

HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 676 of 2017

Firoz Khan S/o Shri Achhan Khan Aged About 38 Years R/o Parasa Nagar, Near Masjid Devendra Nagar, Police Station Devendra Nagar, Tahsil & Civil & Revenue District And District. Raipur, Chhattisgarh

---- Applicant

Versus

1. Smt. Arsiya Begum W/o Shri Firoz Khan Aged About 28 Years,
2. Ku. Huda Khan, Aged About 2 Years & 6 Months (Minor Daughter) Being represented by N.A.01 Mother in relationship,

Both the above are R/o Near Madani Masjid, Sector 11 Zone-02, Khursipar, Bhilai, Tahsil & Civil & Revenue District & District. Durg, Chhattisgarh

---- Respondents

For applicant - Shri J.A. Lohani, Advocate.

For Respondents – Shri Amiyakant Tiwari, Advocate.

Hon'ble Shri Justice Goutam Bhaduri

Order

21/09/2017

1. Heard.
2. Instant revision is against the order dated 3/12/2015 passed in Misc. Criminal Case No.415/2015 by the First Additional Principal Judge, Family Court, Durg (C.G.). By such order the learned family court has directed the applicant herein to pay amount of Rs.5000/- to the respondent No.1 wife and respondent No.2 minor daughter.
3. It is contended by learned counsel that on 26/10/2015 family court proceeded ex-parte though applicant has neither received any notice nor has refused to accept notice since at the relevant time the applicant herein husband was at Banaras. He further referred to Annexure P-3 and would submit that he has not challenged order dated 3/12/2015 but actually ex-parte date of the order is under challenge

which was on 26/10/2015 i.e. before passing of final order.

4. Learned counsel for the respondents vehemently opposes the same and submitted a chart and stated that from 22nd September, 2015 to 22nd August, 2017 applicant was directed to pay Rs.5000/- pm and the arrears have accumulated to Rs.1,20,000/-. It is stated that till August 2017 only Rs.22,000/- has been paid and that too at times Rs.2000/- at times Rs.1000/- was paid, thereby Rs.98,000/- still remains to be recovered. He further submits that another Rs.5000/- would fall due in the consecutive date of september and followed by in month for october. It is stated that the recovery proceeding which has been prosecuted by the respondents under section 125 (3) Cr.P.C., the notices are avoided on some pretext or other on non availability of husband which are evident from the reports but non-payment of maintenance exists. He further submits that respondents being the wife and the minor children their rights are defeated and applicant is avoiding to pay amount on technical reasons. He submits that another application to set aside the ex-parte order is still pending before the trial court and is fixed for evidence on 21/09/2016 therefore similar relief cannot be claimed in this petition.

5. Perused the record. Perusal of the record would show that the applicant has preferred an application to set aside ex-parte order. The reading of application Annexure P-3 would show that it is pleaded that on 26/10/2015 the court had proceeded ex-parte and on 3/12/2015 ex-parte final order of maintenance was passed. The said application is captioned as to set aside ex-parte order to give a chance of hearing. Thereby in all fairness the ex-parte order is prayed to be set aside. The said application is pending adjudication till date, which is fixed for

evidence. The plausible inference would be that if the order proceeding ex-parte of 26/10/2015 is set aside naturally it will take within its sweep the final order dated 3/12/2015 whereby the maintenance order has been fixed. Therefore, submission cannot be appreciated that application to set aside the ex-parte was filed only with respect to the date of 26/10/2015. Since the application has been filed before the court below which is pending and is fixed for evidence to find out the facts, it would not be proper to go into the same issue again as this court cannot appreciate the facts without evidence. Perusal of the memo of revision to set aside ex-parte necessarily involves disputed question of fact as the applicant claim that on the date ex-parte order was passed he was not at the given place of the notice and he was at Banaras. Therefore, this court in exercise of revisional jurisdiction will not go into fact finding of such case. Perusal of the order dated 3/12/2015 consequently would be subject to the application which is pending before trial court for setting aside of the order. If ex-parte is set aside as a natural consequence thereof the order dated 3/12/2015 shall also be set aside. Therefore, I am not inclined to interfere in this revision at this stage.

6. Now turning to non payment, respondents have contended that out of Rs.1,20,000/- only Rs.22,000/- has been paid till maintenance of August, 2017. Till the date the order for maintenance exists the husband would be liable to pay the same to wife and minor children as they cannot be allowed to starve for arrogance of husband. In case of **Poongodi & anr. Vs. Thangavel** reported in **(2013) 10 SCC 618** Supreme Court has held that provision of sentencing under Section 125 (3) of Cr.P.C. was held to be mode of enforcement as distinguished

from the mode of satisfaction. In this case also despite order of this court, applicant is unable to satisfy the court as to how much amount has been paid. On the contrary, respondent/wife and the minor children has come out with the fact that only Rs.22,000/- has been paid till August 2017 out of the total due of Rs.1,20,000/-. Record shows that MJC having filed for recovery, therefore in view of such principle it is directed to the applicant to pay the arrears of maintenance due to the respondents commencing from the date of maintenance order as has been directed in order of payment within a period of two months and the current maintenance commencing from the month of September, 2017 on or before 7th day of each successive month. If the order of this court is not complied with by the applicant, learned trial court is directed to issue warrant for arrest of the applicant and in the meantime same may be executed and the applicant be taken into custody to suffer imprisonment as per provisions of Section 125 (3) of the Cr.P.C.

7. With such observation, petition stands disposed of.

Sd/-

(Goutam Bhaduri)

JUDGE