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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on:19.07.2022***
Pronounced on: 22.08.2022

\+ **CRL.REV.P. 1001/2018**

BABITA ..... Petitioner
Through: Ms. Supriya Juneja,
Mr. Suryanshu Priyadarshi and
Mr. Adhiswar Suri, Advocates.

versus

MUNNA LAL ..... Respondent
Through: Ms. Ashu Chaudhary and
Mr. Nitin Bindav, Advocates.

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present petition has been filed under Section 397 read with Section 402 read with Section 482 of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.') for setting aside impugned judgment dated 09.02.2018 passed by the Learned Judge, Family Court, Shahdara District, Karkardooma Courts, New Delhi in CC no. 364/2017 whereby the grant of maintenance under Section 125 Cr.P.C. to the Petitioner herein was declined on the ground that Respondent had obtained a decree for restitution of conjugal rights in his favour. The question for consideration before this Court is:

> *"Whether the wife against whom decree for restitution of conjugal rights has been passed, is entitled to claim maintenance under Section 125 of the Code of Criminal Procedure?"*

FACTUAL BACKGROUND

2. The marriage between the parties was solemnized on 13.05.1993, and a daughter and a son were born out of their wedlock. The Petitioner/wife filed a petition under Section 125 Cr.P.C. against the Respondent for grant of maintenance for herself and children on 15.04.2009. Respondent was served, however he did not appear before the learned Trial Court on 01.10.2022 despite service of summons, therefore he was proceeded ex-parte by following order:-

> *01.10.2012*
> *Present Petitioner with counsel Sh. Sanjeev Kumar from DLSA*
> *Respondent absent.*
> *Respondent is not present despite service. Be awaited. Put up at 12.30 pm.*
>
> *At 12.30 pm*
> *Present Petitioner with counsel.*
> *Respondent absent.*
> *Respondent is not appeared despite repeated calls. In view of the same, respondent is proceeded exparte.*
> *Put up for exparte PE on 30.11.2012.*

3. The matter was adjourned for recording ex-parte evidence of the petitioner to 30.11.2012. On 30.11.2012, the respondent alongwith his counsel appeared before the Trial Court and filed application under section 126 Cr.P.C. Thereafter the matter was adjourned and was listed for argument on application under Section 126 Cr.P.C to 04.03.2013.

On 04.03.2013, respondent did not appear to address the arguments for setting aside the ex-parte order, however he was allowed to join the proceedings by way of the following order:-

> *Present Petitioner in person.*
> *Sh. Jia Lal, father of Munna Lal.*
> *Exemption application along with medical certificate stating that respondent is not well. In view of the submission made, exemption is allowed for today only. It is pertinent to mention here that respondent has already been proceeded exparte in the present case. However, he has every right to join the proceedings of further dates. He has also moved an application u/s 126 Cr.P.C. Reply to the application is not filed. Put up for reply and arguments on application for 21.5.2013.*

Thereafter, respondent did not appear again to participate in the proceedings and only appeared on 14.08.2013 for filing of certified copy of a judgment.

4. Evidence by way of Affidavit was tendered by the Petitioner on 27.01.2014. Further, despite notice issued on 05.09.2014, the Respondent did not appear before the Trial Court on 27.01.2015. Thus, *vide* order dated 06.10.2015, the Respondent was again proceeded ex-parte. The relevant portion of the order dated 06.10.2015 reads as under: -

> *"…From the perusal of the record, it is reflected that even on the last several dates of hearing i.e., 27.01.2015, 19.03.2015, 20.05.2015, 01.08.2015 none was present on behalf of the Respondent and hence Respondent is proceeded ex-parte, to come up for ex-parte evidence on next date i.e. 30.01.2016…"*

5. Due to non-appearance of the Respondent, the matter was put up for ex-parte evidence on 27.11.2017 *vide* order dated 16.08.2017. On 27.11.2017, the evidence of the Petitioner was recorded by way of an affidavit which was never cross-examined by the Respondent.

6. Parallelly in 2009, the Respondent filed a petition under Section 9 of the Hindu Marriage Act, 1955 (hereinafter 'HMA') before the Learned Family Court, Hamirpur for Restitution of conjugal rights. He was aware about the maintenance proceedings at Delhi in 2012, but chose not to join proceedings at Delhi and also did not disclose this fact to the court at Hamirpur. Later, by virtue of an ex-parte judgment dated 23.04.2013, the petition was decreed ex-parte in favour of the Respondent and consequently, the Petitioner/wife was directed to join the company of the Respondent.

