

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO.267 OF 2019

Raosaheb S/o Bhimrao Dhas,
Age : 35 Years, Occ. Service,
R/o. Shikshak Colony, Kaij,
Taluka Kaij, Dist. Beed .. Applicant

VERSUS

Sau. Varsha W/o Raosaheb Dhas,
Age : 36 Years, Occ. Service (Teacher),
R/o. C/o. Deepak Nivrutti Phad,
Deogiri Building, B-1, C-4,
Mahavitaran Quarters, Mill Corner,
Aurangabad .. Respondent

...
Advocate for the applicant : Mr. S. S. Jadhav
Advocate for respondent : Mr. Rohit P Patwardhan
...

CORAM : S. G. MEHARE, J.

DATE : 01.08.2023

ORAL ORDER :

1. Heard the learned counsel for the applicant and the learned counsel for the respondent/wife.
2. The applicant has impugned the orders rejecting the application to set aside the *ex-parte* order passed under Section 125 of the Code of Criminal Procedure (for short, "Cr.P.C.") by the learned Judge Family

Court, Aurangabad, in Criminal Misc. Application No.45 of 2016, dated 25th June 2019. Initially, the applicant had preferred the revision against the order granting maintenance before this Court. However, the statement was made that the applicant wanted to exhaust the appropriate legal remedy; therefore, the said Petition was disposed of by this Court as withdrawn. Thereafter, the applicant approached the learned Judge, Family Court, Aurangabad, for setting aside the order granting maintenance passed in Petition No.E-1/2015, dated 26.02.2016.

3. The learned Judge, Family Court, Aurangabad, dismissed the said application observing that there were no sufficient reasons to set aside the *ex-parte* order.

4. The learned counsel for the applicant has vehemently argued that Section 127 of the Cr.P.C. does not contemplate provisions for setting aside the *ex-parte* order passed under Section 125 of the Cr.P.C. However, proviso to sub-section 2 of Section 126 of the Code of Criminal Procedure empowers the Court to set aside the order passed *ex-parte* under Section 125 of the Code of Criminal Procedure. Therefore, the learned Judge, Family Court, rightly considered the application under Section 126 (2) of the Code of Criminal Procedure. However, the Court erred in not believing the ground for the absence

of the applicant in the said proceedings. He would argue that the applicant could not appear in the proceedings under Section 125 of the Cr.P.C., in which the impugned order was passed, as the wife had filed various cases in different courts, and it was not possible for him to appear in all cases. The wife took a disadvantage and got the *ex-parte* order. It is also argued that the applicant did not deliberately remain absent in the proceedings. Therefore, the impugned order is liable to be set aside, and an opportunity needs to be granted to contest the Petition on merit.

5. Per contra, the learned counsel for the wife has vehemently argued that the learned Judge, Family Court, Aurangabad, has assigned the appropriate reasons to decline to set aside the *ex-parte* order. The applicant is in huge arrears of maintenance. He was avoiding maintenance. Hence, considering his conduct, he is not entitled to get the *ex-parte* order set aside.

6. The learned Judge, Family Court, Aurangabad, declined to set aside the *ex-parte* order by observing that the proceeding under Section 125 of the Code of Criminal Procedure is a quasi-civil proceeding. The applicant had a right to file an application for setting aside the order as per Order IX, Rule 13 of the Code of Civil Procedure

(for short, “C.P.C.”). As per the Order IX, Rule 13 of the C.P.C., if the *ex-parte* decree/order is passed, then the aggrieved person can file an application for setting aside the same, and the Court may set aside the same if the applicant satisfies to the Court that either the summons was not duly served or he was prevented by sufficient cause from appearing in the Court when the suit was called on for hearing.

7. In the case at hand, the summons was properly served to the applicant. Thereafter, the applicant appeared before the Court but failed to file the written statement.

8. When the Criminal Procedure Code provides for setting aside the *ex-parte* order, would Order IX, Rule 13 of the C.P.C. apply to set aside the *ex-parte* orders passed under Section 125 of Cr.P.C?

9. For ready reference, Section 126 (2) of the Cr. P.C is reproduced thus;

“(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 opposite party as the Magistrate may think just and proper.”

10. The above provision appears to be a complete code on the procedure dealing with the maintenance application and setting aside the *ex-parte* orders. Therefore, the Court is of the view that Order IX, Rule 13 of C.P.C. would not apply.

11. In the case at hand, the applicant appeared but could not file the written statement.

12. The applicant has to satisfy the Court that there was good cause for his absence in the proceedings. It is to be examined whether the cause for his absence was due to multiple cases and whether he could not attend each and every proceeding is a good cause. Admittedly, various proceedings were filed by the wife and the husband. The matrimonial dispute is a sensitive matter for the husband and wife, and those are hotly contested. A number of laws provide for different rights under different laws. Normally, multiple proceedings are filed arising out of the matrimonial dispute. In the fact situation, the Court

has to consider the plea of the husband on the preponderance of probability. There was no quarrel that both had filed various cases against each other. The cases were filed in different Courts. In some cases, coercive actions are taken. Both parties to the petition have to show due diligence at a particular stage. Considering the various cases filed and pending, the absence in some cases is probable. That apart, the wife was getting maintenance not only under Section 125 of the Cr.P.C. but also under other provisions of law like the Protection of Women From Domestic Violence Act and Hindu Marriage Act. It is always better to have an adjudication of any petition on the merits. The term 'good cause', in the proviso to sub-section 126(2) of Cr.P.C., shall be interpreted liberally, and a lenient view has to be taken to give the logical end to the dispute between the husband and the wife.

13. In view of the above discussion, the Court is satisfied that the reason for the absence of the appellant in the proceeding was probable. The applicant needs to be granted the opportunity to contest the proceeding on merits. Hence, this Court is of the view that the petition is liable to be allowed, subject to certain conditions. Hence, the following order:-

ORDER

- (i) The revision application is allowed.

- (ii) The order dismissing Criminal Misc. Application No.45 of 2016, dated 25th June 2019, passed by the learned Judge, Family Court, Aurangabad, is quashed and set aside.
- (iii) Criminal Misc. Application No.45 of 2016 stands allowed.
- (iv) The order granting maintenance in petition E-1 of 2015, decided *ex-parte* on 26th February 2016 by the learned Judge, Family Court, Aurangabad, is set aside.
- (v) Petition No. E-1 of 2015 stands restored on the file of the learned Judge, Family Court, Aurangabad.
- (vi) The liberty is granted to the applicant to file his written statement and contest the petition on merits with further liberty to the wife to lead the evidence, if any.
- (vii) The applicant is to deposit Rs.2,00,000/- (Rs.Two Lakh) with the same Court within two months in two equal instalments and shall continue to pay Rs.5,000/- per month as interim maintenance to the wife till the conclusion of the petition on merits.
- (viii) The applicant and the respondent to appear before the learned Judge, Family Court, Aurangabad, on 24th August 2023.
- (ix) After the appearance, the applicant shall file his written statement within one month and the learned Judge, Family Court, Aurangabad, is requested to dispose of the application within six months thereafter.

(S. G. MEHARE)
JUDGE