

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL REVISION APPLICATION (ST) NO.91 OF 2018
WITH
CRIMINAL APPLICATION NO.83 OF 2018
WITH
CRIMINAL APPLICATION NO.84 OF 2018

Santosh Madhukar Mane] Applicant

Vs.

Mrs. Deepali Santosh Mane & Anr.] Respondents

Mr. K.H. Giri, for Applicant.

Mr. B.P. Shukla, for Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 20TH APRIL, 2018.

P.C.

Heard Mr. Giri, learned Counsel for the applicant and Mr. Shukla, learned Counsel for respondent No.1 at length.

2. By this application u/s 397 read with section 401 of the Code of Criminal Procedure, 1973 (for short "Cr. P.C."), the applicant/husband has challenged the judgment and order dated 25th November, 2013 passed by learned Judge, Family Court No.6 Mumbai at Bandra in Petition No.E 243 of 2011. By that order, the learned trial Judge allowed the Petition instituted by respondent No.1/wife u/s 125 of Cr.P.C and directed the petitioner herein to pay Rs. 10,000/- per month to her towards maintenance from the date of the Petition till further orders. The petitioner was directed to deposit amount in

the designated account of respondent No.1 herein on or before 10th day of every month as per English calender. The petitioner was given 12 equal installments to clear the arrears. First installment was to fall one month from the date of the order.

3. Respondent No.1 instituted Petition u/s 125 of Cr. P.C on or about 1st June, 2011 claiming maintenance @ of Rs. 10,000/- per month. The petitioner filed say at Exhibit 6 resisting the proceedings. The learned trial Judge recorded that reconciliation was made at the initial stage, but could not bear any fruit. Hence, the case was proceeded further on merits. On the basis of the pleadings of the parties, the learned trial Judge framed issues. In paragraph 7, the learned trial Judge noted that respondent No.1 examined herself alone by filing evidence in the form of Affidavit at Exhibit 8. She also produced documents with list Exhibit 7. Petitioner failed to adduce evidence in support of his defence and also failed to cross-examine respondent No.1. The learned trial Judge noted that the petitioner and his Advocate were absent and respondent No.1 was present at the time of arguments. By order dated 10th October, 2013 below Exhibit 1, right of petitioner herein to adduce evidence was forfeited.

4. In support of this Petition, Mr. Giri submitted that the impugned order suffers from several errors of law apparent on the face of the record. The impugned order is wholly unsustainable and is contrary to the provisions of the Family Courts Act, 1984 (for short 'Act') as also the provisions of Cr. P.C. He submitted that Section 10 (1) lays down that subject to the other provisions of the Act and the rules, the provisions of Code of Civil Procedure, 1908 (for short 'C.P.C') and of any other law for the time being in force shall apply to the suits and proceedings before a Family Court. However, C.P.C does not apply to the proceedings under Chapter IX of Cr.P.C. Sub-section (2) thereof lays down

that subject to the other provisions of the Act and the rules, the provisions of Cr. P.C and the rules made thereunder shall apply to the proceedings under Chapter IX of Cr. P.C before a Family Court.

5. Mr. Giri submitted that Chapter IX consists of sections 125 to 128. Section 126 lays down the procedure. Sub-section (2) lays down that 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.

6. Section 274 so far as is relevant in the present case, lays down that in all summons-cases tried before a Magistrate, the Magistrate has to make a memorandum of substance of evidence in the language of the Court. In other words, Mr. Giri submitted that the oral evidence has to be recorded by the Magistrate and affidavit of evidence under Order-XVIII, Rule-4 of the C.P.C. cannot be filed. He relied on the following decisions.