7. By virtue of order dated 05.09.2013, the Learned Metropolitan Magistrate allowed the interim maintenance application and directed the husband to pay Rs. 1,300/- per month each to the Petitioner and children. The first challenge to this order by the Respondent, before the Learned Sessions Court, was dismissed *vide* order dated 19.12.2013. Further, the Respondent approached this Court which denied the Respondent the relief sought for, *vide* order dated 13.06.2016, by holding as under: -

> *"The Revisional Court opined that the Petitioner had not shown to the court that he had taken steps to take the custody of his children and therefore the maintenance qua them cannot be set aside on the ground that a civil decree had been passed against their mother by a civil court. As regards the allegation that the Respondent No.3/wife had left the company of the Petitioner/husband, it was observed*

that the same can be decided only after the trial and not at the stage of interim application.

6. It was an admitted position that the Respondent No.3 was unrepresented before the Court in the Section 9 of HMA petition and her version remained unrepresented there. The finding in an ex parte decree, if unchallenged will remain binding on the Petitioner, but it cannot become a ground for refusing the version of the Respondent No.3 which was not put before the Court at all.

7. The fact that she had been prevented by the men of the Petitioner/husband from entering appearance before the Civil Court is to be judged after the trial as per the evidence to be led by the parties. It was also to be appreciated by the Court that she had been misguided by her previous counsel. Thus, it was inappropriate to bind the Respondent No.3 by a decree in which her part of the story was not even heard by the court. As for the quantum of maintenance, the Revisional Court observed that the Petitioner/husband himself had not come out clean on his source of income and thus there was no error in the finding of the Trial Court holding his income at Rs.6,500/- per month. However, it is made clear that any payment made in pursuance of the order granting interim maintenance shall be subject to the adjustment of the maintenance granted while passing final order by the Trial Court."

8. The Learned Family Court, after closing of evidence by the Petitioner wife, passed the impugned judgment on 09.02.2018, placing reliance on the ex-parte decree under Section 9 of the HMA dated 23.04.2013, rejecting plea of grant of maintenance under Section 125 of Cr.P.C. to the Petitioner. The observation of the learned Family Court reads as under:

"*No doubt the Respondent has not led any evidence but a certified copy of the judgement given by Hamirpur Court is*

on record which says that petition filed u/s 9 of HMA by the Respondent has been decreed on 23.04.2013. The Petitioner no.3 wife apparently has deserted the Respondent so she was directed to join the company of the Respondent. This judgement has not been challenged by the Petitioner no. 3 in higher court and it has become final. The certified copy of the judgement lying on record can be looked into even without its formal proof. Since, it is apparent from record due to this judgment that Petitioner no. 3 has virtually deserted the Respondent so she is not entitled to any maintenance from the Respondent. However, Petitioners no. 1 & 2, the children of the Respondent are entitled to get maintenance from their Respondent father."

SUBMISSIONS OF LEARNED COUNSELS

9. The main contention of the Learned Counsel for the Petitioner is that the Learned Trial Court has committed grave error in arriving at conclusion that the Petitioner was bound by the ex-parte decree of restitution and by not complying with the same, she has disentitled herself from grant of maintenance. The Learned Counsel further argued that since the decree of restitution was an ex-parte decree, therefore, the learned Trial Court could not have denied grant of maintenance to the Petitioner wife.

10. In support of her contention, the Petitioner/wife has filed on record the following judgments:

a) ***Ravi Kumar v. Santosh Kumari* 1997 *CivilCC* 52**

b) ***Babulal v. Sunita* 1987 *CriLJ* 525; *Haizaz Pashaw v. Gulzar Banu* 2002 *CriLJ* 3282** and ***Mohd. Shakeel v. Shaeehna Parveen and Ors.* 1987*CriLJ* 1509**

11. Per contra, the Learned Counsel for the Respondent submits that since the competent Civil Court has passed decree dated 23.04.2013 directing the Petitioner to restitute their conjugal rights, the Learned Trial Court was rightly persuaded to accept the ground denying maintenance to the wife.

