

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 7TH DAY OF JANUARY 2015/17TH POUSHA, 1936

R.P.(F.C.)No. 323 of 2014 ()

**AGAINST THE ORDER IN M.C.NO.334/2008 of FAMILY COURT, ERNAKULAM
DATED 17-07-2014**

REVISION PETITIONER(S)/PETITIONERS:

- 1. SHEELA, AGED 42 YEARS
W/O.ALBERT HEMSON (JAMES), KOLARICKAL HOUSE
VETTISSERRY LANE, VADUTHALA BOAT JETTY ROAD,
CHERANALLOOR VILLAGE, ERNAKULAM.**
- 2. STEENA, AGED 18 YEARS
D/O.SHEELA, KOLARICKAL HOUSE, VETTISSERRY LANE,
VADUTHALA BOAT JETTY ROAD, CHERANALLOOR VILLAGE,
ERNAKULAM.**

**BY ADVS.SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM**

RESPONDENT(S)/RESPONDENT:

**ALBERT HEMSON @ JAMES, AGED 59 YRS,
S/O.LAZAR, KOLARICKAL HOUSE, VETTISSERY LANE,
VADUTHALA BOAT JETTY ROAD, CHERANALLOOR VILLAGE,
ERNAKULAM - 682 023.**

**BY ADVS. SRI.P.GOPAKUMARAN NAIR
SRI.N.K.SUBRAMANIAN
SRI.C.S.DIAS**

**THIS REV.PETITION (FAMILY COURT) HAVING BEEN FINALLY HEARD ON
12.12.2014, THE COURT ON 07-01-2015 PASSED THE FOLLOWING:**

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C.R.

K. Ramakrishnan, J.

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R.P.(F.C.).No.323 of 2014

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Dated this, the 07th day of January, 2015.

ORDER

Petitioners in M.C.No.334/2008 of Family Court, Ernakulam are the revision petitioners herein. The application was filed by the revision petitioners who are the wife and daughter of the respondent claiming maintenance under Section 125 of the Code of Criminal Procedure.

2. The case of the petitioners in the petition was that they belong to Christian community and first petitioner married the respondent on 03.01.1995 as per custom from Palayam St.Joseph Cathedral Church, Thiruvananthapuram and in that wedlock, the second petitioner was born on 16.10.1995. At the time of marriage, she was given 65 sovereigns of gold ornaments and Rs.5,00,000/- cash by her parents. At the time of marriage, respondent was working in Gulf in a Kuwait Company and he was working even now there. At the time of marriage, respondent was not having a house of his own. Petitioner was residing with the respondent, his brothers and sisters in the family house of the respondent. The gold

ornaments and cash received by the petitioner at the time of her marriage were entrusted with the respondent as a trustee. Out of the gold ornaments, 35 sovereigns of gold ornaments and an amount of Rs.5,00,000/- were utilised by the respondent for meeting the necessities of his brothers and sisters. After the marriage, the respondent and his family members started harassing the petitioner both physically and mentally. Within one month from the date of marriage, she conceived and she gave birth to the second petitioner on 16.10.1995. She delivered the child from her house. After delivery, the petitioners were residing in the tharavadu house of the respondent. When the respondent came on leave from abroad, the family members of the respondent raised so many complaints against the first petitioner and thereafter, their cruelty towards her increased. She was found fault for even trivial matters. The younger brother of the respondent Mr.Jilson came from Gulf after resigning his job. Thereafter, he started sending money to the petitioner through his younger brother and he used to give only meager amounts by way of maintenance to the petitioner that too once in four months. She was not even allowed to go to her family house by the members of the respondent's family. The respondent was showing more

