

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

% *Judgment pronounced on: 6th April, 2015*

+ **Crl. M.C. No.850/2015 & Crl. M.A. No.3213/2015**

PRASHANT OJHA Petitioner
Through Mr.Prashant Mendiratta, Adv.

versus

SHALU OJHA Respondent
Through Mr.Maninder Jeet Singh, Adv.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. The present petition has been filed by the petitioner under Section 482 read with Section 483 Cr.P.C. seeking quashing of the impugned judgment dated 13th February, 2015 passed by the Additional Sessions Judge-04, North-West District, Rohini Courts, Delhi, in C.A. No.75/2014, titled as *Sh.Prashant Ojha vs. Ms.Shalu Ojha*, to the extent it awards maintenance to the tune of Rs.50,000/- to the respondent.

2. By the impugned judgment dated 13th February, 2015, the appeal filed by the petitioner under Section 29 of the Protection of Women Domestic Violence Act, 2005 (hereinafter referred to as the "Act"), was partly allowed and the maintenance fixed by the trial court at Rs.2,50,000/- per month was reduced to Rs.50,000/- per month by the petitioner to the respondent from the date of filing of the petition

under Section 12 of the Act as the Appellate Court felt that this amount would be sufficient, reasonable and appropriate in view of material placed on record and peculiar facts of the matter. The petitioner was directed that in discharge of the arrears of maintenance granted, after adjusting the sum of Rs.10 lac already paid to the respondent, to pay a sum of Rs.4 lac to the respondent in execution proceedings coming up on 24th February, 2015 before the trial court and further to pay a sum of Rs.8 lac to her on 24th March, 2015 and equivalent sum on 24th April, 2015 and clear the arrears by making balance payment on 24th May, 2015.

3. I have been informed by the learned counsel for the respondent on 24th March, 2015 that with great difficulty, the petitioner has only paid a sum of Rs.4 lac to the respondent. The remaining sum of Rs.8 lac was not paid as directed by the Appellate Court till the date of hearing of present petition.

4. The Appellate Court has narrated the relevant facts and details of the previous litigations while passing the impugned judgment in paras 2 to 10 thereof. The same are reproduced as below :-

“2. The case as set out in appeal in brief, is that the parties had married to each other on 20.04.2007 in Delhi. They had stayed in hotel/Executive Farms for few days as the rental accommodation of appellant at E419, Greater Kailash, Part-II, New Delhi was occupied by his outstation relatives. On return to the said home, apparently bickering had started very soon between the parties. While the respondent has leveled allegations of harassment, using abusing language, non-cooperation, beatings and having extra marital affairs against the appellant in her petition

leading to their separation within a period of four months, the appellant has alleged her to be misbehaved, erratic and wished to live lonely life besides exhibiting depressive nature. The respondent even did not allow the marriage to be consummated. A petition under Section 13 (1) of The Hindu Marriage Act being HMA No. 637/07 was therefore, filed by the appellant before the District Court, Tis Hazari, Delhi which was dismissed on 03.10.2008 being premature. Another petition for dissolution of marriage was filed by the appellant in the District Courts, Patiala House and that is pending. The appellant claims that the petition under Section 12 of The Protection of Women from Domestic Violence Act was filed by the respondent by way of afterthought and as counter-blast to the divorce petition filed by him. Alleging that the petition suffered from evil intention and attitude of the respondent containing false unsubstantiated facts. The impugned order was passed by Trial Court without considering or recording any of the facts and submissions made by the appellant in his reply. The same is therefore perverse, unreasoned and liable to be set-aside. The issuance of notice of the petition to the appellant without considering Domestic Incidence Report vitiated the entire proceedings and reflects non-application of mind by the court in deciding the case. Neither the factum of domestic violence by the appellant could be established or proved nor same has been recorded in the impugned order. No relief under Section 19, 20 or 22 of the Protection of Women from Domestic Violence Act, 2005 therefore could have been granted to the respondent. The observation of trial court that the appellant has tried to show his income on a very lower side and since the respondent has shown his income on very higher side, the court is left with no option but to indulge in guess work, is erroneous and beyond the four corners of law. Despite the availability of income tax returns of the appellant for the years 2007-10, reflecting his annual income to be in the range of Rs. 2,10,000 - Rs. 2,55,000/-, assumption of his income to be Rs. 7,50,000/- per month had no basis and is

