

HON'BLE SRI JUSTICE CHEEKATI MANAVENDRANATH ROY

Criminal Revision Case No.1009 of 2019

ORDER:

Assailing the order dated 29.06.2018 passed in M.C.No.8 of 2015 on the file of the Principal Junior Civil Judge, Badvel, YSR Kadapa District, whereby petition filed under Section 125 Cr.P.C. was allowed and a sum of Rs.5,000/- was awarded towards monthly maintenance to the petitioner therein, the instant Criminal Revision Case is preferred by the revision petitioner. The revision petitioner is the respondent in the above M.C.No.8 of 2015.

Brief facts of the case may be stated as follows:

The 1st respondent is the legally wedded wife of the revision petitioner. Their marriage was solemnized on 06.02.2014 as per the Hindu rites and customs. However, they did not lead marital life and their marriage was not consummated as the petitioner did not show any interest to lead marital life with the 1st respondent. The petitioner is evading to lead marital life with the 1st respondent since the date of the marriage. The 1st respondent informed the same to her parents. The elders advised the petitioner to consult a doctor and the petitioner refused to obey the said advice.

Thereafter, the petitioner and his family members started harassing the 1st respondent and subjected her to both physical and mental cruelty. Unable to bear the said harassment, she has lodged a report with the Police and a case in Crime No.17 of 2015 was registered by B.Mattam Police Station against the petitioner and his family members. Thereafter, the petitioner in the presence of the elders agreed to enter into a compromise with the 1st respondent and they have also executed a memorandum of understanding agreeing to return the amount that was paid to the petitioner at the time of marriage and also to pay a sum of Rs.10.00 Lakhs towards compensation and for the purpose of the livelihood of the 1st respondent. However, they did not pay the said money and cheated the 1st respondent and they entered into the said compromise only to wriggle out from the said criminal case. In the said circumstances, the 1st respondent has no other alternative except to live away from the petitioner. Therefore, she is living with her old aged parents. She has no means to maintain herself.

The petitioner has neglected her. He is working as a private employee and earning Rs.60,000/- per month. He also got other immovable properties worth of Rs.10.00 Crores. So, he got

sufficient means to maintain the 1st respondent. Therefore, she prayed to grant a sum of Rs.25,000/- p.m. towards maintenance.

Her claim was resisted by the revision petitioner. He pleaded that the 1st respondent is not interested in leading marital life with him and she started harassing the petitioner and ill-treating him and his family members. She demanded him to take his share from the immovable properties of his father and to set up a separate residence. When he refused for the same, she grew-wild and subjected him to torture. It is his further case that the 1st respondent and her parents raised a dispute before elders and demanded divorce from him stating that she is not interested in leading marital life with him and she demanded Rs.10.00 Lakhs towards permanent alimony. Accordingly, a memorandum of understanding, dated 03.08.2014, was entered into between both of them and when he is prepared to pay the said sum of money by way of demand draft, she demanded to pay the amount in cash. Thereafter, she raised the claim to Rs.15.00 Lakhs. When he refused to pay the same, she foisted a false criminal case against him. At the intervention of elders, the said matter was settled amicably and a memorandum of understanding was executed whereunder he agreed to pay Rs.8,50,000/- at the time of granting

divorce. However, she did not receive the money from him when the same was offered by him. As regards his means is concerned, it is stated that he is doing private service and earning only Rs.10,000/- p.m. which is not sufficient to maintain himself and his family members and that the parents of the 1st respondent are financially sound enough to maintain her and thereby prayed to dismiss the petition.

Considering the aforesaid pleadings of both the parties and also the evidence that was adduced by both the parties in support of their respective contentions, the learned Principal Junior Civil Judge allowed the petition granting a sum of Rs.5,000- p.m. towards monthly maintenance to the 1st respondent, by the impugned order dated 29.06.2018.

Aggrieved thereby, the revision petitioner has filed this Criminal Revision Case assailing the legality and validity of the impugned order.

Heard learned counsel for the revision petitioner and learned counsel for the 1st respondent.

