

"C.R"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

MONDAY, THE 1ST DAY OF AUGUST 2022 / 10TH SRAVANA, 1944

MAT.APPEAL NO.181 OF 2013

AGAINST THE ORDER/JUDGMENT IN OP 944/2005 OF FAMILY
COURT, TRIVANDRUM

APPELLANT/PETITIONER:

JUMAILA BEEVI
AGED 43 YEARS
D/O.SULAIKHA BEEVI, VARUVILAKAM, KARIYIL,
KAZHAKUTTOM, THIRUVANANTHAPURAM.

BY ADVS.
SRI.N.MAHESH
SRI.P.RAHIM

RESPONDENT/RESPONDENT:

A.NISSAR
NIFLA MANZIL, KARICHARA, PALLIPPURAM.P.O.,
PIN-695 304.

BY ADVS.
SRI.S.VINOD BHAT
KUM.ANAGHA LAKSHMY RAMAN

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
20.07.2022, ALONG WITH RPF.41/2019, THE COURT ON 01.08.2022
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

MONDAY, THE 1ST DAY OF AUGUST 2022 / 10TH SRAVANA, 1944

RPFC NO. 41 OF 2019

AGAINST THE ORDER DATED 10/05/2017 IN MC 185/2005 (CMP
No.229/2010-M.C. 248/2010) OF FAMILY COURT, TRIVANDRUM

REVISION PETITIONERS/PETITIONERS:

- 1 JUMILA BEEVI.S
AGED 49 YEARS
W/O.NIZAR, KARIYIL VARUVILAKAM VEEDU, MENAMKULAM
VILLAGE, KAZHAKKUTTOM,
THIRUVANANTHAPURAM.
- 2 AMEENA.J
AGED 26 YEARS
D/O JUMAILA BEEVI, RESIDING AT KARIYIL VARUVILAKAM
VEEDU, MENAMKULAM VILLAGE, KAZHAKKUTTOM,
THIRUVANANTHAPURAM.
- 3 AL-AMIN.N
AGED 22 YEARS
S/O.NAZAR, RESIDING AT KARIYIL VARUVILAKAM
VEEDU, MENAMKULAM VILLAGE, KAZHAKKUTTOM,
THIRUVANANTHAPURAM.
- 4 AZNA.J
AGED 20 YEARS
D/O.JUMAILA BEEVI, RESIDING AT KARIYIL VARUVILAM
VEEDU, MENAMKULAM VILLAGE, KAZHAKKUTTOM,
THIRUVANANTHAPURAM.

BY ADVS.
PADMALAYAN.P.P.
SRI.P.A.JOSEPH (J-1448)
SRI.P.RAHIM

Mat.Appeal No.181/13 & R.P (FC) 41/19 3

RESPONDENT/RESPONDENT:

A NIZAR
AGED 56 YEARS
S/O. ASANARUPILLAI, RESIDING AT NIFLA
MANZIL, KARICHIRA, PALLIPPURAM-P.O, KANIYAMPURAM,
THIRUVANANTHAPURAM.

BY ADVS.
SRI.S.VINOD BHAT
KUM.ANAGHA LAKSHMY RAMAN

THIS REV.PETITION(FAMILY COURT) HAVING BEEN FINALLY
HEARD ON 20.07.2022, ALONG WITH Mat.Appeal.181/2013, THE
COURT ON 01.08.2022 PASSED THE FOLLOWING:

“C.R”

**A.MUHAMED MUSTAQUE &
SOPHY THOMAS, JJ.**

Mat. Appeal No.181 of 2013 &
R.P (F.C) No.41 of 2019

Dated this the 1st day of August, 2022

J U D G M E N T

Sophy Thomas, J.

The appellant/wife filed Mat.Appeal No.181 of 2013 against the dismissal of O.P No.944 of 2005 on the file of Family Court, Thiruvananthapuram, and she along with her three children filed R.P (F.C) No.41 of 2019, challenging the order in M.C No.248 of 2010 dated 10.05.2017. In both cases, the respondent is her husband.