hugely exorbitant. The direction to pay maintenance at the rate of Rs. 2,50,000/- per month to the respondent thus is unsustainable as there is no scope for guess work in criminal proceedings. It is stated that the trial court has committed gross error in recording the fact without supporting evidence that the match of parties had been initiated through Sychorian Matrimonial Services Ltd. or that the profile of appellant was procured therefrom. There was further no evidence to hold that the appellant was never accommodating or had thrown respondent out of matrimonial home on 14.08.2007. In fact, due to regular disturbance, the appellant had shifted to his friend's place on that day as he was facing tremendous mental trauma. The appellant never gave details for his profile to the matrimonial services. He is earning just to survive with his bare basis minimum need. His printing press has only three machines where 10 laborers are employed. Its business started running in losses and therefore the printing press has become dysfunctional. Further there is no evidence to the effect that appellant had taken the parents of respondents to his printing press being run in a three storey building at Okhla or to the lounge/bar namely *Urban Pind* stated to be one of the fine multi-cuisine restaurants in the town. The allegation of appellant being fond of drinking or keeping his friend at home or of ill-temper have all been controverted. There is no evidence to the effect that the appellant was obsessed with his sister-in-law namely Ms. Tarang Ojha or having humiliated the respondent because her father did not sponsor their honeymoon trip to Europe. The Trial Court was under a duty to record only the proved facts and not the unsubstantiated version. She made no efforts to find out the truth before passing the impugned order.

3. In a detailed reply to the grounds of the appeal, the respondent has asserted the facts pleaded in her petition and controverted those of the appeal. The impugned order has been supported by stating that the same has been passed after appreciating the documents and evidence

available on record. Although, the Domestic Incidence Report had been called by the Trial Court yet it is not a condition precedent for issuing notice to the opposite party. Analysis about the income of appellant from his various ventures has been inferred/deduced by the respondent. Since the appellant has purposely and with malafide intention withheld his financial health from the trial court despite availing several opportunities and the documents of his investment of crores of rupees in his companies was evident and he was enjoying luxuries of life, his claim of being a poorly salaried person is a white lie with specific aim to deny maintenance to the respondent. The printing press of appellant has modern and latest machinery and opulence/grandeur of his restaurant is to be seen to be believed. The latter had become a chain of six restaurants/lounge/bar within a span of four years till April, 2011 and his both the businesses were flourishing.

4. Since the admitted facts are not required to be proved, the entry in the statement of Vijaya Bank, Defence Colony, New Delhi pertaining to the appellant would reflect that he had taken the membership of Sychorian Matrimonial Bureau. Despite the bureau publishing his matrimonial advertisements and his profile without his consent, the appellant did not take any action against them. It is alleged that the income tax returns filed by the appellant are bogus, absurd and an eye-wash. He has made investments worth crores in his companies about which the said returns are silent. His chain of restaurants have gained such a popularity and patronage that they are featured almost daily on Page 3 of English dailies vis. Times of India and Hindustan Times. It has been denied that the Trial court has committed any error in passing the impugned order or that sufficient material was not available before it to pass the impugned order. On these averments dismissal of appeal has been urged with exemplary costs with added claim to enhance the amount of maintenance to Rs. 3,00,000/- per month and compensation to Rs.

10,00,000/- taking into account status, stature and standing of the appellant in the society.