love and affection towards his family members than towards the petitioners. He used to come drunk along with his own brother and physically harassed the first petitioner. There were mediation talks at the instance of the brothers of the first petitioner with the respondent and he and his family members agreed that they would not harass her. It was also agreed that by using the share of the respondent, a house could be constructed for the respondent in the family property and brothers of the first petitioner would meet the expenses for construction of the building. They spent Rs.6,00,000/- and constructed a building in the plot given to the respondent. The amount was entrusted to the brother of the respondent for construction of the building. He utilised a portion of the amount for buying a car for him. After completion of the house, they started residing in the newly constructed building. But, the making of false complaints against the first petitioner continued. They even threatened her to do away with her. On 03.12.2006 at about 10 'o' clock, the brother of the respondent assaulted the first petitioner by kicking her on her body and manhandled her by beating on several parts of her body. On the next day when she woke up, it was found that she was lying inside a room locked from outside. She was not even allowed to go to

hospital. Again, there was a compromise and even thereafter, the ill treatment continued. So, she filed a complaint against the younger brother of respondent before the Judicial First Class Magistrate Court, Ernakulam alleging offence under Section 498A and Section 341 of Indian Penal Code and the same was forwarded to the police under Section 156(3) of Code of Criminal Procedure. Thereafter, she was denied maintenance. The respondent is working in a company in Kuwait for the last sixteen years. He was getting a monthly income of Rs.55,000/- per month. She is without any job and she is unable to maintain herself and the second petitioner. Second petitioner is studying in 8th Standard in a convent girls' High School, Pachalam. They require an amount of Rs.5,000/- and Rs.4,000/- per month respectively for their maintenance. So, they prayed for allowing the application.

3. Respondent filed objection contending as follows:

He had admitted the marriage and paternity of the second petitioner, but, denied the allegations of cruelty alleged against him and his family members. He also denied that first petitioner was given 65 sovereigns of gold ornaments and cash of Rs.5,00,000/- at the time of marriage and a portion of the same was misutilised by the respondent. The first petitioner was

working in an orphanage at Bishop House, Thiruvananthapuram at the time of marriage. He came to know about her through his elder sister who is a nun. His elder sister Bessy felt sympathy on the poor condition of the first petitioner and requested the respondent to give a life to her. So, he decided to marry her under the impression that since she was working in an orphanage, her character and behaviour would be good and she would be a loyal wife. Her financial condition was pathetic at the time of marriage. They were residing in a hut at Puthuvila at the time of marriage. The father of first petitioner was having ownership over 21 cents of land and another 6 cents of land. He promised to assign 6 cents of land to the first petitioner as her family share. But, he did not transfer the same in favour of the first petitioner till his death. It was the church authorities who took initiative for the marriage of the first petitioner. The allegation that the respondent was not maintaining her is not correct. He used to send Rs.7,000/- per month to the first petitioner towards her expenses. He provided everything for the petitioners. The allegations that he used to send only Rs.500/- occasionally and that too through his brother is not correct. The allegations that she was ill treated by him and his family members also is not correct. The allegation that

her family members helped by giving Rs.6,00,000/- for construction of the house in the family property and the allegation that his brother had misused a portion of the amount and purchased a car etc., are not correct and hence denied. In fact, all facilities were given to her in the new house and the house was constructed with his funds. She was having illicit connection with one Advocate by name Ajith Krishnan and she was leading an adulterous life with him. The allegation that he was getting a monthly income of Rs.55,000/- is not correct. He was getting only a monthly income of Rs.25,000/- and used to send money after minimizing his expenses in Gulf. In fact, the respondent is not allowed to enter the house and he has been thrown out of the house. He is living in hostels at the mercy of others. The allegation that his brother trespassed into the house of the petitioner and assaulted her is not correct and it is a cooked up story. The said Ajith Krishnan and another person named Krishnan who are claimed to be relatives of the first petitioner were the members of the ruling party and at their influence, no cases were registered against the petitioner though complaints were given and false cases were registered against them. She used to go along with the said Ajith Krishnan and she used to return home very late in the night. He used to visit

the house frequently at the time when she was alone in the house. When he came to know about the illegal connection, he advised her not to repeat the same and look after the child properly. But, that was not heeded by the first petitioner and she is continuing her adulterous life with the said Ajith Krishnan. So, she is not entitled to get any maintenance. He is now residing in a men's hostel at Aluva paying a rent of Rs.3,000/-. He is also suffering from several diseases including high blood pressure with diabetes and cholesterol. He is undergoing treatment for Coronary Artery disease. So, he is unable to maintain the petitioners by providing independent and separate maintenance. She is now trying to grab the money as claiming maintenance for the second petitioner as well. So, he prayed for dismissal of the application.

