

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

MONDAY, THE 7TH DAY OF AUGUST 2023 / 16TH SRAVANA, 1945

OP(CRL.) NO. 620 OF 2022

CMP 142/2019 OF FAMILY COURT, MAVELIKKARA

PETITIONER/S:

ABDUL MUJEEB

BY ADVS.
T.MADHU
C.R.SARADAMANI
SHAHID AZEEZ
B.K.RAJAGOPAL
RENJISH S. MENON

RESPONDENT/S:

- 1 SUJA
- 2 MUHAMMED MUSHTHAQU
- 3 MUHAMMED MUBEEN
- 4 MUHAMMED MUZAMMIL

O.P.(Crl) No.620 of 2022

-2-

5 FIRST RESPONDENT HEREIN, PIN - 690548
STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, PIN - 682031
BY ADVS.
V. BEENA
S. NAUSHAD (K/874/1998)
M. THAHA (K/000029/2019)

THIS OP (CRIMINAL) HAVING BEEN FINALLY HEARD ON 20.07.2023,
THE COURT ON 07.08.2023 DELIVERED THE FOLLOWING:

O.P.(Crl) No.620 of 2022

-3-

"CR"

JUDGMENT

Dated this the 07th day of August, 2023

The petitioner's wife and children, respondents 1 to 4 herein, had approached the Family Court, Mavelikkara by filing MC No.42 of 2016 claiming maintenance allowance under Section 125 of Cr.P.C. As the petitioner failed to appear despite issuance of notice, he was set ex parte and the maintenance case decided as per order dated 30/08/2016, directing the petitioner to pay maintenance allowance at the rate of Rs.4,000/- to each claimant with effect from 16.04.2016.

2. The petitioner having failed to pay maintenance in terms of the order, respondents 1 to 4 filed CMP No.142 of 2019 claiming a total amount of Rs.1,20,000/- towards arrears of maintenance for the period from 30.01.2019 to

O.P.(Crl) No.620 of 2022

-4-

30.10.2019. The petitioner filed an objection to the execution petition contending that, as against the claim for Rs.1,20,000/-, he has already paid an amount of Rs.2,68,607/-. The court below after hearing the parties, dismissed CMP No.142 of 2019, finding that the petitioner had paid Rs.1,15,152/- to the account of the second respondent, which along with other payments made towards education fees and expenses of respondents 2 to 4 totaled Rs.2,68,607/-.

3. On dismissal of CMP No.142 of 2019, respondents 1 to 4 filed Crl.MP No.220 of 2022 seeking review and recall of the order dismissing the execution petition. In the petition for review, respondents contended that the petitioner had not paid any amount towards maintenance allowance and the payments claimed to have been made were towards the educational expenses of the children, more particularly the second respondent, who was pursuing his Engineering

O.P.(Crl) No.620 of 2022

-5-

Course. The respondents also produced documents to show that the petitioner had received reimbursement for the amount spent for educational expenses of the children. It was also contended that the petitioner was liable to pay maintenance to each respondent separately and the excess amount paid to one of the respondents cannot be taken as a ground for rejecting the claim made by the others. The petitioner filed an objection to the review petition contending that the payment was made in favour of the second respondent based on a joint demand made by all respondents. Further, the order sought to be reviewed being one passed under Section 128 Cr.P.C, the prohibition against review under Section 362 would apply.

4. The Family Court, on careful analysis of records, found that it had committed a mistake by treating the payment of tuition/school fee of respondents 2 to 4 as payment made towards

O.P.(Crl) No.620 of 2022

-6-

maintenance. Further, the document produced by the respondents to prove receipt of reimbursement of the tuition/school fee paid, was omitted to be considered. Based on these findings, the court below came to the conclusion that there was an error apparent on the face of the order sought to be reviewed. Relying on the decision in Sanjeev Kapoor v. Chandana Kapoor and Others [2020 (2) KLT 267 (SC)], the Supreme Court held that a court passing final order in proceedings under Section 125 Cr.P.C is not rendered *functus officio* and hence the embargo under Section 362 will not apply. Consequently, the petition was allowed and the order passed in CMP No.142 of 2019, reviewed.