5. It is necessary to narrate the sequence of proceedings in the Trial Court. On completion of pleadings, parties were asked to file their affidavits in evidence. On the same being filed by both sides on 07.06.2010, the appellant/husband was asked to file an affidavit disclosing his education, employment, movable and immovable assets, details of bank accounts and Income Tax Returns for last three financial years and the matter was posted for final arguments. The respondent/petitioner/wife thereafter had formally tendered her affidavit on 18.04.2011. The appellant/husband had sought to cross-examine her on 05.07.2011. An application in this behalf was filed by him on 12.08.2011 which was allowed on 24.10.2011. When however, the appellant did not avail three opportunities to cross-examine the respondent, his right was closed on 22.02.2012. The respondent had declined to cross-examine the present appellant on 27.03.2012 which was reiterated on 19.04.2012 and evidence was closed by her. Appellant had also closed his evidence by making statement through his counsel on 19.04.2012 itself.

6. In appeal, the matter was referred for mediation for 06.10.2012 but the parties could not settle their case. An application was filed by the respondent for directing appellant to pay arrears to pay maintenance etc. on 23.11.2012. The matter was listed for arguments on application as well as on appeal. It was challenged by the respondent by filing Crl. M.C. No. 4136/2012 in the Hon'ble High Court which was disposed off on 07.12.2012 by observing that the Sessions Court would notice that the respondent has not been paid maintenance since her separation i.e. 14.08.2007. The application of respondent was allowed on 10.01.2013 directing the appellant to deposit entire arrears within two months in the shape of two FDRs and the appeal would be heard thereafter. It was

challenged by the appellant by filing Crl. M.C. No. 1026/2013 in the Hon'ble High Court of Delhi. Since the appeal itself was dismissed on 07.05.2013, for non-payment/compliance of order dated 10.01.2013, the challenge to latter order was held infructuous by Hon'ble High Court on 21.08.2013.

7. The appellant filed Crl. M.C. No. 1975/2013 in the Hon'ble High Court against the order dated 07.05.2013 of dismissal of the appeal. SLP (Crl.) No. 6509-6510/2013 was filed out of the proceedings of Hon'ble High Court but it was dismissed-in-limine on 13.08.2013 and the parties were directed to opt for mediation. The case was referred to High Court Mediation & Conciliation Centre during pendency of said case but the parties could not settle their dispute.

8. SLP (Crl.) No. 2210/2014 was filed by the respondent in Hon'ble the Supreme Court of India against non-passing of payment orders by the High Court. It was disposed off on 31.03.2014 and interim stay granted by Hon'ble High Court against execution of maintenance order was set-aside.

9. CM No. 18869/13 of the respondent for payment of current maintenance was dismissed by the Hon'ble High Court as 'not pressed' on 27.05.2010. The respondent preferred CA No. 2070/2014 arising out of Special Leave Petition (Crl.) No. 6220/2014 aggrieved by the said order. The order dated 27.05.2010 was set-aside and appeal before the Sessions Court was restored vide judgment dated 18.09.2014 rendering the Crl. M.C. No. 1975/2013 infructuous. The appellant therefore withdrew the same from Hon'ble High Court on 31.10.2014. The executing court was directed to complete the process of execution within eight weeks and report compliance to the High Court. The Sessions Court was directed to commence hearing on appeal on its restoration only after the execution

of order of maintenance is passed by the Magistrate. Vide Crl. M.P. No. 25026/2014, the respondent sought some clarification as the appellant had been detained in civil prison by the executing court for non-compliance of order of maintenance. Vide order dated 18.12.2014, this court was directed to hear the appeal on merits and pass appropriate orders.

10. Vide further order dated 12.01.2015, Hon'ble the Apex Court permitted the respondent to place on record additional documents within one week which she filed on 19.01.2015. Vide Crl.M.P. No. 1577/2015, the appellant had sought transfer of the case to the place where learned predecessor of this court, who had substantially heard the parties on appeal, has been transferred. It was however dismissed."

5. It appears that in view of the order passed by the Supreme Court on 12th January, 2015, the respondent was directed to file the additional documents which were filed on 19th January, 2015. The appeal was heard by the Appellate Court between 20th January, 2015 and 23rd January, 2015. The impugned judgment was passed on 13th February, 2015 which has now been challenged by the petitioner before this Court.

