

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH**

**Criminal Revision (F) No. 79 of 2017(O&M)**

**Date of Decision: May 23 , 2017.**

Manish Tandon ..... PETITIONER (s)

**Versus**

Ankita Bhutani ..... RESPONDENT (s)

**CORAM:- HON'BLE MRS.JUSTICE LISA GILL**

Present: Petitioner-in-person.

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**LISA GILL, J.**

The petitioner is aggrieved of order dated 13.02.2017 passed by the learned District Judge (Family Court), Sonapat whereby two applications filed by the petitioner (referred to as the 2<sup>nd</sup> application and 3<sup>rd</sup> application in the impugned order) have been decided.

It is to be noted that there is a matrimonial dispute between the petitioner and the respondent. Proceedings in FIR No.6 dated 12.02.2012 under Sections 498A/406/420/323/506/34 IPC lodged at the behest of the respondent are pending. The respondent – wife filed a petition (bearing No.133 of 2012) under Section 125 Cr.P.C. claiming maintenance, which was dismissed as withdrawn on 15.12.2012. Thereafter another petition under Section 125 Cr.P.C. (i.e. wherefrom the present proceedings emanate) was filed by the respondent. It is stated that the respondent's application for grant of interim maintenance in the second petition under Section 125 Cr.P.C. was dismissed by the learned District Judge (Family Court), Sonapat on 10.05.2016.

The petitioner moved an application dated 17.12.2016 under Order 23 CPC (Annexure P3, referred to as the 2<sup>nd</sup> application in the impugned order) for dismissal of the petition filed by the respondent under Section 125 Cr.P.C. being not maintainable on the ground that once her earlier petition under Section 125 Cr.P.C. was dismissed as withdrawn without any specific liberty having been afforded to the respondent to file afresh, a second petition under Section 125 Cr.P.C. is not maintainable. Another application (Annexure P4, referred to as the 3<sup>rd</sup> application in the impugned order) was filed by the petitioner under Order 18 Rule 17 CPC and Section 138 of the Indian Evidence Act for recalling and re-examining one of his own witness RW1 Mr. B.M.Pandey.

Learned trial court on considering the entire facts and circumstances of the case rejected the said applications moved by the petitioner vide common impugned order dated 13.02.2017. Aggrieved therefrom, the petitioner has filed the present revision petition.

The petitioner vehemently argues that a second petition under Section 125 Cr.P.C. is not maintainable once the first petition has been dismissed as withdrawn without a specific permission to file afresh. He first of all refers to Section 10 of the Family Courts Act, 1984, which reads as under:-

**“10. Procedure generally.”-(1)** Subject to the other provisions of this Act and rules, the provisions of the Code of Civil Procedure, 1908(5 of 1908), and of any other law for the time being in force shall apply to the suits and proceedings other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973(2 of 1974), before a Family Court and for the purpose of the said provisions of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court.

(2) Subject to the other provisions of this Act and the rules, the

provisions of the Code of Criminal Procedure, 1973 (2 of 1974), or the rules made thereunder, shall apply to the proceedings under Chapter IX of the Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.”

The petitioner then refers to Section 257 Cr.P.C., which reads as under:-

**“257. Withdrawal of complaint.** If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom the complaint is so withdrawn.”

The petitioner on the one hand submits that provisions of the Code of Criminal Procedure are applicable in the present proceedings whereas on the other, it is submitted that as the present proceedings have a definite civil flavour, the Code of Civil Procedure is applicable in the present situation in respect to withdrawal of the petition. In this regard, he refers to a judgment of the Hon'ble Supreme Court in Vijay Kumar Prasad v. State of Bihar and others (2004) 5 SCC 196.

The petitioner thus submits that in terms of Order 23 Rule 3 & 4 CPC, a second petition under Section 125 Cr.P.C. is barred in case specific permission to file afresh has not been granted. Reference is made to the judgment of Bombay High Court in Sou. Janabai v. Krishna Ravba Rithe and

another, 1993 Cri.LJ 1183 (Annexure P10). It is argued that the application filed by the respondent is on the same set of facts and circumstances therefore, the same is barred. Therefore, the second petition/application under Section 125 Cr.P.C. should be dismissed. The learned trial court has erred in passing the impugned order which should be set aside.

