

\$~2

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.M.C. 1084/2021, CRL.M.A.5550/2021
SOUMITRA KUMAR NAHAR

..... Petitioner

Through: Mr. Attin Shankar Rastogi and
Mr. Archit Chauhan, Advocates.

versus

PARUL NAHAR

..... Respondent

Through: Mr. Mehmood Pracha, Mr. Sanawar
Choudhary, Mr. Jatin Bhatt,
Mr. Azeem Mehmood Alvi,
Mr. Aayushman Aggarwal,
Mr. Altamas Pathan, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

ORDER

22.07.2022

%

1. This petition is filed by the petitioner/husband seeking quashing of the order dated 26.02.2021 and the maintenance petition under Section 125 Cr.P.C. pending adjudication before the learned Family Court, South East, Saket District Court, Delhi, being Maintenance Case No.99/2019.
2. It is argued the impugned order and the maintenance petition are in direct violation of the consent order dated 01.03.2013, duly clarified and reiterated on 02.04.2013 by the Division Bench of this Court in FAO (OS)129/2013 and the judgment dated 18.02.2019 passed by the Hon'ble Supreme Court in S.L.P(C)6201/2016.
3. It is argued the parties have acted upon the consent terms and respondent/wife cannot be allowed to flout the said terms and embroil the petitioner in multiple cases. It is argued the learned Family Judge, without

appreciating the orders passed on the issue, in a mechanical manner had dismissed the application filed by the petitioner/husband for dismissal of the maintenance petition filed by the respondent/wife. It is argued the impugned order is in complete violation of the orders passed by the Division Bench of this Court.

4. I would like to refer to an order dated 01.03.2013 in FAO(OS) 129/2013 annexed as Annexure-P4 of the paper book and the relevant portion of the said order read as under:

“With the assistance of the learned counsel for the parties and the appellant and respondent No.2 present in court we have been able to arrive at a mutual settlement so far as the dispute before us is concerned as also the main suit and certain aspects qua the accommodation and maintenance of the appellant. It is thus agreed as under:

i) The appellant states that the accommodation occupied by respondent No.2 at present i.e. Second Floor, M-24, Greater Kailash-I, New Delhi of two bed rooms fully furnished is acceptable to her for the purpose of her residence and of her children. This course of action being acceptable to respondent no.2, the appellant agrees to move into the accommodation within a period of 15 days from today. The natural sequitor is that respondent no.2 will move out of that accommodation within the same period of time.

ii) Respondent No.2 undertakes to this court to continue to pay the rent, electricity and water charges for the aforesaid premises and ensure that the accommodation is available to the appellant and the children.

iii) Respondent No.2 will pay appellant maintenance @ Rs.60,000/- per month inclusive of the children and their education expenses. Such payment should be made on or before 7th day of each month. The maintenance will commence from 1st March 2013.

iv) The appellant and respondent No.2 also agree that the issue of visiting rights be settled. It is thus agreed that the appellant will make available the children to respondent No.2 on every Saturday at 10.00 AM to be brought back at 10.00 AM on the following Sunday.

v) The appellant gives up her right and claim in the suit property in view of the settlement arrived at.

vi) It is further agreed that this interim arrangement qua maintenance will continue to prevail during the pendency of the divorce proceedings. We make it clear at the request of learned Senior counsel for respondent no.2 that there is of course no obstruction to respondent No.2 going back in the suit property provided respondent no.1 is willing to accommodate

*respondent no.2.
Appeal accordingly stands disposed of.”*

5. Further on 02.04.2013 yet again in FAO(OS)129/2013 an order was passed on an application for clarification and it read as under:

“At request of learned counsel for the respondents, we clarify that the object of the consent order is quite clear i.e. it brings to rest all other issues other than the divorce proceedings in which the parties want to litigate as there are extreme postures on both sides on that issue, each side having its own story. It is, thus, agreed that the divorce proceedings should also move expeditiously and both the parties will assist the Family Court in concluding the divorce proceedings preferably within one year from the date of the order being brought to the notice of the Family Court. All other issues of maintenance, domestic violence etc. as also matters of custody and visiting rights stand resolved by the consent order dated 01.03.2013. The application accordingly stands disposed of.”

6. It is argued later there was change in the circumstances as the respondent was not adhering to the consent order and was violating the visitation rights of the petitioner, hence a Special Leave Petition (C) 6201/2016 was filed by the petitioner herein in which vide order dated 20.03.2017 it was directed:

“We permit Mr. Soumitra Kumar Nahar to take the necessary steps for admission of both the children in Welhams Boys/Girls School, Dehradun and if not possible, in the Wynberg Allen School, Mussoorie. We request the Management of the Schools to consider compassionately these two admissions as a special case and.

We direct Ms. Parul Nahar, mother of the children, to cooperate with the formalities for the admission of the children in the school. Mr. Soumitra Kumar Nahar, father of the children, has graciously volunteered to bear the entire educational expenses. Report on the steps taken by the parties shall be filed before this Court within three weeks.”