6. Mr. Prashant Mendiratta, learned Counsel appearing on behalf of the petitioner, has mainly argued on legal issue raised by him. His submission is that the final impugned judgment was passed by the trial court on the basis of the allegations made in the application filed by the respondent under Section 12 of the Act, her affidavit, documents and oral arguments. In absence of an opportunity for the purpose of cross-examination of the deponent/respondent, the said

judgment nullify and is bad in law. In support, he has referred Section 28 of the Act and Rule 6(5) of the Protection of Women from Domestic Violence Rules, 2006 (hereinafter referred to as the "Rules") and has submitted that the procedure for disposal of an application under Section 125 Cr.P.C. ought to have not been followed by trial court.

7. He argues that no doubt, as per sub-section (2) of Section 28 of the Act the trial court is at liberty for laying down its own procedure for disposal of such application, but the said provision does not exclude the procedure as laid down in Sub-section (1) of Section 28 of the Act and Sub-rule (5) of Rule 6 of the Rules, which provides same procedure as is applicable to applications under Section 125 Cr.P.C. Even as per the scheme of Section 125 Cr.P.C., the application cannot be disposed of without providing opportunity of leading evidence.

8. In support of this proposition he has relied upon the decision of Allahabad High Court in **Het Ram vs. Smt. Ram Kunwari**, 1975 CriLJ 656, Karnataka High Court in **Sankarasetty Pompanna vs. State of Karnataka and Anr.**, 1977 CriLJ 2072, and Gujarat High Court in **Pendiyala Sureshkumar Ramarao vs. Sompally Arunbindu and Anr.**, 2005 CriLJ 1455. In nutshell, it is also argued by him that irrespective of the fact that the petitioner's right to cross-examination of the complainant was closed due to non appearance, but still before passing the final judgment by the trial Court, the petitioner should have been granted one opportunity to cross

examine the respondent in order to know the truth. Counsel argues that had an opportunity been granted to his client, he would have demolished the case of the respondent in cross-examination as there is no material on record in order to show the actual income of his movable and immovable assets.

9. Therefore both courts have incorrectly passed the judgments without examining the true facts. In support of his submissions, he has referred few decisions and submits that the impugned order has been passed contrary to the provisions of the Act.

10. It is true that as per settled law, fairness of the trial generally speaking is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. The object underlying is that there may not be failure of justice on account of non-appearance or failure to avail the opportunity at the appropriate stage by either party for the purpose of cross-examination of witness(s), but determining factor at this stage is whether the petitioner is entitled for such benefit once his right was closed in 2012 and the said order was not challenged by the petitioner and when the judgment is passed, now after the expiry of long period, the objection is raised. Apart from the legal issue, it is also to be examined as to whether the petitioner is entitled to any relief claimed in the present matter.

11. With regard to legal issue raised by him, as per Rule 6(5) of the Rules, the procedure prescribed for final disposal of an application under Section 125 Cr.P.C., is to be applied for disposing of an application under Section 12 of the Act. On plain reading of Section

125 Cr.P.C., the provision for maintenance of wives, children and parents is made, but procedure for disposal of such application has been given in Section 126 Cr.P.C.

12. The relevant provisions have been reproduced herein below:

i) Section 18 of the Act.

Protection Orders.- The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from-

- (a) committing any act of domestic violence;
- (b) aiding or abetting in the commission of acts of domestic violence;
- (c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;
- (d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact;
- (e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;
- (f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;

(g) committing any other act as specified in the protection order.

ii) Section 28 of the Act.

Procedure.- (1) Save as otherwise provided in this Act, all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in Sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under Section 12 or under Sub-section (2) of Section 23.

iii) Rule 6 of the Rules.

Applications to the Magistrate. - (1) Every application of the aggrieved person under Section 12 shall be in Form II or as nearly as possible thereto.