In respect to the application filed by the petitioner seeking recall of RW1 Mr. B.M.Pandey for re-examination, the petitioner submits that once there is a contradiction in the statement of a witness, it is incumbent upon the court to recall the said witness. The petitioner is not seeking to fill-up any lacunae but wishes to seek a clarification in respect to a contradiction which has arisen in the statement of RW1 Mr. B.M.Pandey, a witness examined by the present petitioner to prove his case. The said witness in his examination-in-chief (by way of his affidavit dated 15.09.2016) stated that he visited the premises of the respondent on 05.11.2014 and saw two banners hanging outside the premises. He again visited the premises of the respondent on 01.12.2014 and recorded an audio-video conversation with her on his mobile phone of Carbons company bearing model No.A-35. He took a print-out of the banners and handed them over to the petitioner. A certificate under Section 65B of the Indian Evidence Act was also issued by RW1 Mr. B.M.Pandey.

The petitioner submits that in the cross-examination, RW1 B.M.Pandey has however stated that conversation was not prepared by him and the transcript was also not prepared by him. It is this stand of RW1 that the petitioner seeks to clarify. It is submitted that he wishes to clarify this apparent contradiction in the statement of RW1 Mr. B.M.Pandey. The petitioner relies upon a judgment of Kerala High Court in Valsamma v. Satheesh Kumar, 2001

*Cri.LJ 1574* (Annexure P8) to submit that he merely seeks to explain a circumstance and establish that it is a mistake on the part of the said witness. It is not a case where he is seeking to fill-up a lacunae. Therefore, the learned trial court has power or discretion under Section 311 Cr.P.C. to recall a witness. The petitioner relies upon the judgment of the Hon'ble Supreme Court in Mohan Lal Shamlal Soni v. Union of India and another, 1991 AIR 1346 (Annexure P5) to urge that the trial court has wide power to recall a witness. He further relies upon the judgment of the Hon'ble Supreme Court in Rammi @ Rameshwar v. State of Madhya Pradesh, decided on 21.09.1999 (Annexure P6) to contend that a witness may be recalled for re-examination to explain a certain ambiguity which has emanated from his cross-examination. Reliance is also placed on a judgment of the Gujarat High Court in Pushpendrasinh @ Paresh Vaghela v. State of Gujarat, Special Criminal Application No.3082 of 2012 decided on 08.02.2013 (Annexure P7). Judgment of the Hon'ble Supreme Court in Anvar P.V. v. P.K.Basheer and others, Civil Appeal No.4226 of 2012 decided on 18.09.2014 which deals with the admissibility of electronic evidence/record is referred to by the petitioner.

It is urged that, first and foremost, petition under Section 125 Cr.P.C. itself be dismissed being not maintainable. In the alternate, the application under Order 18 Rule 17 CPC and Section 138 of Evidence Act be allowed and the petitioner be permitted to re-examine RW1 B.M.Pandey on the contradiction as mentioned above. It is thus prayed that this petition be allowed and impugned order dated 13.02.2017 passed by the learned trial court be set aside.

I have heard the petitioner at length and have carefully gone through the file.

