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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**REVIEW PETITION NO. 1 OF 2021
IN
WRIT PETITION ST NO. 98122 OF 2020**

Aditi Chandel

....Petitioner

V/s.

Dinesh Kumar Chandel

.....Respondent

Mr. Ajinkya Udane i/b Abhijit D. Sarwate for the Petitioner

CORAM : NITIN W. SAMBRE, J.

RESERVED ON : 28th JANUARY, 2021.

PRONOUNCED ON: 12th MARCH, 2021.

P.C.:

1] This Petition is by original Petitioner under Section 114 of Code of Civil Procedure, 1908 [Hereinafter referred to as 'CPC' for the sake of brevity] seeking a review of the order dated 17th December 2020 passed by this court.

2] By the said order, this Court has dismissed the Petition preferred by the Petitioner wherein order passed below Exhibit 583

seeking striking off the defence of the Respondent came to be turned down and for dismissal of counterclaim, as cost was not paid so also interim maintenance.

3] Mr. Sarwate learned counsel appearing for the Petitioner would urge that merely because execution proceedings for recovery of maintenance amount are pending, same will not act as an embargo on the right of the Petitioner to claim striking off the defence. He has invited my attention to the judgement in the matter of **Dilip Girdhar Chaudhari Vs. Nirabai Dilip Choudhari** delivered on 16th January 2002 in **Civil Revision Application No. 1044 of 2001**. According to him, the remedy of Order XXXIX Rule 11 of Code of Civil Procedure, 1908 as is incorporated vide Bombay Amendment on 1st October 1983 is in addition to remedy of execution. As such, according to him, there is an error apparent on the face of record. So as to claim that Review Petition on the aforesaid ground is maintainable, he has drawn support from the judgement of the Apex Court in the matter of **M/s. Green View Tea and Industries Appellant V. Collector, Golaghat, Assam and another**¹. According to him, it is the duty of the Court to

¹ AIR 2004 SUPREME COURT 1738

rectify, revise and recall its orders in case if it is brought to the notice that orders were passed on wrong and mistaken assumption of facts and the implementation of such orders would have serious consequences.

4] Considered submissions.

5] At the outset it is required to be observed that the point which is sought to be argued in the Review Petition was never canvassed by the counsel who appeared and argued on the date when the order under Review came to be passed. On that day some different lawyer appeared and after considering the contentions canvassed, this Court has passed an order. The contentions which are now sought to be canvassed are all together different than the one which were canvassed before the court on earlier occasion.

6] Be that as it may, the fact remains that this Court is required to appreciate whether in the given set of facts this Court has committed

an error in not granting prayer for striking off the defence. Prevailing circumstances as where brought to the notice of the court are, that the amount of cost of Rs. 2,000/- in spite of chances and extensions was not paid, so also the maintenance amount was not paid inspite of extensions to pay the same were granted. According to Mr. Sarwate, there was an intentional and deliberate non compliance of the orders on Exhibit 514, 574 so also 152 and 154. As far as the orders passed below Exhibit 152 and 154 are concerned, same are for payment of cost of Rs. 2,000/-. As far as order below Exhibit 514 is concerned, Family Court on 4th February 2020 directed the payment of interim maintenance in 6 equal installments in 6 months. Though Mr. Sarwate is justified in relying on the judgement of this court in the matter of **Dilip Girdhar Chaudhari** [cited supra] this court had an occasion to consider the scheme of the said provision in the matter of **Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi**². It is held by this court that the said provisions are directory in nature and the provisions can be exercised only when there is willful default and the conduct of defaulting party is contumacious resulting into serious prejudice to the opposite party.

² [2004 (2) Mh.L.J.]

7] Paragraph 7 and 11 of the said judgement are worth referring to.

8] In the aforesaid background, judgement of **Dilip Girdhar Chaudhari** [cited supra] delivered by the learned single Judge is required to be ignored.

9] Apart from above it cannot be said that there was serious intentional default on the part of the Respondent for justification of invoking provisions of Order XXXIX Rule 11 of CPC for striking off the defence.

10] As such no case for Review is made out. Review Petition as such fails stands dismissed.

11] However, this will not preclude the Petitioner from taking out fresh proceedings in case if continuous willful default on the part of

the Respondent husband in complying with the order of payment of maintenance is noticed.

[NITIN W. SAMBRE, J.]