

**(2012) 03 BOM CK 0139**

**In the Bombay High Court**

**Case No :** Writ Petition No. 747 of 2012 in Petition No. C-20 of 2010

Mr. Rajesh H. Parikh E/15, Bussa Apartment, B.M. Bhargave  
Marg Santacruz (W), Mumbai-400054

APPELLANT

Vs

Mrs. Deepika R. Parikh E/15, Bussa Apartment, B.M.  
Bhargave Marg Santacruz (W), Mumbai-400054 <BR> Mrs.  
Deepika R. Parikh E/15, Bussa Apartment, B.M. Bhargave  
Marg Santacruz (W), Mumbai-400054 Vs Mr. Rajesh H. Parikh  
E/15, Bussa Apartment, B.M. Bhargave Marg Santacruz (W),  
Mumbai-400054

RESPONDENT

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**Date of Decision :** 07-03-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21, Order 15 Rule 5, 151  
Hindu Adoptions and Maintenance Act, 1956 — Section 18  
Hindu Marriage Act, 1955 — Section 13(1)IA  
Penal Code, 1860 (IPC) — Section 498A

**Citation :** (2012) 3 ALLMR 9 : (2012) 3 BomCR 28 : (2012) 3 MhLj 331

**Hon'ble Judges :** Mridula Bhatkar, J

**Bench :** Single Bench

**Advocate :** Taubon F. Irani, for the Appellant; R.J. Lalwani, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Mrs. Mridula Bhatkar, J.—Rule. Rule made returnable forthwith. By consent of parties, heard finally at the stage of admission. Judge, Court No. 3 of the Family Court, Bandra, Mumbai by its order dated 18.11.2011 has allowed the application of the respondent-wife for striking off the defence on the ground of non compliance of the Court's order of maintenance.

2. The petitioner is a husband of the respondent. They got married on 3.5.1983. However, the marriage did not sail smooth and parties approached the Court by filing petitions against each other. Wife filed petition for divorce bearing No. A-1796 of 1997 u/s 13(1) IA of Hindu Marriage Act of 1955. Thereafter the petitioner-husband also filed petition for divorce on the ground of cruelty which is

numbered as A-1803/1998. Proceedings u/s 498-A of IPC are also pending against the husband in the criminal court. The parties arrived at an agreement to settle the matter amicably and filed consent terms on 31.8.2004. One of the consent terms agreed by the parties was that the parties will reside together in the flat at Bussa Apartment, Santacruz and if respondent-wife was required to leave the said flat and stay separately, in that event, the petitioner-husband should pay sum of Rs. 8 lakhs before removing the respondent-wife from the house. Both the parties agree to withdraw the respective petitions filed against each other. However, it appears that the parties did not behave as per the consent terms. So the petitioner-husband filed a Petition No. 1815 of 2006 for compliance of the consent terms. In the said petition, wife filed the Application No. A-1365 of 2006 and prayed for interim maintenance. The Court while deciding the said application on 14.10.2008 fixed the amount of maintenance of Rs. 3000 per month to the wife. Petitioner-husband found that it is not possible for him to deposit the amount of maintenance of Rs. 3000, hence withdrew the said petition on 29.8.2009.

3. Respondent-wife thereafter filed Petition No. C-20 of 2010 u/s 18 of the Hindu Adoption & Maintenance Act of 1956. Respondent filed written statement on 25.2.2011. In the said petition, respondent-wife filed an application for striking off the defence for non compliance of the order of maintenance passed by the Court in the Petition No. A-1365 of 2006. He demanded that respondent should pay the arrears from 14.9.2006 till 29.8.2009 i.e the date of the withdrawal of the petition. The application was contested by filing reply by the petitioner-husband. The learned Judge of the Family Court held that the petitioner-husband has not paid even a single paisa and arrears of maintenance amount is more than Rs. 1 lakhs. The Judge held that on failure of the compliance of the order of interim maintenance, his defence is struck off under the provisions of Order-39 Rule-11 read with Section 151 of CPC.

4. Learned Counsel for the petitioner argued that the respondent-wife has not complied with the consent terms and said consent terms are binding on the parties as they have signed and accepted the terms before the Court. She submitted that the petitioner is always ready and willing to perform as per the consent terms. Petitioner-husband is ready to pay Rs. 8 lakhs to the respondent in lieu of the said flat and she should vacate the same. It is submitted that the order passed by the Family Court Judge striking off the defence is a wrong order.