Learned counsel for the revision petitioner assailed the impugned order purely on a technical ground that Section 126(2)

Cr.P.C. mandates that all evidence in proceedings under Section 125 Cr.P.C. shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made i.e. in the presence of the revision petitioner, who is the respondent in the said case, or, when his personal attendance is dispensed with, in the presence of his pleader, and the evidence shall be recorded in the manner prescribed for summons cases. He submits, however, the evidence of the 1st respondent, who is the petitioner in the said case, was not recorded as contemplated under Section 126(2) Cr.P.C. and her evidence-in-chief was considered in the form of evidence affidavit and as such, the procedure contemplated for recording the evidence under Section 126(2) Cr.P.C. is violated and consequently, the trial of the case is vitiated and the impugned order passed on the basis of the said evidence taken in the said case is also vitiated and the same is legally unsustainable and the impugned order is liable to be set aside.

Per contra, learned counsel for the 1st respondent would submit that the proceedings under Section 125 Cr.P.C. are quasi-civil in nature and they are not penal in nature and it is only meant to prevent the destitute woman from starvation and vagrancy and as such, the procedure contemplated for taking evidence under

Order XVIII Rule 4 CPC in civil cases can be followed. Therefore, he would contend that taking evidence in the form of evidence affidavit is permissible under law and consequently, the proceedings of the case are not vitiated as contended by the learned counsel for the revision petitioner. He submits that the revision petitioner is not justified in seeking to set aside the impugned order on purely a technical ground and thereby prayed for dismissal of the Criminal Revision Case.

Thus, as can be seen from the aforesaid rival contentions put forwarded by both the learned counsel for the revision petitioner and the learned counsel for the 1st respondent, the seminal point for determination in this Criminal Revision Case is, whether evidence relating to proceedings in a petition filed under Section 125 Cr.P.C. claiming maintenance by a wife can be taken up in the form of evidence affidavit as contemplated under Order XVIII Rule 4 CPC in civil proceedings or is it mandatory to record the evidence in the Court in the presence of the opposite party against whom the claim was made. The further question that arises for determination is whether the proceedings of the case stands vitiated for non-compliance with Section 126(2) Cr.P.C. in recording the evidence of

the party concerned and whether the order of maintenance is liable to be set aside on that ground.

In order to appreciate the above questions, it is expedient to extract Section 126(2) Cr.P.C. to consider the same and it reads as follows:

“Section 126. **Procedure.**—(1)...

(a)...

(b)...

(c)...

(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 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 as to payment of costs to the opposite party as the Magistrate may think just and proper.

[\(3\)](#) ...”

A careful reading of the above Section 126(2) CrPC makes it manifest that all evidence relating to the proceedings under Section 125 Cr.P.C. 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. Chapter-XX of the Cr.P.C. deals with trial of summons cases by Magistrates. It contains Sections 251 to 259 Cr.P.C. Section 254 thereof contemplates that the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

Therefore, a combined reading of Section 126(2) Cr.P.C. and Section 254 Cr.P.C. makes it absolutely clear that the evidence has to be taken up by the Court in such proceedings in the presence of the opposite party or when his presence is dispensed with in the presence of his pleader and recording evidence in the form of taking evidence affidavit is not contemplated and it is not permissible under law.

Now the crucial question that arises for consideration is whether evidence in the form of evidence affidavit as contemplated under Order XVIII Rule 4 CPC to record evidence in civil

proceedings can be adduced in the proceedings under Section 125 Cr.P.C. or not.

Order XVIII Rule 4 CPC is a new insertion as an amendment in CPC in the year 2002 which permits adduction of evidence in examination-in-chief in civil proceedings by way of filing evidence affidavit. It can be treated as valid evidence in examination-in-chief. However, the law is now clearly well settled that in view of the fact that specific procedure relating to adducing evidence in proceedings under Section 125 Cr.P.C. is prescribed in Section 126(2) Cr.P.C., that the procedure contemplated under Order XVIII Rule 4 CPC to take evidence in the form of evidence affidavit cannot be applied to the proceedings under Section 125 Cr.P.C. Even in a Family Court when the petition under Section 125 Cr.P.C. is filed, the Family Court has to follow the procedure prescribed under Section 126(2) Cr.P.C. despite the fact that in all other proceedings initiated before the Family Court for divorce, restitution of conjugal rights etc, evidence can be taken up by way of evidence affidavit. Section 10 of the Family Courts Act, 1984 deals with the procedure to be generally followed in taking up the evidence in the proceedings initiated before it. Section 10 reads as follows:

S.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 of 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.”