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(4) The affidavit to be filed under Sub-section (2) of Section 23 shall be filed in Form III.

(5) The applications under Section 12 shall be dealt with and the orders enforced in the same manner laid down under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974).

iv) Section 126 Cr.P.C.

Procedure.- (1) Proceedings under Section 125 may be taken against any person in any district—

(a) where he is, or

(b) where he or his wife resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under Section 125 shall have power to make such order as to costs as may be just.

13. Section 12 of the Act reads as under:

“12. Application to Magistrate.-

(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under Sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under Sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under Sub-section (1) within a period of sixty days from the date of its first hearing.”

14. In case all relevant provisions of the Act are read conjointly, it is evident that nowhere in the Act any direction with regard to receiving or recording of evidence of the parties has specifically been mentioned. Sub-section (1) of Section 28 of the Act mandates that all the proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 of the Act shall be governed by the provisions of Code of Criminal

Procedure, 1973, thus, the procedure as laid down in Cr.P.C. has to be followed.

15. The procedure for enquiry as prescribed by the Code of Criminal Procedure, 1973 is to be followed and even for grant of interim relief under Section 23(1) of the Act, the procedure prescribed by the Code of Criminal Procedure has to be followed. The exception of Section 28 of the Act reads thus as under:

“Nothing in Sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under Section 12 or under Sub-section (2) of Section 23.”

16. The exception is that despite the mandate of Sub-section (1) of Section 28 of the Act that all proceedings under the provisions referred to above including Section 23(1) of the Act shall be governed by the provisions of the Code of Criminal Procedure, the proceeding under Sub-section (2) of Section 23 of the Act need not be so. For disposal of an application by an ex-parte order under Sub-section (2) of Section 23 of the Act, the provision envisages that Sub-section (1) of Section 28 of the Act shall not prevent the Court from laying down its own procedure for disposal of such application. In other words, though the procedure prescribed by Code of Criminal Procedure is made applicable for enquiry in a proceeding under Section 23 of the Act and the other provisions of the Act, proceedings referred to under Sub-section (2) of Section 23 of the Act for granting ex-parte interim relief is excepted which is pertaining to only to grant ex-parte orders where the Magistrate is satisfied that an application prima facie

discloses that the respondent is committing, or has committed an act of domestic violence or that there is likelihood that the respondent may commit an act of domestic violence, he may grant an ex-parte order on the basis of the affidavit.

17. The proceeding under Sub-section (1) of Section 23 of the Act which allows to pass interim order has to be governed by the provisions of Code of Criminal Procedure by virtue of Section 28(1) of the Act. But when the magistrate declines to grant ex parte relief and he has to be heard and in such cases, Section 28(1) of the Act applies and the procedure prescribed by the Code of Criminal Procedure becomes applicable.

18. It is correct that in Cr.P.C. for various type of cases different procedures have been mentioned e.g. in; (1) Chapter VIII, which deals with security for keeping the peace and for good behaviour, (2) Chapter IX, which deals with order for maintenance of wives, children and parents, (3) Chapter X, which deals with maintenance of public order and tranquillity, and (4) Chapter XVIII to Chapter XXIX, which provide different procedures for trial of different offences. But, the Legislature has inserted Section 37 of the Act vesting powers with the Central Government to make Rules for carrying out different provisions of the Act. Sub-section (2) of Section 37 indicates that the Rule making power of the Central Government is very wide, in which it is provided that in particular and without prejudice to the generality of the foregoing powers, such Rules may provide for all or any of the following matters, namely, (a) to (m).