4. PWs 1 to 3 were examined on the side of the petitioners and Ext.A1 was marked on her side. RWs 1 to 6 were examined on the side of the respondent and Ext.B1 series, B2 to B6, B7 series, B8 series, B9 to B12, B13 series, B14 and B15 and X1 and X2 were marked on his side.

5. After considering the evidence on record, court below found that the second petitioner has become major and no claim for maintenance had been filed by filing a separate vakalath for

her and so, she is not entitled to get maintenance and first petitioner was leading an adulterous life and as such, she is not entitled to get maintenance and dismissed the application. Aggrieved by the same, the present revision has been filed by the revision petitioners - petitioners before the court below.

6. Heard both sides and perused the records.

7. The Counsel for the petitioners argued that the evidence of RWs 1 to 6 is not sufficient to come to the conclusion that the first revision petitioner is leading an adulterous life so as to deny maintenance to her. RW1 had no direct knowledge about any of the things about the alleged adulterous life said to have been lead by PW1. RW2 is the brother of the respondent who was inimical terms with the first petitioner as he used to assault her and she had filed a complaint against him also and he is the person behind all these things. So, his evidence also cannot be relied on for the purpose of proving the alleged adulterous life. RWs 3 and 4 were examined for the purpose of proving the account statements Exts. X1 and X2 to show that he was sending money to the petitioner. Though RW5 was examined to prove that first petitioner is leading an adulterous life with Ajith Krishnan, she did not support the case of the respondent. RW6 had only

stated that he used to see Ajith Krishnan coming to the house of the first petitioner and he came to know about an incident in which RW2 had stopped the car when she was travelling along with Ajith Krishnan. He had also no direct knowledge about the same. So, his evidence is not sufficient to come to the conclusion that she is having illicit connection leading to adulterous life so as to deny maintenance. Further, in some of the complaints filed against her, such an allegation has not been made. So, under the circumstances, the evidence adduced is not sufficient to come to the conclusion that she is leading an adulterous life with Ajith Krishnan so as to deny maintenance to her as found by the court below. The second petitioner after attaining majority had filed vakalath. So, the observation made by the court below that, after attaining majority, she did not pursue her claim for maintenance is not correct. There is nothing on record to show that she is having independent income to maintain herself. Being a female child, she is entitled to get maintenance till her marriage or she is capable of maintaining herself. The said Ajith Krishnan is none other than her mother's sister's son and as requested by PW2, he was assisting her and it was he who had filed the maintenance application and also the complaint. The allegation of adulterous

life is not correct and all these have been projected at the instance of his brother RW2 and so, the finding of the court below is not proper and they are entitled to get maintenance. The allegation that he is residing in a hostel and he is without any employment and suffering from several diseases etc., is not correct.

8. On the other hand, the Counsel for the respondent argued that the evidence of PW2 will go to show that the first petitioner travelled in the car of Ajith Krishnan in which PW3 also travelled and the reasons stated was that they went in the car for enquiring about the possibility of getting a scholarship for the second petitioner and it was admitted by PW1 that she being a daughter of an NRI, she is not eligible for scholarship. Further, in the case of adultery, there will not be any direct evidence available and court will have to consider the circumstances as to whether the allegation of adultery has been proved or not. Further, that can be proved only by preponderance of probabilities. So, the evidence adduced will go to show that she is leading an immoral adulterous life with the said Ajith Krishnan and as such, court below was perfectly justified in denying maintenance to her. He is now without any employment and suffering from several diseases and so, he is

unable to pay any maintenance to them as well. According to him, court below was perfectly justified in denying the maintenance to the petitioners and rightly dismissed the application.