5. Assailing the decision of the Family Court to review its earlier order, Adv.T.Madhu, learned Counsel appearing for the petitioner contended that the court had committed a fundamental flaw by relying on the decision in Sanjeev Kapoor

O.P.(Crl) No.620 of 2022

-7-

(*supra*), since that decision was rendered based on the interpretation of Sections 125 and 127, while the review order was passed in execution proceedings under Section 128 Cr.P.C. In **Sanjeev Kapoor** (*supra*), the finding that the Family Courts are not rendered *functus officio* was arrived at based on Section 125 (5), which empowers the courts to cancel the order granting maintenance, if so warranted in the light of subsequent events. The other provision considered was Section 127 which empowers the court to alter the maintenance allowance granted on receiving proof regarding change of circumstances. On the other hand, Section 128 deals with enforcement of the order of maintenance, which does not contemplate any alteration after pronouncement of the order. In such circumstances, the general principles of review would apply. Hence, in the absence of manifest error, the court could not have passed the impugned order. Even otherwise no

O.P.(Crl) No.620 of 2022

-8-

question of review arises in view of the prohibition under Section 362 of Cr.P.C.

6. Learned Counsel for respondents 1 to 4 refuted the contentions and submitted that the very objective of Section 125, which is to prevent vagrancy and destitution of neglected wives and children, will be defeated if payments made by the husband towards educational expenses of one child is reckoned as payment of maintenance to all claimants. In the case at hand, the petitioner had deliberately evaded payment of maintenance to the wife and projected the payment of educational expenses to the children as payment made towards maintenance. The court below was initially misled by the averments to the above effect raised by the petitioner in his objection to the execution petition. When the review petition was filed, the court realised its mistake and the injustice meted out to respondent 1 to 4. It is submitted that the contention of

O.P.(Crl) No.620 of 2022

-9-

the petitioner that Section 128 cannot be read along with Section 127 is illogical and unacceptable. If such myopic interpretation is accepted, that would be against the object and purport of the provision for maintenance. Hence, the Family Court was perfectly justified in relying on the decision in Sanjeev Kapoor (*supra*) and allowing the prayer for review.

7. As contended by the respondents, the Family Court had reviewed its earlier order on being convinced that the execution petition was dismissed erroneously, based on the petitioner's contention that he had paid maintenance allowance in excess of the amount claimed. For arriving at such conclusion, the Family Court considered the educational expenses paid to respondents 2 to 4 as payment towards maintenance allowance. As a matter of fact, respondents had produced Ext.A1 document issued by the petitioner's employer to prove that the amount paid towards educational

O.P.(Crl) No.620 of 2022

-10-

expenses for respondents 2 to 4 was reimbursed. This crucial evidence was omitted to be noticed by the Family Court. Even otherwise, the Family Court having directed payment of monthly maintenance allowance at the rate of Rs.4,000/- to respondents 1 to 4 individually, the petitioner was bound to satisfy the court that the amount due as per the order was paid to each respondent separately. It is not in dispute that the petitioner had not paid any amount to the first respondent/wife and payments to the other respondents were towards tuition fees and other educational expenses. The object of Section 125 being to prevent destitution and vagrancy by ensuring reasonable allowance towards maintenance, payment of educational expense, which was later reimbursed, cannot be treated as the maintenance allowance contemplated under Section 125. As such, there was an error apparent on the face of the order dismissing the execution

O.P.(Crl) No.620 of 2022

-11-

petition.

8. The only question therefore is whether the Family Court could have reviewed the order, even if it was found to be patently erroneous. The petitioner relies on Section 362 Cr.P.C to contend that the Family Court could not have exercised the power of review and distinguished the decision in **Sanjeev Kapoor** (*supra*) by arguing that the judgment rendered in the context of Sections 125 and 127 cannot be applied for reviewing an order passed under Section 128. Even though the argument appears impressive at the first blush, the fallacy is in the isolated reading of Section 128 in Chapter IX of the Code. As held by the Apex Court in **Chaturbhuji v Sita Bai [2008 (2) SCC 316]**, the objective of Section 125, which is to ameliorate the sufferings of destitute wives and children, cannot be defeated based on hyper-technical contentions. It is also pertinent to note that the Family Courts are set

O.P.(Crl) No.620 of 2022

-12-

up to deal with disputes concerning the family by adopting an approach radically different from ordinary civil proceedings. In **Abdul Jaleel v Shahida [2003 KHC 428 (SC)]**, the Supreme Court highlighted the settled principle of law that the jurisdiction of Family Courts, created specially for resolution of disputes relating to marriage and family affairs should be construed liberally. Section 10(3) of the Family Courts Act, 1984 empowers the Family Court to lay down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by one party and denied by other. Referring to the above provision, a Division Bench of this Court in **Anjana T. v J.A.Jayesh Jayaram and Another [2022 (3) KHC 221]** observed that the enquiry under the Family Courts Act is focused more on the parties than the process of litigation and hence, the Family Courts are not

O.P.(Crl) No.620 of 2022

-13-

bound by the rigidity of the rules of procedure followed in adversarial litigation. A similar view was expressed earlier in **Nisha Haneefa v. Abdul Latheef and Others [2022 (2) KHC 759]**, the relevant portion of which reads as under;

"4. A combined reading of Sections 9, 10 and 14 would clearly bring out the point that the Family Court is not the mirror of an ordinary Civil Court. The powers of the Family Court can be summarized as follows: (i) Adjudicative power following the rules of procedure as applicable under the adversarial system. (ii) Proactive role for settlement of disputes between the parties. (iii) Inquisitorial power to enquire into the truth of the matter.

