

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH  
(Heard through VC)**

**Crl. Misc. 12419 of 2021 in/and  
CRR (F) 271 of 2019 (O&M)  
Date of Decision: September 7, 2021**

**Shivani Garg and another**

**...Petitioners**

**Versus**

**Rajiv Garg**

**...Respondent**

**CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR**

Present:- Mr. Sapan Dhir, Advocate  
for the petitioners.

Dr. Rau P.S. Girwar, Advocate,  
for the respondent.

**JAISHREE THAKUR, J.**

1. The present revision petition has been filed under Section 401 of the Code of Criminal Procedure to challenge the impugned order dated 22.4.2019 passed by the Principal Judge, Family Court, Bathinda, by which he has fixed the matter afresh for re-examination of witnesses, who have already been examined more than two years ago.

2. The facts in brief are that petitioner No.1 and the respondent got married on 21.6.2003 as per Hindu rites at Bathinda. Out of this wedlock, a male child was born on 7.4.2004. However, due to temperamental issues, an FIR No. 897 dated 16.11.2008 under Sections 451, 323, 506 IPC came to be registered against the respondent at the instance of petitioner No.1. It is alleged that since petitioner No.1 had no source of income to maintain herself as well as her minor child, therefore, an

application under Section 125 of the Code of Criminal Procedure (hereinafter referred to as “**the Code**”), was filed for grant of maintenance. The application was contested by the respondent, while denying all the averments made in the application.

3. After completion of the pleadings, the trial court fixed the matter for petitioners' evidence. The petitioners after examining as many as four witnesses closed their evidence on 12.4.2017. In the meantime, since all the matters under Section 125 of the Code of Criminal Procedure were ordered to be transferred to learned Special Family Courts, this matter was also transferred to the Principal Judge, Family Court, Bathinda on 2.1.2019, who passed the impugned order dated 22.4.2019 summoning three witnesses, namely AW3, AW4 and and RW4 for recording their evidence again.

4. Learned counsel for the petitioners would argue that by passing the impugned order, the learned Principal Judge, Family Court, has re-opened the trial again despite the fact that the present proceedings had already been delayed which are pending for almost ten years since 2009. It is further argued that the Family Court, while passing the impugned order, did not advert to the provisions of the Family Courts Act, 1984, particularly Section 15, which provides that in suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded a memorandum of the substance of what the witness deposes and such memorandum shall be signed by the witness and the Judge and shall form part of the record. It is submitted that since the evidence

already stand recorded, summoning aforesaid witnesses for recording their evidence again did not call for at all. In support of his contentions, learned counsel relies on the judgments of this Court rendered in **Roshan Lal Versus State of Haryana and another 2018 (4) RCR (Criminal) 273** and **Surma Versus Santra 2018 (4) RCR (Criminal) 563**.

5. Per contra, learned counsel for the respondent, while supporting the impugned order, submits that since there is no illegality in the impugned order, therefore, no interference is called for. It is argued that the Magistrate did not follow the procedure as prescribed for recording evidence in a summons case. Reliance has been placed upon **Gurtej Singh vs. Balwinder Kaur 2013 (5) RCR (Criminal) 814**, in support of his argument.

6. I have heard learned counsel for the parties and have perused the impugned order.

7. The sole question that falls for consideration in this instant revision is, whether the Family Court was within its jurisdiction to summon the aforesaid three witnesses for recording their evidence once again, when they had already tendered their evidence by way of affidavit during the proceedings pending before Chief Judicial Magistrate?

8. Before delving into the issues involved in the instant petition, it is necessary to refer to Section 126 of the Code, which reads as under:-

*"126.Procedure.- (1) Proceedings under section 125 may be taken against any person in any district-*

*(a) where he is, or*

*(b) where he or his wife resides, or*

*(c) where he last resided with his wife, or as the case may be,*

*with the mother of the illegitimate child.*

*(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:*

*Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.*

*(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just."*

9. A plain reading in sub-section (2) of Section 126 makes it clear that all evidence in respect of proceedings under Section 125 of the Code shall have to be recorded in the manner prescribed for summons cases. The procedure prescribed for recording of evidence in summons case is enumerated in Section 274 of the Code, which reads as under:-

*"274. Record in summons-cases and inquiries.- (1) In all summons-cases tried before a Magistrate, in all inquiries under sections 145 to 148 (both inclusive), and in all proceedings under section 446 otherwise than in the course of a trial, the Magistrate shall, as the examination of each witness proceeds, make a memorandum of the substance of his evidence in the language of the Court:*

*Provided that if the Magistrate is unable to make such memorandum himself, he shall, after recording the reason of his inability, cause such memorandum to be made in writing or from his dictation in open Court.*

*(2) Such memorandum shall be signed by the Magistrate and shall form part of the record."*

10. Whereas proceedings for grant of maintenance and other proceedings under the Family Courts Act are regulated by Section 10 which for the sake of ready reference is reproduced as under :

*"10. Procedure generally. (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 to 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)], before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil Court and shall have all the powers of such Court.*

*(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.*

*(3) Nothing in Sub-section (1) or Sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."*

11. A plain reading of Sub Section (2) of Section 10 of the Family Court's Act would make it clear that the provisions of the Criminal

Procedure Code or rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court. The procedure as contemplated in Section 126 and Section 274 of the Criminal Procedure Code would have to be adopted in so far as evidence is to be recorded for proceedings under Section 125 Cr.P.C which is under Chapter IX of the Code. From the above procedure prescribed for a summons case, it is clear that the Magistrate shall make a memorandum of the substance of evidence of the witness in the language of the Court. The only evidence that can be recorded by way of affidavit is of a formal witness as under Section 296 of the Code. The statements of the parties to proceedings under Section 125 of the Code cannot be termed of a formal character.

12. The judgments as relied upon by the counsel for the petitioner are distinguishable and not applicable to the facts of the present case. In **Roshan Lal case (Supra)**, the matter pertained to the right of cross examination by the husband as the same was denied by the Family court, whereas a similar issue arose in the case of **Surma (supra)**. The impugned orders were set aside, holding that the right to cross examination cannot be taken away. Whereas the judgment relied upon in **Gurtej Singh ( Supra)** is fully applicable which deals with the issue in hand.

13. Coming to the present case, statement of the complainant and the other material witnesses i.e of AW3 Gian Chand Garg father of complaint, AW4 Shivani Garg and RW4 Ashok Kumar have been recorded by way of affidavit before the Magistrate before the case was transferred to the Family Court and the recording of evidence is not in consonance with procedure prescribed for a summons case and as per Section 274 Cr.P.C.

This was noticed by the Family Court, which lead to the impugned order. Consequently, there is no infirmity with the order passed by the Family Court. This petitions stand dismissed.

14. However, as the matter pertaining to grant of maintenance is pending since the past 9 years the Family Court is directed to conclude the proceedings expeditiously preferably within a period of three months. Any applications pending for clearance of interim maintenance stand disposed off, without passing any effective orders and is open for agitation afresh.

September 7, 2021  
prem

(JAISHREE THAKUR)  
JUDGE

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|----------------------------------|------------|
| <i>Whether speaking/reasoned</i> | <i>Yes</i> |
| <i>Whether reportable</i>        | <i>No</i>  |