

HIGH COURT OF CHHATTISGARH, BILASPUR

Order Reserved on : 12.02.2020

Order Passed on : 12/03/2020

Cr.R. No.1302 of 2019

- Himanshu Jaiswal S/o Arun Jaiswal Aged About 33 Years R/o In Front Of Laxmi Talkies, Lepo Road, Hazaribagh, District - Hazaribagh (Jharkhand) Present Address F/511, Pride Apartment, Beilkahalli Signal, B.G. Road, Bengaluru (Karnataka) Office Address - Citrix Systems Inc. 851, West Cyprus Creek Road, Fort Lauderdale, Florida - 33309, United States Of America.

---- Applicant

Versus

- Nidhi Nagwanshi (Jaiswal) W/o Himanshu Jaiswal, Aged About 32 Years R/o 6B/ 6/1, Bhilai, District - Durg Chhattisgarh

---- Non-applicant

For Applicant	:	Mr. Awadh Tripathi along with Mr. Soumitra Kesharwani, Advocates.
For Non-applicant	:	Mr. Prateek Sharma along with Mr. Tushar Dhar Diwan, Advocates.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

C A V ORDER

12/03/2020

1. This petition has been brought challenging the correctness, propriety and legality of order dated 13.08.2019 passed by the Court of First Additional Principal Judge, Family Court, Durg, District- Durg, C.G. in Criminal M.J.C. No.334/2017, by which the application filed by the petitioner under Section 127 of Cr.P.C. was dismissed.
2. Earlier, a petition was filed by the respondent under Section 125 of

Cr.P.C. which was registered as Criminal M.J.C. No.96/2016. The ex-parte order against the petitioner was passed on 01.08.2016 by which the applicant has been ordered to make a payment of Rs.30,000/- per month as maintenance to the respondent. The petitioner came to know of the ex-parte order against him subsequently, and then he has filed the application under Section 127 of Cr.P.C, which is the matter in present petition in which he has stated that previously he was employed in Citrix System Inc. Florida, U.S.A. and was getting a salary of Rs.5,20,000/- per month but after the deduction, the net salary received by him was Rs.2,62,000/- per month. The circumstances have changed because since 26.12.2017, the applicant has been placed in suspension, therefore, he is now unemployed and he has no source of income apart from that the cost of living in U.S.A. is too high, therefore, prayer was made for interference.

3. The respondent has contested the application, therefore, the learned trial Court framed issues and recorded evidence of the witnesses and then passed the impugned order dismissing the application of petitioner.
4. It is submitted that the learned Family Court has committed error in passing the impugned order. The applicant had requested for issuance of summons to the witnesses to the Court, but his prayer was rejected. As the witnesses did not agree on call of the applicant to appear before the Court, therefore, the evidence could not be recorded. The evidence of those witnesses was very much essential. Further, the applicant was also deprived of his right to cross-examine the non-applicant. Further, the learned Court below has not taken into consideration this fact that the respondent is herself employed and capable to maintain herself, regarding which she has made a false statement before the Court. Hence, on this basis, it is prayed that the petitioner should be given a

chance to prove his case.

5. It is submitted that in **Manish Kumar Vs. Mrs. Pratibha** reported in ***ILR (2009) II Delhi 246***, the Delhi High Court has held that the maintenance should be to the order only on the basis of the take away income of the respondent husband. In the case of **Mamta Jaiswal Vs. Rajesh Jaiswal** in ***Civil Revision No. 1290/1999 decided on 24.03.2000*** by the Indore Bench of Madhya Pradesh High Court, this fact was taken notice of that the applicant wife was herself employed and getting a salary. In the matter of **Beena Kumari and Ors. Vs. Manoj Kumar** in ***Criminal Revision No.50/2019***, the Delhi High Court has decided this case on 21.02.2019, holding that the petitioner did not get sufficient opportunity to prove his case and he was given opportunity for proving the same by remanding the case back.
6. It is also submitted that in the case of **Dalip Singh Vs. State of U.P. and Ors.** in ***Civil Appeal No.5239/2002 decided on 03.12.2009*** by the Supreme Court, it has been observed that “Truth constitute an integral part of justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell the truth in the Courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the Court proceedings.”
7. The respondent in this case has suppressed this fact that she is highly qualified and has capability to earn her living herself and that she is also having a comfortable salary to maintain herself. The applicant has made an attempt to bring facts suppressed before the Court in which he has

failed because his opportunities in leading the evidence was arbitrarily closed by the Court below. The applicant had challenged the ex-parte order of maintenance against him and approached Supreme Court by filing ***Special Leave to Appeal No.4394/2019***. However, he withdrew his petition and sought liberty to approach the High Court and bring to the notice of the High Court that respondent is employed in a reputed IT Company, therefore, if he is not given opportunity by this Court, then the whole exercise made by him will be futile. It is prayed that the impugned order be set aside and applicant be given opportunity to bring evidence in support of his statements and for that, the case be remanded to the learned Family Court.

