

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. No.2602/2010

% Judgment reserved on : 06th January, 2012
Judgment delivered on:30th January, 2012

POONAM KHANNA

..... Petitioner
Through : Petitioner in person.

versus

V P SHARMA & ANR

.... Respondents
Through : Respondent No.1 in person.
Mr.Navin Sharma, APP for State/R-2.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. Instant petition is being filed under Section 482 Cr.P.C. against the impugned order dated 29.07.2010 passed by learned Additional Sessions Judge, whereby the revision petition of respondent No.1 was allowed and the order dated 23.01.2010 passed by learned Magistrate granting interim maintenance to the tune of ₹ 5,000/- per month to the petitioner was set aside.

2. Being aggrieved, on 24.02.2010, respondent No.1 filed Revision Petition No.19/2010 under Section 397 Cr. P.C. seeking dismissal of interim order of maintenance. The same was disposed of vide impugned order dated 29.07.2010 while setting aside the interim

maintenance and allowed the revision petition of respondent.

3. It is pertinent to mention that petitioner and respondent No.1 both are appearing in person.

4. Petitioner has raised the issue that as per the settled law, the interlocutory order being the interim maintenance order cannot be challenged by way of revision petition under Section 397 Cr. P.C. Secondly, she has raised the issue that learned Additional Sessions Judge, while setting aside the order passed by learned Magistrate has ignored the fact that on the presumption that respondent may be able to prove the means of petitioner in future by placing additional material on record, which is against settled law that the interim maintenance must be decided on the material available on record and not on the hypothecation that the material likely to be adduced at the time of evidence.

5. Further petitioner has submitted that in Revision Petition No.19/2010, learned Additional Sessions Judge, has not considered this fact that petitioner being the wife of respondent is unemployed and is not earning her livelihood. Learned Additional Sessions Judge, has ignored the submission made by petitioner that the respondent / husband is having rental income from the properties.

6. Vide order dated 23.01.2010, interim maintenance was awarded in favour of petitioner on the basis of the material placed on record by both the parties. However, vide the impugned order, learned Additional Sessions Judge, has set aside the award of interim maintenance on the

presumptive and hypothecated ground that the respondent may placed the requisite material required to cancel the interim maintenance before learned Trial Court. She has referred to **Savitri v. Govind Singh Rawat** **AIR 1986 SC 984** and relied upon para No.6 thereof which reads as under:-

“In view of the foregoing it is the duty of the court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made under section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. It is quite common that applications made under section 125 of the Code also take several months for being disposed of finally. In order to enjoy the fruits of the proceedings under section 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the court. Every court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim 'ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist.) (Vide Earl Jowitt's Dictionary of English Law 1959 Edn. P.1797). Whenever anything is required to be done by law and it is found impossible to do that thing unless something not

authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice Caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties. The magistrate, may, however, insist upon an affidavit being filed by or on behalf of the applicant concerned stating the grounds in support of the claim for interim maintenance to satisfy himself that there is a prima facie case for making such an order. Such an order may also be made in an appropriate case ex parte pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the respondent is heard. If a civil court can pass such interim orders on affidavits, there is no reason why a magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a magistrate under section 125 of the Code, we feel that the said provision should be interpreted

as conferring power by necessary implication on the magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to the pending final disposal of the application. In taking this view we have also taken note of the provisions of section 7 (2)(a) of the Family Courts Act, 1984 (Act No. 66 of 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by magistrates under section 125 of the Code to the Family Courts constituted under the said Act.”

7. The instant petition is being filed on the ground that the respondent has not placed any material on record showing the earning or employment of the petitioner. By quoting the qualification of the petitioner to earn is not contemplated under Section 125 (1) (a) Cr. P.C. and a wife, who sacrifices her lucrative career for the sake of her children besides herself being ill cannot be denied maintenance by her husband/respondent as held by various Courts in the decisions; **Vijay Singh Yadav v Rajesh Yadav & Anr 2009 (III) DRJ 516** wherein para No.5 reads as under:-

*“5. I have carefully considered the submissions made by counsel for the petitioner. There is no doubt that no revision is permissible under Section 397(2) Cr. P.C. against an interlocutory order. However, in appropriate cases, the High Court in exercise of its powers under Section 482 is competent enough to intervene or set aside or modify even an interlocutory order in case it has resulted in abuse of process of law or is causing grave miscarriage of justice. For this purpose, the judgments which have been relied upon by counsel for the petition in case of **Krishnan &***

Anr. v. Krishnaveni & Anr. & in case titled Delhi Labour v. Raj (supra) are not in dispute.”