9. It is also submitted that being a revisional court, this court cannot impose its own views as the revision jurisdiction is very limited and this court can only consider as to whether the findings arrived at by the court below on the basis of the evidence is also possible and unless it is found to be perverse, this court cannot reverse the finding of the court below.

10. It is an admitted fact that respondent married the first petitioner as per Christian custom to which they belong and they were living together as husband and wife in the tharavadu house of the respondent. It is also an admitted fact that the second petitioner was born to them in that wedlock. It is also an admitted fact that, at the time when the marriage took place, he was working in gulf and he was providing maintenance to the petitioners. It is also in a way admitted that, when the allegations of immoral life with Ajith Krishnan was projected by his brother RW2, the relationship strained. It is also in a way admitted that a new house was constructed in the family property of the respondent and the petitioners were residing in

that house. The fact that Ajith Krishnan, a practicing lawyer used to visit the first petitioner occasionally was admitted by her. Her case was that, he is her mother's sister's son and since in the absence of the respondent, she was being ill treated by his brother and making her life miserable in the house. When she made the complaints, he used to come to help her to get protection from the ill treatment of the family members of the respondent.

11. Section 125(4) of the Code of Criminal Procedure says that no wife shall be entitled to receive an allowance of maintenance or interim maintenance and expenses of proceedings as the case may be from her husband under this Section, if she is living in adultery or if without any sufficient reason she refuses to live with her husband or if they are living separately by mutual consent. In this case, the allegation was one of living in adultery with one Ajith Krishnan.

12. In the decision reported in **Pattayee Ammal Vs. Manickam Gounder and another [1967 Cri.L.J. 900 (Vol.73, C.N.229)]** equivalent to **[AIR 1967 MADRAS 254 (V 54 C 81)]**, the Madras High Court observed that, adultery, from its nature, is a secret act. Direct evidence of an act of adultery is extremely difficult. It is very rarely indeed that the

parties are surprised in the direct act of adultery. Direct evidence, even when produced, the court will tend to look upon it with disfavour, as it is highly improbable that any person can be a witness to such acts, as such acts are generally performed with at most secrecy. It is further observed in that decision that taking comprehensive view of the case law as to standard of proof necessary in matrimonial causes that the facts and circumstances of the case would not certainly lead a reasonable man to the conclusion that the appellant had been living in adultery with the second respondent. Further, in paragraph 9 of the judgment, it has been observed that, "is living in adultery" to mean a continuous course of adulterous life as distinguished from one or two lapses from virtue. Living in adultery is wider than mere living as a concubine or as a kept mistress. The word "is living" cannot mean "was living". It is true that it would not be possible to lay down any hard and fast rule. Each case must be decided upon its own facts.

13. In the decision reported in **Chandrakant Gangaram Gawade Vs. Sulochana Chandrakant Gawade and others [1997 CRI.L.J.520]**, it has been observed that mere stray or single lapse is not sufficient to constitute living in adultery. Proof of continuous course of adulterous conduct is necessary.

The same view has been reiterated in the decision reported in **Baishnab Charan Jena Vs. Ritarani Jena [1993 CRI.L.J.238]**, where it has been observed that merely proving one or more instances of lapses in character of wife is not sufficient to absolve her husband from liability to pay maintenance to her. Very allegation by husband and members of his family castigating wife as a person living in adultery or having extra marital relationship is insulting and humiliating entitling her to live separately from her husband and to claim maintenance from him.

