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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Revision No.600 of 2018

Order Reserved on : 10.5.2019

Order Passed on : 8.7.2019

Arvind Kumar Tiwari, S/o Dr. Lekh Ram Tiwari, aged about 37 years,
R/o Village and Post Chitoud, Tahsil and Police Station Gurur, District
Balod, Chhattisgarh

---- Applicant

versus

1. Smt. Pushpa Tiwari, W/o Arvind Tiwari, aged about 28 years,
2. Mehul Tiwari (Minor), aged about 02 months, S/o Arvind Tiwari,
through Guardian mother Smt. Pushpa Tiwari, R/o New Raipur,
Kendri, Abhanpur, Raipur, District Raipur, Chhattisgarh

--- Respondents

For Applicant	:	Shri Anil S. Pandey, Advocate
For Respondents	:	Shri Sampurnank Gupta, Advocate

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. ORDER

1. The instant revision has been preferred by the husband against the order dated 24.5.2018 passed by the 1st Additional Principal Judge, Family Court, Raipur in M.J.C. No.310 of 2015, whereby the Family Court has granted monthly maintenance of Rs.5,000/- in favour of Respondent No.1/wife.
2. Facts of the case, in brief, are that marriage between the Applicant and Respondent No.1 was solemnised on 30.5.2009. As alleged by Respondent No.1/wife, after solemnisation of the marriage, the Applicant/husband and his parents started harassing her for demand of dowry. On the occasions of festivals, they used to send her to her maternal house threatening her to bring different dowry

articles for them. It was further pleaded by her that when she got pregnant, the husband ousted her from his house and pressurised her for undergoing DNA test and he also denied her to keep with him. On 8.10.2015, Respondent No.2/son took birth. The husband, after birth of Respondent No.2, refused that he is his own child. In these circumstances, due to fear that she may fall mentally ill, now, she herself is not interested to live with the husband. She is unable to maintain herself and the child. The husband has sufficient means to maintain them. Therefore, a claim of maintenance of Rs.25,000/- per month was made by her.

3. In his reply, the Applicant/husband only admitted that Respondent No.1 is his wife. He denied all the allegations made against him and pleaded that the wife used to visit and reside at her maternal house most of the times. She resided at her maternal house since 21.11.2014 to 22.3.2015. On 23.3.2015, she returned to his house. On 14.5.2015, she told him that she is pregnant. At that time, her medical examination was got done. In the report, it was disclosed that she was carrying pregnancy of 16 weeks and 5 days. During the period she conceived, she was residing at her maternal house and, therefore, her pregnancy was not from his side. Thus, DNA test was demanded by him, but she refused for the test. She herself left his house without any reasonable cause. Therefore, she is not entitled to get any maintenance.

4. Before the Family Court, Respondent No.1/wife examined herself as Applicant Witness No.1 and also examined her sister Kumari Mithlesh Pathak as Applicant Witness No.2 and mother Smt. Shakuntala Pathak as Applicant Witness No.3. The Applicant/husband examined himself as Non-Applicant Witness

No.1 and also examined his father Lekhram Tiwari as Non-Applicant Witness No.2. Both the husband and wife also led certain documentary evidence before the Family Court. After recording evidence of the parties and hearing arguments on their behalf, the Family Court, vide the impugned order dated 24.5.2018, rejected the claim of maintenance of Respondent No.2/son on the ground that he is not a legitimate or illegitimate child of the Applicant, but granted a monthly maintenance of Rs.5,000/- in favour of Respondent No.1/wife. Hence, the instant revision by the husband.

5. Learned Counsel appearing for the Applicant submitted that in the DNA test report of Respondent No.2/child, it is clearly stated that the Applicant is not biological father of Respondent No.2. Thus, it is clear that Respondent No.1/wife is living in adultery and, therefore, she is not entitled to get any maintenance from the Applicant. It was further submitted that from the evidence available on record, it is also clear that Respondent No.1/wife is residing separately from the Applicant/husband without any reasonable cause and, therefore, on this ground too, she is not entitled to get any maintenance. The Family Court has granted maintenance of Rs.5,000/- per month in favour of the wife despite there being the fact that the husband has no source of income.
6. Learned Counsel appearing for the Respondents supported the impugned order.
7. I have heard Learned Counsel appearing for the parties and perused the entire record with due care.
8. It is not in dispute that Respondent No.1 is legally wedded wife of

the Applicant. Their marriage was solemnised on 30.5.2009. It is also not in dispute that before the Family Court, during the pendency of the litigation between the parties, DNA test of Respondent No.2/son was conducted. In the DNA test report, which is placed on the record of the Family Court, it is reported that the Applicant is not biological father of Respondent No.2/child and Respondent No.1 is biological mother of Respondent No.2/child. Thus, as per the DNA test report, the Applicant is not biological father of Respondent No.2/child.

9. It was argued on behalf of the Applicant that since the DNA test report states that the Applicant is not biological father of Respondent No.2/child, it is clear that Respondent No.1 is living in adultery and, therefore, she is not entitled to get any maintenance.
10. Sub-section (4) of Section 125 of the Code of Criminal Procedure runs thus:

**“125. Order for maintenance of wives,
children and parents.—xxx xxx xxx xxx**

xxx xxx xxx xxx

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.”

