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

+ CRL.REV.P. 364/2017 & CrI.M.A. 8250/2017 (stay)

KAMAL KUMAR Petitioner

Through Mr.Harsh Kumar, Adv.

versus

SAPNA Respondent

Through Mr.Anant Sharma, Adv. with
Mr.Sanjay Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ORDER

% **25.08.2017**

The petitioner/husband is aggrieved by the order dated 17.02.2017 passed by the learned Principal Judge, Family Court, Vishwas Nagar, North-East District, Delhi in connection with MT No.220/2015 whereby the petitioner has been directed to pay an amount of Rs.6,600/- towards monthly maintenance, as an interim measure, to the respondent, from the date of filing of the petition.

The order has been assailed on several accounts.

In the first instance, the petitioner submits that the respondent is living in adultery and therefore is not entitled to payment of any maintenance in accordance with section 125(4) of the Cr.P.C. In support of his contention, learned counsel for the petitioner has drawn the attention of this Court to the DD entry whereby the respondent was found in company of one Dharmender, her neighbour while the two children of the petitioner and the

respondent were found to be present in the car which was parked outside the hotel.

The other ground of challenge is that a very rudimentary test was applied by the Trial Court for assessing the income of the petitioner. The petitioner has shown his income as Rs.5,000/- per month which was not accepted by Trial Court, taking into account that he was a skilled driver. The Trial Court has, justifiably assessed the income of the petitioner at Rs.11,000/- per month on the basis of the average income of a skilled artisan which is around Rs.11,000/-.

The last of the grounds of challenge to the order is that without giving any express reason for making the interim order for payment of maintenance from the date of filing of the petition, the same has been directed.

Learned counsel for the petitioner submits that in view of the provision of section 354(6) of the Cr.P.C., reasons are required to be accorded by the trial court for fixing a date from which the interim maintenance was required to be paid, which could be either from the date of passing of the order or from the date of filing of the application.

So far as the first ground of challenge is concerned, merely by placing on record a DD entry indicating that the respondent was found in the company of one Dharmender, who is her neighbour, it cannot be inferred that the respondent is living in adultery. Adultery has been made punishable under Section 497 of the IPC. It reads as hereunder:

“497. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be

punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

Section 497 of the IPC provides for punishment to the adultery but it does not explain as to what would constitute an adultery. If one goes by the wordings of the Section 497 IPC, it would mean that whoever has sexual intercourse with a person, who is wife of another person, without consent or connivance of that person, it would be an offence of adultery. At other places, adultery has been defined as consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse during the subsistence of marriage. It may not be necessary to adduce direct evidence for proving adultery and it can only be inferred from the surrounding circumstances namely undue familiarity, suspicious circumstances, improper behaviour etc.

True it is that adultery cannot be proved by direct evidence but then something more than mere assertion of adultery is necessary. A solitary instance of a person having been seen in the company of another man, cannot be taken as a incidence of adultery. The respondent, according to the DD entry, was found in company of one Dharmender, her neighbour, while her children were found to have been occupying a car which was parked in front of a hotel. This is not evidence enough to disentitle the respondent from receiving any maintenance from the petitioner.

Learned counsel for the petitioner has, however, stated that a complaint was made before a competent court for registering a case against the respondent for adultery, which prayer was rejected. The aforesaid order of rejection has been challenged by the petitioner. It has also been

submitted by him that the ground of adultery was taken by him before the trial court also but the impugned order does not refer to the same.

Be that as it may, as has been stated earlier, such an illustration of the evidence of adultery, which has been provided by the petitioner, is not tenable.

In so far as the assessment of monthly income of the petitioner is concerned, the trial court was perhaps left with no other alternative but to draw a parallel from the general opinion about the monthly income of a skilled worker. The stand of the petitioner that he earns only Rs.5,000/- per month, was not acceptable and the trial court, therefore, correctly assessed the income of the petitioner at Rs.11,000/- p.m.

Section 125(2) of the Cr.P.C. reads as hereunder:

“Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.”

The trial court can grant maintenance from the date of the order or from the date of the application.

Section 125(2) Cr.P.C., but has to be necessarily read along with Section 354(6) of the Cr.P.C. which reads as hereunder:

“Language and contents of judgment - Every order under Section 117 or sub-section(2) of Section 138 and every final order made under section 125, Section 145 or Section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision.”

Thus, every final order under Section 125 of the Cr.P.C. would have to contain the reasons for the decision. A conjoint reading of the aforesaid

sections namely Section 125 (2) and 354(6) of Cr.P.C., it becomes evident that reasons have to be accorded for either making the order of maintenance effective from the date of passing of the order or from the date of the application.

In **Shail Kumari Devi v. Krishan Bhagwan Pathak** 2008 (9) SCC 632, the Supreme Court has explained that it is incorrect to hold that, as a normal rule, the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance. It would be open to the Magistrate to award maintenance from the date of filing of the application. But in that case, the Magistrate would be required to record reasons in support of such an order.

In **Jaiminiben Hirenghai Vyas and Anr. V. Hirenghai Rameshchandra Vyas and Anr.** reported in AIR 2015 SC 300, the Supreme Court has held as hereunder:

“7. I have considered the rival submissions canvassed on behalf of learned advocates for the parties and also gone through the documents produced on record and the impugned orders. From the order passed by learned Judicial Magistrate First Class in Criminal Miscellaneous Application No. 85 of 2010 it is revealed that while granting the amount of maintenance from the date of application learned Magistrate has not assigned any reason. The Honourable Supreme Court in the case of Jaiminiben Hirenghai Vyas (supra) in paragraph No.7 has observed as under:-

"7. Section 125 of the Cr.P.C., therefore, impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. For good

reason, evident from its order, the Court may choose either date. It is neither appropriate nor desirable that a Court simply states that maintenance should be paid from either the date of the order or the date of the application in matters of maintenance. Thus, as per Section 354(6) of the Cr.P.C., the Court should record reasons in support of the order passed by it, in both eventualities. The purpose of the provisions to prevent vagrancy and destitution in society and the Court must apply its mind to the options having regard to the facts of the particular case.”

No such reason can be found in the impugned order.

As such, the impugned order is modified to the extent that the petitioner is now directed to pay interim maintenance of Rs.6,600/- p.m. to the respondent from the date of passing of the order i.e. from 17.02.2017.

It is, however, made clear that when the learned Magistrate passes a final order, it would be open for him to consider as to whether the maintenance, which would be ordered, would be paid from the date of filing of the petition or from the date of the passing of the interim order or the final order.

With these modifications in the order impugned, the revision petition is dismissed.

ASHUTOSH KUMAR, J

AUGUST 25, 2017

ab/ns