Without going into the question of maintainability of the present revision petition as to whether one revision petition would be maintainable in the present situation where two separate applications have been disposed of by the learned District Judge (Family Court), Sonapat by a common order, it is considered just and expedient to decide this matter on merits in order to obviate any delay in the proceedings under Section 125 Cr.P.C. Be that as it may, the petitioner is unable to point out any bar to the filing of a second petition under Section 125 Cr.P.C. Section 10 of the Family Courts Act, 1984 provides that provisions of Code of Civil Procedure shall be applicable to suits and proceedings other than those under Chapter IX of the Code of Criminal Procedure i.e. provisions relating to maintenance of wives, children and parents. It is to be noted that the petitioner has filed the application Annexure P3 under Order 23 CPC. For the sake of arguments, even taking or assuming the contention of the petitioner to be correct that proceedings under Section 125 Cr.P.C. would have a civil flavour, Order 23 Rules 3 & 4 CPC does not act as an absolute bar to the filing of a subsequent petition under Section 125 Cr.P.C. claiming maintenance in the present factual matrix. It is not in dispute that right to maintenance is a recurring cause of action. Furthermore, the earlier petition filed by the respondent was not decided on merits. It cannot be denied that once there is no adjudication on the merits of a case, the second application would not necessarily be barred solely because of the withdrawal of the earlier petition. Furthermore, Section 125 Cr.P.C. is admittedly a piece of beneficial legislation. Therefore, a restricted or a hyper-technical view in such matters is not to be countenanced.

The judgment of the Bombay High Court in Sou Janabai's case (supra) does not advance the petitioner's case. In the said case, it was pleaded that a subsequent application for maintenance under Section 125 Cr.P.C. filed by the wife was barred by res judicata. The first application moved by the wife in this case was dismissed on merits. After about 17 years, another application for maintenance was filed by her. This application was dismissed being barred by res judicata. The Bombay High Court set aside the said orders holding that the second application is not hit by the principles of res judicata as the second application has been filed under different circumstances.

In the present case, the first petition filed by the wife was dismissed as withdrawn on 15.12.2012 and admittedly there is no adjudication of the matter on the merits of the case. Right to maintenance is admittedly a recurring cause of action. The judgment of the Hon'ble Supreme Court in Vijay Kumar's case (supra) does not in any manner hold that a second application under Section 125 Cr.P.C. is per se barred. The question involved in Vijay Kumar's case (supra) was regarding jurisdiction of the court to entertain the petition under Section 125 Cr.P.C. Vijay Kumar's case (supra) was discussed by the Hon'ble Supreme Court in its subsequent judgment in **Dawalsab v. Khajasab (2009) 14 SCC 660**. The other judgments cited by the petitioner are also not applicable in the facts and circumstances of this case. Therefore, I do not find any ground to interfere in the decision of the learned trial court in this respect.

In respect to the prayer of the petitioner for re-examination of RW1 Mr. B.M.Pandey, it is to be noted that the petitioner preferred an application under Order 18 Rule 17 CPC and Section 138 of the Indian Evidence Act for

recalling and re-examining RW1. He has addressed arguments in respect to the power of the trial court to recall a witness under Section 311 Cr.P.C. As far as the position of law is concerned, there is no doubt regarding the power of the court to recall a witness for re-examination in a given case. The trial court is unfettered in its power under Section 311 Cr.P.C. to summon a material witness, recall or re-examine any person if it appears to be necessary for the just decision of the case.

**Section 138** of the Indian Evidence Act reads as under:-

**“138. Order of examinations.** – Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

**Direction of re-examination.**– The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examination upon that matter.”

There is also no quarrel with the proposition of law that in case an explanation is required for any matter, re-examination of a witness can be directed.

In the present case, the petitioner urges that RW1 B.M.Pandey in his cross-examination has stated that the conversation in question was not prepared by him and neither was the transcript prepared by him whereas in his examination-in-chief (by way of affidavit) he has stated otherwise. The relevant part of the affidavit of RW1 Mr. B.M.Pandey reads as under:-

“2. That on 01.12.2014 I again visited the aforesaid premises and

talked to the neighbour of Ankita Bhutani and recorded the audio video conversation on my mobile phone of Carbonn company bearing model No.A-35. Thereafter, I contacted Ankita Bhutani and also talked to her and recorded the audio-video conversation with Mrs.Ankita Bhutani on my mobile phone of Carbonn company bearing model No.A-35.