19. Under Section 37 of the Act, the Rules are framed which have been published in the Gazette of India. Extra, Part II, Section 3(i), dated 17th October, 2006, vide G.S.R No. 644(E), dated 17th October, 2006. The Rules framed by the Central Government are having statutory force and shall require to be given effect to. Although vide Sub-section (3) of Section 37 of the Act the parliament can amend or disagree with the Rules, yet unless such amendment or disagreement comes in existence, the operation of these Rules will remain in force and have to be effective. In order to give more clarity in Section 28(1) of the Act, the Legislature has given a mandate to follow the procedure as laid down in Cr.P.C., but the same has not been clarified as to what procedure will be adopted in dealing with the application under Section 12 of the Act, the Rule 6(5) has been framed. After inserting Rule 6(5) of the Rules and the said confusion has been clarified in further mandatory words by mentioning, that the application under Section 12 shall be dealt with and order enforced in the same manner as laid down under Section 125 Cr.P.C.

20. It is, thus, evident that without providing opportunity of leading evidence such application cannot be finally disposed of unless the other side is ex-parte or not contesting the matter. The procedure required to be adopted to deal with an application under Section 12 of the Act to comply with the direction under Section 28(1) of the Act read with Rule 6(5) of the Rules. The Magistrate is required to comply with the provisions of this sub-rule read with Section 28(1) of the Act

and was required to follow the procedure as laid down in the Code of Criminal Procedure for the application under Section 125 Cr.P.C.

21. Sub-section (2) of Section 28 stipulates that nothing in Sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 of the Act. But from the conjoint reading of Sub-sections (1) and (2) of Section 28 of the Act and Rule 6(5) of the Rules, it is evident that ambiguity with regard to the provision of Section 28(1) of the Act has now been clarified by the Central Government under its powers given by Section 37 of the Act by insertion of Rule 6(5) of the Rules.

22. Therefore, it is held that in all the applications filed by the petitioner under Section 12 of the Act, before passing the final judgment the evidence of the parties is mandatory and an opportunity for the purpose of cross-examination of the witnesses is to be granted to both the parties, except in the case where the respondent is *ex parte*. The procedure prescribed by Code of Criminal Procedure as referred to in Sub-section (1) of Section 28 of the Act becomes applicable. In case non-applicant is *ex-parte* or despite of opportunity, he lost his right to cross-examine the applicant, under these circumstances, Sub-section (2) of Section 28 of the Act would be attracted. If it is an *ex parte* order, then the procedure prescribed by Sub-section (2) of Section 23 of the Act would be applicable.

22. In the present case, no doubt after filing the affidavits in the present case, the trial court fixed up the matter for arguments on several dates. When it was pointed out before the Court about the

evidence, the opportunity to cross-examine the respondent was sought for the first time on 5th July, 2011 which was allowed on 24th October, 2011. However, the petitioner did not cross-examine the respondent on 13th December, 2011 and 22nd February, 2012. Thus, the learned trial court closed the right of the petitioner to cross-examine the respondent. In view of the above, the respondent also closed her right to cross examine the petitioner. The statements in this regard were recorded on 19th April, 2012.

23. The petitioner did not challenge the order in any Court for closure of his right to cross-examine the respondent. Counsel for the petitioner says that the trial court has passed the impugned judgment by violating the principle of natural justice, as his client was not afforded a chance to rebut the facts and documents tendered by the respondent. Therefore, the present case is not a case where the opportunity was not granted. Rather it was granted but the same is not availed by the petitioner.

24. It is evident that the Sub-section (2) of Section 28 was inserted for such types of cases, i.e. where the non-applicant is *ex parte* or the right to cross-examination of either party is closed despite of opportunity is granted, the trial court under those circumstances shall not be prevented from laying down its own procedure for disposal of an application under Section 12 or Sub-section (2) of Section 23 of the Act. Under those circumstances, if the trial court is able to find *prima-facie* material by way of cogent and unimpeachable evidence, the Court may lay down its own procedure by fixing the amount under

Section 28(2) of the Act which has been rightly applied in the present case.

