

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

THURSDAY, THE 26TH DAY OF MARCH 2015/5TH CHAITHRA, 1937

RPFC.No. 52 of 2011 ()

MC 13/2010 of FAMILY COURT, THODUPUZHA

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REVISION PETITIONERS/PETITIONERS:

- 1. DELCY, AGED 40 YEARS,
W/O.ROBERT, PAUL VILLA HOUSE, ANACHAL KARA,
PALLIVASAL VILLAGE, DEVIKULAM TALUK.**
- 2. RESHMA, AGED 15 YEARS,
D/O.ROBERT, PAUL VILLA HOUSE, ANACHAL KARA,
PALLIVASAL VILLAGE, DEVIKULAM TALUK.**
- 3. RONALD, AGED 8 YEARS,
S/O.ROBERT, PAUL VILLA HOUSE, ANACHAL KARA,
PALLIVASAL VILLAGE, DEVIKULAM TALUK.
(MINOR PETITIONERS 2 AND 3 ARE REPRESENTED BY
MOTHER AND GUARDIAN THE IST PETITIONER).**

**BY ADVS.SRI.K.A.JALEEL
SRI.C.Y.VINOD KUMAR**

RESPONDENT/RESPONDENT:

**ROBERT XAVIOUR, AGED 45 YEARS,
S/O.XAVIOUR, KATTIPARAMBIL, PAUL VILLA,
CHITHIRAPURAM P.O, ANACHAL, NOW RESIDING
C/O.MARTIN JOHN, VELIKKATH HOUSE, S.C.BOSE ROAD,
EDAPPALLY, COCHIN-24.**

BY ADV.SRI.C.AJITH KUMAR (KALLESSERIL)

**THIS REV.PETITION(FAMILY COURT) HAVING BEEN FINALLY HEARD ON
26-03-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

OKB

K.HARILAL, J.

R.P(FC). No.52 of 2011

Dated this the 26th day of March, 2015.

O R D E R

1.The revision petitioners herein are the petitioners in M.C.No.13/2010 on the files of Family Court, Thodupuzha. The respondent herein is the husband of the first revision petitioner as well as the father of the revision petitioners 2 and 3. The revision petitioners filed the above M.C. for enhancement of maintenance allowance under Section 127 of the Code of Criminal Procedure. According to the averments in the petition, in the earlier M.C.No.82/2006, the respondent was directed to pay monthly maintenance allowance at the rate of Rs.250/- each to the petitioners. But the said amount is not sufficient to meet their requirements due to inflation and corresponding hike in the cost of living. The petitioners 2 and 3 are school going children and a substantial amount is required to meet their educational

expenses. In the above circumstances, they claimed for enhanced maintenance allowance at the rate of Rs.2,000/- each to the petitioners.

2.The respondent filed objection contending that, though he was working abroad, he had lost his job and now he is working as a cleaner in a lorry and all the earnings from his job are under the custody of the first revision petitioner. It is also contended that he had lost his job, when the notice from the court reached the office of his employer in the gulf country. Now he is unable to work due to deterioration of eye sight and other health problems. He denied the allegation that he is getting Rs.15,000/- per month. On the other hand, the first petitioner has 50 cents of property in her possession and she has availed an agricultural loan from Devikulam Agricultural Co-operative Bank for conducting anthurium cultivation. She has sufficient earnings from anthurium cultivation. Apart from that, she is getting sufficient

amount from her father every month. In short, the first petitioner is able enough to maintain herself and the petitioners 2 and 3. Whereas, the respondent is unhealthy and his earning capacity has been deteriorated too much.

3.After considering the rival pleas, the court below dismissed the M.C. on a finding that the first petitioner is able enough to maintain herself and the children and further she failed to prove that the respondent is having any income more than what he was earning in the year 2006. The legality of the denial of enhanced maintenance allowance is under challenge, in this revision petition.

4.The learned counsel for the revision petitioners advanced arguments challenging the findings whereby the court below declined the claim for enhanced maintenance. According to the learned counsel, the court below

miserably failed to evaluate the relevant facts, which are required to be considered under Section 127 of the Cr.P.C.

5.Per contra, the learned counsel for the respondent advanced arguments to justify the findings by which the court below declined the claim for enhanced maintenance.

6.In view of the submissions at the Bar, the question to be considered is whether there is any illegality or impropriety in the finding by which the court below declined the claim for enhanced maintenance allowance.

