

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE PRAKASH CHANDRA GUPTA

CRIMINAL REVISION No.8 of 2023

BETWEEN:-

(SHRI ABHIJEET DUBE - ADVOCATE)

.....PETITIONER

AND

(SHRI ANIL KUMAR DAWALE - ADVOCATE)

.....RESPONDENTS

***Reserved on : 04.03.2024
Pronounced on : 12.03.2024***

This revision having been heard and reserved for orders, coming on for pronouncement this day, this Court pronounced the following:

ORDER

This revision petition has been filed by the applicant u/S 19(4) Family Courts Act, 1984 (hereinafter referred as Act 1984) r/w S. 397 and

401 of Cr.P.C., against the order dated 11.11.2022 passed by II Additional Principal Judge, Family Court, Indore, M.P. in Miscellaneous criminal case No.578/2016, whereby the learned trial Court has partly allowed an application u/S 125 of Cr.P.C. and awarded Rs.10,000/- per month maintenance to the respondent/wife from the petitioner/husband.

2. It is an admitted fact that the marriage of the petitioner/husband is solemnized with the respondent/wife as per Hindu ritual and rites on 22.03.2015. It is also admitted that in the case of HMOP No.464/2016, the Additional Family Court, Coimbatore allowed a petition u/S 13(1)(i-a) of the Hindu Marriage Act, 1955, filed by the husband and granted ex-parte decree of divorce between the parties on 14.12.2016, on the ground of cruelty by wife.

3. Facts giving rise to this case are that the respondent/wife during pendency of divorce petition at Family Court, Coimbatore, had filed an application for maintenance u/S 125 of Cr.P.C., stating that few days after the marriage, the petitioner had started to harass the respondent/wife and started to demand Rs.10,00,000/- as dowry and on non-fulfillment of demands, he had started to physically assault her. He did not use to let the respondent/wife talk to her parents and used to tell her that she is ugly. Respondent/wife, in order to save the relation, had borne all the cruelty caused upon her but the petitioner/husband's behavior did not improve. The petitioner/husband used to get messages and calls from other girls on his phone and when the respondent/wife used to object for the same, he used to harass her. One year before the filing of maintenance application, the petitioner/husband had got the respondent/wife out of his house. Since

then, she has been living in a rented room and the petitioner/husband has not arranged anything for her. Respondent/wife is dependent on her father and has no source to maintain herself. While the respondent is working as Botanical Scientist at Botanical Survey Of India from where he receives a monthly salary of Rs.50,000/-. Therefore, she prayed to be given a monthly maintenance of Rs.25,000/- from the petitioner/husband.

4. Husband, in his reply denied all the averments made in maintenance application except the admitted facts and pleaded that the husband had neither demanded any amount as dowry from the wife nor had harassed or subjected her to cruelty for the same. He further submitted that he is posted as Assistant Scientist at Biological Survey Of India from where he receives a good sum of money and he possesses good character. The wife voluntarily had left his company without any reasonable cause. It was also pleaded that the wife used to physically assault him and abuse him and his family members. She is stubborn and insane. Husband had not got her out of his house. It is also pleaded that the wife used to have obscene talk with a man named Chetan Pathak at night hours on her mobile phone. She was indulged in adultery with Chetan Pathak and she wanted to reside with him. At current as well, she is residing with him at Bhopal. The wife has obtained Ph.D. and is currently having a job. Therefore, she is not entitled for maintenance from the husband.

5. Respondent/wife examined herself as PW-1 and her friend Supriya Bisen (PW-2). The petitioner examined himself as DW-1.

6. The learned trial Court after considering the evidences adduced by

the parties found that the respondent is divorced wife of the petitioner/husband. She is unable to maintain herself. While the petitioner is a Government Servant and earns Rs.69,000/- per month. Therefore, petitioner/husband has all the sufficient means and is able to maintain the respondent/wife. The trial Court further found that the respondent/wife had sufficient cause to stay apart from her husband. Therefore, she is entitled for maintenance. Accordingly, the application was partly allowed.