5. The above enumerated powers are only for the Family Court. That distinguishes it from an ordinary Civil Court. More interestingly, it is to be noted that as reflected from S.10(3), the Family Court is given the power to lay down its own procedure with a view to arrive a settlement, or to enquire into the truth of the facts alleged. The power to choose the mode of procedure itself sufficiently indicates that the Family Court is not

O.P.(Crl) No.620 of 2022

-14-

bound by any strictness of procedure of law as referred in the Code of Civil Procedure, the Indian Evidence Act, Criminal Procedure Code etc. What is essential in a dispute before the Family Court is that the Family Court is only to devise procedure for fair conclusion of the proceedings. If the Family Court is able to adhere to the "fairness", the decision or order of the Family Court cannot be questioned in a higher Court. The Family Court is given complete freedom in devising fair procedure for speedy resolution of disputes before the said Court."

The irrefragable position emerging from the above discussion is that, insofar as the objective of Chapter IX of the Code is to ensure payment of reasonable amount for the maintenance of neglected/deserted wives, children and parents and enforcement of the provisions is through Family Courts, the embargo under Section 362 will not apply to any of the provisions in the Chapter, including Section 128. Therefore, the contention that even if Sections 125 to 127 does

O.P.(Crl) No.620 of 2022

-15-

not envisage the court becoming *functus officio* on passing the order, that will not apply to Section 128, cannot be countenanced. If the argument is accepted, the resultant position would be that, in spite of finding an error apparent on the face of the order dismissing the execution petition, the Family Court will have to remain helpless, compelling the hapless wife and children to approach the High Court. That, definitely, is not the objective of Section 125 or the other provisions in Chapter IX of the Code.

For the aforementioned reasons, the original petition is dismissed.

Sd/-

V.G.ARUN
JUDGE

Scl/

O.P.(Crl) No.620 of 2022

-16-

PETITIONER EXHIBITS

- Exhibit-P1 THE TRUE COPY OF THE ORDER DATED 30/8/2016 IN M.C.NO.42/2016 ON THE FILES OF THE FAMILY COURT, MAVELIKKARA.
- Exhibit-P2 THE TRUE COPY OF THE PETITION IN C.M.P.NO.142/2019 IN M.C.NO.42/2016 ON THE FILES OF THE FAMILY COURT, MAVELIKKARA.
- Exhibit-P3 THE TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER HEREIN IN C.M.P NO.142/2019 IN MC NO.42/2016 ON THE FILES OF THE FAMILY COURT, MAVELIKKARA.
- Exhibit-P4 THE TRUE COPY OF THE STATEMENT FILED BY THE PETITIONER IN C.M.P.NO.142/2019 IN M.C.NO.42/2016 ON THE FILES OF THE FAMILY COURT, MAVELIKKARA
- Exhibit-P5 THE TRUE COPY OF THE ORDER DATED 17/5/2022 IN CMP NO.142/2019 IN M.C.NO.42/2016 ON THE FILES OF THE FAMILY COURT, MAVELIKKARA
- Exhibit-P6 THE TRUE COPY OF THE PETITION DATED 1/6/2022 IN CMP NO.220/2022 IN CMP NO.142/2019 IN M.C.NO.42/2016 ON THE FILES OF THE FAMILY COURT, MAVELIKKARA.
- Exhibit-P7 THE TRUE COPY OF THE OBJECTION IN CMP NO.220/2022 IN CMP NO.142/2019 IN M.C.NO.42/2016 ON THE FILES OF THE FAMILY COURT, MAVELIKKARA.
- Exhibit-P8 THE CERTIFIED COPY OF THE ORDER DATED 4/11/2022 IN CRL.M.P.NO.220/2022 IN CMP NO.142/2019 ON THE FILES OF THE FAMILY COURT, MAVELIKKARA.
- Exhibit P9 THE TRUE COPY OF THE ORDER DATED 28/11/2022 IN CMP NO.142/2019 IN M.C.NO.42/2016