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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 15/10/2020****Judgment Delivered on : 16/12/2020****Criminal Revision No. 388 of 2020**

1. Smt. Monika Arase W/o Shri Kailash Arase Aged About 32 Years R/o House No. 54/ 1354, Near Sahnai Garden, Goel Chowk, Rohinipuram, Tehsil And District Raipur Chhattisgarh., District : Raipur, Chhattisgarh
2. Kumari Anshika Arase D/o Shri Kailash Arase Aged About 9 Years Minor Through Her Mother And Natural Gaurdian Smt. Monika Arase, R/o House No. 54/ 1354, Near Sahnai Garden, Goel Chowk, Rohinipuram, Tehsil And District Raipur Chhattisgarh., District : Raipur, Chhattisgarh

---- Applicants**Versus**

Kailash Arase S/o Shri Indelal Arase Aged About 40 Years R/o House No. Ha - 23, Senior Hudco , Hudco Staff Colony, Hedalgarg Cement Plant, Narsingarh, District Damoh Madhya Pradesh.

---- Respondents**AND****Criminal Revision No. 156 of 2020**

Kailash Arase S/o Indelal Arase Aged About 40 Years R/o House No Ha-23, Senior Hudko Hudko Staff Colony, Hedalgarg Cement Plant, Narsingarh, District Damoh, Madhya Pradesh. Mobile No. 7389109562,8462002567, District : Damoh, Madhya Pradesh.

---- Applicant**Versus**

1. Smt. Monika Arase W/o Kailash Arase Aged About 32 Years R/o House No 54/1354, Near Sahanai Garden, Gol Chowk, Rohonipuram, Tahsil And District Raipur, Chhattisgarh. Mobile No 8349705775, District : Raipur, Chhattisgarh
2. Kumari Anshika Arase D/o Kailash Arase Aged About 9 Months Represented Through Mother Smt. Monika Arase, R/o House No 54/1354, Near Sahanai Garden, Gol Chowk, Rohonipuram, Tahsil And District Raipur, Chhattisgarh. Mobile No 8349705775, District : Raipur, Chhattisgarh

---- Respondents

For the Applicants : Shri Rajesh Kumar Kesharwani, Adv.
in CRR No.388 of 2020 and
for the respondents in CRR 156 of 2020.

For the Respondent in : Shri Pawan Kesharwani, Advocate.
CRR No.388 of 2020 and
for the applicant in CRR 156 of 2020.

Hon'ble Shri Justice Rajendra Chandra Singh Samant
CAV JUDGMENT

1. These revision petitions have been filed against the same order dated 12.12.2019 passed by the Learned First Additional Principal Judge, Family Court in M.J.C. No. 290 of 2019. The applicants in CRR No. 388 of 2020 shall be referred to as the applicants and the applicant in CRR No.156 of 2020 shall be referred to as respondent throughout in this order.
2. The applicants in CRR No. 388 of 2020 have brought this revision petition praying for enhancement in the order of maintenance passed by the Court below whereas Applicant – Kailash Arase in CRR No.156 of 2020 has filed this revision petition being aggrieved by the order directing him to pay maintenance of Rs.20,000/- to the respondents.
3. The applicants had filed an application under Section 125 of the Cr.P.C. stating that the respondent is husband of applicant No.1 – Smt. Monika Arase and father of applicant No.2 – Kumari Anshika Arase who has deserted the applicants and not taking care of their maintenance. The applicants are unable to maintain themselves whereas, the respondent is a person having means to pay the same. It was prayed by the applicants in this case that the respondents be directed to pay the maintenance of Rs.35,000/- per month.
4. Respondent – Kailash Arase, who is the applicant in CRR No.156 of 2020 denied the pleadings and raised the grounds that applicant No.1 – Smt. Monika Arase was living an adulterous life and that she is having qualification of MBA, and is also earning of Rs.20,000/- per month, therefore, applicant No.1 – Smt. Monika Arase in CRR No.388 of 2020

had no entitlement for maintenance.

5. Learned Court below by the impugned order has held that applicant No.1 is wife and applicant No.2 is daughter of respondent – Kailash Arase. On the question regarding the capability of applicant No.1 to earn livelihood, the finding was given that she is not having any engagement at present, therefore, she is unable to maintain herself and the application was allowed by passing an order to grant maintenance of Rs.12,000/- to applicant No.1 – Smt. Monika Arase and Rs.8,000/- to applicant No.2 – Kumari Anshika Arase.
6. Learned counsel for the applicant in CRR No. 156 of 2020 submits that the respondent was not given proper opportunity of hearing which is demonstrated from the order-sheet itself. On the date fixed for further proceedings on 22.10.2019, respondent – Kailash Arase was represented by his counsel and then the date was fixed on 7.11.2019 only for appearance of the respondent. On 7.11.2019, the respondent was unable to give appearance and for that reason the order was passed for *ex parte* proceeding. On the next date i.e. on 7.12.2019, the affidavits under Order XVIII Rule 4 of the CPC were filed by the applicants and their evidence was closed. It was on the very same day, the respondent gave appearance and filed an application under Order IX Rule 7 of the CPC praying for setting aside the *ex parte* proceedings. The Learned Family Court by order dated 10.12.2019 dismissed the application without giving any consideration to the prayer made by the respondent's side and then the matter was finally decided by the impugned order on 12.12.2019.
7. It is submitted that the respondent had bonafide reason for his non-appearance on 7.11.2019 and that he had very promptly filed an

application praying for setting aside the *ex parte* proceedings against him. It was not at all considered by the Court below and the order passed on 10.12.2019 dismissing the application under Order IX Rule 7 of the CPC was arbitrary and without application of mind. Therefore, the impugned order is not sustainable.

