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ALEXANDER THOMAS, J.

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R.P(F.C)No.115 of 2019

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Dated this the 23rd day of May, 2019

ORDER

The factual aspects projected in this revision petition is as follows:

2. That the revision petitioner is the petitioner in M.C.No.124/2016 on the files of the Family Court, Kalpetta filed under Sec.125 of the Cr.P.C., 1973 [hereinafter referred to as the Code] seeking maintenance from the respondent who is her husband. The petitioner is aggrieved by the judgment dated 08.01.2019 in M.C.No.124/2016 whereby the petitioner seeking maintenance was dismissed on the ground that the petitioner was living in adultery and hence she was not entitled for maintenance as per Sec.125(4) of the Code. Her claim was further rejected on the ground that the she was employed in an Akshaya centre.

3. It is contended that the learned Family Court judge erred in finding that "the case of CPW1 that PW1 is living in adultery is most probable". This is in spite of the fact that there was no ocular or documentary evidence adduced by the respondent to prove such adultery. Even assuming the version of the respondent was accepted, it only referred

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to a single instance of unchastity or lapse of virtue on the part of the petitioner. It is trite law as held by this Court in ***Sandha v. Narayanan*** [1999(1) KLT 688] that in order to constitute the "act of living in adultery" there should be a continuous course of conduct or living in the State of quasi-permanent union with the adulterer. It was held that a single act of unchastity or a few lapses of virtue will not disentitle a wife from claiming maintenance from her husband under Sec.125 of the Code. The dictum in **Sandha's case** was followed in ***Sheela and another v. Albert Hemson @ James*** [2015 (1) KLT SN 113]. That it is an admitted fact that the petitioner is living with her parents and thus there is no evidence whatsoever to indicate that the petitioner was continuing to live in adultery. Thus, the impugned judgment of the learned Family Court Judge is erroneous and legally unsustainable, it is urged.

4. It is further contended that the learned Family Court Judge erred in failing to consider the relevance of the employment of the petitioner in the light of the decision of the Apex Court in ***Chaturbhuj v. Sitabhai*** [(2008) 2 SCC 316]. The Apex Court held in **Chaturbhuj's case** that the term "unable to maintain herself" means the inability of the wife to maintain herself in the manner which was available to her while she was residing with the husband and would not take within its ambit, the

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efforts made by the wife to survive somehow after the desertion. The petitioner had a consistent case that she was only a trainee at the Akshaya centre owned by one Bindhu Elias. The respondent did not adduce any evidence to show that the income generated from the employment of the petitioner was sufficient to maintain herself in the same stature as she was while residing with the petitioner. The onus is on the husband to prove that the wife had sufficient income to maintain herself in the manner as laid down in **Chaturbhuj's case** (supra). In the absence of any such evidence, the impugned rejection of the petitioner's claim for maintenance is most erroneous and illegal, it is urged.

5. Heard Sri.Nirmal V.Nair, learned counsel appearing for the petitioner/wife. Though notice has been duly served on the respondent/husband, the said party has not entered appearance.

6. After perusal of the pleadings and materials on record in this case and after consideration of various aspects of the matter, it is seen that some of the crucial contentions canvassed by her are against the case of adultery set up against her, has not been properly considered by the Family Court. It is pertinently contended that there has been no ocular or documentary evidence adduced by the respondent to prove such adultery and that even assuming that the version of the respondent was accepted, it

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has only referred to a single instance of unchastity or lapse. That the court below has not considered the effect of dictum laid down in various cases as in ***Sandha v. Narayanan*** [1999(1) KLT 688] that in order to constitute the "act of living in adultery" there should be a continuous course of conduct or living in the State of quasi-permanent union with the adulterer and that a single act of unchastity or a few lapses of virtue will not disentitle a wife from claiming maintenance from her husband under Sec.125 of the Cr.P.C. The said dictum has been also followed in various other cases as in ***Sheela and another v. Albert Hemson @ James*** [2015 (1) KLT SN 113]. It is further pointed out that there is evidence of record to show that the petitioner is living with her parents and accordingly, it is contended by the petitioner that there is no evidence whatsoever to indicate even remotely that the petitioner was continuing to live in adultery in a State of quasi-permanent union with the alleged adulterer, etc.