25. In the present case, the trial court at the initial stage fixed the amount of Rs.2,50,000/- which has been reduced by the Appellate Court to Rs.50,000/- by passing the impugned judgment. While reading the impugned judgment, it appears to the Court that the Appellate Court has given the reasons after examining the cogent evidence placed by the respondent and on the basis of the said evidence, the amount of Rs.50,000/- was fixed. Had there been no evidence or the evidence produced by the respondent, then the situation would have been different. But, in the present case, the Appellate Court rather after examining the clear evidence has reduced the amount from Rs.2,50,000/- to Rs.50,000/-.

26. The said findings of the Appellate Court are given in paras 18 to 27 which reads as under:-

“18. It has therefore, been stated by Sh. Menhdiratta, Advocate that since this appeal was restored vide the referred order dated 18.09.2014 of Hon'ble Apex Court, reference to an article in business magazines therein cannot be termed to be final pronouncement of the court but just a prelude to get the appeal decided on its merits by the competent court. Sh. Singh although resisted by saying that acclaimed business magazines publish articles akin to those relied upon by him after thorough research and verification of facts from concerned stake holders and as such are close to truth yet did not contradict the legal proposition. The extensive reference to the newspapers/ business articles, hard copies of information available on

the internet therefore is not being taken cognizance of by this court.

19. Turning to the crucial issue of financial status of the appellant based on Sychorian factor, it has vehemently been contended on behalf of the respondent that the profile containing the monthly/annual income of the appellant was provided by Sychorian Matrimonial Services to her. The said service provider could not have prepared it on its own and rather the same must have been vetted by the appellant. The non-initiation of any proceedings against the Service Provider also indicates that the plea of appellant of his profile containing facts which he had not disclosed to them, holds no water. Learned Counsel for the appellant on the other hand claimed that his so called profile has been manipulated by the respondent otherwise she would have examined a witness from the matrimonial services for proving it as per law. It is contended that the multiple litigations on many fronts initiated by the respondent left no scope and resources with the appellant to open up legal action against Sychorian.

20. The profile of the appellant purportedly collected from the Sychorian, forming the backbone of impugned order, by the respondent is neither authenticated nor signed on behalf of the service provider. The information contained therein cannot be ex-facie read against the appellant without substantiation as the respondent herself does not claim to be privy thereto. Non-initiation of any action against Sychorian by the appellant would not automatically tantamount to acceptance of the contents of profile in the background of his incessant denial thereof since beginning.

21. Ld. Counsel for the appellant has resented that the Trial court resorted to guesswork despite the availability of documents which the appellant had filed with his affidavit pursuant to order dated 07.06.2010. Sh. Singh, Advocate

on the other hand contended that the appellant did not clear his heart by disclosing his actual and true income to the trial court and that compelled it to dispose off the application of respondent by applying guesswork. It is also asserted that estimation of income of the husband in such facts is not unknown to the law pertaining to grant of maintenance. Since appellant himself was found wanting in sharing crucial details out of his personal knowledge and custody, the impugned order cannot be blamed.

22. I would observe that the parties had propelled the trial court to resort the guesswork by their lackadaisical attitude towards the trial of their rival pleadings. It is another matter that such guesswork by the court seems to have gone haywire. True that the trial court had initially proceeded tangentially in adopting the procedure yet on correcting its path, the parties chose not to adduce specific evidence to enable it to justly assess the earning of appellant. The appellant on his part has shirked from disclosing his true income/earning from various sources from threshold. His reply/affidavit reflects as if he were under a sort of cross-examination. It manifestly lead respondent to frantically gather whatever documents she could lay her hands on pertaining to the appellant and the companies/firm with which he was associated, to cull out his income. During the course of arguments, the intended information had to be dug out of plethora of documents. In the melee, the distinction between financial health of a juristic person and/or a partnership firm and that of an individual, the appellant in this case, who is one of its operators has been marred. It has to be appreciated that the financial well being of a juristic or fictitious person cannot be an appropriate parameter to correspond it to the individuals operating it. There is no material to construe the paid up capital of the appellant in the various concerns and the share of profits disbursed to him over the years.