2. Brief facts necessary for the appeal could be stated as follows:

The appellant and the respondent are husband and wife. Their marriage was solemnised on 11.03.1990 as per Muslim rites and custom. Three children were born in their lawful

wedlock. At the time of marriage, the appellant was given 50 sovereigns of gold ornaments and 42 cents of land from her family, apart from a gold chain weighing 2 sovereigns and a gold ring weighing 1 sovereign given to the respondent/ husband. By selling away her 50 sovereigns of gold ornaments, the husband purchased plaint 'A' schedule property having 25 cents in his name though it was agreed to be purchased in her name. Only later she could realise that the document was registered in the name of the respondent. The respondent constructed a house in plaint 'A' schedule property expending his own money. But the movables in that house were gifted to the appellant from her family. The respondent ill-treated the appellant demanding more dowry. Her brothers purchased six cents of land in her name, but the respondent compelled her to sell away that property for constructing shop rooms in 'A' schedule property. She sold away that property for Rs.2,40,000/- and that amount was utilised for constructing five shop rooms in 'A' schedule property. In April 2005, the appellant and her children were ousted from the house in the 'A' schedule property, and thereafter he contracted a second marriage. The appellant and her children were abandoned by the respondent and he failed even to pay their

maintenance. So, she filed O.P No.944 of 2005, for declaring her title over 'A' schedule property and to get back 'B' schedule movables kept in the house in 'A' schedule. She along with her three children filed M.C No.185 of 2005 for maintenance from the respondent.

3. The respondent/husband filed counter affidavit denying the claim of the appellant/wife. According to him, the appellant was leading a wayward life and she misused and misappropriated the amounts he had given to her, while he was working abroad. No property was purchased by selling away her gold ornaments, and no property was purchased in her name by her brothers. The house as well as the shop rooms in 'A' schedule were constructed by the respondent using his own hard earned money. Regarding her maintenance claim also, the respondent disowned his liability as he was even doubting the paternity of the children.

4. After formulating necessary issues by the Family Court, the parties went on trial. Both the O.P and M.C were tried together. PW1 was examined and Exts.A1 to A15 were marked from the side of the appellant/wife, and RW1 was examined and Ext.B1 was marked from the side of the respondent/husband.

5. On an anxious consideration of the rival contentions put forward from either side, the Family Court dismissed O.P No.944 of 2005 and allowed M.C No.185 of 2005, awarding monthly maintenance allowance @ Rs.2,000/-, Rs.1,850/-, Rs.2,150/- and Rs.1,600/- respectively to petitioners 1 to 4.

6. Against the order in M.C No.185 of 2005, the respondent/husband preferred R.P (F.C) No.257 of 2009 challenging the quantum of maintenance awarded, as he had lost his job and suffered a stroke as well. This Court, as per judgment dated 18.03.2010, revised and fixed the monthly maintenance allowance @ Rs.2,000/- to the wife and Rs.1,500/- each to the children from 29.10.2005, giving liberty to the parties to move for variance, when circumstances exist under Section 127 of Cr.P.C.

7. Later, the respondent/husband filed C.M.P No.229 of 2010 under Section 127 of Cr.P.C to modify the maintenance order, as he had no assets or source of income, after his return from Gulf. That C.M.P was converted into M.C No.248 of 2010. PWs 1 to 3 were examined and Exts.A1 to A14 were marked from the side of the husband and CPWs 1 and 2 were examined and Exts.B1 to B6 were marked from the side of the wife.

8. The learned Family Court Judge, on analysing the facts and evidence, found that the husband is suffering from renal problem and he needs kidney transplantation and moreover a portion of his body was paralysed as he had suffered a stroke. Finding that the husband had no means to pay the maintenance, the order passed in M.C No.185 of 2005 was altered and it was ordered that the wife and children were not entitled to recover maintenance from the respondent/husband from the date of petition. Challenging that order dated 10.05.2017, the wife and children preferred R.P (FC) No.41 of 2019.

9. Let us have a scrutiny of the facts and evidence, to find out whether any interference is warranted in the judgment and order impugned.

10. Admittedly, the appellant and the respondent are husband and wife. Ext.A3 document shows that, even prior to the marriage, the appellant/wife was having 43 cents of land, settled in her favour by her sister. The respondent is not disputing that fact, and that property is not a subject matter here. Though the appellant contended that, in connection with the marriage, she was given 50 sovereigns of gold ornaments as her patrimony, no evidence is forthcoming to support that

contention. There is no evidence to show that, a gold chain weighing 2 sovereigns and a gold ring weighing 1 sovereign were given to the respondent in connection with the marriage.