12. The issue before this court is as to whether an ex-parte decree of restitution of conjugal rights by itself can be held to be binding to the extent that the Trial Court, without deciding any of the issues relevant and related for consideration of granting maintenance, deny the same?

SECTION 125 OF Cr.P.C.

i) Objective of Section 125 Cr.P.C.

13. It is vital to look at the aim behind introduction of Section 125 Cr.PC. The provision was introduced to secure social justice and financial support for the wife, children, infirm parents. The purpose behind the provision was to provide quick remedy to the children, wife and parents suffering from destitution, financial suffering and starvation. The powers under Section 125 are completely discretionary and independent from any personal law and are essentially secular in character.

14. In ***Chaturbhuj v. Sita Bai, (2008) 2 SCC 316,*** the Hon'ble Supreme Court emphasized the introduction of the provision by giving due consideration to Article 15(3) and Article 39 of the Constitution of India, 1950. The observation by the Apex Court reads as under: -

> "*5. The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy*

by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. In the instant case, the phrase "unable to maintain herself" would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors. (AIR 1978 SC 1807) falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India, 1950 (in short the 'Constitution'). It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat and Ors. (2005 (2) Supreme 503).”

(Emphasis supplied)

15. The Hon’ble Apex Court in ***Bhuwan Mohan Singh v. Meena & Ors. (2015) 6 SCC 353*** further elaborated the objective of Section 125 and observed as under: -

“2. Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short “the Code”) was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere

else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one…"

(Emphasis supplied)

ii) Essential ingredients for grant of maintenance under Section 125 Cr.P.C.

16. Section 125(1) Cr.P.C. lays down essential ingredients for the grant of maintenance. The same is reproduced as under:

"…(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c)his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or 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 or such child, father or mother, at such monthly as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:.."

17. A bare reading of the aforesaid provision will reveal that to make out a case for grant of maintenance it is to be proved, firstly, that Petitioner is legally wedded wife of the Respondent, secondly, that the Petitioner has been living separately from the Respondent/husband due

to reasonable cause, thirdly, that the Petitioner is unable to maintain herself, fourthly, that there has been willful neglect on the part of the Respondent or that he refuses to maintain the Petitioner, and fifthly, that the Respondent has sufficient means to maintain the Petitioner.

iii) Grounds on which maintenance can be denied

18. Section 125 (4) Cr.P.C. lays down the grounds on which the wife will not be entitled to maintenance. The relevant section reads as under:

> *"(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."*

19. Section 125(4) clarifies the cases and situations wherein the wife will not be entitled to grant of maintenance, which are as follows: i) if she is living in adultery ii) in case it is proved that the wife has deserted the husband without any reasonable cause and, iii) or if they are living separately by mutual consent. In such cases, she will be disentitled to grant of maintenance.

SECTION 9 OF HINDU MARRIAGE ACT, 1955

20. I deem it appropriate to reproduce section 9 of HMA as it is relevant to decide the issue in question. The provision reads as under: -

> *"Section 9 Restitution of conjugal rights: When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth*

of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. 8 [Explanation. Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.]"

INTER-RELATION BETWEEN SECTION 9 HMA AND SECTION 125 CR.P.C.

21. A reading of both the statutes will reveal that they are intertwined to some extent, in the sense that in case, if a decree of Restitution of conjugal rights is granted in favour of the husband and it is clearly opined on an issue so framed in the said case that the wife has left the company of the husband willingly and has not been living with him without reasonable cause, Section 125(4) will come into picture which lays down the grounds when the wife will not be entitled to maintenance.

22. In the present case, the impugned order has been passed relying on the ex-parte judgment *vide* which the petition filed under Section 9 of HMA of the Respondent has been allowed.

