

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Cr.R. No.1378 of 2019

- Yashwant Sahu S/o R.P. Sahu Aged About 34 Years R/o House No. 377, Sundar Nagar, Raipur, District Raipur Chhattisgarh

---- Applicant

Versus

1. Smt. Abha Sahu W/o Shri Yashwant Sahu Aged About 32 Years D/o Manharan Sahu
2. Anya Sahu D/o Shri Yashwant / Abha Sahu Aged About 1 Year Through Natural Guardian Mother Smt. Abha Sahu (R.No. 1)

(Both are r/o Naya Sarkanda, Bangali Para, Bilaspur, Police Station Sarkanda, Tahsil And District Bilaspur Chhattisgarh)

--- Non-applicants

For Applicant	– Mrs. Aarti Chanda (Dutta), Advocate.
For Non-applicants	– Mr. Amiyakant Tiwari, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant
Order on Board

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13-02-2020

Heard.

1. This revision has been brought against the order dated 27.09.2019 by which the applicant had prayed under Section 126(2) of Cr.P.C. to set aside the ex-parte order granting maintenance dated 17.05.2019 passed by the same Court, which has been rejected. The order dated 17.05.2019 is also challenged.
2. It is submitted by the learned counsel for the applicant that the order of maintenance passed against the applicant by the Family Court is excessive. The applicant has a monthly income of only Rs.6,000/-, regarding which he had filed the certificate Ex.N.A./96 which was not at all appreciated by the Family Court. Further, the opportunity of leading

the evidence of the applicant was arbitrarily closed and the order of maintenance dated 17.05.2019 was passed. The applicant then prayed for setting aside the ex-parte order in application under Section 126(2) of Cr.P.C., that has also been erroneously, arbitrarily and illegally rejected by the trial Court. Therefore, it is prayed that petition may be admitted and relief be granted to the applicant.

3. Learned counsel for the respondent opposes the submissions and submits that the learned Family Court had not committed any error in passing the impugned order. The applicant had been on various pretext obstructing and lingering on the proceeding. Therefore, the rejection of the application under Section 126(2) Cr.P.C. is appropriate which needs no interference.
4. In reply, it is submitted that the evidence of the applicant that he is unable to pay maintenance as ordered has not at all been taken into consideration by the Court below, therefore, it is prayed that this petition may be allowed.
5. Heard learned counsel for the parties and perused the documents.
6. The first things that needs consideration is whether the order dated 17.05.2019 was passed ex-parte against the applicant. The proviso to Section 126(2) of Cr.P.C. provides that if the Magistrate is satisfied, then the person against whom the order of payment of maintenance is proposed to be made is willfully avoiding the service or willfully neglecting the order of the Court, the Magistrate can hear and determine the case ex-parte and the order so made may be set aside. The good cause shown in the application may be shown within three months from the date of subject to terms including the terms as if the Magistrate needs just and proper.

7. On perusing the record of the proceeding which is M.J.C. No.247/2016, it is reflected that on 16.05.2019, the applicant who was non-applicant in that case was present before the Court who filed an application for taking additional document on record which was dismissed. Thereafter, the applicant sought adjournment from the Court praying to produce witnesses on the next date of hearing, the Court rejected his prayer saying that its final arguments will be heard on the same day and the order dated 17.05.2019 was passed on the very next date. On 12.06.2019, the applicant filed the application under Section 126(2) of Cr.P.C. of which the impugned order has been passed.
8. The conditions as stipulated in the proviso to Section 126(2) of Cr.P.C. clearly not present in this case. The applicant was present on the date of hearing and his opportunity for producing evidence was closed. There is no cure for this kind of order of the Court under Section 126(2) of Cr.P.C. Looking to the presence of the applicant in the Court on the date of hearing of final arguments of the case, it cannot be said that it was an ex-parte proceeding against him. Therefore, for this kind of order, the application under Section 126(2) of Cr.P.C. was not at all maintainable.
9. Submission of the applicant that the order of maintenance has been passed without appreciating the capacity of the applicant to do the same is again an issue which needs to be considered and decided in this revision petition. As there is also a prayer made by the applicant in the petition for setting aside the order dated 17.05.2019 of the Family Court, therefore, this submission is taken into consideration.
10. The order of maintenance is only in favour of the respondents. It is not denied that respondent No.2 is child of the applicant and respondent No.1 is his wife, therefore, they have entitlement for maintenance. The

