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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 22.08.2022
Pronounced on: 31.08.2022

+ **CRL.REV.P. 208/2018**

HEMANT KUMAR

..... Petitioner

Through: Mr Ravindra Narayan and
Mr Raghav Narayan,
Advocates along with
petitioner in person.

versus

STATE & ANR.

..... Respondents

Through: Mr Manoj Pant, APP for State
Mr. S.S. Chaudhary with Mr.
Rakesh Gupta, Advocates for
R-2.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present petition has been filed under Section 401 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") praying for setting aside impugned order dated 17.11.2017 passed by the learned Additional Principal Judge (APJ), Family Courts, Shahdara, Delhi and seeking issuance of directions to the learned Judge, Family Court to pass orders afresh on interim maintenance on merits of the case.



2. The question that arises for consideration is that in case an order is passed setting aside ex-parte proceedings, whether relief of granting ex-parte interim maintenance vide the same order, will also be automatically set aside or not.

3. The brief facts of the case are that the respondent No.2/wife herein had filed an application seeking maintenance from the petitioner/husband herein on 03.06.2014.

4. On the date fixed for appearance of the petitioner/husband i.e. 01.12.2014, since he did not appear despite service of notice, he was proceeded ex-parte. On the said date, the following order was passed by the learned Principal Judge-Family Courts which reads as under:

“...Present: As above.

Respondent is proceeded ex-parte.

Heard petitioner on application seeking interim maintenance. According to the petition respondent is earning more than Rs. 40,000/- per month. There is no challenge to this averment. I, therefore, allow the application seeking interim maintenance. Respondent is directed to pay a sum of Rs. 10,000/- per month, month by month to petitioner till disposal of the petition.

Put up for PE on 26.09.2015...”

5. Pursuant to the same, the learned counsel for the respondent/husband (petitioner herein) had moved an application under Section 126(2) Cr.P.C. for setting aside ex-parte order. The ex-parte order was set aside by the learned Principal Judge, Family Courts on 03.10.2016.

6. Thereafter, the case was transferred on administrative grounds to another Family Court, Shahdara District, Karkardooma Courts, Delhi.



The impugned order before this court was passed by the learned Judge, Family Court (transferee Court). In the impugned order dated 17.11.2017 the learned Judge held that there was no need to hear arguments on application for interim maintenance as though an order had been passed setting aside ex-parte proceedings dated 01.12.2014, the order granting maintenance on the same date vide the same order were not specifically set aside.

7. The learned Judge-Family Court held as under:

“...The copy of the order dated 03.10.2016 was given to both the parties. If this above order is read and taken into consideration, then it shows that only the order to proceed exparte was set aside and the order regarding disposal of interim maintenance application was not changed nor this application was got revived or ordered to be reconsidered. Even the prayer made in the application u/s 126 (2) Cr.P.C. of the respondent is pertaining to setting aside the exparte order and not the order of deciding interim maintenance application.

It appears that inadvertently the case was again fixed for arguments on the interim maintenance application by my Ld. Predecessor before the case was transferred to this court on the last date of hearing. When infact this interim maintenance application was already decided on 01.12.2014 and even clarification was given on the same on 21.02.2015, then the same is not required to be reconsidered again. This order of fixing interim maintenance was not set aside through the order dated 03.10.2016 and only the exparte proceeding was set aside by my Ld. Predecessor. Thus, when there is no interim maintenance pending as on date, then there is no requirement to pass any fresh order...”

8. Aggrieved by this order the present petition was filed praying for setting it aside.



9. Counsel for the petitioner argued that since the entire ex-parte order dated 01.12.2014 was set aside, it included setting aside of the ex-parte order granting interim maintenance too as it was part of order dated 01.12.2014 itself. He, therefore, argued that the learned Judge-Family Court was required to hear arguments afresh for grant of interim maintenance since the petitioner herein was allowed to join proceedings and file written statement as well as affidavit of income and expenditure.

10. Counsel for the respondent No.2/wife herein however argues that there is no illegality or infirmity in the said order since it has been rightly held by the learned Trial Court that only order regarding ex-parte proceedings was set aside and there is no specific order setting aside order granting interim maintenance.

11. After hearing arguments and going through the case file, this Court is of the opinion that on 03.10.2016 the ex-parte order dated 01.12.2014 had been set aside after an application under Section 126(2) Cr.P.C. was moved by the husband. The relevant portion of the order reads as under:

*“...considering the same, I deem it proper to pass order **to the extent of** setting aside the exparte order dated 01.12.2014 subject to the conditions that the respondent will pay atleast Rs. 1,00,000/-, out of Rs. 2,05,000/- which has become due as against the respondent within 2 equally monthly installments of Rs. 50,000/- each. It is made clear that in case of a default on the part of respondent to make said payment, earlier exparte order dated 01.12.2014 will stand revived”.*



12. Since the order was passed under section 126(2) Cr.P.C., it will be useful to refer to the same. Section 126(2) Cr.P.C. and Section 126 (3) Cr.P.C. read as under:

“(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proceed 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 wilfully avoiding service, or wilfully 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 at 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...”

13. When the order dated 03.10.2016 is read in light of the above Section under which it was decided, it makes clear that the learned Judge had exercised his discretion under Section 126(2) Cr.P.C. to recall the ex-parte order. Further, the order was set aside subject to terms and conditions including terms as to payment of cost by the respondent to the complainant as he had thought just and proper as envisaged under Section 126(2) Cr.P.C. In his discretion, the learned Judge on 03.10.2016 had set aside the ex-parte order on terms of payment of Rs. 1,00,000/- to the complainant.