23. It will be appropriate therefore to reproduce the said judgment. The ex-parte judgment dated 23.04.2013, reads as under:-

न्यायालय अपर जिला जज न्या0सं0–2 हमीरपुर
उपस्थित– दिनेश चन्द, (उच्चतर न्यायिक सेवा)
वैवाहिक वाद संख्या– 06/2009

मुन्नालाल पुत्र श्री जियालाल निवासी ग्राम अतरौलिया (राठ), परगना व तहसील राठ जिला हमीरपुर उ0प्र0।

. . . प्रार्थी।

बनाम

1. **श्रीमती बबीता** पत्नी मुन्नालाल पुत्री चिरंजीलाल
2. **चिरंजीलाल** पुत्र श्री बरवा

निवासीगण ग्राम उमरई, तहसील कुलपहाड जिला महोबा हाल मुकाम जे0जे0 कैम्प ई0 85/124 आनन्द बिहार नई दिल्ली पिन कोड 110092

. . . विपक्षीगण।

धारा 9 हिन्दू विवाह अधिनियम,

एक पक्षीय निर्णय

यह वैवाहिक याचिका याची ने विपक्षीगण के विरूद्ध धारा 9 हिन्दू बिवाह अधिनियम के अन्तर्गत वैवाहिक सम्बन्धों के पुनर्स्थापन हेतु प्रस्तुत किया है कि विरूद्ध पक्ष सं0 1 को याची के साथ दाम्पत्य अधिकारों एवं कर्तव्यों के पुनर्स्थापन हेतु आदेश पारित किया जाए।

यह पत्रावली माननीय जनपद न्यायाधीश हमीरपुर के आदेश दिनांकित 29.9.2012 के अनुपालन में अन्तरण द्वारा प्राप्त हुई।

याचिका में यह प्रकथन है कि प्रार्थी मुन्नालाल व विरूद्ध पक्ष सं0 1 श्रीमती बबीता का बिवाह लगभग 15–16 वर्ष पूर्व दिनांक 30.5.1993 को हिन्दू रीति रिवाज के अनुसार हुआ था। प्रार्थी के विवाह के बाद विरूद्धपक्ष सं0 1 प्रार्थी के साथ लगभग बारह वर्ष तक बतौर पत्नी याची के घर आती जाती रही व रहती रही है। दोनों के संसर्ग से एक लड़की काजल उम्र लगभग बारह वर्ष तथा एक लडका करन उम्र लगभग नौ वर्ष हैं। याची व उसके माता पिता ने विपक्षी नं0 1 श्रीमती बबीता को हमेशा लाड़ प्यार से रखा तथा कभी भी किसी प्रकार की दुख तकलीफ नहीं दी। शादी के समय याची के पिता ने चढ़ावे में विपक्षी नं0 1 को लगभग 60,000/– रुपया के जेवर दिये थे जो विपक्षी नं0 1 के पास रहे और अब भी उसके पास हैं। विपक्षी नं0 2 व उसकी पत्नी बहुत ही चालाक व होशियार किस्म के व्यक्ति हैं और हमेशा विपक्षी नं0 1 को याची के खिलाफ बरगलाते रहे हैं। विपक्षी नं0 2 कुछ समय से दिल्ली में रह रहा है और उसके परिवार के लोग ग्राम चमरई में नहीं रहते हैं। लगभग तीन साल पूर्व

विपक्षी नं0 2 अपनी पुत्री विपक्षी सं0 1 को यह कहकर कि परिवार में शादी है अपने साथ ग्राम चमर्रा लिवा ले गया परन्तु वहां कोई शादी नहीं थी। एक माह बाद याची के पिता विपक्षी सं0 1 को लिवाने गया तो विपक्षी सं0 1 को नहीं भेजा। विपक्षी नं0 1 लगभग तीन साल से बिला किसी कारण के याची से अलग अपने पिता विपक्षी नं0 2 के पास रह रही है तथा याची के पुत्र एवं पुत्री को भी अपने साथ रखे हुए हैं जिससे याची को दाम्पत्य जीवन के सुख से वंचित रहना पड़ रहा है। याची की पत्नी काफी हृष्टपुष्ट है और मेहनत करने वाली औरत है तथा अपने माता पिता के साथ दिल्ली में मजदूरी करती है और पैसा कमा रही है इसलिए विपक्षी नं0 1 के माता पिता लालचवश विपक्षी नं0 1 को याची के साथ नहीं भेजना चाहते हैं। प्रार्थी अपनी पत्नी विरूद्ध पक्ष को बहुत चाहता है। उसके बगैर जीवन यापन सम्भव नहीं है। इसलिए प्रार्थी विरूद्ध पक्ष के साथ दाम्पत्य अधिकारों के पुनर्स्थापन का अधिकारी है।

