



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL REVISION APPLICATION (REVN) NO.164 OF 2023

[Shyam Dilip Shende .**Vrs.** Bharati Shyam Shende and Anr.]

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Mr V. Kataria, Advocate for Applicant.

Mr M. A. Randive, Advocate for Non-Applicants.

CORAM : ANIL L. PANSARE, J.

DATE : 19th OCTOBER 2023.

. The challenge is to the order dated 9th November, 2022 passed by the Family Court No.4, Nagpur. By the impugned order, the Applicant – Husband was directed to pay to the Non-Applicant No.1 - wife an amount of Rs.4,000/- per month and amount of Rs.2,000/- per month to the Non-Applicant No.2 - daughter towards monthly maintenance allowance.

2. Having heard both the sides and having gone through the record placed before me, it appears that the Non-Applicant – wife had filed Petition under Section 125 of the Code of Criminal Procedure (In short, “Code”). The Applicant – husband appeared, but failed to file reply. The matter was proceeded without reply. The Family Court considered the evidence placed by the Non-Applicant No.1. On the basis of the same, the Family Court has arrived at the finding that the Non-Applicants are entitled to get the maintenance. As regards the income of the Applicant, the

evidence of Non-Applicant No.1 is that the Applicant is earning amount of Rs.40,000/- to Rs.50,000/- out of his electrical shop. The Family Court has, however, noted that except for the oral testimony of the Non-Applicant No.1, she failed to place on record any documentary evidence to show that the Applicant is earning Rs.40,000/- to Rs.50,000/- per month. Accordingly and considering the totality of the facts and further considering the dependency, social status, medical expenses and increase in prices of daily needs, the Family Court thought it proper to pass the aforesaid order.

3. The learned Counsel for Applicant has invited my attention to Section 126 of the Code. It provides that, in the proceedings under Section 125 of the Code, the evidence should be recorded in the presence of the person against whom an order for payment of maintenance is to be made. It further provides that the Magistrate has to record satisfaction 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, then only the Magistrate may proceed to hear and determine the case Ex-parte.

4. The learned Counsel submits that this finding of willful absence is absent. Therefore, the impugned order is not sustainable in the eyes of law. He has placed reliance upon the judgment of the Co-ordinate Bench of this Court

in the case of *Umakant Bhaskarao Nawarkhele vs. Sneha Umakant Nawarkhele and Ors., (Criminal Revision Application No.21 of 2014)* dated 5th February, 2014. The facts in the said case were such that the husband appeared before the Conciliator, but did not participate in the proceedings. The Court noted that entire proceedings were heard in his absence. The Court below therein has recorded in the judgment that the respondent husband appeared, but did not file say and therefore, the matter was heard without the say of respondent. This Court, by noting the aforesaid status, has held that since the Court below has proceeded with the matter by simply noting the absence of the respondent husband and has not concluded that such absence was willful or deliberate, the impugned order is said to be not in accordance with law.

5. In the present case, however, the further question that arises for consideration is, whether the Applicant has shown good cause for setting aside the impugned order. Section 126 of the Code itself provides that if such Ex-parte order is passed, the same 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. This opportunity should have been availed before the Court, which has passed the said order. The Applicant has not availed the said opportunity and approached this Court.

6. The ground put forth is of medical ailment. In support, he has annexed the prescriptions, which indicate that the couple of medicines have been prescribed. These prescriptions are for the period from May 2018 to October 2018. The learned Counsel submits that these prescriptions relate to medicines for depression.

7. The prescriptions, however, do not indicate that there was any restriction on movements of the Applicant. The prescriptions do not indicate that the Applicant could not have signed the Vakalatnama or could not have appointed Counsel and further could not have attended the Court proceedings. A mere statement that he was suffering from depression, by no stretch of imagination, can be said to be a cause much less good cause to not appear before the Court below.

8. That apart, *vide* order dated 25th July, 2023, the impugned order was stayed subject to applicant depositing 70% of the arrears as accrued on that date. The learned Counsel for Non-Applicants submits that the said order has not been complied with. The learned Counsel for Applicant submits that he has taken arrears to be a figure that finds place in the executing proceeding, which according to him is Rs.2,31,000/-. As against, mere arithmetical calculation of arrears in terms of the impugned order dated 9th November, 2022, would show that the arrears would be to the tune of

Rs.3,30,000/-. Thus, the Applicant has made an attempt to mislead the Court as well.

9. I am of the view that neither there is good cause for setting aside the impugned order nor the conduct of the Applicant is acceptable. There is, thus, no merit in the revision application. The revision application is, accordingly, dismissed with cost of Rs.10,000/- to be deposited before the Family Court, Nagpur in the execution proceedings, within ten working days from today.

10. The Non-Applicant - wife is at liberty to file application before the Executing Court to withdraw the said amount.

JUDGE