

IN THE HIGH COURT OF KERALA AT ERNAKULAM



PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

THURSDAY, THE 16<sup>TH</sup> DAY OF JUNE 2022 / 26TH JYAISHTA, 1944

OP (CRL.) NO. 226 OF 2022

AGAINST THE ORDER IN CMP NO.848/2022 IN MC 34/2018 OF  
JUDICIAL MAGISTRATE OF FIRST CLASS , NJARAKKAL

**PETITIONER:**

NEETHU, AGED 32 YEARS, D/O LAWRENCE,  
MAYYATTIL (H), NAYARAMBALAM P.O.,  
MANATTUPARAMBU,, PIN - 682509

BY ADVS.  
DHANYA P.ASHOKAN  
SUBAL J.PAUL

**RESPONDENT:**

TRIJO JOSEPH, AGED 36, S/O JOSEPH,  
KANNANKERIL (H), KUMBALANGI P.O.,  
ERNAKULAM, PIN - 682007

BY ADV D.LEEMA ROSY

HIGH COURT OF KERALA  
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THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ON  
13.06.2022, THE COURT ON 16.06.2022 DELIVERED THE FOLLOWING:



“C.R.”

**J U D G M E N T**

Dated this the 16<sup>th</sup> day of June, 2022

What is the nature of proceedings under the Protection of Women from Domestic Violence Act, 2005 - civil or criminal?

Does the Court/Magistrate dealing with the complaint filed under the provisions of the Protection of Women from Domestic Violence Act, 2005 have the power to strike off the defence for non-compliance with the order to pay *pendente lite* maintenance?

These are the important questions that arise for consideration in the above original petition.

2. The petitioner in OP (Cr1) No. 226/2022 is the wife of the respondent therein. She filed MC No.34/2018 at the Judicial First-Class Magistrate Court, Njarakkal (for short 'trial court') u/s 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, the DV Act) seeking various reliefs including

OP(Cr1) No.226/2022 &  
Cr1.M.A.No.1/2022 in  
OP(Cr1) No.286/2019



-:3:-

maintenance. She has also moved an application for interim maintenance u/s 23(2) as CMP No.1087/2018. It was allowed *ex parte* and interim maintenance of ₹15,000/- was awarded to the petitioner. The said order was challenged by the respondent at the Sessions Court-II, North Paravur (for short 'appellate court') in Cr1.Appeal No.97/2019. The respondent sought a stay of the interim order passed by the trial court. The appellate court dismissed the stay petition as per Ext.P1 order with an observation that the Magistrate shall consider the contentions of the respondent and pass final order in the application for interim maintenance. Thereafter, the respondent was given an opportunity to file an objection to CMP No.1087/2018. After considering the objection, the trial court confirmed the ad interim order and directed the respondent to pay all the arrears of maintenance within two weeks as per Ext.P3 order. The said order was challenged by the respondent before this Court in OP (Cr1) No.286/2019. This court after hearing both sides disposed of the original petition setting aside Ext.P3 order passed by the trial court and directing the respondent to pay ₹2,00,000/- towards

OP(Cr1) No.226/2022 &  
Cr1.M.A.No.1/2022 in  
OP(Cr1) No.286/2019

-:4:-



arrears of maintenance within a period of one month. The trial court was directed to dispose of MC No.34/2018 itself within a period of three months. Ext.P4 is the said order. Since the respondent failed to comply with the direction in Ext.P4 that he shall pay ₹2,00,000/- within a period of one month, the petitioner filed an application at the trial Court to strike off the defence of the respondent in MC No.34/2018. Ext.P5 is the said application. After hearing both sides, the trial court dismissed the application as per Ext.P6 order. Aggrieved by Ext.P6 order, the petitioner preferred OP (Cr1) No. 226/2022.

3. The respondent in OP(Cr1) No.226/2022 has filed Cr1.M.A.No.1/2022 in OP(Cr1) No.286/2019 seeking 6 months' time to comply with the direction in Ext.P4 judgment to deposit ₹2,00,000/-.

4. I have heard Smt. Dhanya P.Ashokan, the learned counsel appearing for the petitioner/wife and Smt. D.Leema Rosy, the learned counsel appearing for the respondent/husband.

