HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

SINGLE BENCH

BEFORE JUSTICE S.K.AWASTHI

Criminal Revision No 85/2016

Kamal Singh

Versus

Savitri Bai

Shri D.D.Bansal, learned counsel for the applicant.
Shri Pawan Singh Raghuvanshi, learned counsel for the respondent.

O R D E R

(02.01.2017)

The applicant has filed this criminal revision under Section 397 read with Section 401 CrPC against the order dated 2.7.2015 passed by Principal Judge, Family Court Vidisha in M.J.C. No.342/2014, whereby the application filed by the applicant under Section 125 of the Code of Criminal Procedure, 1973 (for brevity, the 'CrPC') has been allowed and maintenance of Rs.3000/- per month has been awarded to the respondent.

2. This matter canvassed two legal issues pertaining to the maintainability of the application under Section 125 of CrPC. However, before proceeding to discuss the same, it is appropriate to briefly state the relevant facts of the case on which this matter has arrived before the Court.

3. According to the applicant, the respondent-wife in the year 2005 moved first application under Section 125 of CrPC demanding maintenance from the applicant-husband, which was contested on merits and the court below dismissed the application vide order dated 16.12.2008 on the ground that, the respondent failed to

establish the fact that she is residing separately for any considerable or sufficient reason. It is submitted that rejection of this application vide order dated 16.12.2008 attained finality as the same remained unchallenged for considerable length of time.

4. Despite aforesaid, the respondent-wife resurfaced with another application under Section 125 CrPC in the year 2011, which according to the applicant was withdrawn without any liberty due to compromise which was entered into between the parties and in lieu of the same, the applicant made lumpsum payment of Rs.5.00 lacs to the respondent. Therefore, according to the applicant, the respondent waived her right under the Statute by accepting the compromise, hence she is estopped from moving any further application under Section 125 CrPC.

5. As per the applicant, the respondent with intention of abusing criminal justice system moved third application under Section 125 CrPC, in which the applicant was not served with any notice and he was proceeded *ex parte*. Further the proceedings were concluded by passing impugned order dated 2.7.2015 whereby the Court has allowed the application under Section 125 CrPC. It is this order against which the instant revision application has been filed before this Court.

6. In view thereof, the sum and substance of the arguments advanced by learned counsel for the applicant is that, the impugned order is bad in law on three counts. First being that, the applicant was not afforded any opportunity to contest the application. Secondly, the

application of the respondent was barred by the principle of *res judicata*. Thirdly, withdrawal of second application by the respondent reflects that she had entered into a compromise with the applicant and both parties agreed to reside separately. Therefore, by virtue of Section 125(4) of CrPC she is residing separately out of her own will and thus, she is not entitled to any amount from the applicant.

7. In order to bring home the second proposition regarding principle of *res judicata*, learned counsel for the applicant placed reliance on a judgment pronounced by the High Court of Manipur in the case of **Shri Laisram Nipamacha Singh vs. Smt. Khaidem Ningol Sakhi Devi and others, AIR 1965 MANIPUR 49.**

8. Per Contra, learned counsel for the respondent submitted that for non-grant of opportunity to the applicant to contest the application, the applicant himself is to be blamed as despite of service of notice, the applicant failed to appear before the court below, secondly the principle of *res judicata* is not attracted to the facts of this case. Hence, the impugned order is just and proper and deserves to be upheld.

9. I have considered the rival contentions of both the parties and have perused the documents placed before the Court.

10. Before adverting to the contentions of the respective parties, it is apt to reproduce the excerpt of certain judicial pronouncements necessary for adjudication of the instant case.

11. This Court in the case of **Kamlesh Kumar Patel vs. Smt. Madhularta (Misc.Cri.Case No.2439/2011,**

decided on 26.3.2013), concluded in following manner:-

> *"It is also settled position of law that the principle of res judicata is not applicable to the criminal proceeding including the proceeding under Section 125 of the Cr.P.C. In any case the impugned application under Section 125 of Cr.P.C. could not be treated to be second time prosecution of the applicant by the respondent. It is needless to state here that the provision of Section 125 of Cr.P.C has been enacted by the Legislature for the welfare of weaker section of the society like women, children and parents, who are unable to maintain themselves and if their applications are thrown away without making any enquiry on merits of the same, then till the extent of such parties, the process of justice would be failed. So in such circumstances, without recording the evidence and examining the case on merits, I do not find fit to quash the application of the respondent filed under Section 125 of Cr.P.C. by invoking the power of this court enumerated under Section 125 of the Cr.P.C. Consequently this petition being devoid of any merits is hereby dismissed at this stage."*