learned trial Court has appreciated in the order dated 17.05.2019, the expenses that were made by the applicant and making refund of loan of Rs.18,20,000/- to the parents of respondent No.1 making expenditure of medical expenses at the time of the delivery of respondent No.2 which appears to demonstrate that the applicant has capability to make expenditure and therefore, he must be having income in the same fashion. The applicant is giving emphasis to Ex.N.A./96, which is a certificate given by one Subhash Chand Agrawal stating that the applicant is working in an institution of the computer operator and getting a salary of Rs.6,000/-, however, it is not mentioned as salary per month or for any other period.

11. The applicant Yashwant Sahu (N.A.W.-1) has stated in his examination-in-chief that he is not in a possession of any property, he is unemployed and at present he is employed in petty service earning only Rs.6,000/- per month. He has also stated that the applicant herself is highly qualified and had been working as software engineer prior to her marriage with the applicant and at present also she is making an income of Rs.40,000/- to Rs.50,000/- per month by giving tuition to children. In cross-examination, he has reiterated that he is at present working as computer operator in the concern of Subhash Chand Agrawal, who is a civil contractor. The certificate produced as Ex.N.A./96 does not bear any seal. The applicant had not examined said Subhash Chand Agrawal as his witness, therefore, this certificate is not proved by the person issuing the same and that being given by a private concern cannot be regarded as conclusive evidence.

12. Respondent No.1 has in her statement, examination-in-chief stated that before marriage, she was working as software engineer in Pune, Maharashtra where the applicant was also serving as network engineer

in some company. The respondent No.1 then left job on pressure given by the applicant. The applicant is employed in Magma Infotech Company, Pune as engineer and has yearly package of Rs.20,00,000/-. At present, the respondent No.1 is not having any source of income. In cross-examination, on suggestion given by the applicant side she has admitted that applicant had purchased flat of nearly Rs.36,00,000/- which was arranged by the other family members of the applicant. She has denied all the other adverse suggestions given to her regarding the present income of the applicant and also denied that at present the applicant has income of only Rs.6,000/- per month. She has also admitted that prior to marriage she has purchased a car and denied that she does not require any maintenance. She has also admitted that she has worked in three different companies for a period of 5 years in Pune, Maharashtra.

13. On perusal of the statement of the respondent No.1, it appears that she is qualified and has capability to earn herself. The present income of the applicant has not been very clearly established. Similarly, the evidence based on the certificate Ex.N.A./96 also cannot be regarded as a conclusive proof for the reason that certificate does not speak that it is a monthly salary and also that it cannot be said that it is the only engagement of the applicant. The applicant also is technically qualified person and has capability to find employment and generate income. The learned Family Court had not taken very well into consideration that the respondent No.1 is also similarly qualified and capable to find employment and earn her living. Hence, on this basis, I am of this view that the learned Family Court has not exercised the jurisdiction in the way as it should have been. It is not so that the order granting maintenance against the applicant is liable to be totally set aside but,

however, I am of this view that it can be reduced to some extent, only for the reason that the income of the applicant has not been established with certainty. Hence, this revision petition is partly allowed. The prayer made for setting aside the order dated 27.09.2019 is rejected, however, the prayer for interference in the order dated 17.05.2019 is allowed with modification. The maintenance in the impugned order is reduced to Rs.5,000/- to each of the respondents and in total that will be Rs.10,000/- per month. The order regarding the cost of the proceedings remains as it is.

14. Accordingly, the petition is disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
Judge

Monika