5. The marital status of the parties is not in dispute. The *ex parte* interim order of maintenance was confirmed as per



Ext.P3 order after hearing both sides. However, this court set aside Ext.P3 order with a specific direction to the respondent to pay ₹2,00,000/- within a period of one month towards arrears of maintenance due. The said order was passed on 3/2/2022. Admittedly, the direction in the said order has not been complied with so far. MC is of the year 2018. The trial court passed the interim order directing the respondent to pay maintenance at the rate of ₹15,000/- per month, as early as on 1/12/2018. Even today, admittedly, the respondent has not paid a single pie towards maintenance. It is in these circumstances, that the petitioner/wife filed Ext. P5 application at the trial court to strike off the defence.

6. Ext.P5 application was dismissed by the trial court vide Ext.P6 order mainly holding that as per S.28(1) of the DV Act, all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and the offence u/s 31 shall be governed by the provisions of the Code of Criminal Procedure and there is no provision in the Code to strike off the defence.

7. The DV Act was enacted by the Parliament based on



the larger interest of human rights concomitant with various declarations made in international conventions. The very objective of the Act is to protect the women against the violence that occurs within the family and for matters connected therewith. The Act, therefore, conceives a scheme of protective measures with the object to protect women. The statement of objects and reasons of the DV Act record that the civil law does not address the phenomenon of domestic violence and therefore, a law be enacted to provide a remedy in civil law for the protection of women from being victims of domestic violence. Thus, the purpose of enacting the law was to provide civil remedies to a woman who is subjected to domestic violence.

8. Apart from the statement of object and reasons, various provisions contained in the Act make it clear that predominantly the rights and remedies created under the Act are of civil nature. Except for Sections 31 and 33, there is no penal provision in the Act. The Magistrate is empowered, under Section 18, to pass protection order. Section 19 of the DV Act authorizes the Magistrate to pass residence order which may include

OP(Cr1) No.226/2022 &  
Cr1.M.A.No.1/2022 in  
OP(Cr1) No.286/2019



-:7:-

restraining the respondent from dispossessing or disturbing the possession of the aggrieved person or directing the respondent to remove himself from the shared household or even restraining the respondent or his relatives from entering the portion of the shared household in which the aggrieved person resides etc. Monetary reliefs which can be granted by the Magistrate under Section 20 of the DV Act include granting the relief in respect of the loss of earnings, the medical expenses, the loss caused due to destruction, damage or removal of any property from the control of the aggrieved person and the maintenance for the aggrieved person as well as her children, if any. Section 21 deals with the orders of custody of any child or children to the aggrieved person. Section 22 empowers the Magistrate to grant compensation and damages for the injuries, including mental torture and emotional distress, caused by the domestic violence committed by the respondent. The reliefs under Sections 18 to 22 can be sought in any legal proceedings pending before a civil court, a family court or a criminal court (Section 26). All these reliefs that can be granted by the Magistrate/court are meant for



the welfare and well-being of the women. When the welfare Statute is made with the single focus of the protection of women, such Act has to be treated as remedial to protect the women. It is, thus, clear that various kinds of reliefs which can be obtained by the aggrieved person are of civil nature. At the same time, when there is breach of such orders passed by the Magistrate, Section 31 terms such a breach to be a punishable offence.

9. The Apex Court in **Indra Sarma v. V.K.V.Sarma** (2013 (14) SCALE 448) examined the scope of the DV Act and held that it was enacted to provide a remedy in civil law for the protection of women from being victims of domestic violence. The Division Bench of the Delhi High Court in **Nidhi Kaushik v. Union of India** [(2013) 203 DLT 722] has held that the proceedings under Sections 12 and 18 to 23 of the DV Act are purely civil in nature. In **Vijaya Baskar v. Suganya Devi** (Cr1.O.P.(MD).No.10280/2010 decided on 28/10/2010), the Madras High Court examined the scope of the DV Act and held that the term civil law used in the statement of object and reasons of the Act is not an empty formality and would exemplify and





demonstrate that the proceedings in the first instance should be civil in nature. In **Naorem Shamungou Singh v. Moirangthem Guni Devi** (AIR 2014 Mani.25), the Manipur High Court held that the DV Act provides the remedies available under civil law. In **Narayan Babi Salgaonkar v. Jayshree @Manasi Narayan Salgaonkar** (2017 SCC OnLine Bom 723), the Bombay High Court considered the question whether the application u/s 26 of the DV Act is maintainable in the divorce proceedings and held that an application u/s 26 of the DV Act is very much maintainable in a suit for divorce which is purely a civil proceeding. The Gujarat High Court in **Suo Motu v. Ushaben Kishorbhai Mistry** (2015(4) KLT Online 3520) has held that the provisions of the Act provide for remedial measures for the civil rights of women but the machinery provided is through criminal court. Recently, the Delhi High Court in **S v. J.** (2018 SCC OnLine Delhi 8421) has held that DV Act provides a remedy in civil law for the protection of victims of domestic violence as noted in the statement of objects and reasons. This Court in **Dr.V.K.Vijayalekshmi Amma and Another v. Bindu V. and**



