

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO.306 OF 2022

Petitioner : **Mithun s/o Ghanshyam Kherde,**
Aged about 36 years, Occu. Contractual Job,
R/o. C/o. G.N. Kherde, Plot No.592,
“Durga Bhawan”, Anand Nagar, Nagpur,
Pin Code: 440017, Phone No. 9819881649,
E-mail mithun.kherde@gmail.com

– Versus –

Respondents : 1] **Smt. Shrawani W/o. Mithun Kherde,**
Aged about 30 years.

2] **Savitri alias Trisha D/o. Mithun Kherde,**
as guardian,
Through i.e. Respondent No.1-Mother,
Aged about 3 Years, 1 Month,
Both the Respondent
R/o. C/o. Mahavir Chindhu Gawarle,
Plot No.215, Shilpa Society,
Behind Ajanta Marbles, Near N.I.T. Garden,
Manish Nagar, Nagpur,
Pin Code : 440015, Phone 9665569274,
E-mail id : gawarleshravani@gmail.com

Mr. M.G. Kherde, Petitioner-in-Person.
Mrs. Padma Chandekar, Advocate for the Respondents.

CORAM : **VINAY JOSHI, J.**

DATE : **23rd JUNE, 2022.**

ORAL JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally by consent of both sides.

02] The petitioner-husband has challenged two orders passed by the Family Court viz. order dated 28/03/2022 by which the petitioner's defence was struck off and consequential order dated 06/04/2022 by which the petitioner's application for exhibiting certain documents was came to be turned down.

03] Initially, respondent-wife had approached to the Family Court (Petition No.E-25/2019) seeking maintenance in terms of Section 125 of the Code of Criminal Procedure. The respondent-wife had also applied for grant of interim maintenance. The learned Family Judge vide order dated 17/03/2021 has granted interim maintenance to the wife at the rate of Rs.8,000/- per month and to the daughter at the rate of Rs.5,000/- per month from the date of application i.e. from 14/01/2019. The said order was not complied, rather which gave rise to the present dispute. The husband has challenged the order of interim maintenance in Criminal Writ Petition No.379/2021, however, this Court has declined to interfere.

04] Much has been argued by the petitioner-in-person regarding his inability and incapacity to clear the arrears and to pay the interim maintenance as directed by the Family Court. It is submitted that the petitioner was earlier working at Thane, however, during pandemic period, he lost his job and has been shifted to Nagpur and doing a job on contractual basis. It is the petitioner's case that his income has been drastically reduced and currently he is getting near about Rs.32,000/- per month from his temporary contractual job. As a matter of fact, now it is not open in this proceeding to make any comment on the quantum of interim maintenance since already this Court has closed the said chapter vide order dated 22/06/2021 in Writ Petition No.379/2021.

05] Coming to the challenge in this petition, it is about the order dated 28/03/2022 passed by the Family Court on Exh.266 pertaining to striking off the defence. It reveals that the wife has filed an application to the Family Court seeking to strike off the defence of the petitioner-husband on the premise of non-compliance of interim maintenance order. The Family Court considered the accumulation of arrears and passed conditional order by which the petitioner was directed to pay 50% of the outstanding arrears till 04/04/2022 and balance amount in two equal installments within two

months. The order was with a rider that petitioner's failure to comply the order, has effect of striking off the defence in the main petition. The petitioner vehemently challenged the said order contending that there is no provision under the Code to strike off the defence like the Code of Civil Procedure. Secondly, he would submit that due to change in place of residence and pandemic situation, he was not in a position to comply with the order of this Court. It is his contention that somehow he has cleared the maximum part of arrears, but it is difficult for him to strictly comply with the order dated 28/03/2022 due to financial exigencies. He has also submitted that denial of right to defend is against the principles of natural justice and, therefore, he urged to set aside the order of striking off the defence.

06] The learned Counsel appearing for the respondent-wife has opposed the prayer for setting aside the order by which the defence was struck off. The respondent's learned Counsel attracted my attention to paragraph 26 of the judgment of the Supreme Court in the case of Rajesh vs. Neha and another – (2021) 2 SCC 324, wherein after considering earlier orders, the Supreme Court has approved the action of striking off the defence in the maintenance proceedings. However, the Supreme Court has expressed that such order shall be passed as a last resort that too if the Court finds that the default was willful

and, particularly, the dependents are unemployed wife and minor children. Thus again it falls in the realm of facts to decide, whether it is a fit case wherein the Court can exercise its discretion in taking drastic steps of shutting a party from putting his defence. It is informed rather the admitted fact that till date, the petitioner has paid Rs.2,60,000/- to the respondent-wife and according to the respondent, still balance of Rs.2,76,000/- remains. Certainly the figure of arrears would be huge as the Family Court has passed the interim order on 17/03/2021 directing to pay the arrears from 10/03/2019 i.e. for preceding three years. Particularly, it is to be noted that this Court vide order dated 05/05/2022 has directed the petitioner to deposit an amount of Rs.1,00,000/- before the Family Court within the stipulated period. It is not disputed that in compliance with the interim order of this Court, the petitioner-husband has deposited an amount of Rs.1,00,000/- in the Family Court.

07] Having regard to the above situation and peculiar facts, it cannot be said with certainty that the default was deliberate and willful. No doubt the amount of maintenance is for survival of a lady and her child. Though the petitioner stated that the wife is earning, however, at present, there is no material to substantiate the said contention. In the circumstances, having regard to the figure of outstanding arrears, which is ranging in between

Rs.2,50,000/- and Rs.2,75,000/-, it would be in the interest of justice to direct the petitioner to pay Rs.50,000/- within the stipulated period and to allow him to contest the petition on merits.

08] In the Courts of Law, always striking off defence is a last resort rather these orders are in the nature of persuading other side to make necessary compliances. The Courts are also unhappy in deciding the matters by gagging the defence of rival. In such case, there is every likelihood that the matter would rotate from Courts to Court for no reason. It is informed that in the Family Court, already the respondent-wife's evidence is over, and the petitioner-husband has also filed evidence-affidavit. However, due to existence of impugned order, the defence was struck off. The position can be set right by passing conditional orders so that the petitioner can show *bona fides* as well as he would get a chance to exercise his right to defend the proceedings on merits.

09] It takes me to the next challenge raised by the petitioner, which pertains to rejection of his application [Exh.255] by the Family Court for exhibiting documents. The petitioner-father after filing his evidence-affidavit, has filed some documents in support of his contention and urged for exhibition of documents. The Family Court has rejected the said application

simply for the reason that the petitioner's defence has been struck off and, therefore, application cannot be entertained. Needless to say that the petitioner's application for exhibition of document was not considered on merits. In the above part of the order, I have shown my inclination to accord an opportunity to the petitioner to lead his defence, therefore, as a natural corollary, application [Exh255] requires to be decided on its own merits. In view of the above, the following order is passed :

- i. The impugned order dated 28/03/2022 passed on Exh.266 by the Family Court is set aside to the extent of striking off the defence on condition that the petitioner shall deposit Rs.50,000/- (Rupees Fifty Thousand Only) in the Family Court towards arrears within two weeks from today.
- ii. The consequential order dated 06/04/2022 on Exh.255 passed by the Family Court is also set aside with a direction to decide said application afresh on its own merits provided that the petitioner complies the condition of pre-deposit as aforesaid mentioned.
- iii. Needless to say that the petitioner shall continue to pay the interim maintenance and endeavour to clear the arrears.

- iv. The order is dictated in the open Court in presence of the petitioner, who has understood the directions about the time bound compliance of the order.
- v. The petition stands disposed of in the above terms.

(VINAY JOSHI, J.)

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