36क जबावदावा श्रीमती बबीता विपक्षी सं0 1 प्रस्तुत करते हुए यह कथन किया है कि याची को कोई वाद कारण मुझ विपक्षी के विरूद्ध हासिल नहीं है। याची व विपक्षी के वैवाहिक जीवन से एक पुत्री काजल व एक पुत्र करन पैदा हुए जो आज भी विपक्षी के पास रहते हैं। विपक्षी की शादी में विपक्षी के पिता ने अपनी हैसियत से ज्यादा दान दहेज लगभग साढे तीन लाख रुपया दिया था तथा नगदी जेवर व सभी कीमती व अच्छा सामान दिया था जो आज भी याची व उसके परिवार के कब्जे में है जो कि उक्त सामान विपक्षी का स्त्रीधन है। शादी की विदा के बाद जब विपक्षी पहली बार ससुराल गई तो याची व उसके पिता जियालाल व माता शोभारानी ने विपक्षी से दहेज कम लाने का उलाहना दिया तथा दहेज में सी0डी0 प्लेयर, यामाहा मोटर साइकिल तथा एक लाख पचास हजार रुपयों की मांग की, जिस पर विपक्षी ने असमर्थता जतायी तो उक्त सभी झगड़ा फसाद पर आमादा हुए। विपक्षी अपनी ससुराल में रहकर बराबर अपने दाम्पत्य जीवन का पालन करती रही लेकिन याची व उसके परिवार के सदस्य विपक्षी से बराबर दहेज की मांग दुहराते रहे। समय व्यतीत होने के साथ साथ विपक्षी के दो सन्तानें हो गईं। अपने बच्चों की खातिर विपक्षी सभी उत्पीडन सहती रही। विपक्षी के जब लड़का हुआ तो विपक्षी के सास ससुर ने सोने की चैन व अंगूठी की नई मांग की। विपक्षी ने असमर्थता

जतायी तो सास ससुर ने विपक्षी व उसके माता पिता को बुरी बुरी गालियां दीं। याची की लत शराब पीने व जुआ खेलने की है जिससे याची विपक्षी से पैसों की मांग करता था एवं मना करने पर मारपीट करता तथा कहता कि अपने मायके से मंगवाओ नहीं तो विपक्षी को जान से मार डालेगा। दिनांक 11.9.06 को याची ने विपक्षी को जलाकर मार डालने का प्रयास किया लेकिन विपक्षी जान बचाकर भागी तथा अन्दर से कमरा बन्द कर लिया तब कहीं विपक्षी की जान बची। विपक्षी सं0 1 ने यह बात अपने माता पिता तक पहुंचाई तब विपक्षी के पिता ने किसी तरह रुपयों का इन्तजाम करके 70 हजार रुपया याची को मोटर साइकिल खरीदने हेतु दिया लेकिन याची पूरे डेढ़ लाख रुपया की मांग करता रहा तथा 70 हजार रुपया जुएं में हार गया। विपक्षी ने यह बात अपने ससुर से बताई तो उन्होंने याची को डांटा जिस पर वहीं पर मौजूद याची ने विपक्षी सं0 1 को जोर से तमाचा मारा जिससे उसके कान का पर्दा क्षतिग्रस्त हो गया। जिसका इलाज विपक्षी के माता पिता ने कराया। दिनांक 21.10.2006 को विपक्षी के पति व सास ससुर ने विपक्षी को मारपीट कर घर से निकाल दिया था तब से लिवाने नहीं आया और न ही फोन से बातचीत की जब कि विपक्षी हमेशा दाम्पत्य जीवन का पालन करने को तैयार रही है। यदि विपक्षी को याची आज भी लिवाने आये तथा दहेज की मांग न करे तो विपक्षी याची के साथ रहकर दाम्पत्य जीवन गुजारने की इच्छुक है। विपक्षी अपनी इच्छा से दिल्ली में अपने पिता के पास नहीं रह रही है बल्कि अपने जीवन की सुरक्षा व बच्चों के भविष्य के लिए मजबूरी में दिल्ली में माता पिता के साथ रहती है। यदि याची विपक्षी को अपने साथ रखना चाहता तो विपक्षी को लिवाने दिल्ली अवश्य आता, लेकिन आज तक विपक्षी व बच्चों को लिवाने नहीं गया है। विपक्षी के माता पिता जहां रहेंगे वहां विपक्षी की रहना मजबूरी है। याचिका में विपक्षी सं0 2 को गलत पक्षकार बनाया गया है। विपक्षी के पिता ने कभी भी भेजने से इन्कार नहीं किया है। याची को निर्देशित किया जाए कि याची विपक्षी को उसके माता पिता के घर से लिवा ले जाए तथा बतौर पत्नी अपने साथ रखे तथा अपने दाम्पत्य जीवन का निर्वाह करे।