8. She also relied upon **Rakhi v. Pankaj Kumar 123 (2005) DLT 262** wherein in para No.5 this Court has held as under:-

“5. Looking at the matter as it stands it appears that the judgment under challenge is erroneous and that the learned Additional Sessions ought not to have interfered at a stage when the Metropolitan Magistrate fixed only the interim amount in the proceedings under Section 125 Cr. P.C.”

9. Petitioner has further pointed out that learned Additional Sessions Judge, vide the impugned order has cancelled the award of interim maintenance to the petitioner not on the basis of any material placed on record, but on the hypothecation that required material may be placed before the Court by respondent/husband later on in future.

10. On the other hand, respondent No.1 has filed his reply whereby he has taken preliminary objection about the maintainability of petition. He has submitted that the petitioner has concealed important / material facts from this Court because these facts render this petition to be non-maintainable. The said facts are as under:-

(i) The petitioner proposed a settlement deed in the Court of Smt.R.S.Nag on 27.05.2002 which envisaged that the parties will seek divorce, petitioner will not claim any maintenance and respondent will forego his lien over the DDA flat as also a shop in property No. N-15, Malviya Nagar, and property No.C-18, Shivalik, shall be sold off and sale proceeds shall be divided equally between the parties.

(ii) The petitioner backtracked from the said settlement and continued with the litigation vigorously. Another settlement was executed on 02.04.2003 which was ultimately registered. Only difference between vis-a-vis previous settlement was that respondent reduced his share in the property C-18, Shivalik from 50 per cent to 45 per cent.

(iii) On 03.05.2003, the divorce obtained by mutual consent in terms of settlement dated 02.04.2003 and petitioner withdrew her case in the guardianship court and petition under Section 125 Cr. P.C. on behalf of his son. The joint petition for mutual consent divorce, statement on oath as well as final order expressly stipulating that the petitioner shall not claim any maintenance through rest of the life.

(iv) The petitioner filed the application under The Protection of Women from Domestic Violence Act, 2005 claiming maintenance and same was dismissed by learned Trial Court as well as Sessions Court as non-maintainable in the background of settlement dated 02.04.2003.

(v) On the basis of settlement dated 02.03.2003, this Court quashed four criminal cases in Criminal M.C.No.3337/2007 a petition filed under Section 482 Cr. P.C. by respondent. The petitioner preferred to challenge the said judgment in the Supreme Court, whereupon the petitioner's appeal was dismissed, thus adding sanctity to the settlement.

11. Respondent has further stated in the reply on question of law that learned Additional Sessions Judge cancelled the interim maintenance on the basis of material placed on record including the registered

settlement deed dated 02.04.2003 and para No.30 of the Trial Court order dated 24.07.2009 reads as under:-

“Thus, it is clear that grant of maintenance under Section 125 Cr. P.C. certain conditions are required to be fulfilled and it would be a matter of trial whether the respondent has refused or neglected to maintain the petitioner, whether the petitioner is unable to maintain herself and whether the respondent has sufficient means to maintain the petitioner”

12. It is further submitted that the question of law is not against the orders of learned Additional Sessions Judge dated 04.06.2010 as alleged and the petitioner has received most of the interim maintenance till the said order dated. Learned Additional Sessions Judge in para No.13.0 observed as under:-

“It is pertinent to mention here that there is no mode of recovery, if later on it is found that respondent / wife has sufficient means to maintain herself.”

13. Respondent has also filed additional submissions and submitted that in para No.12.2 of the impugned order, learned Additional Sessions Judge has opined as under:-

“I consider that in view of these peculiar facts and circumstances, parties are required to prove whether the settlement arrived into between them was only illusory and sufficient arrangement not made for the future maintenance of the respondent/ wife or that whether respondent/wife is unable to maintain herself or whether the petitioner/ husband has sufficient means or not. I consider that parties are required to lead evidence in this regard.”

14. Respondent had handed over the shop in property No.N-15, Malviya Nagar, New Delhi and DDA flat in Khirki Village at the time of settlement / divorce by mutual consent. The petitioner has sold off these properties and purchased a double story 250 yards house bearing No.758, Sector 7, Punchkula and is getting rent of around ₹ 40,000/- per month. Proof thereof is annexed as Annexure R-1.

15. The petitioner continuously living in the same house and is maintaining the same living standard in contrast to the respondent, who has been forced to live in an unauthorised colony and that too on rent.