[1]Aruna @ Suvarna & Anr Vs. Marilingappa, I (2010) Divorce and Matrimonial Cases, 704 where the learned Single Judge of Karnataka High Court has considered the provisions Sections 125, 126 and 274 of Cr. P.C. After considering these provisions in paragraph 7, the learned Single Judge observed that in all summons cases tried by a Magistrate, the Magistrate shall as the examination of each witness proceeds, make a memorandum of the substance of the evidence in the language of the Court. It is, therefore, clear from the procedure prescribed for summons cases that the evidence will have to be recorded before the Magistrate and the learned Magistrate will have to record the substance of the evidence as examination of each witness proceeds. In that case, the petitioners

claiming to be wife and daughter respectively of the respondent filed Petition u/s 125 of Cr. P.C. In that proceeding, respective parties filed Affidavits. It was, therefore, contended that the procedure followed by the learned Magistrate was unknown to law and it could not have permitted to file affidavits. Relying on this judgment, Mr. Giri submitted that in the present case, admittedly respondent No.1 filed Affidavit of evidence at Exhibit 8. The learned trial Judge proceeded to pass impugned order on the basis of that affidavit which was wholly impermissible.

[2] Vinod S/o Pralhad Balap Vs. Smt. Chhaya W/o Vinod Balap, 2002 ALL MR (Cri) 2513. In that case, by order dated 8th December, 2000, Family Court, Nagpur awarded maintenance @ Rs. 800/- per month. The applicant/husband did not pay interim maintenance. He was in arrears from November, 2001 till February, 2002. In those circumstances, respondent-wife preferred an application on 29th January, 2002 marking grievance for non payment of interim maintenance and striking out of the defence of her husband. By order dated 28th March, 2002, the trial Court allowed the application and struck out defence of the husband. It is against that order, husband instituted proceedings in this Court. In paragraph 5, this Court reproduced section 10 of the Act. In paragraph 6, it was observed that in so far as application for maintenance u/s 125 of Cr. P.C, the same falls under Chapter IX of the Cr.P.C and C.P.C has no application and the proceedings would be governed by the Cr.P.C.

[3]Anil Ambashankar Joshi Vs. Reena Anil Joshi & Anr, 2017 ALL MR (Cri) 338. In that case, the order dated 8th October, 2015

passed by the learned Judge of the Family Court, Pune below Exhibit 18 was challenged. That application was filed for discarding the evidence sought to be adduced by the respondent by way of Affidavit and asking her to step into the witness box and lead her own evidence was rejected by the Family Court. The Learned Single Judge referred to the decision of the Karnataka High Court in case of **Aruna @ Suvarna & Anr.** (supra), as also Division Bench judgment of Madhya Pradesh High Court in the case of **Rama Prasanna Tiwari Vs. Ashima**, LAWS (MPH)-2005-2-46 and Division Bench of Karnataka High Court in the case of **Gayithri Vs. Ramesh**, 1993 (2) DMC197 as also the learned Single Judge of this Court in the case of **Vinod S/o Pralhad Balap** (supra).

7. In paragraph 7, the learned Single Judge noted the issue that arose for consideration was whether recourse could be taken to Order-XVIII, Rule-4 of the C.P.C in the matter of filing an affidavit of evidence in a proceeding u/s 125 of the Cr.P.C. It was noted that Section 125 of the Cr. P.C is in Chapter IX. The said provision is followed by section 126. The learned Single Judge reproduced section 10 of the Act. In paragraph 8, it was observed that a reading of sub-section (2) of Section 10 of the Act makes it absolutely clear that the provisions of the Cr. P.C or rules made thereunder, apply to the proceedings under Chapter IX before a Family Court. If that be so, the procedure as contemplated in section 126 and section 274 of the Cr.P.C would have to be adopted in so far as evidence to be recorded under section 125 of Cr.P.C. In paragraph 14, it was observed that in so far as sub-section (3) of Section 10 of the Act is concerned, the same would also not further the case of the respondent in so far as the application of the procedure applicable to the summons cases are concerned. He also invited my attention to the order dated 28th March, 2018 passed by this Court while granting ad-interim order. Relying

on these judgments, Mr. Giri submitted that the impugned order deserves to be set aside.

8. On the other hand, Mr. Shukla relied on order dated 15th December, 2017 passed by this Court in Civil Application No.1852 of 2017 in Writ Petition No.12439 of 2016. He submitted that the order recorded the statement made by the petitioner/husband that he will deposit Rs. 4,00,000/- within a period of four weeks from the date of the order and also respondent No.1 be permitted to withdraw the said amount. Subject to the petitioner/husband depositing Rs. 4,00,000/- being arrears of maintenance, this Court directed no coercive action for recovery of the amount of arrears of maintenance be taken against him. He submitted that the said order was, however, not disclosed by the petitioner.