It is significant to note that clause (2) of Section 10 of the Family Courts Act, 1984, clearly mandates that the procedure contemplated under Cr.P.C. or the Rules made thereunder shall apply to the proceedings under Chapter IX of Cr.P.C. even before a Family Court. Therefore, even the Family Courts Act, 1984 also mandates that the procedure contemplated under Section 126(2) Cr.P.C. which is part of Chapter IX of Cr.P.C. in recording the evidence shall be followed when the proceedings under Section 125 Cr.P.C. are initiated before the Family Court.

Considering the above legal position, the Division Bench of Bombay High Court in the case of **Mr.K.V.More, 3.d Jt. Civil Judge (J.D.) & J.M.F.C., Pune, Baramati District v. The State of Maharashtra** held that the evidence in proceedings under Section 125 Cr.P.C. has to be recorded as per the procedure contemplated under Section 126(2) Cr.P.C.

The question before the Division Bench of the Bombay High Court was whether in view of the provisions of the Family Courts Act, 1984, Order XVIII Rule 4 CPC and also under Order VI Rule 15(4) and Section 26(2) of C.P.C. whether the evidence in proceedings under Section 125 Cr.P.C. covered by Chapter-IX of Cr.P.C. can also be recorded by way of receiving evidence affidavit or the evidence has to be recorded only in the court in the presence of the opposite party or not. Having considered at length the purpose, object and separate provisions of Chapter IX of Cr.P.C. read with Chapter IV of the Family Courts Act and Order XVIII Rule 4 as also Order VI Rule 15(4) and Section 26(2) of C.P.C., the Division Bench of the Bombay High Court answered the question stating that the evidence in proceedings under Section 125 Cr.P.C. is to be recorded in the Court in the presence of the opposite party even in a Family Court also.

The Bombay High Court in another case in **Mr. Anil Ambashankar Joshi v. Mrs. Reena Anil Joshi & Anr.** while elaborately discussing with all the relevant provisions of law and considering the judgments of both Single Judge and Division Bench of the other High Courts like Madhya Pradesh High Court, Karnataka High Court and also the Bombay High Court, again authoritatively held that in the proceedings under Section 125 Cr.P.C. the evidence has to be recorded by the Court in the presence of the opposite party and the evidence cannot be taken up by way of evidence affidavit.

Even our Andhra Pradesh High Court in the case of **V.D. Solomon v. V. Solomon Mary** held that the evidence in proceedings under Section 125 Cr.P.C. has to be recorded in the Court in view of Section 126(2) Cr.P.C. and evidence cannot be taken in the form of evidence affidavit. Relying on the said judgment, the common High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh in **Gollamudi Ramesh v. Modukuri Nagamani** held that evidence in the proceedings under Section 125 Cr.P.C. has to be recorded by the Court as per the procedure prescribed under Section 126(2) Cr.P.C. and in the said case the common High Court of Judicature

at Hyderabad has also set aside the impugned order therein in exercise of its powers under Sections 397 and 401 Cr.P.C. as the proceedings were taken place contrary to law by following an irregular procedure.

So, in view of the above settled law as per long line of judicial pronouncements which include the judgments of the Andhra Pradesh High Court and the common High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, the impugned order which was passed based on the evidence that was taken up in the form of evidence affidavit cannot be sustained as the same is vitiated for non-compliance with the procedure prescribed under Section 126(2) Cr.P.C. for recording the evidence in the said proceedings under Section 125 Cr.P.C. Therefore, the impugned order is liable to be set aside on the above ground of violation of procedure prescribed for recording the evidence.

Before parting with the case, this Court makes it clear that this Court did not deal with the merits of the case in any manner. The impugned order is set aside purely on the above technical ground. Therefore, the matter is remanded to the trial Court to take up the evidence in the said case strictly in compliance with the

procedure prescribed under Section 126(2) Cr.P.C. and dispose of the said case afresh.

In the result, the Criminal Revision Case is allowed setting aside the impugned order dated 29.06.2018 passed in M.C.No.8 of 2015 on the file of the Principal Junior Civil Judge, Badvel, YSR Kadapa District. The matter is remanded to the trial Court to record the evidence afresh as contemplated under Section 126(2) Cr.P.C. and dispose of the case on merits according to law. Since, it is a claim relating to maintenance by a destitute wife, who claims to have no means to maintain herself, the trial Court shall dispose of the said case within two months from the date of receipt of a copy of this order.

Consequently, miscellaneous applications, pending if any, shall also stand closed.

JUSTICE CHEEKATI MANAVENDRANATH ROY

Date:24-04-2020.

Note:
L.R. copy to be marked.
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