11. A perusal of the entire record of the Family Court shows that there is no pleading or evidence to show that with whom and for which period Respondent No.1/wife lived in adultery. From the DNA test report, it is only established that the Applicant is not biological father of Respondent No.2/child. There is no evidence on record to show that immediately before filing of the application for

maintenance or when the said application was being considered, Respondent No.1/wife was living in adultery. According to sub-section (4) of Section 125 of the Code of Criminal Procedure, it has to be established that the wife, who had filed the application for maintenance, was living in adultery immediately before filing of the application or when the said application was being considered.

- 12. In 1977 Cri.L.J. (NOC) 148 (Cal.) (Nalini Kumar Pal v. Smt. Khukurani Pal), it has been observed as under:**

“In order to come within S. 125(4), it has to be established that the wife who had filed the application for maintenance was living in adultery immediately before the filing of application or when the application was being considered. As ex parte decree for divorce on the ground of wife's adultery obtained by husband 5 years prior to the maintenance application would not satisfy, the main requirement with regard to adultery within meaning of S. 125.”

- 13. In 1987 Cri.L.J. 655 (Orissa High Court) (Smt. Rachita Rout v. Basanta Kumar Rout), it has been observed as follows:**

“6. The expression “if she is living in adultery” undoubtedly connotes a course of adulterous conduct more or less continuous. An occasional lapse would not be a sufficient reason for refusing maintenance within the ambit of sub-s. (4). Therefore, a Magistrate has to probe and find out whether at or about the time of the application, there has been an adulterous conduct on the part of the wife. Further, there must be clear proof of adultery. A suspicion nurtured by the husband will not disentitle the wife to receive the maintenance under the Code. It is true that direct evidence of adultery can seldom be given, but at the same time there must be some evidence to prove the allegations of adultery and a mere bazar gossip would not prove adultery. Since sub-s. (4) is in the nature of an exception to the main section, it is for the husband claiming protection under the said provision to show that the said sub-section is applicable, that is to say, the husband must establish

that the wife is living in adultery.”

- 14.** In **AIR 2009 (NOC) 212 (Gau.) (Md. Abdul Sattar v. The State of Assam)**, it has been observed thus:

“A bare reading of the provisions of Section 125(4) makes it more transparent that a husband has no obligation to maintain his wife if she is living in adultery. The expression “if she is living in adultery” occurring in S. 125(4) conveys present continuous tense. That is to say, a wife disentitles herself from receiving maintenance from her husband only during the period, when she lives in adultery. When she does not live in adultery, or when she ceases to live in adultery, even if she had lived in adultery in the past, the husband cannot refuse to maintain her on the ground that she had, in the past, lived in adultery. When the wife ceases to live in adultery, the husband cannot say that since she had lived in an adulterous relation with a man in the past, she is not entitled to receive maintenance from her husband, even though she has ceased to live in adultery. In the case at hand, even if the second party had lived in adultery, the fact remains that according to the evidence on record, she has been presently living, admittedly, with her parents and has no surviving ties with her abductor or paramour, as the case may be. In such circumstances, the present petitioner, as husband of the opposite party, was liable to maintain her, particularly when the opposite party does not admittedly, have any independent source of livelihood and she is dependent for her sustenance on her parents.”

- 15.** In the light of above enunciation of law, in the instant case, I find that there is nothing on record to show that Respondent No.1/wife was living in adultery immediately before filing of the application for maintenance or when the application was being considered. Therefore, the argument advanced by Learned Counsel for the Applicant/husband in this regard is not sustainable.

- 16.** In her affidavit submitted under Order 18 Rule 4 of the Code of

Civil Procedure, it has been categorically stated by Respondent No.1/wife that after the marriage, demand for dowry was being made from her. Whenever she was visiting her maternal house, she was being asked to bring dowry articles. She was being mentally harassed by the Applicant/husband and her in-laws. During her cross-examination, the above facts have not been rebutted by the Applicant/husband. Respondent No.1/wife's sister Kumari Mithlesh Pathak (AW2) and mother Smt. Shakuntala Pathak (AW3) have also corroborated the above statement of Respondent No.1. In his examination-in-chief, the Applicant/husband has also admitted the fact that Respondent No.1/wife had made a complaint in Mahila Police Station about beating and thereafter expelling her out of his house. He has also admitted that she is residing at her maternal house from 19.5.2015. Thereafter, he never went to her to bring her back. There is also no evidence on record to show that he ever made any social or legal effort to bring her back. Therefore, from the evidence on record, it is clear that Respondent No.1/wife has sufficient cause to reside separately. Hence, the finding of the Family Court in this regard is in accordance with the evidence available on record.

17. As regards quantum of maintenance, the Applicant/husband has admitted that he owns a flour mill in his village and he earns upto Rs.150/- per day from the said mill. In paragraph 8, he has also admitted that he owns an STD-PCO shop at Village Charama and the said shop is still in his name. In paragraph 13, he has also admitted that he owns about 2.5 acres of agricultural land at Village Chitaud. He has also admitted that at Village Charama, where his STD-PCO shop is being run, he owns total 4 complexes and out of

them 3 complexes are given on rent. From the above also, it is clear that the Applicant/husband has sufficient means to maintain Respondent No.1. Taking into consideration the financial condition of the Applicant/husband and social status of both the husband and wife, I find that the grant of maintenance of Rs.5,000/- per month to Respondent No.1/wife is just and proper.

18. Consequently, I find no merit in the revision. It is, therefore, dismissed.
19. Record of the Court below be sent back along with a copy of this order forthwith for information and necessary compliance.

Sd/-

(Arvind Singh Chandel)
JUDGE