5. In reply, Learned Counsel for the respondent-wife has submitted that not only the consent terms were flouted by the respondent but the order of the court to pay maintenance of Rs. 3000 per month is disobeyed by the husband. He submitted that the order of striking defence can be passed by the Family court u/s 151 of CPC. He relied on judgments of Neeta Shreyas Joshi Vs. Shreyas S. Joshi reported in AIR 1991 Guj 251 and also on Vanmala Hatkar Vs. Maroti Sambhaji Hatkar, . He submitted that the court is also empowered to pass order under Order 39 Rule-11 of CPC.

6. Admittedly, the order of maintenance of Rs. 3000/- per month passed by the court is not obeyed by the petitioner-husband. The amount of maintenance claimed is only between the period when the order was passed and when the petition was withdrawn. Technically when the petition was withdrawn the order of maintenance of Rs. 3000/- did not survive from the date of the withdrawal of the petition. Naturally, the demand of arrears is made till the withdrawal of the petition which is more than Rs. 1 lakhs. It is true that for recovery of the said arrears, respondent-wife has a remedy of file separate recovery petition or a petition for contempt. Question is whether disobedience of that order can be taken into account as a ground to strike off the defence and whether Court has such power to do so?

7. The court has power to strike off the defence under order 39 rule 11 where the proceedings are taken out for temporary injunction and interlocutory orders. u/s 151 inherent power vests with the Court to enable it to pass such orders which are necessary to meet the ends of justice and to prevent abuse of process of law. Maintenance may be permanent or temporary relief which wife can claim in any matrimonial proceedings. The proceedings may be for divorce, may be for separation or for custody or injunction. Under Code of Civil Procedure, Court has power to strike off defence of the erring party. Such power is given to the Court under Order-11 Rule-21. Similarly under Order 15 rule-5 which is a state amendment introduced by UP & Punjab & Haryana like the amendment under Order-39 Rule 11 which is a state amendment of State of Maharashtra. A court has power to strike off defence of a party if that party does not comply or disobey the orders of the court. It is a courts expression of disapproval towards the conduct of the defaulter. To strike off defence is a discretionary power but may have drastic effects; so not to be used arbitrarily but it is to be used to reprimand the party who has no regard for the orders and procedure of the Court. It is a kind of punitive action taken by the Court.

8. On this background, the impugned order passed by the Family Court is to be looked into. The husband has filed a petition for compliance of the consent terms and in that petition, Court has passed the order of interim maintenance of Rs. 3000/- per month against the husband. The petition was pending. As per the consent terms, the petitioner showed readiness to pay Rs. 8 lakhs towards the permanent maintenance if wife leaves the flat. The husband showed his readiness in the said petition demanding compliance of the consent terms. However, the order of the interim maintenance passed by the Court was not complied by the petitioner. Once the order of interim maintenance was passed by the Court, it was binding on husband to pay the interim maintenance. It was not a permanent maintenance but it was an interim maintenance which is to be paid by the husband towards a stop-gap financial arrangement made in favor of the wife to enable her to maintain herself. He flouted the orders of the Court by withdrawing the said petition. The intention to withdraw the petition was neither innocuous nor honest. The intention to avoid maintenance and to disobey the order of the court was explicitly clear. Withdrawal of petition was a cunning move

to frustrate the court order. No doubt, the respondent-wife could have filed separate petition for recovery of the arrears of the maintenance amount, for that, she needs to file and pursue one more petition. In this petition for divorce filed by her in the Family Court a request to strike off his defence was made as he did not pay the arrears of the maintenance in the said withdrawn suit.

9. In the cases pertaining to the matrimonial relations an issue of maintenance is common and is raised in all those proceedings. So the Court has discretionary power to ask the defaulter husband to clear the arrears due in one petition while entertaining the other matrimonial proceedings. No hyper-technical approach can be taken by the Judge but litigant friendly approach is required. Various matrimonial disputes arise wherein incident of marriage is the root cause and other proceedings like restitution of conjugal rights, maintenance under various Acts, petition for divorce and custody etc. branch out of the same issue of matrimonial discord. Thus it is one and the same continuous process wherein the wife's right to maintain uninterruptedly flows. This right is acknowledged by the law hence to be honored and vindicated by the Court. Therefore, if husband has not paid the arrears, it is up to the Judge to consider all the prevailing circumstances and if he thinks fit, just and appropriate in the totality of circumstances to strike off the defence, then he is justified to do so. Thus the order passed by the Family Court Judge is correct, legal hence it is maintainable. I find no merit in the petition. Writ petition is dismissed. Six weeks time is granted to the petitioner-husband to deposit the amount to clear the arrears in the Family Court and respondent-wife is allowed to withdraw the same.