14. In the decision reported in **Jagan Nath Vs. Mst. Sarjoo [1971 CRI.L.J.158 (Vol.77, C.N.50)]**, it has been observed that living in adultery means outright adulterous conduct where wife lives in quasi permanent union with whom she commits adultery. In the decision reported in **Smt. Mehbubabi Nasir Shaikh Vs. Nasir Farid Shaikh and another [1977 CRI.L.J.391]**, it has been held that courts are not justified in suspecting chastity of woman merely because husband casts aspersions on her chastity. In the decision reported in **S.S.Manickam Vs. Arputha Bhavani Rajam [1980 CRI.L.J.354]**, it has been observed that, while considering the words provided in Section 125(4) of Code of

Criminal Procedure 'is living in adultery' it would not take into its fold stray instances of lapses from virtue, it would not also mean that the wife should be living in adultery on the date of the petition. The proper interpretation would be that there should be proof of adulterous living shortly before or after the petition, shortly being interpreted in a reasonable manner viewing it in the light of the facts of the case. It is further observed in the same decision that, when the husband challenges the claim for maintenance of his wife, alleging that his wife is living in adultery, the husband ought to begin his case and prove the allegation of such adulterous life on the part of the wife by letting in evidence of her continued adulterous conduct at or about the time of the application and then the wife against whom such a charge is made ought to be given an opportunity to rebut such allegation. In the same decision, it has been observed that, the provisions do not apply to a divorced 'wife' in the form of an Obiter. The same view has been reiterated in the decision reported **Satish Kumar Arora Vs. Smt. Varsha Arora and another [1984 CRI.L.J.1012]**.

15. In the decision reported in **Mohandas Panicker Vs. Dakshayani [2014 (1) KLT 397]**, the Division Bench of this court has held that, in civil cases, preponderance of probabilities

is the standard to be adopted to prove the case. No doubt, matrimonial cases are civil proceedings and Court can act upon preponderance of probabilities, especially in adultery cases, since it is difficult to get direct evidence. Even in that case, the Division Bench of this court has observed that, in case where the evidence adduced on the side of the husband leads to the irresistible conclusion that in all probabilities, the relationship between the wife and the person with whom she is said to have adulterous relationship is of permanent nature and lead to a conclusion that they are living in adultery, then only court can come to such a finding to grant the relief to the husband. So, with this principles in mind, the case in hand has to be considered.

16. RW1 is the husband of the first petitioner and he had no direct knowledge about the allegation of adultery or the illicit relationship between PW1 – the first petitioner and the said Ajith Krishnan. He is only relying on the hearsay knowledge of instances given by his brother RW2 on this aspect. Even according to the evidence of RW2, he had only seen PW1 going along with Ajith Krishnan in a car along with PW3 and at that time he along with others obstructed the same and took some photos and objected their going together. He had no case that

he had seen them in any suspicious circumstances. It was also brought out in evidence that the petitioner had filed a complaint against him for assaulting her and he is not in good terms with the first petitioner. So, his evidence is also not sufficient to come to the conclusion that the relationship even admitted between first petitioner and the said Ajith Krishnan will be sufficient to lead to a conclusion that they are living in adultery. The evidence of RW6 is also not sufficient to come to such a conclusion as he had no direct knowledge about the alleged incident in which people had stopped the car in which PW1 was travelling along with the said Ajith Krishnan on a particular day and he had knowledge about that incident as spoken to by RW2 who is his friend. PW3 was examined on the side of the first petitioner to prove the circumstances under which they happened to travel together in the car with Ajith Krishnan. She had stated that she along with PW1 went in the car of Ajith Krishnan to get a stamp paper for the purpose of submitting an application for scholarship for their children who were studying in the same school. Except that incident, there is no concrete evidence adduced on the side of the respondents to prove that their relationship is in the nature of living in adultery. Even assuming that they were travelling together in a car or they

were meeting frequently alone is not sufficient to come to a conclusion that they were living in adultery as contemplated under Section 125(4) of the Code of Criminal Procedure to deny maintenance to her.