11. Though the pleadings of the appellant are to the effect that, her 50 sovereigns of gold ornaments were utilised for purchasing 'A' schedule property, there is no pleading to the effect that, those ornaments were ever entrusted with the respondent. But, when examined before court as PW1, she put forward a new case that her entire 50 sovereigns of gold ornaments were put in the locker of the sister of the respondent and without informing her, those ornaments were sold away and the sale proceeds were utilised to purchase 'A' schedule property. At the same time, she has got a contention that, the respondent had agreed to purchase 'A' schedule property in her name. But, only later she came to know that the said property was purchased in the name of the respondent himself.

12. The appellant is admitting that, at the time of marriage and even thereafter, the respondent was employed in Gulf countries drawing monthly income of Rs.1 lakh. The appellant had no job or income of her own. In the absence of evidence either to show that, the appellant was having 50 sovereigns of

gold ornaments at the time of marriage, or to prove entrustment of that gold with the respondent or his sister, we could not presume that 'A' schedule property was purchased in the name of the respondent, by selling away the gold ornaments of the appellant.

13. The appellant contended that, the respondent compelled her to bring money from her family for constructing a house in 'A' schedule property. Her case is that, when there was pressure to bring money from home, her brothers purchased six cents of land in her name. If she was compelled to bring money, there was no probability for her brothers to purchase a landed property in her name. According to her, that six cents of land was subsequently sold away for a sale consideration of Rs.2,40,000/- and with that amount, five shop rooms were constructed in 'A' schedule property. But, no evidence is forthcoming to substantiate that fact. According to the respondent, he himself purchased 'A' schedule property, constructed a house therein, and later constructed shop rooms also in that property, for which no gold or money of the appellant was utilised.

14. During cross examination, PW1 admitted that, the sale proceeds of her property was never entrusted with the husband, and it was deposited in her own bank account. Admittedly, she sold away her 43 cents to her brother, and the sale proceeds were deposited in her account, and that amount also was never given to the respondent. Subsequently, she returned that money to her brother and got the property reconveyed in her name. There is nothing to show that 'A' schedule property was purchased and the house and shop rooms were constructed with the funds of the appellant. So, the Family Court rightly found that she was not entitled for a declaration as prayed for, with respect to 'A' schedule property.

15. Now coming to the 'B' schedule movables, according to the appellant, 38 items in 'B' schedule belonged to her and it was gifted to her from her family. But, during cross examination, she admitted that, the gas connection which she had claimed is in the name of her husband. The motorcycle claimed by her was brought by the husband from Gulf. According to her, item Nos.1 to 28 were given from her family in connection with the housewarming function. But, there is no evidence to show that 'B' schedule movables were either purchased or gifted to the

appellant from her family. Admittedly, she had no job or income at the time of marriage or even after that. The Family Court rightly rejected her claim for recovery of 'B' schedule movables also. Hence her Mat.Appeal No.181 of 2013 is liable to be dismissed.

16. Coming to R.P (F.C) No.41 of 2019, the Family Court, by the impugned order dated 10.05.2017, altered the order in M.C No.185 of 2005, finding that the appellant and her children are not entitled to recover maintenance from the respondent from the date of the petition. It is not specified from the date of which petition the order was altered.

17. Originally in M.C No.185 of 2005, maintenance was awarded to the wife and children finding that they have no means for their sustenance, and the respondent/husband who was having sufficient means was not maintaining them willfully. Though the husband approached this Court by filing R.P(FC) No.257 of 2009 against the maintenance awarded in M.C No.185 of 2005, with similar allegations of stroke and no means, the order was not cancelled, but it was only revised fixing the maintenance @ Rs.2,000/- to the wife and Rs.1,500/- each to the children. That judgment was dated 18.03.2010. Again the

respondent approached the Family Court for modification of the maintenance allowance under Section 127 of Cr.P.C availing the liberty granted by the High Court to move for variance.

18. The Family Court found that the respondent was suffering from kidney problem and a portion of his body was paralysed due to stroke. He was found to be a man of no means, incapable of doing any job also. There was no contra evidence from the part of the wife to show that he was having any income or assets in his name. Further she had no case that, he was physically fit to do any job to earn income therefrom. So, the finding of the Family Court that the order passed in M.C No.185 of 2005 requires alteration, is well founded. But, in fact, the maintenance allowance prevailing then was the one modified and fixed by this Court in R.P (F.C) No.257 of 2009. Since the parties were given liberty by this Court to move for variance, the Family Court was empowered to alter or modify that order, on being satisfied that circumstances exist under Section 127 of Cr.P.C.