16. Learned Additional Sessions Judge in para No.13.0 observed that *“that there is no mode of recovery, if later on it is found that respondent / wife has sufficient means to maintain herself.”*

17. During her cross-examination, in the petition under Section 125 Cr. P.C. on behalf of son, petitioner while asserting that she is living on the mercy of relatives, friends, but failed to name even a single person from whom she had taken debt or loan and this fact goes to prove that she has sufficient means to maintain herself.

18. Petitioner has filed her income tax returns till the year 2007-08. And declared her income to be ₹ 3.31Lacs in comparison to ₹ 2.40Lacs of the respondent. Annexure R-3 has been placed on record in this regard.

19. It is further stated that because she initiated litigation on her income and the income of a practicing gynaecologist is always in cash, therefore, stopped filing her tax returns. Failing in her endeavour to

fulfil her greed under Prevention of Domestic Violence against Women Act, because the case was ruled to be non-maintainable in the background of settlement dated 02.04.2003, she took the shelter of Section 125 Cr. P.C. and filed the petition, therein.

20. It is stated, the petitioner has concealed the fact that just before filing the petition mentioned above, she got admitted her adopted daughter to a prestigious, high end public school and is spending more than ₹ 30,000/- per month upon her.

21. The respondent has stated in the reply to the instant petition that the wife should maintain standard of living, comparable to the husband as per the provision enshrined under Section 125 Cr. P.C. In the instant case, the petitioner is living in partially self owned house, whose monthly rental is ₹ 80,000/- whereas respondent is living in a rented house in an unauthorised colony whose rental is ₹ 8,000/- per month. Moreover, she is running a nursing home in the basement of property No.C-18, Shivalik, New Delhi whose monthly rent is ₹ 25,000/- per month.

22. I note that the petitioner proposed a settlement deed in the Court of Smt.R.S.Nag on 27.05.2002 which envisaged that the parties will seek divorce, petitioner will not claim any maintenance and respondent will forego his lien over the DDA flat as also a shop in property No.N-15, Malviya Nagar, and property No.C-18, Shivalik, shall be sold off and sale proceeds shall be divided equally between the parties.

23. Another settlement was executed on 02.04.2003 which was

ultimately registered. The only difference between vis-a-vis previous settlement was that respondent reduced his share in the property C-18, Shivalik from 50 per cent to 45 per cent. On 03.05.2003, the divorce obtained by mutual consent in terms of settlement dated 02.04.2003 and petitioner withdrew her case in the guardianship court and petition under Section 125 Cr. P.C. on behalf of his son. The joint petition for mutual consent divorce, statement on oath as well as final order expressly stipulating that the petitioner shall not claim any maintenance through rest of the life.

24. Thereafter, the petitioner filed another application under The Protection of Women from Domestic Violence Act, 2005 claiming maintenance and same was dismissed by learned Trial Court as well as Sessions Court as non-maintainable in the background of settlement dated 02.04.2003.

25. It is pertinent to mention here that on the basis of the settlement dated 02.03.2003, this Court quashed four criminal cases in Criminal M.C.No.3337/2007 petition filed under Section 482 Cr. P.C. by respondent. The petitioner preferred to challenge the said judgment in the Supreme Court, whereupon the petitioner's appeal was dismissed.

26. It is also pertinent to mention that learned Trial Court recorded in its order dated 24.07.2009 that for grant of maintenance under Section 125 Cr. P.C. certain conditions are required to be fulfilled and it would be a matter of trial whether respondent has refused or neglected to maintain the petitioner whether the petitioner is capable to maintain herself and whether the respondent has sufficient means to

maintain the petitioner.

27. Moreso, in the aforesaid order, learned Additional Sessions Judge has recorded his opinion that parties are required to prove that whether the settlement arrived at between them was only illusory and sufficient arrangements not made for the future maintenance of the wife or that whatever wife is unable to maintain herself or whether the husband has sufficient means or not. To this effect, parties are required to lead evidence. The petitioner during her cross-examination in petition under Section 125 Cr. P.C. on behalf of her son deposed that she was living on the mercy of the relatives, friends, however failed to name even a single person from whom she had taken debt or loan.

28. Moreso, annexure R-3 shows that her income tax returns till the year 2007-08 and her income was ₹ 3.31Lacs in comparison to ₹ 2.40Lacs of the respondent.

29. In view of above, I find no perversity in the impugned order passed by learned Additional Sessions Judge. I concur with the same.

30. Keeping the above discussion into view, I find no merit in the case. Accordingly, Criminal M.C. No.2602/2010 is dismissed.

31. No order as to costs.

SURESH KAIT, J

JANUARY 30, 2012

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