

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12981 OF 2018

Evelyn Pacifico Gonsalves

...Petitioner

vs.

Eleanor Evelyn Gonsalves

...Respondent

Mr. R.S. Apte, Sr. Advocate a/w. Mr. D.H. Shukla i/b.Yash Associates, for the Petitioner

Ms. Ghazala Khan, for Respondent

CORAM : M. S. SONAK, J.

DATE : DECEMBER 06, 2018

JUDGMENT :

. Heard Mr. R.S. Apte, learned senior counsel for the Petitioner and Ms. Ghazala Khan, learned counsel for the Respondent.

2. Rule.

3. Rule is made returnable forthwith with the consent of and at the request of learned counsel for the parties.

4. The challenge in this Petition is to the order dated 26th September, 2018 made by the learned Family Court at Mumbai.

The operative portion of this reads as follows:

1. The application is allowed.
2. The respondent's defence is hereby strike out under Order 39 Rule 11 of C.P.C for non payment of

maintenance amount.

3. Cost to follow the cause.

5. Today Mr. Apte on the basis of instruction from the Petitioner who is present in the Court makes a statement that the Petitioner will pay the arrears of maintenance, which, have, by now come to Rs. 6,12,500/- within a period of four weeks from today. He states that the Petitioner will also file an undertaking to the said effect. Mr. Apte submits that in such circumstance, the harsh order of striking of Petitioner's defence may be set aside.

6. Ms. Ghazala Khan, learned counsel for the Respondent opposes the request made on behalf of the Petitioner. She submits that the Petitioner is in default for payment of maintenance for a considerable period. She submits that no payments were made despite the fact that joint pursis were filed in which the Petitioner undertake to pay the maintenance of Rs. 12,500/- p.m. with respect of their son Ethan. She submits that it is only after the Respondent was forced to take out execution proceeding that amount of Rs. 2 lakhs was ultimately paid. For all these reasons Mr. Khan submits that this Court may not interfere with the impugned order dated 26th September, 2018.

7. In the fact and the circumstances of the present case, the request made by learned senior counsel Mr. Apte appears to be quite reasonable request. The Respondent, is no doubt entitled to insist that the order for maintenance made in favour of their son Ethan should to be complied with and respected. However, the order for striking out defence is discretionary. The discretion can in a given case and depending upon facts be exercised in favour of a defaulting party provided defaulting party gives firm commitment to the Court that such default will be made good within a reasonable period. Since in the present case, the Petitioner is willing to give undertaking that the maintenance amount in terms of joint pursis which as of now comes to Rs. 6,12,500/- will be positively cleared within four weeks from today, some discretion can be exercised in favour of the Petitioner. The Petitioner deserves to be granted at least one chance in order to defend the proceeding before the trial Court.

8. This Petition is therefore disposed of with the following order:

(i) The Petitioner, consistent with his statement to file an undertaking in this Court within a period of one week from today

that he shall clear the arrears of maintenance of Rs. 6,12,500/- on or before 6th January, 2019;

(ii) The Petitioner, consistent with such undertaking actually clears the arrears of maintenance as aforesaid on or before 6th January, 2019.

(iii) In case there is any difficulty in payment of said amount directly to the Respondent, the Petitioner is at liberty to deposit this amount before the trial Court on or before 6th January, 2019.

(iv) In case the Petitioner fails to file undertaking in the aforesaid terms within one week from today, then this Petition shall be deemed to have been dismissed without any further reference to this Court but with cost of Rs. 25,000/-.

(v) Similarly, if the amount of maintenance is not paid or deposited on or before 6th January, 2019 even then this Petition shall be deemed to have been dismissed without any further reference to this Court but with cost of rs. 25,000/-.

(vi) If the undertaking is filed and the payments are made/deposited consistent with such undertaking and within the time period stipulated above, then the impugned order dated 26th September, 2018 shall be deemed to have been set aside. The Petitioner in such situation will be entitled to defend proceeding

before the trial Court.

(vii) The trial Court is requested to adjourn tomorrow's hearing and give suitable date beyond 6th January, 2019.

(viii) The trial Court, in any case, is requested to dispose of the Petition A-2575 of 2013 and E-248 of 2013 as expeditiously as possible but in any case on or before 31st July, 2019.

(ix) This Court has not adverted to the merits of the respective Petitions filed by the parties and all contentions are left open for determination by the learned Family Court on their own merits and in accordance with law.

(x) Rule is made absolute with the aforesaid terms.

(xi) There shall be no order as to cost.

(M. S. SONAK, J.)