8. On behalf of the respondent the submissions made by the learned counsel for the applicant are opposed. It is submitted that the applicant is pursuing simultaneous proceeding, he is challenging the ex-parte order of maintenance passed against him and also he has filed this application under Section 127 of Cr.P.C., therefore, only one of such proceeding is not maintainable. It is submitted that the applicant was given ample opportunity to prove his statement in the application and subsequent to that, the learned Family Court has passed the impugned order. The proof brought in evidence by the respondent side very clearly shows that the applicant has an earning which is more than 10 times as compared to the income of the respondent. Even if the wife has an earning of herself, this alone does not dis-entitle her from making a prayer for maintenance. It has been held in the case of **Chaturbhuji v. Sita Bai** reported in ***AIR 2008 SC 530*** by the Supreme Court, that if wife has some income, that does not dis-entitle her for maintenance and the phrase “unable to maintain herself” has been interpreted that would mean unable to maintain herself in the way she was living with her

husband. Therefore, the inability of the respondent to maintain herself has been widely defined.

9. Reliance has also been placed on the judgment of Supreme Court in **Bhagwan Dutt Vs. Kamla Devi** reported in ***AIR 1975 SC 83***. Hence, it is prayed that this petition may be dismissed.

10. The learned Family Court has appreciated all the evidence that were brought by both the sides and come to a conclusion on that basis in the impugned order. The findings given are right or wrong is not the main question here. The main question is that the applicant was not given proper opportunity to prove his case.

11. The applicant filed this application under Section 127 Cr.P.C. on 22.12.2017. After the appearance of the respondent, the case was posted for recording of evidence on 03.07.2018. Subsequent to that, the interlocutory applications were filed and after the disposal of the same, the case was again fixed for evidence on 04.01.2019. On the given date, the case was adjourned on the prayer made by the respondent and date was fixed for 05.01.2019. Again on the prayer made by the respondent side, the another date 18.03.2019 was fixed for recording of applicant evidence. The applicant had made a request to the Court to record the evidence of witnesses through video conferencing which was allowed on 18.03.2019 with condition that in case both the parties agree, then the evidence of the applicants witnesses can be recorded through any social media, otherwise the applicant would have to produce the witnesses in Court and no evidence was recorded on that date. On the next date fixed, the respondent side expressed disagreement for recording of the evidence of applicant witnesses through social media. Therefore, the next date was fixed and for recording of evidence, the applicant was directed to pay process fee for

service of summons on the witnesses from his side. The witnesses of applicant were present in Court on 28.06.2019 but on account of objection raised by the learned counsel for the respondent. However, both the witnesses who had come from outside were examined, but the prayer of the applicant to record his evidence through video conferencing was rejected and he was directed to appear in the Court on the next date. The applicant could not give appearance on the next date that is 29.06.2019 and a last opportunity was given to the applicant side. On the next date that is 01.07.2019, a separate application was filed by him for summoning additional witnesses. The application was kept pending to be decided on 03.07.2019. On 03.07.2019, the applicant was present before the Court but then the respondent sought adjournment and the case was adjourned for 05.07.2019. On 05.07.2019, the respondent again did not appear and prayed for adjournment which was refused. The amicus curiae appearing for the respondent started the cross-examination of the applicant, however, he requested the Court that he could not continue because of his own physical infirmity and then the case was adjourned. The cross-examination of the applicant was later on completed. However, the application filed by the applicant for summoning additional witnesses was decided and rejected by the trial Court by simply mentioning that the Court does not find it proper to issue summons to the said witnesses and the opportunity of the applicant side was closed.

12. The case was fixed for respondent evidence on 16.07.2019, 23.07.2019, 24.07.2019, 26.07.2019 and 31.07.2019, but the respondent did not appear and her opportunity was closed and then the arguments were heard and the application was decided.

13. The applicant has raised the ground in his application that firstly he does

not have the resource to pay the maintenance and secondly that the respondent is having earning of her own which is sufficient to maintain herself.

14. On perusing the order sheets of the proceedings, it is found that the proceedings have not gone on smoothly. Objections have been raised with frequency and lastly the application of the petitioner for summoning additional witnesses to prove his case, has been rejected by the learned Family Court without assigning any specific reason. Therefore, it can be said that the applicant did not have the complete opportunity to produce evidence to prove his case. Section 126 of the Code of Criminal Procedure provides for the proceeding, which does not limit anywhere to produce witnesses in number and the time that may be required. However, it is the duty of the Court dealing with such proceeding to dispose off the case as early as possible. In this particular case, it appears that the applicant side has taken all pains for summoning the evidence and also the applicant who is a resident of United States of America has given appearance before the Court on the date fixed for his evidence. On the contrary, the respondent side has shown less enthusiasm, the reason itself is clear that the respondent did not appear before the Court to examine herself. Therefore, I am of this opinion that it is a proper case, where the applicant should be given one more opportunity to bring evidence in proof of his case.

15. Hence, only for this reason that full and complete opportunities are availed by both the parties to prove their cases, the impugned order is set aside and the case is remanded back to the learned Family Court with a direction to allow the applicant for summoning additional witnesses for his case and then after completion of applicant evidence, the respondent be also given another chance to examine herself before

the Court and also to produce any witnesses, if it is so desired and advised by the counsel. The Family Court then after completion of recording of evidence shall pass fresh order on merits of the case without being influenced by any of the observations that have been made in this order.

16. Accordingly, the petition stands disposed off.

Sd/-

(Rajendra Chandra Singh Samant)

Judge

Monika