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

WRIT PETITION NO. 1220/2022

SUNIL BALASAHEB SHALBINDRE ..PETITIONER

VS.

SUREKHA SUNIL SHALBINDRE & ORS. ..RESPONDENTS

Mr. Niranjan Bhavake i/b. Mr. Bhavake & Associates for
petitioner.

Mr. Rohaan Cama Amicus Curiae.

Mr. R. M. Pethe, APP for respondent-State.

CORAM : M. S. KARNIK, J.

HEARD ON : NOVEMBER 17, 2022.

PRONOUNCED ON : MARCH 9, 2023.

ORDER :

1. The challenge in this writ petition under Article 227 of the Constitution of India is to an order dated February 18, 2022 passed by the Family Court, Kolhapur below Exhibit 27 thereby striking off the defence of the petitioner (original respondent-husband before the Family Court).

2. The petitioner - wife filed a petition before the Family Court, Kolhapur, for maintenance under Section 125 of the Code of Criminal Procedure. An application for interim maintenance was filed below Exhibit 6. The husband filed reply below Exhibit 16/C to the application below Exhibit 6.

The wife's application was allowed and the following order was passed:-

"ORDER

1. Application at Exh.6 is allowed as under:-

(i) The respondent shall pay interim maintenance @ Rs.5,000/- p.m. each to the petitioner No.1 to 3 i.e. total amount of Rs.15,000/- p.m. from the date of application i.e. 23.10.2019 till the decision of main petition on merits.

2. Cost shall follow the events."

3. The order granting interim maintenance was challenged by the husband in this Court by way of Criminal Writ Petition No.57/2022 which came to be dismissed by an order dated February 25, 2022.

4. An application for striking off the defence was filed by the wife under Order XXXIX Rule 11 of the Code of Civil Procedure (hereafter 'CPC', for short) before the Family Court on February 18, 2022. By the impugned order dated February 18, 2022 passed below Exhibit 27, the Family Court struck off the defence of the husband.

5. Learned counsel submitted that the impugned order is passed by the Family Court under Order XXXIX Rule 11 of

the CPC but as per Section 10 of the Family Courts Act, 1984 (hereafter 'the said Act', for short), CPC is not applicable to any proceedings filed under Chapter IX of the Code of Criminal Procedure (hereafter 'Cr.P.C.' for short). It is further submitted that Section 10 (2) of the said Act clearly states that the provisions of the Cr.P.C. or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court. It is submitted that Section 10 mandates the applicability of the relevant procedure Code and therefore, applying the provisions of the CPC to proceedings under Chapter IX would run counter to the mandate of Section 10 of the Act. In support of his submissions, learned counsel for the petitioner relied upon the following decisions: -

- 1. Pankaj s/o. Bhalaji Atram vs. State of Maharashtra and ors.¹**
- 2. State of Andhra Pradesh vs. Linde India Limited (Formerly BOC India Limited)²**
- 3. Union of India through Director of Income Tax vs. Tata Chemicals Limited³**
- 4. Vinod s/o. Pralhad Balap vs. Smt. Chhaya w/o. Vinod Balap⁴**

1 2017(2) Mh.L.J. 707.

2 (2020) 16 SCC 335

3 (2014) 6 SCC 335

4 2002 (4) Mh.L.J. 937.

5. **Rajnish vs. Neha and another**⁵

6. Though notice was duly served on the respondents, there was no representation on their behalf. Considering the nature of the issue involved, I had requested Shri Rohaan Cama to assist this Court as an Amicus Curiae.

7. Shri Cama submitted that the issue raised in this writ petition pertains to the interplay between Section 10 of the Act and Order XXXIX, Rule 11 of the CPC, as also Section 125 of the Cr.PC. According to Shri Cama, the decision of the Hon'ble Supreme Court in the case of **Rajnish vs. Neha and others (supra)** and this Court in its judgment dated October 7, 2021 in **Neha w/o. Rajnish Naidu (Joshi) vs. Rajnish s/o. Rajendrapal Naidu**⁶ clearly appear to take the view that the Family Court would have power to strike off the defence even in a case where the order of which breach is complained, was passed under Section 125 of the Cr.P.C. Learned counsel submits that the Hon'ble Supreme Court and this Court were considering a matter where, on facts, the application for maintenance was under Section 125 of the Cr.P.C., and after considering the legal position the

5 (2021) 2 Scc 324

6 Criminal Writ Petition No.692/2021, Nagpur Bench, Nagpur.

Hon'ble Supreme Court held that, albeit as a last recourse, the Family Court had the power to strike off the defence, while this Court passed a conditional order of striking off. Shri Cama submitted that the decision of **Vinod s/o. Pralhad Balap** (supra) would stand impliedly overruled by the decision of the Hon'ble Supreme Court in **Rajnesh vs. Neha and another** (supra). Shri Cama submitted that in paragraph 126 of the decision in **Rajnesh vs. Neha and another** the Hon'ble Supreme Court held thus :-

“126. 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 willful and contumacious, particularly to a dependent unemployed wife, and minor children. Contempt proceedings for willful disobedience may be initiated before the appropriate court.”

According to Shri Cama, the logical way to reconcile Section 10 of the Act, with the conclusions and the intent of the judgments of the Hon'ble Supreme Court and this Court, is to hold that Section 10(1) of the Act only excludes the applicability of the procedural provisions of the CPC to an application under Chapter IX of the Cr.P.C.. There is no

exclusion in Section 10 of the applicability of the substantive provisions of the CPC.

8. Heard.

9. Having heard learned counsel, I am of the opinion that the impugned order called for interference. On account of the default on the part of the husband to pay the interim maintenance which was granted by the Family Court, an application was filed by the wife for striking off the defence. In the light of the law laid down by the Hon'ble Supreme court in **Rajnish vs. Neha and another** (supra), it is held that 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 willful and contumacious, particularly to a dependent unemployed wife, and minor children. Contempt proceedings for willful disobedience may be initiated before the appropriate Court.

10. This Court in the case of **Neha w/o. Rajnish Naidu (Joshi)** (supra), in paragraph 15 on facts held that since default is willful and contemptuous and the sufferers are the wife and child, a case is made out for striking out the defence. His Lordship passed a conditional order of striking

out the defence.

11. In my opinion, having regard to the law laid down in the decision of the Hon'ble Supreme Court in **Rajnish vs. Neha and another** (supra), it is clearly seen that 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 willful and contumacious.

12. It is necessary to reproduce the impugned order passed by the Family court which reads thus:-

“Heard both the counsels. The amount of Rs.3,75,000/- is due against respondents since long he has not deposited any amount for their children and wife. Under such circumstances the defence of the respondent is struck off.”

13. From the order passed by the Family Court it is seen that there is no finding as to whether the default on the part of the husband is willful and contumacious and that the order of striking of the defence has been passed as a last resort. It appears that the aforesaid decisions were not placed before learned Family Court. The matter therefore needs to be remanded to the Family Court for a fresh decision of the application below Exhibit 31 in the light of

the law laid down by the Hon'ble Supreme Court and this Court. The trial Court is requested to expeditiously decide the application.

14. The impugned order is set aside and the application Exhibit 31 is remitted to the Family Court to reconsider the application afresh. All contentions kept open.

15. The writ petition is disposed of.

16. No order as to costs.

17. I place on record the valuable assistance rendered by Shri Rohaan Cama who graciously agreed to appear as an Amicus Curiae.

(M. S. KARNIK, J.)