**Others** (2010 (1) KHC 57) has held that the proceedings under the DV Act are of civil nature. This Court again in **Saramma Shyju v. Shyju Varghees and Others** (2011 (3) KHC 235) has held that since the proceedings under the DV Act are civil in nature, an application for amendment of petition is maintainable. The Apex Court in **Kunapareddy @Nookala Shanka Balaji v. Kunapareddy Swarna Kumari and Another** (2016 KHC 6400) observed that the purpose of enacting the DV Act was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is further observed that it is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality.

10. Upon consideration of the provisions under the DV Act and the principles in the aforesaid decisions, it becomes manifest that Act, in general, is of civil kind and the reliefs available



thereunder are of civil nature, but the forum prescribed to secure the reliefs is criminal court. Merely because the jurisdiction is exercised by the criminal court/Magistrate and the provisions of the Code of Criminal Procedure are followed, it does not change the character of the proceedings as criminal proceedings. The character of the proceedings depends not upon the nature of the forum which is invested with authority to grant relief, but upon the nature of the relief sought to be enforced. A proceeding that deals with the right of civil nature does not cease to be so just because the forum for its enforcement prescribed by the statute is the criminal court.

11. Section 28(2) of the DV Act provides that the court can formulate its own procedure for disposal of an application under Sections 12 or 23(2) of the DV Act. The flexibility has been given to the court as the proceedings under Sections 12 and 18 to 23 provide civil remedies whereas S.31 provides a criminal offence. The Apex Court in **Kunapareddy** (supra) considered the nature of proceedings under the DV Act and held that S.28(2) empowers the court to lay down its own procedure and the Magistrate



dealing with the DV Act is empowered to allow the amendment of the application. Thus, it is clear that even though S.28(1) of the DV Act provides that all proceedings under Ss.12 and 18 to 23 and for the offence under Section 31 shall be governed by the provisions of Cr.P.C., the court can still lay down its own procedure while dealing with the applications under sub-section (1) of Section 12 or while considering the grant of interim or *ex parte* ad interim relief orders under sub-section (2) of Section 23. In view of the nature of the proceedings under the DV Act and the procedural flexibility provided under sub-section (2) of Section 28 in deciding the applications under Sections 12 or 23(2), it cannot be said that Court is bound to strictly abide by the provisions of Cr.P.C in all cases. In appropriate cases, it would be open to the court to formulate its own procedure as may be found necessary in the interest of justice, in which event, the court may not have to rely upon Cr.P.C. Thus, the court below went wrong in holding that it has no power to strike off the defence for the reason that the procedure to be followed in the proceedings under Sections 12 and 18 to 23 is that provided under Cr.P.C.



12. The Apex Court in **Rajnesh v. Neha and Another** (2020 (6) KHC 1) referring to the judgments of the High Court on the point upheld the power of the court to strike off the defence if there was non-compliance with the order of payment of maintenance. It was, however, held that striking off the defence is an order which ought to be passed in the last resort, if the court finds default to be wilful and contumacious, particularly to a dependent unemployed wife and minor child. The Division Bench of this Court recently in **Shyju v. Nadeera** (2021(5) KLT 693) has held that the Family Court can strike off the defence on failure to pay interim maintenance ordered by the court where the default is found to be wilful. For all these reasons, I hold that in a proceeding under the DV Act, the defence can be struck off for non-compliance with an order of payment of *pendente lite maintenance* if the default is found to be deliberate and wilful. However, such an order ought to be passed only as a last resort as held in **Rajnesh** (supra).

13. Coming to the facts of the case, it has come out in evidence that the petitioner is a dependent unemployed wife. It



has also come out in evidence that the respondent has the ability to maintain the petitioner. Even though interim maintenance was awarded by the trial court as early as in 2018, not a single month's maintenance is paid so far. A specific direction of this court to deposit ₹2,00,000/- towards arrears of maintenance has been flouted without assigning any valid reason. In these circumstances, I have no hesitation to hold that the failure on the part of the husband to pay interim maintenance ordered by the learned Magistrate as well as this court is wilful and contumacious. Thus, the court below ought to have allowed the prayer for striking off the defence. However, considering the entire facts and circumstances of the case, before striking off the defence, I am of the view that a last opportunity can be given to the respondent to comply with the order of this court.