7. It is argued by the learned counsel for the petitioner despite the time limit granted to dispose of the divorce proceedings within a year *per* order dated 01.03.2015, the respondent/wife dragged the said case and the same is still pending, hence, she blatantly violated the order dated 01.03.2013

8. It is submitted in HMA No.1184/2016, vide order dated 19.09.2017 her application for enhancement of maintenance was also dismissed by the learned Court on the following grounds:

“Sh. Rastogi, on instructions from the petitioner, who is present in court submits that petitioner has been regularly depositing the rent of the premises in occupation of respondent. He, further, submits that the children who are both, now studying in Boarding Schools are being taken care of by the petitioner. Their monthly expenses are roughly Rs.1,10,000/- per month, which is more than the maintenance monthly directed to be paid by him. It is submitted that the electricity bill are not being paid periodically as the respondent does not hand over the bills to the petitioner and the payment is being made in lump sum in advance. It is submitted that the arrears, if any, towards the electricity charges shall be cleared within 2 days.

On the aforesaid submissions of Sh. Rastogi and undertaking of the petitioner the application does not call for any order. The same is, accordingly, dismissed.”

9. It is further submitted in violation of the consent order the respondent filed a petition No.99/2019 under Section 125 Cr.P.C. and an application moved for dismissal of the said petition by the petitioner was dismissed by the learned Trial Court. The dated 26.02.2021 is as under:

“It is based on this order that the applicant/respondent contends that issue of maintenance is settled and present petition is not maintainable. However, parties have again approached the Hon'ble High Court with various grievances and the Hon'ble High Court has passed some subsequent orders.

*Vide order dated 29.10.2013, the Hon'ble High Court observed that **the parties are at liberty to take recourse to any other measures that may be available to them in accordance with the law.** Again, vide order dated 03.04.2014, disposed the application filed by the petitioner, **permitting the petitioner to make a request before the Family Court of enhancement of the maintenance as well as the arrears of the maintenance.** Relevant portion of the order is as below:-*

This is an application seeking enhancement of the maintenance amount which has been earlier fixed by this Court. The matter, as is clear from the order dated 29.10.2013, is now pending before the Family Court.

We dispose of this application by permitting the applicant/appellant to make a request before the Family Court

for enhancement of the maintenance as well as the arrears of maintenance.

The application stands disposed of.

Dasti."

As per the initial consent order 01.03.2013, the applicant/respondent has to pay Rs.60,000/- per month as maintenance to the petitioner. In course of hearing, it is informed to this court that the respondent has stopped making the payment of said amount to the petitioner. The counsel for the applicant/respondent argued that the respondent is paying around Rs.1,15,000/- towards the school fees of the children, who are studying at boarding school in terms of the order passed by the Hon'ble Apex Court and is also paying the rent and utility charges for residence of the petitioner. But, that does not dis-entitle the petitioner claiming maintenance under section 125 Cr.P.C. as she is not paid Rs.60,000/- as per the order dated 01.03.2013 passed by the Hon'ble High Court. Even otherwise, the scope and ambit of section 125 Cr.P.C. is definitely broad enough to take care of the monetary needs towards maintenance of a woman from her husband. Apart from that the chapter 22 of Cr.P.C also provides for enhancement of the maintenance amount under section 127. Dismissal of the application filed under DV Act by Ld. MM. does not bar the proceedings under section 125 Cr.P.C. which though appears similar but exists in the books of statute with unique and independent scope. Besides the above, it is also relevant to mention that issues are already framed and case is at the stage of the evidence. In view of the above, application is dismissed."

10. It is the submission of the learned counsel for the petitioner the impugned order is blatantly wrong as is against the consent order passed by the Division Bench of this Court; hence petition under Section 125 Cr.P.C. ought to have been dismissed.

11. Heard.

12. Suffice is to say for the last two years, the petitioner is not making any payment of maintenance to his wife on the pretext he is making payment of school fee of both his children. The order dated 18.02.2019 of the Hon'ble Supreme Court reveal it was the petitioner himself who had voluntarily agreed to make payment of the school fee of both their children but such consent could not have been given *at the cost of maintenance*

payable to the respondent and such a concession given by the petitioner cannot be read as contrary to the right of his wife to seek maintenance.

13. Though the petitioner alleges the respondent cannot be permitted to violate the consent dated 01.03.2013 but the petitioner himself had got it modified from the Hon'ble Supreme Court *per* order dated 18.02.2019; secondly the documents on record show even the electricity of respondent's house was disconnected once as the petitioner had failed to make payment of electricity dues, despite the consent order; hence he has also been violating the consent order.