3. That I had taken the print out of the banners and handed over the copy thereof to the respondent which has been attached with the reply to the petition as Annexures P-6 (and also exhibited herein as Exhibit R-2 (colly) and transcription of the audio video recording of the conversation dated 01.12.2014 with Ankita Bhutani and her neighbourer is also exhibited herein as Exhibit R-3 (colly) and same was also annexed by the respondent in para No.12 and 13 of the preliminary submissions and in para No.10 of the parawise reply. That audio video recording dated 05.11.2014 and 01.12.2014 was performed by me in my mobile phone of Carbonn company bearing model No.A-35 at the residence of Ankita Bhutani.

4. That I had transferred the audio video recording of the banners and conversations from my mobile to my computer through data cable. Thereafter, the aforesaid information was copied in the Compact Disc CD/DVD and given to the respondent Manish Tandon for annexing in the present proceedings. The aforesaid CD/DVD is annexed herein as Exhibit R-4 and already annexed by the respondent as Exhibit P-1 with the reply filed to the petition under Section 125 Cr.P.C., Ankita Bhutani versus Manish Tandon, Case No.44/2013 pending adjudication before this Hon'ble Court.

5. I identify the mobile phone of Carbonn company bearing model No.A-35 and audio video recording of the conversations dated 05.11.2014 and 01.12.2014 with Ankita Bhutani and her neighbourer.

6. I also certify that the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process

information for the purposes of activities regularly carried on over that period by me and during the said period, audio video recording of the videography of the banners and conversation of Ankita and her neighbourer with me in my mobile phone was regularly fed in to the computer in the ordinary course of the said activities and throughout the material part of the said period, the computer was operating properly and the information contained in the computer reproduces such information fed in to the computer.”

Relevant portion of the cross-examination of RW1 B.M.Pandey reads as under:-

“XX XX XX

I am not a summoned witness. I have come in this case thrice at the instance of respondent. On 05.11.2014, I had gone to the residence of the petitioner at the instance of the respondent. I reached the house of the petitioner after asking the people who met me on the way. Photographs Ex.R2 was taken by me. It is correct that it is not made out from the photo Ex.R2 that this house belongs to late Sh. Bhim Sain Bhutani. It is also correct that it is not made out from the board that this institute is being run by the petitioner. I have no documentary proof that my daughter had ever studying in the institute, the board of which, is appearing. I know the respondent for the last three years. I am on visiting terms with him. I do not know where the respondent was serving. I do not get the voice of the petitioner tested from any Lab etc. Self stated, that I had given the same to the respondent. Conversation was not got prepared by me. Self stated that I had given the CD to the respondent. It is wrong to suggest that the transcription is not correct. It is further incorrect to suggest that the photos were also got prepared by way of camera trick etc. It is correct that transcription Ex.R6 was also not prepared by me. CD was prepared by me myself. I came to Sonipat twice that is on 05.11.2014 and 01.12.2014.”

I have gone through the evidence of RW1 B.M.Pandey by way of affidavit as well as the cross-examination which is attached with the present petition. It has been observed by the learned trial court in order dated 13.02.2017 that the cross-examination of RW1 was concluded on 10.11.2016 however, no request for re-examination of the said witness was addressed by the petitioner at that time. The application was subsequently moved by him on 17.12.2016. Though this fact in itself may not be enough to non-suit the petitioner, I do not find that there is any necessity to recall the said witness for any clarification as urged by the petitioner. The so-called contradiction, if any, would be taken into account by the learned trial court at the time of final decision of the case. The petitioner is unable to point out any material clarification that is required in reference to the alleged contradiction in the cross-examination of RW1 B.M.Pandey. There is no patent illegality or irregularity in the decision arrived at by the learned trial court.

No illegality, infirmity or perversity is pointed out by the petitioner in the impugned order dated 13.02.2017 passed by the learned District Judge (Family Court), Sonapat which calls for any interference by this Court in exercise of its revisional jurisdiction.

Consequently, finding no merit, this petition is dismissed.

It is however clarified that none of the observations made hereinabove shall be construed to be a reflection on the merits of the case. The same are solely confined for the purpose of decision of the present petition.

May 23 , 2017.  
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**( LISA GILL )**  
**JUDGE**

Whether speaking/reasoned: Yes/No  
Whether reportable: Yes/No