19. Now the question to be answered is what shall be the crucial date on which an order of cancellation of maintenance allowance to take effect? Is it the date of the application for cancellation or the date of the order. To put it otherwise whether

the order of cancellation of maintenance operates prospectively or retrospectively?

20. In the case on hand, the Family Court cancelled the maintenance order from the date of application, which means the cancellation was ordered retrospectively.

Section 125(2) of Cr.P.C reads thus:

“Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be”.

So, maintenance allowance ordered under Section 125 Cr.P.C shall be payable either from the date of order, or if so ordered it can be from the date of application.

21. Section 127(1) of Cr.P.C empowers the Magistrate to alter the monthly maintenance awarded under Section 125 Cr.P.C, on proof of a change in the circumstances and Section 127(2)Cr.P.C gives the power to the Magistrate to cancel or vary the order. The legislature under Section 125(2) Cr.P.C has given power to the Magistrate to date back the order to the date of application, but such a power is not there under

Section 127(2) of Cr.P.C. So, the order of cancellation shall be effective only from the date of order, and it cannot date back to the date of application. Till the order is altered, modified or cancelled, the earlier orders will remain effective. So the order of cancellation of maintenance always operates prospectively and not retrospectively.

22. In **Balraj Singh vs. Balkar Singh** (1983 (2) Crimes 506), the Punjab & Haryana High Court held that, Section 127(2) of the Code of Criminal Procedure enjoins that where after an order for maintenance passed in favour of the wife under Section 125(2) of the Code, the husband obtains a decree necessitating the cancellation of the order, the court shall cancel or vary the order. The legislature under Section 125(2) Cr.P.C has given power to the Magistrate to date back the order of the application, but does not give any such power under Section 127(2) of the Code. We cannot read a power into the Code which is not there. The order of cancellation of maintenance always operates prospectively and not retrospectively. This position was reiterated by the Rajasthan High Court in **Harikishan vs. Smt.Shantidevi** (1989 CrLJ 439) as well.

23. So, the impugned order altering/cancelling the maintenance order in M.C No.185 of 2005 from the date of the petition, is not valid or proper in the eye of law. The cancellation order will take effect only from the date of cancellation i.e. from 10.05.2017. The R.P (F.C) is allowed to that extent.

In the result, Mat.Appeal is dismissed and R.P (F.C) is allowed in part, setting aside the order cancelling the maintenance awarded in M.C No.185 of 2005 from the date of petition. It is further clarified that, the revision petitioners are entitled to recover the arrears of maintenance as ordered in M.C No.185 of 2005 and as modified in R.P (FC) No.257 of 2009 till 10.05.2017, and the cancellation order will take effect only from the date of order i.e. 10.05.2017. No order as to costs.

Sd/-

**A.MUHAMED MUSTAQUE
JUDGE**

Sd/-

**SOPHY THOMAS
JUDGE**

Mat.Appeal No.181/13 & R.P (FC) 41/19 17

APPENDIX OF MAT.APPEAL 181 OF 2013

ANNEXURES :

ANNEXURE R1 CERTIFIED COPY OF THE ORDER DATED
10.05.2017 IN M.C 185/2005 OF THE
FAMILY COURT, THIRUVANANTHAPURAM.

ANNEXURE R2 ATTESTED COPY OF THE DISABILITY
CERTIFICATE ISSUED TO THE RESPONDENT.

True Copy

P.S to Judge

smp

APPENDIX OF RPFC 41/2019

PETITIONER ANNEXURES

- ANNEXURE A1 TRUE COPY OF THE COMMON ORDER DATED
16/1/2009 IN O.P.NO.944/05 AND
M.C.NO.185/05 OF THE FAMILY
COURT,TRIVANDRUM.
- ANNEXURE A2 TRUE COPY OF THE ORDER DATED 18/03/2010
IN R.P.(F.C.)NO.257/2009 OF THE HON'BLE
HIGH COURT OF KERALA,M.C.185/2005 OF
FAMILY COURT,TRIVANDRUM.
- ANNEXURE A3 TRUE COPY OF THE ORDER DATED 10/5/2017
IN.M.C No.185/2005 (CMP.NO.229/2010
(M.C.NO.248/2010)OF THE FAMILY
COURT,TRIVANDRUM.

True Copy

P.S to Judge

smp