from the said property. When the 1st respondent was examined, she stood by the said pleadings. Though she was subjected to cross-examination, at length and into minute details to the above version, nothing brought out to discredit her version; whereas, when the petitioner was cross-examined by the learned counsel for the respondent, he put a definite question suggesting that the petitioner has given the said property for slaughter tapping and thereafter, at present, the rubber saplings are having age of six months only. But he replied that he did not know about the present nature of the property. If that be so, it could reasonably be presumed that the case of the petitioner that the property is planted with rubber saplings and the 1st respondent is getting 5 rubber sheets per day is a mere assertion without knowing even the present lie of the property. Needless to say, no reliance can be

placed on the said assertion which is made without any basis or knowledge. Though, the petitioner contended that the first respondent is working as a cashier in a hotel belongs to her father, no evidence had been adduced to prove the same also.

8. That apart, the case of the petitioner as regards the income of the 1st respondent is not supported by any independent evidence. I am of the opinion that under Sec.125 of the Cr.P.C. the burden is heavy on the husband to prove that the wife has sufficient income to eke out her livelihood. But the petitioner miserably failed to discharge the burden of proof. In this analysis, the court below can be justified in finding that the 1st respondent has no income from the landed property and she is unable to maintain herself and the 2nd respondent.

9. The next question to be considered is whether the petitioner has succeeded in proving that the bakery belongs to his mother and he is an employee only in that bakery. Admittedly, there is a bakery; but the ownership is in question. It is the case of the petitioner

that the bakery belongs to his mother. To prove the said contention, the mother of the respondent was examined as R.W.2 and Ext.D1 licence was produced and marked in evidence. But in cross-examination, she admitted that Ext.D1 licence is one expired in the year 2008. It is also deposed that the bakery was shifted to another newly constructed shop room and the inauguration of that bakery was conducted recently. She admitted that after starting the new bakery, fresh licence had been taken for that bakery also from the Panchayat; but the same was not produced before the court below. I am of the view that the licence which was expired in the year 2008 has no relevancy at all, particularly when the shop was stopped and a new bakery was started in another shop room with fresh licence. In this context, I am of the opinion that from the non-production of the present licence, an adverse inference can be drawn against the petitioner that, had it been produced, the said licence would have proved the case of the 1st respondent that ownership of the bakery stands in the name of the

petitioner. The above view is justified under Sec.114(g) of the Indian Evidence Act i.e., “That evidence which could be and is not produced would, if produced, be unfavourable to the person who withhold it.” When R.W.2 was cross-examined, she admitted that the weekly turn over of the said newly opened bakery is Rs.16,000/- and the weekly expense is only Rs.12,000/- and thereby now the bakery would fetch an income of Rs.4,000/- per week. Further, she admitted that six workers are employed in the said bakery. If six workers are employed, certainly the probable income would be much more than Rs.4,000/-. In this analysis, it can safely be concluded that the bakery as alleged by the 1st respondent, belongs to the petitioner and he would get sufficient income from the bakery so as to eke out livelihood for his family.

10. The wife and children have the rights to live with the standard of life at par with that of the husband. Second respondent is a student studying at school level and substantial amount is required for her education, food, cloths, medical care etc. If the petitioner

is getting a substantial amount per week as income from the said bakery, the court below is justified in directing him to pay monthly maintenance at the rate of Rs.2,000/- to the 1st petitioner and Rs.1,000/- to the 2nd petitioner. The said amount is less than his admitted weekly income. The quantum of maintenance allowance determined by the court below is just and proper warranting no interference by this Court under the revisional jurisdiction.

11. Though the petitioner contended that he had undergone surgery for hernia and appendicitis and now he is unable to do work, the said contention is not proved by any evidence, other than the oral assertion of the petitioner. Therefore, the petitioner failed to prove that he is unhealthy or disabled or physically incapacitated to do work so as to earn livelihood for his family. This revision petition is devoid of merits and dismissed.

12. Coming to the arrears, I am of the opinion that the petitioner can be given four months' time to pay the arrear, if any, provided that half of the entire arrear

shall be remitted within a period of two months from today and the balance within the next two months. In the event of default in paying the first instalment, this instalment facility will stand cancelled and the 1st respondent is at liberty to realise the entire amount in lump sum.

Sd/-
K.HARILAL
JUDGE

/TRUE COPY/

PA TO JUDGE

VS