23. The Income Tax returns heavily relied upon by the appellant to contend that in the presence of documentary evidence, the trial court should not have turned to guessing his monthly incomes, suffer from lacuna firstly because they are unilateral documents which are not shown to have been verified by the concerned Government department and secondly it is not expected that an individual paying monthly rent of Rs. 23,000/- is earning a measly sum in the range of Rs. 20,000/- per month.

25. Besides paying aforesaid rental, the appellant had been paying monthly installments of Rs.23,609/-, Rs.22,837/- and Rs.8,359/- which are categorically reflected in his account maintained with Vijaya Bank, Defence Colony, New Delhi. The appellant has utterly failed to explain as to how he had been managing all these regular expenses out of the income disclosed to the Income Tax department. The amounts credited in his one of these bank accounts from 2008 onwards has not been satisfactorily explained by the appellant. Besides managing all these recurring expenditures, the appellant had been maintaining servants at home, car with driver and liberal household expenditure. Although, the appellant claims to have left the partnership of restaurant Urban Pint yet the intellectual property rights case filed by M/s. Sun F & B Hospitality against 21st Hospitality Pvt. Ltd. has his affidavit of 2013 wherein he has proclaimed to be its partner. Anyone having a regular source of income of less than Rs.1,40,000/- – 1,50,000/- per month will not be able to manage all these expenditures leaving aside the expenditures on parties, hotels, liquor etc. Due to the handicap of the appellant having hesitantly produced paltry documents of his income / earning, this court again will take recourse to the exercise of estimation albeit close to admitted /acceptable documents, to the above extent. On conservative note therefore I would deem his monthly income to be not lesser than Rs. 1,40,000/- to Rs. 1,50,000/- p.m.

26. It has lastly been contended that by Shri Mehndiratta that respondent is an able bodied and educated young lady capable of earning. She has not disclosed the efforts made for securing employment. Her earning potential however, cannot be diminished. She may not need any maintenance from the appellant if these factors are taken into consideration. Reliance in this behalf has been placed upon *Sanjay Bhardwaj V. State, 2010(118) DRJ 358* where it was held that *Section 20 of the Act only enables the Magistrate to pass the order as per the rights available under the existing law and does not create any additional right in favour of the wife. A husband cannot be set to beg, borrow or steal for paying maintenance to the wife.* Further, in *Bhushan Kumar Meen V. Mansi Meen, (2010)15 SCC 372*, it was observed that *having regard to the qualifications of wife, there is no reason as to why she ought not to be in a position to maintain herself. The amount of interim maintenance granted by the Trial Court was reduced therefore.* Shri Singh, countered the submissions by stating that such averment is missing from the pleadings and that the appellant very well knows it a matter of fact that respondent has not been earning. He cannot shirk from his liability on flimsy ground.

27. There is no document to discern the educational / professional qualifications of the respondent to estimate her earning potential. Since it had not been made one of the grounds to reduce / deny the maintenance to the respondent/wife so steadfastly before Ld. Trial Court, the maintenance cannot be declined to her as she had no opportunity to lead whatever evidence on the point.”

27. After having gone through the findings arrived at by the trial court as well as by the Appellate Court, as there is no infirmity in the impugned judgment, in fact, the Appellate Court has passed the

impugned judgment after considering the cogent evidence available on record, rather the appeal filed by the petitioner was partly allowed by reducing the amount from Rs.2.5 lac to Rs.50,000/- per month on the basis of material positively available. Further, it is admitted by the counsel that when the right to cross-examination of respondent in 2012 was closed the said order was not challenged by the petitioner, the same becomes final at the time of passing the final judgment. The petitioner is even not ready to comply the direction issued by the trial court which are issued in the impugned judgment but at the same time the petitioner has challenged the findings of the judgment which are legally correct and there is no legal infirmity. I do not find any reason to interfere or to take a different view by exercising my discretion under Section 482 Cr.P.C. in the present case. The petition is accordingly dismissed.

28. No order as to costs.

(MANMOHAN SINGH)
JUDGE

APRIL 06, 2015