

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPCR No.248 of 2019**

1. Mrs. Damayanti Chandrakar, W/o Kailash Chandrakar, Aged About 39 Years
2. Miss. Kunika Chandrakar, D/o Kailash Chandrakar, Aged About 13 Years (Minor represented through the Natural Guardian (Mother) Mrs. Damayanti Chandrakar (Petitioner No.1)

Both R/o Village Matwari, Police Station
Anda, Tahsil and District Durg,
Chhattisgarh

----- Petitioners**Versus**

1. State Of Chhattisgarh Through Home Department, Central Secretariat, Naya Raipur, Chhattisgarh
2. Inspector General of Police, Raipur Range, District Raipur, Chhattisgarh
3. Superintendent of Police, Mahasamund, District Mahasamund, Chhattisgarh
4. Police Station House Incharge/Town Inspector, Police Station Mahasamund, Tahsil and District Mahasamund, Chhattisgarh
5. Kailash Chandrakar, S/o Rekhulal @ Rekhuram Chandrakar, Aged About 43 Years, R/o Behind Rajendra Farshi Udyog, Ward No.01, Shankar Nagar, Old Raipur Naka, Police Station/Tahsil/District Mahasamund, C.G.

----- Respondents

For Petitioners Mr. B. P. Singh, Advocate
For Respondent-State Mr. Jitendra Pali, Dy. AG

Hon'ble Justice Shri Sanjay K. Agrawal

Order On Board

22/02/2021

1. This writ petition has been filed by the petitioners, the wife and daughter, respectively, of respondent No.5 Kailash Chandrakar, that despite maintenance being granted to them, it is not being paid by respondent No.5 and is avoiding the orders/summons/warrants of the Court. Pursuant to which, this Court has passed the order on 05.02.2021 directing the Collector, Mahasamund to file documents showing the movable and immovable properties of respondent No.5, which has been submitted by the memo dated 11.02.2021, in which movable and immovable properties of respondent No.5 have been mentioned.

2. In that view of the matter, Mr. Singh, learned counsel for the petitioners, submits that in light of the decision rendered by the Supreme Court in the matter of **Rajnesh vs Neha and another**¹, the order of award of maintenance be executed and the petitioners be given maintenance by the respondent No.5 by disposing off his movable and immovable properties.
3. The Supreme Court with regard to the execution of the order of maintenance has passed the following directions in the matter of **Rajnesh** (supra) in para 80 as under:-

"V. Enforcement of orders of maintenance

"80. Enforcement of the order of maintenance is the most challenging issue, which is encountered by the applicants. If maintenance is not paid in a timely manner, it defeats the very object of the social welfare legislation. Execution petitions usually remain pending for months, if not years, which completely nullifies the object of the law. The Bombay High Court in *Sushila Viresh Chhawda v Viresh Nagsi Chhawda*² held that:

1 2020 SCC Online SC 903

2 AIR 1996 Bom 94

"The direction of interim alimony and expenses of litigation under [Section 24](#) is one of urgency and it must be decided as soon as it is raised and the law takes care that nobody is disabled from prosecuting or defending the matrimonial case by starvation or lack of funds."

(i) An application for execution of an Order of Maintenance can be filed under the following provisions :

(a) [Section 28](#) A of the Hindu Marriage Act, 1956 r.w. [Section 18](#) of the Family Courts Act, 1984 and Order XXI Rule 94 of the CPC for executing an Order passed under [Section 24](#) of the Hindu Marriage Act (before the Family Court);

(b) Section 20(6) of the DV Act (before the Judicial Magistrate); and

(c) [Section 128](#) of Cr.P.C. before the Magistrate's Court.

(ii) Section 18 of the Family Courts Act, 1984 provides that orders passed by the Family Court shall be executable in accordance with the CPC / Cr.P.C.

(iii) [Section 125\(3\)](#) of the Cr.P.C provides that if the party against whom the order of maintenance is passed fails to comply with the order of maintenance, the same shall be recovered in the manner as provided for fines, and the Magistrate may award sentence of imprisonment for a term which may extend to one month, or until payment, whichever is earlier.

Striking off the Defence

(i) Some Family Courts have passed orders for striking off the defence of the respondent in case of non-payment of maintenance, so as to facilitate speedy disposal of the maintenance petition.

In *Kaushalya v Mukesh Jain*³, the Supreme Court allowed a Family Court to strike off the defence of the respondent, in case of non-payment of maintenance in accordance with the interim order passed.

(ii) The Punjab & Haryana High Court in [Bani v. Parkash Singh](#)⁴ was considering a case where the husband failed to comply with the maintenance order, despite several notices, for a period of over two years. The Court taking note of the power to strike off the defence of the respondent, held that :

"Law is not that powerless as not to bring the husband to book. If the husband has failed to make the payment of maintenance and litigation expenses to wife, his defence be struck out."