9. Mr. Giri countered this submission by inviting my attention to paragraphs 9 and 11 and submitted that the petitioner has pointed out that he has paid a sum of Rs. 60,000 towards arrears of maintenance. On the date of filing the Petition, he was in arrears of Rs. 4,10,000/-. In paragraph 11, he has referred to Writ Petition 12439 of 2017. In short, he submitted that the petitioner has not suppressed any relevant and material fact.

10. I have considered the rival submissions of learned Counsel for the parties. I have also perused the material on record. As noted earlier, respondent No.1 has instituted proceeding u/s 125 of the Cr.P.C claiming maintenance of Rs. 10,000/-. The petitioner has filed say at Exhibit 6 resisting her application. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. To prove her case, respondent No.1 filed her evidence in the form of Affidavit at Exhibit 8 and produced document below list Exhibit 7. In paragraph 8, the learned trial Judge noted that the petitioner

herein not only failed to adduce evidence in support of his defence but also failed to cross-examine respondent No.1. By order dated 10th October, 2013 below Exhibit 1 right of the petitioner herein to adduce evidence was forfeited. In my opinion, the petitioner should have, at the threshold, objected to the first respondent filing evidence in the form of affidavit under Order-XVIII, Rule-4 of C.P.C. Be that as it may, the petitioner did not adduce any evidence as also failed to cross-examine the first respondent. Even at the time of arguments, petitioner and his Advocate were absent and no arguments were advanced. After considering the material on record which remained un-challenged, the learned trial Judge awarded maintenance @ Rs. 10,000/- per month.

11. Mr. Giri relied on Section 10 of the Act and sections 125, 126 and 274 of the Cr.P.C and the judgments referred hereinabove. The Act is enacted to provide for the establishment of Family Courts with a view to promoting conciliation in, and securing speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. Statement of Objects and Reasons read thus;

Statement of Objects and Reasons. _ Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results **and adherence to rigid rules of procedure and evidence should be eliminated.** The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure, 1908 was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the Courts in adopting this conciliatory procedure and the Courts continue to deal with family

disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

(emphasis supplied)

2. The Bill, inter alia, seeks to,
 - (a) provide for establishment of Family Courts by the State Governments;
 - (b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;
 - (c) enable the State Governments to set up, such Courts in area other than those specified in (b) above;
 - (d) exclusively provide within the jurisdiction of the Family Courts the matters relating to:-
 - (i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of a marriage or as to the matrimonial status of any person;
 - (ii) the property of the spouses or of either of them;
 - (iii) declaration as to the legitimacy of any person;
 - (iv) guardianship of a person or the custody of any minor;
 - (v) **maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure, 1973;**
 - (e) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and the rigid rules of procedure shall not apply;
 - (f) provide for the association of society welfare agencies, counsellors, etc., during conciliation stage and also to secure the services of medical and welfare experts;
 - (g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the Court may, in the interest of justice, seek assistance of a legal expert as *amicus curiae*;
 - (h) **simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;**
 - (I) to provide for only one right of appeal which shall lie to the High Court.

12. Section 7 of the Act reads thus;

“7. Jurisdiction. (1) Subject to the other provisions of this Act, a Family Court shall_

- (a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the *Explanation*; and
 - (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends.
- Explanation (f) reads thus;*

*Explanation.*_ The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

- (a).....
- (b).....
- (c).....
- (d)....
- (e)....

- (f) a suit or proceeding for maintenance.

Sub-section (2) thereof lays down that subject to the other provisions of the Act, a Family Court shall also have and exercise_

(a)the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of Cr. P.C. Section-8 (b) lays down that where a Family Court has been established for any area, no Magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Cr.P.C.

13. Sections 10, 14 & 15 read thus;

10.Procedure generally._ (1) Subject to the other provisions of this Act and the 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 that 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”

14. Application of Indian Evidence Act, 1872._ A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).

15. Record of oral evidence._ In suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record”.

14. Section 20 lays down that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

15. The moot question is whether filing of affidavit of evidence under Order-XVIII Rule-4 before the Family Court in proceeding u/s 125 of Cr. P.C is so fatal so as to set aside the order of granting maintenance?

16. A perusal of sub section (3) of Section 10 clearly shows that nothing in sub-section(10) or sub-section (2) shall prevent a Family Court **from laying down its own procedure with a view to arriving at the truth of the facts alleged by the one party and denied by the other.** Thus, though sub-section (2) of Section 10 lays down that subject to the other provisions of the Act and the rules, the provisions of the Cr. P.C or the rules made thereunder, apply to the proceedings under Chapter IX of Cr. P.C, this will not prevent a Family Court to lay down its own procedure with a view to arriving at the truth of the facts alleged by the one party and denied by the other which will also include the manner of recording evidence which is part of procedural aspect. Section 14 lays down that a Family Court may receive as evidence any report, **statement,**, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872. Section 15 lays down that in suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and Judge and shall form part of the record. This reinforces that the matter is left to the discretion of the Family Court to record substance of the evidence of the witness and not recording evidence of witness at length.

[emphasis supplied]

17. Section 125 lays down that if any person having sufficient means neglects or refuses to maintain parties specified in clauses (a) to (d), a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of such persons specified in clause (a) to (d) as such Magistrate thinks fit. When the

proceedings u/s 125 are before Magistrate , necessarily procedure u/s 126 read with section 274 of Cr. P.C will have to be followed. As against this, Section 8 (b) of the Act lays down that where a Family Court has been established for any area no Magistrate shall in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of Cr. P.C. Thus, exclusive jurisdiction is conferred upon the Family Court established for a particular area and in that case, Magistrate will not be in a position to exercise powers under Chapter IX of Cr. P.C in respect of such area.

18. In view thereof, reliance placed on Sections 126 and 274 of Cr.P.C will not advance the case of the petitioner when the proceedings are before a Family Court. Section 10 (3) of the Act lays down that nothing in sub-section (1) or sub-section (2) shall prevent a Family Court **from laying down its own procedure with a view to arriving at a truth of the facts alleged by one party and denied by other party.**

19. It is also settled principle of law that one has to be guided by the substance and not form of the matter. In any case, these are the procedural aspects during the course of trial. Apart from that, even if the affidavit of evidence under Order-XVIII, Rule-4 is tendered, it will not cause any prejudice to adversary as he can always cross-examine the witness filing affidavit of evidence. Thus, the person complaining about filing of affidavit of evidence under Order-XVIII, Rule-4 will have to plead and prove that prejudice is caused to him by not recording evidence by the presiding Judge.

20. In the present case, as noted earlier, after filing of say, the petitioner did not participate in the trial. He failed to cross-examine respondent No.1. By order dated 10th October, 2013 below Exhibit 1 his right to adduce evidence was forfeited. Even, at the time of arguments, neither the

petitioner nor his Advocate were present. No argument was advanced before the learned trial Judge. In my opinion, the petitioner should have objected at the threshold filing of Affidavit of evidence. After not participating in the trial, it is not open to the petitioner to complain about filing of the affidavit of evidence under Order-XVIII, Rule-4.

21. Apart from that, as noted earlier, the petitioner had instituted Writ Petition No.12439 of 2016 in this Court. In the order dated 15th December, 2017, this Court recorded a statement made on his behalf that he will deposit arrears of Rs. 4,00,000/- within a period of 4 weeks and that the first respondent was permitted to withdraw that amount. It is only on that basis this Court directed no coercive action for recovery of amount of maintenance can be taken against the petitioner. The petitioner has referred to filing of this Petition and order of withdrawal is annexed at Exhibit E Page 47. He has chosen not to annex the order dated 15th December, 2017. Even in the Memo of petition, no reference is made to that order. In short, the petitioner has not approached this Court with clean hands and has suppressed relevant and material facts. But for the said fact being pointed out by Mr. Shukla this fact would not have been brought on record.

22. Coming to the decision in the case of **Aruna @ Suvarna & Anr** (supra). A perusal of that decision clearly shows that proceedings u/s 125 were filed before the learned Magistrate and not before a Family Court. As the proceedings u/s 125 of Cr. P.C were filed before the Magistrate, he has to follow the procedure as per section 126 and 274 of Cr. P.C. In my opinion, the said decision is, therefore, not applicable to the facts of the present case.