17. Further, court must be slow in questioning the chastity of woman unless there is strong circumstance available to come to such a conclusion. Mere suspicion alone is not sufficient to come to the conclusion that she is living in adulterous life. Here even assuming that the entire allegations were accepted, it will not lead to an inference that they were living in adultery so as to give an impression that the alleged adulterous conduct of first petitioner was of permanent nature and they are leading an immoral life so as to bring their relationship in the nature of an adultery a matrimonial offence so as to deny maintenance to the first revision petitioner. Further, the evidence of PW1 and PW2 will go to show that there is some family relationship between PW1 and said Ajith Krishnan and it was he who helped them in filing the complaint against RW2 and for filing this application for maintenance etc. Further, no steps taken by the respondent to dissolve the marriage with PW1 on the ground of adultery as well. So, under the circumstances, court below was not justified in relying on the

evidence of RWs 2 and 6 to come to the conclusion that she is living in adultery and the adulterous life of PW1 with the said Ajith Krishnan was proved by preponderance of probabilities so as to deny her the maintenance under Section 125 of the Code of Criminal Procedure. So, the finding of the court below on this aspect is liable to be set aside as it is perverse and against the decision of courts on this aspect and respondent is liable to pay maintenance to her.

18. There is no evidence to prove that the first petitioner is having any employment or she is getting any independent income to maintain herself and the child. It was in a way admitted that the respondent was working in gulf at the time of marriage. Though he had produced documents to prove that he is having some illness, there is no evidence to show that he is completely incapable of doing any work and earn anything to provide maintenance to his wife and child.

19. As regards the second petitioner is concerned, the observation made by the court below that she did not pursue her claim for maintenance after she became major appears to be not correct, because, she filed the vakalath after she attained majority and that was overlooked by the court below. Further, it is settled law that as regards the female children are

concerned, they are entitled to get maintenance till their marriage unless it is proved that she is having independent income to maintain herself after she attained majority. No such evidence was adduced in this case. She had pursued her claim for maintenance by filing this revision also. So, under the circumstances, the finding of the court below that she did not pursue her claim for maintenance and as such she is not entitled to get maintenance is also not correct. So, the petitioners are entitled to get the maintenance from the respondent and he is liable to pay maintenance to them as well.

20. It is in a way admitted that he is not now working in gulf. But, he had not adduced any evidence to prove the source of his income for his livelihood also. It cannot be believed that he is living at the mercy of his brothers and other family members as claimed by him. It was brought out in evidence that he was paying rent for the hostel where he is said to have been residing now. It was also in a way admitted that the petitioners are residing in the house constructed in the family property of the respondent and there is dispute regarding as to who had spent the money for construction of the house. Further, it is settled law that the maintenance must be provided in such a way as to give a decent life for the wife and child and

to avoid vagrancy and destitution in their life. It must be reasonable and decent also and it should not be a pittance. So, considering the status of the parties and also the present condition of the respondent, this court feels that fixing an amount of Rs.2,500/- to the first petitioner and Rs.2,000/- to the second petitioner will be sufficient maintenance to meet their requirements and they are entitled to get the amount from the date of petition as well. So, the order of the court below dismissing the application is set aside and the petition is allowed as follows:

i) The finding of the court below that first petitioner is not entitled to get maintenance as she is living in adultery with one Ajith Krishnan is set aside and it is held that she is entitled to get maintenance from the respondent and he is liable to pay maintenance to her.

ii) The finding of the court below that since the second petitioner has become major and after attaining majority, she did not pursue for her claim for maintenance by filing a separate vakalath is also not correct as she filed vakalath after attaining majority and she filed the present revision along with her mother pursuing her claim for maintenance and that finding is set aside and she is also entitled to get maintenance from the

respondent.

iii) The respondent is directed to pay maintenance per month at the rate of Rs.2,500/- to first petitioner and Rs.2,000/- to the second petitioner from the date of petition. Four months time is granted to the respondent to pay the arrears of maintenance in four equal monthly installments.

With the above directions and observation, the revision is allowed in part and disposed of accordingly.

Sd/-
K.Ramakrishnan, Judge.

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[True copy]

P.A to Judge