विपक्षी सं0 2 की ओर से कोई जबावदावा प्रस्तुत नहीं किया गया न ही समुचित तामीला के बावजूद वह न्यायालय में उपस्थित आया। उभयपक्ष के अभिवचनों के आधार पर निम्न लिखित वाद बिन्दु विरचित किए

गए—

1. क्या याची वैवाहिक याचिका में वर्णित कथनों के आधार पर दाम्पत्य अधिकारों की पुनः स्थापना की डिक्री प्रात करने का अधिकारी है?
2. क्या प्रतिपक्षी सं0 2 को याची द्वारा गलत पक्षकार बनाया गया है और प्रतिपक्षी सं0 2 को अनावश्यक पक्षकार बनाये जाने के कारण वाद दूषित है ?
3. क्या याची किसी अन्य अनुतोष को प्राप्त करने का अधिकारी है ?

याची की ओर से अपना स्वयं का शपथ पत्र क—39, जियालाल का शपथ पत्र क—40 तथा चेतराम का शपथ पत्र क—41 मुख्य पृच्छा के रूप में प्रस्तुत किया गया है। परन्तु उपरोक्त तीनों गवाहों से विपक्षी की ओर से कोई जिरह नहीं की गयी। यहां यह भी उल्लेखनीय है कि जबावदावा प्रस्तुत करने के पश्चात विपक्षी संख्या 1 की ओर से कोई जिरह न करने के कारण जिरह करने का अवसर दिनांक 30.11.2012 को इस न्यायालय द्वारा समाप्त किया गया और दिनांक 13.2.2012 को पत्नी का साक्ष्य का अवसर समाप्त करते हुए मामले में एक पक्षीय बहस के लिए तिथि नियत की गई।

मेरे द्वारा याची के विद्वान अधिवक्ता की एक पक्षीय रूप से बहस सुनी गयी। विपक्षी की ओर से बहस के लिए कोई उपस्थित नहीं आया। मेरे द्वारा पत्रावली पर उपलब्ध साक्ष्य का परिशीलन किया गया।

निष्कर्ष

वाद बिन्दु संख्या 1—

यह वाद बिन्दु इस आशय का विरचित किया गया है कि—

क्या याची वैवाहिक याचिका में वर्णित कथनों के आधार पर दाम्पत्य अधिकारों की पुनः स्थापना की डिक्री प्रात करने का अधिकारी है?

इस वाद बिन्दु को साबित करने का भार याची पर है। इस सम्बन्ध में याची की ओर से अपनी याचिका में यह कहा गया है कि प्रार्थी का विरूद्ध पक्ष का बिवाह लगभग 15—16 वर्ष पूर्व दिनांक 30.5.1993 को हिन्दू रीति रिवाज के अनुसार हुआ था। प्रार्थी के विवाह के बाद विरूद्धपक्ष सं0 1 प्रार्थी के साथ लगभग बारह वर्ष तक बतौर पत्नी याची के घर आती जाती रही व रहती रही है। दोनों के संसर्ग से एक लडकी काजल उम्र लगभग बारह वर्ष तथा एक लडका करन उम्र लगभग नौ वर्ष हैं। याची व उसके माता पिता ने विपक्षी नं0 1 श्रीमती बबीता को हमेशा लाड प्यार से रखा तथा