7. Learned counsel for the petitioner submits that the petitioner had adduced sufficient and reliable evidence that the respondent/wife is living in adultery. It is also submitted that the petitioner had filed and proved photographs of respondent/wife and Chetan Pathak (Ex. D-2 – D-15), but absence of certification as provided u/S 65-B of the Indian Evidence Act, 1872, the trial Court has committed an error by not relying on the photographs as mentioned above. It is also submitted that as provided u/S 14 of the Family Courts Act, 1984, evidence which otherwise is not admissible in evidence can be taken on record by the Family Court, which assists it to deal with dispute effectually, hence, provision of Section 65-B of Indian Evidence Act is not applicable in the matter. Learned counsel for the petitioner has not raised any other contention and has confined his argument to the aforementioned extent. Therefore, it is submitted that the learned trial Court has erred in passing the impugned order. The impugned order suffers from irregularity. Hence, the impugned order is liable to be set aside.

8. On the other hand, learned counsel for the respondent/wife

supported the impugned judgment and prayed for dismissal of the petition.

9. I have heard learned counsel for the parties and perused the records.

10. In the case of ***Rohtash Singh v. Ramendri***, [(2000) 3 SCC 180] the Apex Court has opined as under:-

“5. Sub-section (4) of Section 125 CrPC provides as under:

“125. (4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.”

“6. Under this provision, a wife is not entitled to any maintenance allowance from her husband if she is living in adultery or if she has refused to live with her husband without any sufficient reason or if they are living separately by mutual consent. Thus, all the circumstances contemplated by sub-section (4) of Section 125 CrPC presuppose the existence of matrimonial relations. The provision would be applicable where the marriage between the parties subsists and not where it has come to an end. Taking the three circumstances individually, it will be noticed that the first circumstance on account of which a wife is not entitled to claim maintenance allowance from her husband is that she is living in adultery. Now, adultery is the sexual intercourse of two persons, either of whom is married to a third person. This clearly supposes the subsistence of marriage between the husband and wife and if during the subsistence of marriage, the wife lives in adultery, she cannot claim maintenance allowance under Section 125 of the Code of Criminal Procedure.

11. Delhi High Court in the case of ***Sh Pradeep Kumar Sharma V Smt. Deepika Sharma*** [2022 Livelaw (Del) 324] has held as under:-

“22. The codified law and judgments of various High Courts settle the position with respect to bar of adultery for grant of maintenance in favour of the wife. The law mandates that in order to extract the provision under Section 125(4) of the Cr.P.C.

the husband has to establish with definite evidence that the wife has been living in adultery, and one or occasion acts of adultery committed in isolation would not amount to “living in adultery”. The concept of “living in adultery” has been defined by the various Courts time and again.”

12. This court in the case of ***Ashok v. Anita, [2011 SCC OnLine MP 2249]***, has opined as under:-

“8. A perusal of the provisions of section 125(4) of Cr. P.C. makes it clear that a stray act of adultery on the part of the wife does not amount to adultery within the meaning of section 125(4) and further does not disentitle the wife to maintenance., The expression “living in adultery” connotes a course of adulterous conduct more or less continuous and not occasional.

13. This Court in ***Sukhdev Pakharwal v. Rekha Okhle, [2018 SCC Online MP 1687]***, has held as under:-

“17. It is settled law that phrase “living in adultery” applies to a continuous adulterous conduct and not a single or occasional lapse from virtue. Solitary Act of adultery or isolated lapse of wife will not disentitle her from claiming maintenance. Unless it is found that at the relevant time, the wife was actually living in adultery, she is not disentitled to claim maintenance. The burden of proof of such adulterous conduct on the part of the wife, is upon the husband.”