8. Reliance has been placed on the judgment of High Court of Punjab and Haryana in the case of **Balwant Singh Bhagwan Singh and Ors. vs. Raj Singh Baldev Kishen** reported in **AIR 1969 P H 197** and on the judgment of this Court in the case of **Premalal and Ors. vs. Kunti Bai and Ors.** in **Second Appeals No.132 and 137 of 2007** dated 11.9.2019 and it is prayed that the petition be allowed by setting aside the impugned order, thereafter, the case be remanded to the Learned Family Court for giving opportunity of hearing to the respondent before deciding the case finally.
9. Learned counsel for the applicants in CRR No.388 of 2020 who are respondents in CRR No.156 of 2020 opposes the submissions made stating that the *ex parte* order was not challenged under the provisions of Cr.P.C., therefore, the *ex parte* order dated 10.12.2019 has become final. The respondent has capacity to make payment of maintenance and the case of the applicants had been fully established regarding their entitlement to receive maintenance. It is further submitted in support of CRR No. 388 of 2020 that the respondent has himself admitted that he is getting monthly salary of Rs.90,000/-, on that basis, the maintenance order is on the lower side and not in accordance with the status which the applicants enjoyed when they had been living in the society of the respondent, therefore, it is prayed that CRR No. 156 of 2020 be dismissed and CRR No. 388 of 2020 be allowed granting relief to the applicants.

10. Learned counsel for the respondent has replied to the submissions made for CRR No.388 of 2020 and submits that the respondent had contested the application filed by the applicants on substantial ground on which he has not been afforded any opportunity for hearing, therefore, CRR No. 156 of 2020 be allowed and the relief be granted to the respondent and in doing so there would not be any necessity for passing any order of enhancement in maintenance as prayed in CRR No.388 of 2020.
11. Heard counsel for both the parties and perused the documents present in the record.
12. On perusal of the order-sheets of the proceedings shows that the respondent gave his appearance for the first time on 25.9.2019. On the next date fixed on 22.10.2019, the respondent was represented by counsel, then again the case was fixed for his appearance and when he did not appear on the next date i.e. 7.11.2019 the order for taking the case *ex parte* was passed. The respondent then gave appearance on 7.12.2019 making a prayer for setting aside *ex parte* proceedings which was dismissed on 7.12.2019.
13. Proviso 2 of sub-section 2 of Section 126 of the Cr.P.C. provides that the order passed in the *ex parte* proceedings may be set aside for good cause shown on an application made within three months from the date of passing of such order.
14. Applicant – Kailash Arase in CRR No. 156 of 2020 instead of filing an application under Section 126(2) of the Cr.P.C. for setting aside the *ex parte* order has preferred this revision petition and there appears to be no bar for bringing such revision petition, as this remedy is also available to the person aggrieved.

15. On perusal of the impugned order and the copy of the order-sheets filed alongwith the application, it is obvious that applicant – Kailash Arase did not give appearance on 7.11.2019 and then, the Court ordered for *ex parte* proceeding. Subsequent to which, the respondent who is applicant in Cr.R. No. 388 of 2020 filed an affidavit under Order XVIII Rule 4 of the CPC and then the Family Court proceeded to decide the case.
16. Applicant – Kailash Arase had filed reply to the petition under Section 125 of the Cr.P.C. and he had taken a stand to defend himself in the proceeding against him, therefore, the case of the respondents/ applicants in Cr.R. No. 388 of 2020 was not uncontested. The negligence of applicant – Kailash Arase is though found due to his non-appearance on 7.11.2019, but he made attempt to amend this situation by appearing on 7.12.2019 and filing an application under Order IX Rule 7 of the CPC, which was dismissed on 10.12.2019 without passing any speaking order. Hence, it appears that applicant – Kailash Arase had made efforts to participate in hearing despite his negligence on one occasion. Therefore, he should have been given one opportunity of hearing before the Court.
17. In the matter of **Premial** (supra) it was observed by this Court that it is now well settled that an affidavit under Order XVIII Rule 4 of the CPC is no evidence within the meaning of Section 3 of the Evidence Act, unless an opportunity to effectively cross-examine is given to the otherside, further consideration can be made to find out what shall be the position of an affidavit under Order XVIII Rule 4 of the CPC, in a case in which the Court has ordered to proceed *ex parte* against the respondent. The provision under Order IX Rule 7 of the CPC cannot be made applicable to a proceeding under Section 125 of the Cr.P.C. as this proceeding is

clearly under the Code of Criminal Procedure, therefore, applicant – Kailash Arase had no option to file an application for setting aside the *ex parte* proceeding but he had an option to file an application under Section 126(2) of the Cr.P.C. to set aside the final order, but instead of doing the same, he has preferred this revision petition regarding which there is no bar in law.

18. The powers that are exercised in the revisionary jurisdiction under Section 397 of the Cr.P.C. are for the purpose of examining the correctness, legality or propriety of any order passed by the Inferior Court. In the present matter, the question of propriety has been brought-forth as applicant – Kailash Arase in Cr.R. No. 156 of 2020 has a stand to take and contest the proceeding initiated on an application filed by the respondent under Section 125 of the Cr.P.C., therefore, the ground of propriety has weight and that cannot be ignored.

19. Hence, for these reasons, Cr.R. No. 156 of 2020 deserves to be allowed which is allowed. The impugned order is set aside and the learned Family Court is directed to take up the proceeding, expeditiously, after give opportunity of hearing to the parties and decide the same preferably within a period of four months and Cr.R. No. 388 of 2020 is also disposed off accordingly.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE