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

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Judgment delivered on: 09.02.2018

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CRL.REV.P. 295/2013 & CRL.M.A. 8002/2013

MANISH KUMAR JAIN

..... Petitioner

Through: Mr. Prashant Mendiratta, Advocate
and Ms. Malvika, Advocate.

versus

AKANKSHA JAIN & ANR.

..... Respondents

Through: Ms. Anu Narula, Advocate for R- 1
with Respondent No. 1 in person.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. The learned counsel for the appellant states that the case was not heard by this Court substantively and since the Roster has changed, the matter stood released to be heard by the Roster Bench. The Court would however note, that the last order records:

*“Arguments heard in part.
List for further arguments on 07.02.2018”.*

2. This petition seeks the setting aside of an order passed by the Family Court, Judge-02, Saket, New Delhi on 08.04.2013, emanating from an ex-parte order dated 25.03.2010.

3. The petitioner and the respondent were married on 16.02.2005. In about two years, there was estrangement between them and the parties have been living separately ever since. The respondent sought maintenance under Section 125 Code of Criminal Procedure (Cr.P.C.), 1973. On 26.05.2009, the appellant was proceeded ex-parte since he did not appear in the proceedings despite being duly served. An amount of Rs.25,000/- was granted on 25.03.2010 after the Trial Court took into account the contentions of the applicant that the appellant was a person of means. While granting the said amount, the applicant's (wife's) family background too was taken into consideration.

4. In the appellant's application for setting aside the ex-parte order, the Trial Court directed him to deposit 50% of the awarded amount since the applicant/wife had not been paid any monies from the time she had to leave the matrimonial home, particularly from March, 2010 onwards.

5. The learned counsel for the appellant states that the impugned order is erroneous since it directs the appellant to pay 50% of the maintenance amount without adjudicating upon the application for setting aside of ex-parte order.

6. It is the appellant's contention that the impugned amount is not payable because the respondent otherwise is gainfully employed.

7. The appellant contends that since neither notice nor copy of the petition was served upon him, the ex-parte order is bad in law and should be set aside. He submits that he was out of station to attend a marriage on 25.09.2009 when the notice was allegedly served upon him at his mother's

address at B-38, Green Park, New Delhi, whereas contemporaneously his place of residence was 303, SFS Apartments, Hauz Khas, New Delhi; he was proceeded ex-parte on 26.05.2009 and the ex-parte maintenance amount was granted to the respondent on 25.03.2010; that the alleged service of notice at his mother's address at B-38, Green Park, New Delhi, is no service because the respondent/applicant had already shifted at his new address at Hauz Khas; that the respondent has no reason to give his previous residential address i.e. his parents' house, for effecting service of notice. It is also contended that the respondent's application for grant of maintenance under the Domestic Violence (DV) Act, 2005 was declined in the first instance because she had not given any details about the rental being paid at the SFS Apartments. It is another matter though, that in appeal an amount of Rs.10,000/- was granted as maintenance under the D.V. Act.

8. Be that as it may, the Court would further note that the address of the appellant in the proceedings under the D.V. Act is shown as B-38, Green Park, New Delhi.

9. The appellant argues that there is not even a whisper of D.V. Act proceedings in the application under section 125 Cr.P.C. The appellant had already appeared in the same Court in which other proceedings between the parties were pending. Therefore, there was no occasion for him to not appear in the proceedings under section 125 Cr.P.C. The notice was never served at his actual address, hence, ex-parte proceedings under section 125 Cr.P.C. were erroneous and should be set aside.

10. Refuting the aforesaid arguments, the learned counsel for the respondent submits that the appellant was duly served but he chose not to

appear in the proceedings; he has resisted payment of any maintenance amount to the respondent – his estranged wife. The story of his new residential address being at 303 SFS Apartments, Hauz Khas, New Delhi, is yet another step in subterfuge to derail the grant and payment of the maintenance amount. It is yet another episode in his relentless pursuit to harass his estranged wife. She contends that other proceedings being under section 24 of the Hindu Marriage (H.M.) Act and under the D.V. Act have nothing to do with the order passed in the application for maintenance under section 125 Cr.P.C.; that under section 24 of the H.M. Act, an amount of Rs.2.00 lakh per month was sought, but the Court granted only an amount of Rs.60,000/- per month which was subsequently reduced to Rs.25,000/- per month and another amount of Rs.10,000/- was granted in the proceedings under D.V. Act.

11. The appellant had preferred an SLP against the order under section 24 of H.M. Act as well as under the D.V. Act. The Supreme Court by its order dated 30.03.2017 directed as under:

“17. The order impugned herein is set aside and the appeal is allowed. The amount of Rs.60,000/- awarded as maintenance pendente lite is reduced to Rs.25,000/- per month which is in addition to Rs.10,000/- paid under the proceedings of the D.V. Act. The appellant-husband is directed to pay the arrears w.e.f. 01.02.2012 till the disposal of the divorce petition, within four weeks from today. The appellant-husband shall continue to pay Rs.25,000/- per month in addition to Rs.10,000/- paid under the proceedings of the D.V. Act on or before 10th of every English calendar month till the disposal of the divorce petition. If the appellant-husband has paid or

deposited any amount of maintenance pursuant to the order of the High Court dated 21.02.2014, the same shall be set-off against the arrears to be paid by the appellant-husband. The respondent-wife is at liberty to withdraw the amount, if any, deposited by the appellant-husband pursuant to the order dated 21.02.2014. We make it clear that we have not expressed any opinion on the merits of the matter. In case the appellant-husband does not comply with the order, as above, including for payment of arrears, he would be visited with all consequences including action for contempt of Court”.

12. In the appellant’s application under section 126(2) Cr.P.C. seeking setting aside of the ex-parte order dated 25.03.2010, the family Court had directed that 50% of the maintenance amount granted by the Court be deposited by him before the next date of hearing and listed the application for arguments on 23.07.2013. The Court was cognizant of the fact that despite the maintenance amount being granted on 25.03.2010, not a single paisa had been paid to the estranged wife.

13. The appellant is particularly aggrieved by the direction to pay 50% of the amount even before his application under section 126(2) Cr.P.C. to be heard and disposed off. Section 126(2) Cr.P.C. reads as under:

26(2)All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proceed 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.(emphasis supplied)

14. The aforesaid provision of law clearly confers jurisdiction upon the Magistrate to proceed ex-parte. Such ex-parte order can be set aside when an application is made within 3 months from the date of the ex-parte order and upon good cause being shown, subject to such terms including payment of costs, as the Magistrate may think just and proper. In the present case, the Magistrate thought it just and proper that at least 50% of the amount granted to be paid to the wife, as maintenance for the previous three years, be deposited especially since no monies at all had been paid to her under the said order. The said direction cannot be faulted with nor is it unjust. It is only an interim order, as a condition to hear the appellant's application under section 126 (2) Cr.P.C. The appellant's contention that the respondent did not inform him about section 125 Cr.P.C. proceedings while she was appearing in the Trial Court in other proceedings against him, is untenable because she is under no obligation to do so. Besides, it cannot be expected for them to exchange any cordial correspondence or information in bitterly contested matrimonial dispute as rival estranged spouses. It is not incumbent upon her to keep informing her spouse against whom she has complaints of physical violence and who allegedly ousted her from her matrimonial home.

15. In view of the above, the Court finds no reason to interfere with the impugned order. The appeal is without merit and it is accordingly dismissed.

NAJMI WAZIRI, J

FEBRUARY 09, 2018/RW