In the light of the above findings, Ext.P6 order in OP(Cr1) No.226/2022 is hereby set aside. The petitioner shall deposit ₹1,00,000/- (Rupees One lakh only) out of ₹2,00,000/- (Rupees Two lakhs only) directed to be paid by this court as per the judgment in OP(Cr1) No. 286/2019 dated 3<sup>rd</sup> February 2022 within

OP(Cr1) No.226/2022 &  
Cr1.M.A.No.1/2022 in  
OP(Cr1) No.286/2019

-:15:-



a period of fifteen days from today. The balance amount of ₹1,00,000/- (Rupees One lakh only) shall be deposited within a period of fifteen days thereafter. On such deposit, the wife is entitled to withdraw the same. If the deposit is made as above, the trial court shall dispose of the MC itself within a period of two months. If the amounts as mentioned above are not paid, the defence of the respondent shall stand struck off and the trial court shall proceed with the matter in accordance with law.

OP(Cr1) No.226/2022 as well as Cr1.M.A.1/2022 in OP(Cr1) No.286/2019 are disposed of as above.

sd/-

DR. KAUSER EDAPPAGATH  
JUDGE

Rp

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**APPENDIX OF OP (CRL.) 226/2022**

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE ORDER DATED 07/06/2019  
IN CMP 1025/ 2019 IN CRIMINAL APPEAL 97/  
2019
- Exhibit P2 TRUE COPY OF THE COUNTER AFFIDAVIT DATED  
21/12/2018 FILED BY THE RESPONDENT IN  
CRL. M.P. 1087/ 2018 IN MC 34/ 2018
- Exhibit P3 TRUE COPY OF THE ORDER DATED 19/06/2019  
IN CMP 1087/ 2018 IN MC 34/ 2018 PASSED  
BY THE JFCM, NJARAKKAL
- Exhibit P4 TRUE COPY OF THE ORDER DATED 03/02/2022  
IN OP (CRL.) 286/ 2019 PASSED BY THIS  
HON'BLE COURT
- Exhibit P5 TRUE COPY OF THE PETITION FILED AS CMP  
848/ 2022 IN MC 34/ 2018
- Exhibit P6 TRUE COPY OF THE ORDER DATED 19/05/2022  
IN CMP 848/ 2022 IN MC 34/ 2018

RESPONDENT EXHIBITS

- Exhibit R1 (A) True copy of the Order passed by the  
Judicial First Class Magistrate Court,  
Njarakkal in M.C. No. 10/2020 Dated  
10.03.2020
- Exhibit R1 (B) True copy of the CMP No. 771/2020 in  
Criminal Appeal No.150/2020 of the  
sessions court Ernakulam dated  
16.03.2020
- Exhibit R1(C) True copy of the Order passed by the  
Principal Sessions Judge Court,



OP(Crl) No.226/2022 &  
Crl.M.A.No.1/2022 in  
OP(Crl) No.286/2019

-:17:-

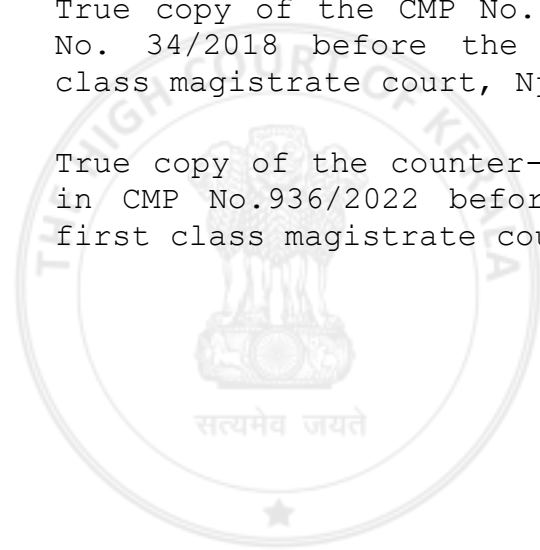


Ernakulam in Crl MP No. 771/2020 in  
Criminal Appeal No. 150/2020 dated  
18.03.2020

Exhibit R1(D) True copy of the affidavit on assets and  
liabilities filed by the Respondent in  
Criminal Appeal 150/2020 in sessions  
court, Ernakulam.

Exhibit R1 (E) True copy of the CMP No.936/2022 in M.C  
No. 34/2018 before the judicial first  
class magistrate court, Njarakkal

Exhibit R1(F) True copy of the counter-affidavit filed  
in CMP No.936/2022 before the judicial  
first class magistrate court, Njarakkal



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