(iii) The Punjab & Haryana High Court in *Mohinder Verma v Sapna*⁵ discussed the issue of striking off the defence in the following words :

"8. [Section 24](#) of the Act empowers the matrimonial court to award maintenance pendente lite and also litigation expenses to a needy and indigent spouse so that the proceedings can be conducted without any hardship on his or her part. The proceedings under this Section are summary in nature and confers a substantial right on the applicant during the pendency of the proceedings. Where this amount is not paid to the applicant, then the very object and purpose of this provision stands defeated. No doubt, remedy of execution of decree or order passed by the matrimonial court is available under [Section 28A](#) of the Act,

³ CRA Nos.1129-1130/2019, decided vide judgment dated 24.07.2019

⁴ AIR 1996 P&H 175

⁵ FAO No.7027 of 2014, decided on 29.09.2014 (P&H)

but the same would not be a bar to striking off the defence of the spouse who violates the interim order of maintenance and litigation expenses passed by the said Court. In other words, the striking off the defence of the spouse not honouring the court's interim order is the instant relief to the needy one instead of waiting endlessly till its execution under [Section 28A](#) of the Act. Where the spouse who is to pay maintenance fails to discharge the liability, the other spouse cannot be forced to adopt time consuming execution proceedings for realising the amount. Court cannot be a mute spectator watching flagrant disobedience of the interim orders passed by it showing its helplessness in its instant implementation. It would, thus, be appropriate even in the absence of any specific provision to that effect in the Act, to strike off the defence of the erring spouse in exercise of its inherent power under Section 151 of the Code of Civil Procedure read with [Section 21](#) of the Act rather than to leave the aggrieved party to seek its enforcement through execution as execution is a long and arduous procedure. Needless to say, the remedy under [Section 28A](#) of the Act regarding execution of decree or interim order does not stand obliterated or extinguished by striking off the defence of the defaulting spouse. Thus, where the spouse who is directed to pay the maintenance and litigation expenses, the legal consequences for its non-payment are that the defence of the said spouse is liable to be struck off." (emphasis supplied)

(iv) The Delhi High Court in *Satish Kumar v Meena*⁶ held that the Family Court had inherent powers to strike off the defence of the respondent, to ensure that no abuse of process of the court takes place.

The Delhi High Court in *Smt. Santosh*

Sehgal v Shri Murari Lal Sehgal⁷ framed the following issue for consideration : "Whether the appeal against the decree of divorce filed by the appellant-wife can be allowed straightway without hearing the respondent-husband in the event of his failing to pay interim maintenance and litigation expenses granted to the wife during the pendency of the appeal." The reference was answered as follows :

"5.The reference to the portion of the judgment in Bani's case extracted herein-above would show that the Punjab and Haryana High Court and Orissa Page 2216 High Court have taken an unanimous view that in case the husband commits default in payment of interim maintenance to his wife and children then he is not entitled to any matrimonial relief in proceedings by or against him. The view taken by Punjab and Haryana High Court in Bani's case has been followed by a Single Judge of this Court in [Satish Kumar v. Meena](#) . We tend to agree with this view as it is in consonance with the first principle of law. We are of the view that when a husband is negligent and does not pay maintenance to his wife as awarded by the Court, then how such a person is entitled to the relief claimed by him in the matrimonial proceedings. We have no hesitation in holding that in case the husband fails to pay maintenance and litigation expenses to his wife granted by the Court during the pendency of the appeal, then the appeal filed by the wife against the decree of divorce granted by the trial court in favor of the husband has to be allowed. Hence the question referred to us for decision is answered in the affirmative."

The Court concluded that if there was non-payment of interim maintenance, the defence of the respondent is liable to be struck off, and the appeal filed by the appellant-wife can be allowed, without hearing the respondent.

(v) The Punjab and Haryana High Court in

Gurvinder Singh v Murti & Ors⁸ was considering a case where the trial court struck off the defence of the husband for non-payment of ad-interim maintenance. The High Court set aside the order of the trial court, and held that instead of following the correct procedure for recovery of interim maintenance as provided u/S. 125 (3) or [Section 421](#) of the Cr.P.C., the trial court erred in striking off the defence of the husband. The error of the court did not assist in recovery of interim maintenance, but rather prolonged the litigation between the parties.

(vi) The issue whether defence can be struck off in proceedings under [Section 125](#) Cr.P.C. came up before the Madhya Pradesh High Court in Venkateshwar Dwivedi v Ruchi Dwivedi⁹ The Court held that neither [Section 125\(3\)](#) of the Cr.P.C, nor [Section 10](#) of the Family Courts Act either expressly or by necessary implication empower the Magistrate or Family Court to strike off the defence. A statutory remedy for recovery of maintenance was available, and the power to strike off defence does not exist in a proceeding u/S. 125 [Cr.P.C.](#) Such power cannot be presumed to exist as an inherent or implied power. The Court placed reliance on the judgment of the Kerala High Court in Davis v Thomas¹⁰ and held that the Magistrate does not possess the power to strike off the defence for failure to pay interim maintenance.

Discussion and Directions on Enforcement of Orders of Maintenance

The order or decree of maintenance may be enforced like a decree of a civil court, through the provisions which are available for enforcing a money decree, including civil detention, attachment of property, etc. as provided by various provisions of the CPC, more particularly

⁸ Gurvinder Singh v Murti I (1990) DMC 559

⁹ II (2018) DMC 103 MP

¹⁰ ILR (2007) 4 Ker 389

Sections 51, 55, 58, 60 read with Order XXI.

Striking off the defence of the respondent is an order which ought to be passed in the last resort, if the Courts find default to be wilful and contumacious, particularly to a dependant unemployed wife, and minor children.

Contempt proceedings for willful disobedience may be initiated before the appropriate Court."

4. In that view of the matter, the Family Court, Durg is directed to execute the award of maintenance in the manner indicated by the Supreme Court in matter of **Rajnesh** (supra) expeditiously, without further delay. The Registry is directed to send the report of the Collector regarding property particulars of respondent No.5 forthwith to the Court concerned.
5. With the aforesaid observation, the writ petition finally stands disposed off.

Sd/-
Sanjay K. Agrawal
Judge