14. It is also clear from this order that the order dated 01.12.2014 was set aside in entirety. It is clearly mentioned in the order dated 03.10.2016 that the ex-parte order dated 01.12.2014 stands set aside. There is no confusion that the order dated 01.12.2014 which was set aside did include order granting interim maintenance to the wife. The learned Judge failed to notice that only one composite order had been passed on 01.12.2014 *vide* which the petitioner was proceeded ex-parte and the respondent No.2 was granted interim maintenance. The order dated 03.10.2016 does not mention that the order was being partially set aside. Rather it clearly mentions that the order dated 01.12.2014 is set aside subject to the condition *“I deem it proper to pass order to the extent of setting aside the exparte order dated 01.12.2014 subject to the conditions that the respondent will pay atleast Rs. 1,00,000/-, out of Rs. 2,05,000/- which has become due as against the respondent within 2 equally monthly installments of Rs. 50,000/- each. It is made clear that in case of a default on the part of respondent to make said payment, earlier exparte order dated 01.12.2014 will stand revived.”*

15. It is clear that the learned Judge had set aside the ex-parte order on condition of payment of a certain amount as he had noted that after passing of interim ex-parte maintenance order an amount of Rs. 2,05,000/- had become due to the wife. The learned Judge may have passed this order directing payment of almost 50% of the said amount to the wife as it was due to fault of the husband and his non-appearance despite service, that the payment of maintenance could not be made to her. Instead of imposing any cost for setting aside ex-parte order, the learned Judge directed the husband to pay at least 50% of the said



amount to the wife. The order does not direct payment of entire arrears of maintenance to the wife which shows that the order of maintenance had also been set aside or otherwise the husband would have been directed to clear the entire arrears of maintenance which had accrued pursuant to passing of ex-parte order. The order further observed that in event of non-payment of Rs. 1,00,000/- to the wife which was a pre-condition for setting aside the ex-parte order of maintenance and ex-parte proceedings, the entire order dated 01.12.2014 will stand revived.

16. Moreover, the Trial Court also failed to consider that after payment of Rs. 1,00,000/- was made to the wife in the court, the petitioner herein was permitted to file written statement and affidavit of income and expenditure which reads as under:

“...Present:

*Petitioner along with counsel Sh. S.S. Chaudhary Adv.
Respondent along with proxy counsel Sh. K.S. Rana Adv.*

Ld. proxy counsel for the respondent has filed WS and affidavit relating to Income/Assets, etc. of the respondent along with copies of certain documents and added that advance copies of the same have already been sent to Ld. counsel for the petitioner. The respondent is directed to send advance copies of the requisite documents in support of his affidavit relating to Income/Assets, etc. in the light of the recent judgment dated 14.01.2015 tilted as "Kusum Sharma Vs. Mahinder Kumar Sharma" as rendered by the Hon'ble Delhi High Court to Ld. counsel for the petitioner in order to enable to file replication and to come up for arguments on the next date i.e. 07.07.2017...”

17. Therefore, there was no occasion to observe that the ex-parte order of maintenance had not been set aside. The application for setting aside ex-parte proceedings moved by the petitioner herein had prayed



for setting aside the entire order 01.12.2014 and there was no need to specifically pray for setting aside ex-parte order granting maintenance as it was one composite order.

18. The learned Trial Court had thereafter itself also fixed the date for arguments on application for grant of interim maintenance after filing of written statement and affidavit of income and expenditure by both parties which also further clarified that the court was to hear both the parties and thereafter pass an order for grant of interim maintenance on merits. The observation in the impugned order that the case might have been inadvertently listed for arguments on application for interim maintenance by the learned predecessor was contrary to the factual position as it is clear from the order-sheets and orders of the learned predecessor of that court.

19. The learned Trial Court failed to visualize that the order dated 03.10.2016 setting aside the ex-parte order dated 01.12.2014 which was one composite order had been set aside in its entirety. The learned Judge, while setting aside the ex-parte order, had directed payment of an amount of Rs. 1,00,000/- and had allowed the respondent to join the proceedings under Section 125 Cr.P.C. as if he was never proceeded ex-parte. The order permitting him to file written statement and affidavit of income and expenditure is an indicator of the same.

20. In view of the above observations, the petition is allowed. Resultantly, the order dated 17.11.2017 is set aside. However, since the matter pertains to the year 2014, the learned Trial court will decide the application for grant of interim maintenance as per law on merits within two months from the receipt of this order. Both the parties will not seek



any adjournment before the learned Trial Court. However, as interim arrangement to ensure that the respondent No.2/wife keeps getting some amount per month, the petitioner herein will continue to pay a sum of Rs. 10,000/- per month till disposal of the application for grant of interim maintenance which has been directed to be decided within two months. In case the Trial Court awards a sum lesser than Rs. 10,000/- per month while deciding the application for grant of interim maintenance, the amount paid in excess will be adjusted in the future amount of maintenance to be paid by the petitioner herein.

21. The *petition* stands disposed of in above terms.

22. Copy of this order be sent to the learned Trial Court for compliance forthwith.

SWARANA KANTA SHARMA, J

AUGUST 31, 2022/zp

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