14. Now the question arise is if the petitioner is not making payment of maintenance *per* order dated 01.03.2013 in FAO(OS)129/2013, thereby violating it, can he say the respondent is bereft of any right to claim her maintenance *per* order dated 01.03.2013. The only argument of the petitioner is the respondent should file an application in the divorce proceeding which is still pending before the learned Family Court and she has no right to file a petition under Section 125 Cr.P.C.

15. I disagree.

16. In *Bai Tahira vs. Ali Hussain Fidaali Chothia and Ors.* AIR 1979 SC 362, the Court held as under:

“13. The last defence, based on mehar payment, merits more serious attention. The contractual limb of the contention must easily fail. The consent decree of 1962 resolved all disputes and settled all claims then available But here is a new statutory right created as a projection of public policy by the Code of 1973, which could not have been in the contemplation of the parties when in 1962, they entered into a contract to adjust their then mutual rights. No settlement of claims which does not have the special statutory right of the divorcee under s. 125 can operate to negate that claim.”

17. In *Sanjeev Kapoor vs. Chandana Kapoor & Ors.* in CRL.A.286/2020

the Hon'ble Supreme Court held as under:

*“29. It has come on the record that after passing of the above order on settlement, the appellant according to his own case has paid only an amount of One Lakh Rupees, i.e. maintenance of four months after May 2017. The arrears from July, 2015 to April 2017 has not been paid by the appellant within six months which was time allowed by the Court. When **the appellant did not honour its commitment under settlement, can the wife be left in lurch by not able to press for grant of maintenance on non-compliance by the appellant of the terms of settlement. The answer is obviously ‘No’.** Section 125 Cr.P.C. has to be interpreted in a manner as to advance justice and to protect a woman for whose benefit the provisions have been engrafted.”*

18. Further in *Nagendrappa Natikar vs. Neelamma* AIR 2013 SC 1541, the Court held as under:

*“5. We notice, while the application under Section 127 Cr.P.C. was pending, respondent wife filed O.S. No. 10 of 2005 before the Family Court, Gulbarga under Section 18 of the Act claiming maintenance at the rate of Rs.2,000/- per month. The claim was resisted by the petitioner husband contending that, in view of the compromise reached between the parties in Misc. Case No. 234 of 1992 filed under Section 125 CrPC, respondent could not claim any monthly maintenance and hence the suit filed under Section 18 of the Act was not maintainable. The question of maintainability was raised as a preliminary issue. **The Family Court held by its order dated 15.9.2009 that the compromise entered into between the parties in a proceeding under Section 125 Cr.P.C. would not be bar in entertaining a suit under Section 18 of the Act.***

9. We are in complete agreement with the reasoning of the Family Court and confirmed by the High Court that the suit under Section 18 of the Act is perfectly maintainable, in spite of the compromise reached between the parties under Order XXIII Rule 3 C.P.C. and accepted by the Court in its order dated 3.9.1994.”

19. In *Ramchandra Laxman Kamble vs. Shobha Ramchandra Kamble and Anr.* in Writ Petition No.3439/2016 the High Court of Judicature at Bombay held as under:

“13. There are several rulings, which take the view that an agreement, in which the wife gives up or relinquishes her right to claim maintenance at any time in the future, is opposed to public policy and, therefore, such an agreement, even if voluntarily entered, is not enforceable. The two courts in the present case have basically relied upon sg wp3439-16.doc such

rulings and held that even if it is assumed that the parties had voluntarily agreed to give up their time to claim maintenance from each other, such agreement is opposed to public policy and, therefore, the same is not enforceable, or the same does not bar the maintainability of an application under Section 125 of Cr.P.C. There is no jurisdictional error in the view taken by these two courts so as to warrant interference under Article 227 of the Constitution of India.”

20. Hence where the petitioner had himself violated the consent order with impunity, he cannot say the respondent has no right to seek the remedial measures. Admittedly, he has not paid any maintenance to the respondent for the last two years on the pretext he is making payment of school fee. If he had any reservations, he could have intimated the Hon'ble Supreme Court at the time he volunteered to make payment of school fee of his children. Later he cannot allege because of school fee he is unable to pay any amount to his wife. The petitioner had stopped making payment of maintenance of respondent and thus finding no other alternative, the respondent moved an application under Section 125 Cr.P.C. No fault can be found in her action, since it is at the first place the petitioner had failed to comply with the consent order thus he cannot allege the respondent must act under the consent order. Pendency of a petition for divorce and rejection of an application for maintenance in such petition, would not disentitle the respondent to seek maintenance under Section 125 Cr.P.C. looking at its scope and ambit. The respondent cannot be left in lurch by denying her maintenance on the ground the petitioner is paying school fee.

21. In the circumstances, the petition being devoid of merits is disposed of by directing the learned trial court to re-fix her maintenance considering effect of order dated 20.03.2017 of Hon'ble Supreme Court qua petitioner's contribution towards educational expenses and hence her maintenance be

fixed again in view of these changed circumstances. Pending application(s), if any, also stands disposed of.

YOGESH KHANNA, J.

JULY 22, 2022

DV