7.Admittedly, the petitioners were granted with maintenance @ Rs.250/- per month in M.C.No.82 of 2006. It is the case of the petitioners that the second petitioner is aged 15 years and she is studying in 10th standard at Koombanpara School at Adimaly by staying

in a hostel and she requires Rs.2,000/- per month for food, medicine, clothes, educational expenses, etc. The minor third petitioner, now aged 8 years, is studying in 3rd standard at Holy Family English Medium Public School at Kanjikuzhy and he requires Rs.2,000/- per month for food, medicine, clothes, educational expenses, etc. These facts are not disputed by the respondent.

8.It is the case of the respondent that he is an X-Ray Welder; but now he is unable to work due to deterioration of eye sight and other health problems. It is incorrect to say that he is earning Rs.15,000/- per month. In fact, his working tools are under the custody of the first petitioner. More over, the first petitioner owns 50 cents of property and by pledging the same with a Co-operative Bank she had obtained Rs.1,00,000/- for conducting Anthurium cultivation. Now she is able enough to maintain herself and the other petitioners by the income from the said Anthurium cultivation.

9. Going by the impugned order it is seen that the court below has declined the claim for enhanced maintenance for two reasons. Firstly, the court below found that the first petitioner has failed to prove that the respondent is having more income than that of the year 2006. Steep hike in the living index caused by inflation is a universal phenomenon, which does not require any proof or evidence. Indisputably, the living index had been considerably increased than that of the year 2006. Increase in the income of a person corresponding to inflation is also a universal phenomenon which does not require any kind of special proof or evidence. Since the right to maintenance allowance is a statutory right conferred under law, it is for the respondent to provide sufficient maintenance allowance to his wife and children, so as to meet their needs in accordance with their living standard and status. It is pertinent to note that though the respondent contended that now he is unable to work due to deterioration of his eye sight and

other health related problems, no medical evidence had been adduced to substantiate the alleged lack of earning capacity. In the absence of any kind of positive evidence from the part of the respondent to prove the decrease in his earning capacity, it can be reasonably concluded that the alleged lack of earning capacity is unbelievable and unfounded. An adverse inference under Section 114(g) of the Indian Evidence Act also can be drawn against the respondent, in the absence of evidence, to establish reduction of earning capacity. In this analysis, I find that the findings of the court below that the first petitioner failed to prove the enhancement in the income of the respondent and thereby the petitioners are not entitled to enhanced maintenance allowance, are illegal and unsustainable.

10. Secondly, the court below found that the first petitioner is able enough to maintain herself and the children by the income from Anthurium cultivation. This finding is also

unsustainable in view of the legal position settled by the Apex Court. Going by the impugned order, it is seen that after leaving the company of the respondent, the first petitioner has availed a loan of Rs.1,00,000/- from a Co-operative Bank and started the business of Anthurium cultivation and selling. I am of the considered opinion that the income which is being derived, after the departure from the company of the respondent cannot be taken into account for considering the “ability to maintain herself” provided under Section 125 of the Cr.P.C. In the decision reported in **Rajathi v. C. Ganeshan [AIR 1999 (6) SCC 326]**, the Apex Court held that “unable to maintain herself means, 'means' available to her while the wife was living with her husband and would not take within itself the efforts made by the wife after the desertion to survive somehow”. Here, indisputably, the first petitioner started Anthurium cultivation as a means for survival, after the desertion. So, the income from Anthurium

cultivation cannot be taken into account to determine ability for survival.

11.The first petitioner has given evidence to substantiate her contention that the amount, which is being received by the petitioners is not sufficient to meet their day-to-day living expenses. The second and third petitioners are school going children and they are studying in private English medium schools. A substantial amount is required for meeting their educational expenses and expenses for food, accommodation, medicine, etc. Admittedly, the respondent is an X-Ray Welder and he had been working in Gulf country for a long period. In the absence of any kind of evidence to show the reduction of his earning capacity, it could be reasonably presumed that he is getting more income than that of the year 2006. Therefore, he is liable to pay enhanced maintenance allowance to the petitioners 1 to 3. Having regard to the

living status and the day-to-day expenses of the petitioners, which had come out in evidence, I find that the quantum of maintenance allowance can be enhanced at the rate of Rs.500/- each to the petitioners.

In the result, this R.P(FC) is allowed. The respondent is directed to pay enhanced maintenance allowance at the rate of Rs.500/- each to the petitioners.

Sd/–
(K.HARILAL, JUDGE)

okb.