23. In so far as the decision of this Court in the case of **Vinod S/o Pralhad Balap** (supra) is concerned, in that case, the respondent did not

comply order dated 8th December, 2012 directing him to pay maintenance @ Rs. 800/- per month. Respondent/wife, therefore, took out application for striking out defence which was allowed on 28th March, 2002. In paragraph 4, this Court noted that contention of the applicant that there is no provision u/s 125 of Cr. P.C to strike out defence if there is failure to comply the order, recourse has to be taken to section 125 (3) for issuing warrant for levying the amount due in the manner provided for levying fines. In paragraph 5, Section 10 of the Act was reproduced. It is in that context, in paragraph 6, it was observed that as an application for maintenance u/s 125 of Cr. P.C falls under Chapter IX of the Cr.P.C, C.P.C has not application and the proceeding will be governed by Cr.P.C. In that case, the Court was not called upon to examine contention based on sub-section (3) of Section 10 of the Act,. In view thereof, said decision is also not applicable to the facts of the present case.

24. In the case of **Anil Ambashankar Joshi** (supra), affidavit of evidence was filed under Order-XVII, Rule-4 of C.P.C. This Court relied on decisions in the cases of;

[1] **Aruna @ Suvarna & Anr.**

[2] **Rama Prasanna Tiwari Vs. Ashima, LAWS (MPH)-2005-2-46**

[3] **Gayithri Vs. Ramesh, 1993 (2) DMC197**

[4] **Vinod S/o Pralhad Balap (supra).**

In paragraph 4, this Court noted the findings recorded by the learned trial Judge while rejecting the application for discarding affidavit filed under Order-XVII, Rule-4. The learned trial Judge while rejecting that application observed that no loss would be caused to the respondent because he has right to cross-examine the petitioner. Though this contention was specifically referred in paragraph 4, a perusal of that decision does not indicate that the said finding was specifically dealt with. In paragraph 14, this Court referred to sub-section

(3) of Section 10 and observed that the same would also not further the case of the respondent in so far as the application of the procedure applicable to the summons cases are concerned.

25. In view of the preamble, Statements of Objects and Reasons, sections 7,8,10,14,15 and 20 of the Act and for the reasons recorded earlier, I respectfully disagree with this view. In normal course, I would have referred the matter to a larger Bench. I, however, refrain from referring the matter to a larger Bench in view of the following circumstances;

- [1] Respondent No.1 has instituted proceedings under section 125 of Cr.P.C. claiming maintenance. By referring the matter to a larger Bench, payment of maintenance will be delayed.
- [2] The petitioner did not participate in the trial after filing say. He did not object to filing of affidavit at the threshold by the first respondent.
- [3] He did not cross-examine responded No.1.
- [4] By order dated 10th October, 2013, right of petitioner to adduce evidence was forfeited.
- [5] Neither the petitioner nor his Advocate were present at the time of arguments.
- [6] The petitioner did not disclose order dated 15th December, 2017 passed by this Court in Writ Petition 12439 of 2016. He also did not comply with order of depositing arrears of Rs. 4,00,000/- within 4 weeks from the date of the order.
- [7] Even otherwise, learned Counsel for the parties have not made elaborate submissions as regards interpretation of provisions of the Act and Cr. P.C. In appropriate case and on fuller consideration, the Court may consider going into this aspect as and when occasion arises.

For the present as advised and in view of the peculiar facts obtaining in the present case, it is not necessary to refer the matter to the larger Bench.

26. In the light of the aforesaid discussions and in view of conduct of the petitioner, I am clearly of the opinion that he is dis-entitled to any relief in exercise of powers u/s 397 and 401 of Cr.P.C. Hence, no case is made out for interfering with the impugned order. The application fails and the same is dismissed. In view of disposal of Criminal Revision Application (ST) No.91 of 2018, Criminal Application No.83 of 2018 and Criminal Application No.84 of 2018 do not survive and the same are dismissed.

27. At this stage, Mr. Giri orally applies for stay for a period of one week. Mr. Shukla opposes to it. For the reasons recorded hereinabove, I do not find that the request made by Mr. Giri is reasonable and oral application for stay is rejected. Order accordingly.

[R.G. KETKAR, J.]