11. The Hon'ble Supreme Court has laid down in the case of **Vanamala (Smt.) vs. H.M. Ranganatha Bhatta, (1995) 5 SCC 299,** in the following manner:-

> *"Section 125 of the Code makes provision for the grant of maintenance to wives, children and parents. Sub-section (1) of section 125 inter alia says that if any person having sufficient means neglects or refuses to maintain his wife unable to maintain herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife not exceeding Rs.500/- in the whole, as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Clause (b) of the explanation to the*

sub-section defines the expression 'wife' to include a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. In the instant case it is not contended by the respondent that the appellant has remarried after the decree of divorce was obtained under Section 13-B of the Hindu Marriage Act. It is also not in dispute that the appellant was the legally wedded wife of the respondent prior to the passing of the decree of divorce. By virtue of the definition referred to above she would, therefore, be entitled to maintenance if she could show that the respondent has neglected or refused to maintain her. Counsel for the respondent, however,invited our attention to sub-section (4) of Section 125, which reads 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.*

On a plain reading of this Section it seems fairly clear that the expression 'wife' in the said sub-section does not have the extended meaning of including a woman who has been divorced. This is for the obvious reason that unless there is a relationship of husband and wife there can be no question of a divorcee woman living in adultery or without sufficient reason refusing to live with her husband. After divorce where is the occasion for the women to live with her husband? Similarly there would be no question of the husband and wife living separately by mutual consent because after divorce there is no need for consent to live separately. In the context, therefore, sub-section (4) of Section 125 does not apply to the case of a woman who has been divorced or who has obtained a decree for divorce. In our view, therefore, this contention is not well founded.

Counsel for the appellant also pointed out that some of the High Courts had taken a similar view. Reference was made to the case of Kongini Balan Vs. M. Visalakshy, 1986 (92) Criminal Law Journal 697 (Kerala), wherein it was held that a wife who obtains a divorce by mutual consent cannot be denied maintenance by virtue of Section 125 (4) of the Code. Similar view was taken in Krishan Kumar Vs. Kiran, 1 (1991) DMC 248 (Madhya Pradesh) wherein it was held that the expression 'living separately by mutual consent' does not cover cases of those living separately due to divorce. The same view was expressed in M. Ramakrishna Reddy Vs. T. Jayamma and Another, 1992 (98) Criminal Law Journal 1368. In that case divorce was obtained by mutual consent on the ground of incompatibility and thereafter the woman was living separately, it was held that this could not be construed to be an agreement for living separately by mutual consent and hence the woman was entitled to maintenance. We think these decisions are in conformity with the plain language of sub-section (4) of section 125 which we have construed herein before. The contention raised by the counsel for the husband is, therefore, unsustainable. The High Court was, therefore, clearly wrong in reversing the order passed by the Sessions Judge. In the result, this appeal succeeds, The impugned order of the High Court dated 19th August, 1991 is set aside. The order of the learned Sessions Judge dated 5th September,1988 is restored. The respondent will pay Rs.5,000/- by way of cost."

12. The reproduced portion of the above, answers to both the contentions of the applicant. Therefore, the proposition that the application of the respondent is barred by principle of *res judicata* cannot be exceeded to. Further the judgment of High Court of Manipur in the case of **Shri Laisram Nipamacha Singh (supra)** will also not be of any help to the applicant as this High Court

in the case of **Kamlesh Kumar Patel (supra)** has taken a view that the principles of *res judicata* are not attracted and in the face of the same, the judgment of other High Court is not binding on this Court.

13. The submission of learned counsel for the applicant that since compromise has taken place and by virtue of Section 125(4) of CrPC the application of the respondent is defeated, has not been termed as valid argument by the Hon'ble Apex Court in the context of Section 125 of CrPC. Further, if this contention is examined on the anvil of the fact that the order sheet dated 26.9.2014 recorded by the Judicial Magistrate First Class only reflects that the matter is withdrawn in view of the compromise but no particulars of compromise or its terms have been mentioned, the contention of the applicant cannot be accepted. Be that as it may, the judgment of Hon'ble Apex Court in the case of **Vanamala (supra)** is self-explanatory and is squarely applicable to the facts of this case.

14. In view of the aforesaid, the only contention which is now left for consideration is that the applicant was not extended any opportunity of hearing. In my considered view, this Court cannot permit bypassing of remedy because the applicant has remedy to move an appropriate application under Section 126 CrPC and raise the point in this regard.

15. In the result, the revision petition is disposed of with the observation that no interference in the order impugned is called for, however the applicant is at liberty to move an appropriate application under Section 126 CrPC before the court below and if such application is

preferred, the same shall be considered on its own merits by the court below.

Let a copy of the order be sent to the trial court concerned for information and compliance.

(S.K.Awasthi)
Judge.

(yogesh)