14. Kerala High Court in the case of ***Sandha V Narayanan [1999 SCC online Ker 64]*** has opined as under:-

8. The phrase ‘living in adultery’ used in Sec. 488(4) of the Cr. P.C. 1898 which is akin to Sec. 125(4) of the present Cr. P.C. has been considered by various High Courts in India and have taken the uniform view that living in adultery denotes a continuous course of conduct or living in the state of quasi permanent union with the adulteror. In the decision in Ma Mya Khin v. N.L. Godenho (AIR 1936 Rang. 446) the Rangoon High Court has observed as follows:

“Emphasis must be laid upon the words ‘living in adultery’. The words used are not ‘committed adultery’, and there is clearly a great distinction between ‘committing adultery’ and ‘living in adultery’ denotes a continuous course of conduct and not isolated acts of immorality. One or two lapses from virtue would be acts of adultery but would be quite insufficient to show that the woman was ‘living in adultery’, which means, so far as I understand the expression, that she must be living in a state of quasi permanent union with the man with whom she is committing adultery.”

15. According to explanation (b) of Sub-Section 1 of Section 125 of Cr.P.C., term “wife” includes a woman, who has been divorced by her husband and has not remarried. From the analysis of the provision and case laws discussed above, it is apparent that the adultery u/S 125(4) of Cr.P.C. has to be continuous and the liability to prove the same is upon the husband in order to debar wife from getting maintenance. The wife can be debarred from getting maintenance on the ground of “adultery” only when she is actually “living in adultery” at or around the time of application for maintenance under S. 125 of Cr.P.C.

16. In the instant case, though the petitioner/husband pleaded that the respondent/wife used to have obscene talk with a man named Chetan Pathak at night hours on her mobile phone. She was indulged in adultery with Chetan Pathak and she wanted to reside with him. At current as well, she is residing with him at Bhopal, but the petitioner (DW-1) has not stated anything in his statement that the respondent is living in adulterous life with Chetan Pathak continuously. Petitioner even could not dare to ask about the same in the cross-examination of the respondent/wife (PW-1). It is established law that mere pleading cannot take place of proof

without evidence. Therefore, in absence of evidence, it is not proved that the respondent/wife is living in adultery with Chetan Pathak.

17. So far as the question of admissibility of photographs is concerned, it is pertinent to reproduce here S. 14 of the Act, 1984, which runs as under:-

“14. A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).”

18. It is clear from the aforementioned provision that Family Court can take evidence on record, which otherwise would be irrelevant or inadmissible as per the provision of Indian evidence Act, 1872, if the same assists it to deal with the dispute effectually.

19. On perusal of paragraph 21 of the impugned judgment, it appears that the respondent has stated that the photographs are not real and on digital platform by means of Photoshop and other means, photographs can be edited. It has not been explained by the petitioner that by which mobile phone, by whom and when the photographs were clicked. Thereafter, even on being required by the learned trial Court to furnish a certificate u/S 65 B of the Evidence Act, the petitioner failed to do so. It appears from the exhibits photograph (Ex. D-2 – D-15) that the photographs were sent by Rashmi Pathak but the petitioner has not examined Rashmi Pathak in his support. Therefore, on the basis of aforementioned photographs, it cannot be concluded that the respondent is living in adultery with Chetan Pathak.

20. Though, on considering S. 14 of Act, 1984, to prove aforementioned photographs, compliance of certification as required u/S 65-B of the Evidence Act is not mandatory but in the present case, there is no specific pleading of the petitioner in respect of adulterous life of the respondent as well as there is lack of evidence adduced by the petitioner in this respect. Only on the basis of aforementioned photographs, it cannot be assumed that the respondent is living in adultery with Chetan Pathak. Therefore, the respondent/wife cannot be barred from claiming maintenance on the ground of adultery as provided u/S 125(4) of Cr.P.C.

21. From the foregoing analysis, it appears that the learned trial Court has properly assessed the evidence produced by both the parties in the case. The learned trial Court has rightly allowed the application u/S 125 of Cr.P.C., filed by the respondent/wife. The impugned order does not suffer from any illegality, irregularity and impropriety. Therefore, the impugned order is not liable to be interfered.

22. Accordingly, this petition being sans-merits is hereby **dismissed** and the impugned order passed by the learned trial Court is hereby affirmed.

(PRAKASH CHANDRA GUPTA)
JUDGE