

HIGH COURT OF CHHATTISGARH, BILASPUR

Cr.R. No.153 of 2020

- Minhaz Ahmad Khan S/o Niyaz Ahmad Khan, Aged About 50 Years R/o Village And Post Raka, Near Electric Sub Station, Raka, Police Station Barela, District- Bemetara, Chhattisgarh

---- Petitioner

Versus

- Smt. Shamima Akhtar W/o Minhaz Ahmad Khan, Aged About 40 Years R/o Yadunanadan Nagar, In Front Of Saraswati Higher Secondary School, House No. D 150, Yadunandan Nagar, Tahsil And District Bilaspur, Chhattisgarh

---- Respondent

For Petitioner	:	Mr. Kalpesh Ruparel, Advocate.
For Respondent	:	Mr. Vijay Kumar Deshmukh, Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order on Board

13-01-2021

Heard.

1. By this Criminal Revision, the petitioner has challenged the order dated 07.01.2020 passed in M.J.C. No.140 of 2019, by the Additional Principal Judge, Family Court, Bilaspur, District- Bilaspur, C.G. dismissing the application filed under Section 126(2) of Cr.P.C.
2. Learned counsel for the petitioner submitted that the respondent filed an application under Section 125 of Cr.P.C. which was registered as M.J.C. No.249 of 2017. The application was disposed off by the learned Family Court vide order dated 25.09.2017, in which the applicant although filed reply but the rest of the proceeding was taken ex-parte against him and the order has been passed against this applicant for payment of

maintenance of Rs.10,000/- per month to the respondent. The order dated 25.09.2017 was challenged in Criminal Revision no.164 of 2018, the Co-ordinate Bench of this High Court vide order dated 31.07.2018 disposed off the revision petition by dismissing it. The applicant then filed a Review Petition No.49 of 2019, which was withdrawn on 12.03.2019 and liberty was granted to file appropriate application before the appropriate forum.

3. On the basis of the liberty granted by the High Court in order dated 12.03.2019 in revision No.49 of 2019, the application under Section 126(2) of Cr.P.C. was filed before the learned Family Court praying to set aside the ex-parte proceeding against the applicant which has been dismissed arbitrarily without giving consideration on the ground raised in the petition. Prayer has been made to set aside the impugned order and grant relief to the petitioner.
4. Learned counsel for the respondent has opposed the petition and the submissions made by the petitioner side.
5. Whenever any ex-parte order is passed under Section 125 of Cr.P.C. against the non-applicant/husband, the non-applicant has remedies available to him under the provisions of the Cr.P.C., firstly to file an application under Section 126(2) of Cr.P.C. making a prayer to the Court itself which has passed the ex-parte order for setting aside the same and secondly he may chose to file a revision against the order granting maintenance before the Court having revisional jurisdiction. In the case of **S.Bhupinder Singh Makkar Vs. Smt. Narinder Kaur & Ors.** reported in **1990 Cri.L.J. 2265** Delhi. The Delhi High Court has held in paragraph 10:-

10.“In *Biswanath Kabi v. Susama Dei*, (1988) 1 All Cr.L.R. 692, a single Judge of Orissa High Court had clearly laid down, in my view, rightly that it is not mandatory for the aggrieved person to move an application before the Magistrate concerned under Section 126 of the Code for setting aside of the ex-parte order and such an aggrieved person can move the High Court by filing a revision. It was opined that nowhere it has been provided in the Code that unless the husband takes recourse to first remedy the second remedy is not available to him according to law. It was observed that there may be cases in which after an ex-parte decree is passed against a husband he may not like to move for setting aside an ex-parte order but may invoke the jurisdiction of the revisional court itself. It will depend on the facts of each case in order to decide whether revisional power of the court should be exercised in a particular case or not, but a revision petition cannot be dismissed at the threshold that the aggrieved person must take resort first to remedy provided in Section 126 of the Code. It is not necessary to refer to two other judgments brought to my notice by the learned counsel for respondents 1 & 2 of other High Courts wherein some view has been taken as in the case of *State of Mysore v. Ghousuddin* (1972 Cri LJ 808) (supra) because in those judgments also reasons which have been given by me and also by a single Judge of Orissa High Court have not been taken note of.”

6. Further in the case of ***Balan Nair vs Bhavani Amma Valsalamma and other.*** reported in ***A.I.R. 1987 Kerala 110 (F.B.)***, the Full Bench of Kerala High Court has held in paragraph No.28 as follows:-

“A person against whom such an ex parte order has been passed has the right to file an application before the Magistrate to set aside the ex parte order, provided the application is filed within a period of three months from the date of the order. Even if there is delay in filing the application, it is open to him to invoke Section 5 of the

Limitation Act. We are not in this case concerned with the question whether "three months from the date thereof shall be interpreted to mean "three months from the date of knowledge of the order". That question does not arise in this case. At the same time, remedy of the person who suffers an ex parte order is not confined to filing an application to set aside the ex parte order before the Magistrate concerned. It is open to him to challenge the order by way of revision before the revisional Court in terms of [Section 397](#) of the Code. Of course, the scrutiny by the revisional Court will be of a more limited nature than the scrutiny the Magistrate himself has to make in an application to set aside the ex parte order. Learned counsel for the petitioner indicated that the learned Sessions Judge in this case took the view that no revision would lie. We do not understand the learned Sessions Judge to have expressed any such view. The view taken by him was that the order is not vitiated on any of the grounds on which he could interfere in revision."

7. As it has been held in the judgments mentioned hereinabove that twin remedies are available to a person aggrieved by an ex-parte order of maintenance and, therefore, he is at liberty to make choice of such remedy. The only thing that is needed to be considered in this order as to what shall be the order of preference to avail such remedies. The provision under Section 126(2) of Cr.P.C. empowers the same Court which has passed ex-parte order to make an inquiry on the application made for setting aside the ex-parte order and decide the same in accordance with law, whereas the Criminal Revision under Section 397 of Cr.P.C. has to be preferred before the higher forum that is the Revisional Court. In the matter of the decision rendered by the Family Court, the revisional jurisdiction vests with the High Court. The person aggrieved against any ex-parte order cannot avail both the remedies for setting aside the same ex-parte order granting maintenance. He can

make choice of only one remedy, either to move an application under Section 126(2) of Cr.P.C. or to move a revision petition under Section 397 of Cr.P.C.

8. In this case applicant firstly moved the Criminal Revision No.164 of 2018 under Section 397 of Cr.P.C. which was dismissed vide order date 31.07.2018. The liberty granted to the applicant in the order dated 12.03.2019 in Review Petition No.49 of 2019 for filing appropriate application before appropriate forum which cannot be regarded as a validation for filing application under Section 126(2) of Cr.P.C. for the simple reason that the law itself does not permit the filing of application for setting aside the ex-parte order under Section 126(2) of Cr.P.C. after the failure of the petitioner for getting an order after the filing of the revision petition on dismissal of the same. Hence, the filing of application under Section 126(2) of Cr.P.C. was itself mis-conceived although there is an order of dismissal by the impugned order but there is no legal reason for passing any order in favour of the applicant. Hence, for these reasons, I do not feel inclined to allow this revision petition and the same is dismissed.

9. Accordingly, the petition stands disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
Judge