7. In the light of these aspects, this Court is of the considered opinion that the said crucial aspects has not been properly considered and adverted to by the learned Family Court.

8. Further the petitioner would also contend that the court below has failed to consider the relevance of the employment of the petitioner, in

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the light of the decision of the Apex Court in the decisions as in ***Chaturbhuj v. Sitabhai*** [(2008) 2 SCC 316], wherein it has been held that the term "unable to maintain herself" means the inability of the wife to maintain herself in the manner which was available to her while she was residing with the husband and would not take within its ambit, the efforts made by the wife to survive somehow after the desertion. Further it is pointed out that it is a specific case of the petitioner that she was only a trainee at the Akshaya centre owned by one Bindhu Elias has not been properly considered. Further it is contended that the respondent did not adduce any evidence to show that the income generated from the employment of the petitioner was sufficient to maintain herself in the same stature as she was residing with the petitioner and that it is seen that the onus is on the husband to prove that the wife had sufficient income to maintain herself in the manner as laid down in the cases as in **Chaturbhuj's case** (supra). After considering these contentions, this Court is of the view that the said aspects have also not been properly and effectively considered by the Family Court in its proper perspective.

9. The petitioner has also raised certain contentions based on Annexure.A-1, which is stated to be a report dated 26.01.2017 of the Investigating Officer in Crime No.707/2016 of Ambalavayal Police Station.

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It is pointed out that the respondent has alleged various offence, including that of commission of adultery as against the petitioner herein and allegations were made as against one Aziz and based on the private complaint of the respondent herein, Crime No.707/2016 of Ambalavayal Police Station was registered for offences punishable under Secs.341, 323, 497 & 506(1) read with Sec.34 of the IPC and Sec.75 of the Juvenile Justice (Care and Protection) Act, 2015. It is pointed out that as there was no cogent evidence for the offence of adultery and the allegation of criminal intimidation, the Investigating Officer had submitted Annexure.A-1 report before the learned Magistrate, seeking permission to reduce the charges under Sec.497 and 506(1) of the IPC and subsequently, the police submitted the final report only for the offences under Secs.341 and 323 read with Sec.34 of the IPC and Sec. 75 of the Juvenile Justice (Care and Protection) Act, 2015. That even as per the allegations in the said final report, it only referred to the incident wherein, accused No.1, Sri.Aziz taken away the child of the petitioner and the respondent to the vacant land and wrongfully restrained him and caused harm to him and that there was no evidence of commission of adultery on the part of the petitioner. The petitioner has also placed reliance on Annexure.A-2 certificate dated 12.02.2019 issued by the abovesaid Bindu Elias that the petitioner has not

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been employed as a staff in the Akshaya centre run by the said person and that the petitioner was engaged only as a data entry operator apprentice and she was only given expenses for bus charge, etc.

10. After considering various aspects of the matter and after perusal of the pleadings and materials on his part, this Court is of the considered view that the matter requires serious re-consideration in the hands of the Family Court and the matter deserves to be thus remitted. To effectuate such a remit, it is ordered that the impugned judgment dated 08.01.2019 rendered by the Family Court in M.C.No.124/2016 will stand set aside. The main matter in M.C.No.124/2016 will stand remitted to the Family Court, Kalpetta for consideration and disposal afresh, after hearing both sides. If the parties want to produce additional evidence, they may be given reasonable opportunity in that regard. As regards the contentions raised by the petitioner based on Annexures.A-1 & A-2 produced along with this revision petition, it is for the petitioner to adduce evidence in that regard if the materials in that regard has not so far been placed on record before the Family Court. The abovesaid contentions of the petitioner regarding the applicability of the dictum in ***Sandha v. Narayanan*** [1999(1) KLT 688], ***Sheela and another v. Albert Hemson @ James*** [2015 (1) KLT SN 113], ***Chaturbhuj v. Sitabhai*** [(2008) 2 SCC 316], etc.

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should be considered in detail by the Family Court. After hearing both sides, the Family Court may pass orders disposing of the M.C, without much delay, preferably within a period of three months from the date of production of a certified copy of this judgment.

With these observations and directions, the above R.P(F.C) will stand finally disposed of.

Sd/-

ALEXANDER THOMAS
JUDGE

vgd