कभी भी किसी प्रकार की दुख तकलीफ नहीं दी। शादी के समय याची के पिता ने चढावे में विपक्षी नं0 1 को लगभग 60,000/- रुपया के जेवर दिये थे जो विपक्षी नं0 1 के पास रहे और अब भी उसके पास हैं। विपक्षी नं0 1 व 2 बहुत ही चालाक व होशियार किस्म के व्यक्ति हैं और विपक्षी नं0 1 अपने पिता के असर में है और विपक्षी संख्या 2 के साथ दिल्ली चली गयी लेकिन वापस नहीं आई और वह लगभग तीन साल से विना किसी कारण के अपने पिता विपक्षी संख्या 2 के साथ रह रही है और याची को दाम्पत्य जीवन के सुख से वंचित रहना पड रहा है और मानसिक व शारीरिक कष्ट भी उठाना पड रहा है। उसकी ओर से यह भी कहा गया कि विपक्षी के माता पिता उसे याची के साथ नहीं भेज रहे हैं। इस याचिका के द्वारा याची द्वारा दाम्पत्य अधिकारों के पुनर्स्थापन के अनुतोष की प्रार्थना की गयी है। इस सम्बन्ध में याची द्वारा अपना स्वयं का शपथ पत्र क-39 प्रस्तुत किया गया है जिसमें याचिका के सभी तथ्यों का समर्थन किया गया है। इसके अलावा उसकी ओर से साक्षी जियालाल व चेतराम के शपथ पत्र मुख्य पृच्छा के रूप में कागज संख्या 40क व 41क प्रस्तुत किए गए हैं। उक्त दोनों साक्षियों ने भी याची के केस का समर्थन किया है।

विपक्षी बबीता की ओर से उत्तर पत्र 36क प्रस्तुत किया गया जिसमें याची के साथ अपनी शादी को उसके द्वारा स्वीकार किया गया है तथा दो बच्चों का याची के संसर्ग से होना भी स्वीकार किया गया है। इसके अलावा शेष समस्त तथ्यों को विपक्षी संख्या 1 द्वारा अस्वीकार किया गया है।

विपक्षी की ओर से याची व उसके साक्षियों से कोई जिरह नहीं की गयी है और अपना भी कोई साक्ष्य याचिका के विरोध में प्रस्तुत नहीं किया गया है। यहां यह भी उल्लेखनीय है कि विपक्षी की ओर से बहस के समय भी कोई उपस्थित नहीं रहा और यह मामला एक पक्षीय रूप से इस न्यायालय द्वारा सुना गया।

चूंकि वादी की ओर से प्रस्तुत साक्ष्य के विरूद्ध विपक्षीगण की ओर से कोई साक्ष्य प्रस्तुत नहीं किया गया है और न ही उसके गवाहान से विपक्षी की ओर से कोई जिरह ही की गयी है। इस स्तर पर याची के स्वयं के शपथ पत्र एवं उसके गवाहान के शपथ पत्रों पर विश्वास न किए जाने का कोई कारण प्रतीत नहीं होता है। ऐसी स्थिति में याची वाद बिन्दु संख्या 1 को साबित करने में सफल रहा है कि विपक्षी विना किसी युक्तियुक्त

कारण के याची का परित्याग किए हुए है और वह जानबूझकर अपना पत्नी धर्म का पालन नहीं कर रही है। ऐसी दशा में वाद बिन्दु संख्या 1 याची के पक्ष में निर्णीत किया जाता है।

वाद बिन्दु संख्या 2

यह वाद बिन्दु इस आशय का विरचित किया गया है कि –

क्या प्रतिपक्षी सं0 2 को याची द्वारा गलत पक्षकार बनाया गया है और प्रतिपक्षी सं0 2 को अनावश्यक पक्षकार बनाये जाने के कारण वाद दूषित है ?

यह वाद बिन्दु विपक्षी के जबावदावा के आधार पर बनाया गया है। विपक्षी की ओर से अपने वाद बिन्दु संख्या 2 के समर्थन में कोई साक्ष्य प्रस्तुत नहीं की गई है। इस प्रकार साक्ष्य के अभाव में वाद बिन्दु संख्या 2 विपक्षी के विरूद्ध नकारात्मक रूप से निर्णीत किया जाता है।

वाद बिन्दु संख्या 3

यह वाद बिन्दु इस आशय का विरचित किया गया है कि –

क्या याची किसी अन्य अनुतोष को प्राप्त करने का अधिकारी है ?

याची की ओर से एक पक्षीय साक्ष्य में शपथ पत्र 39क, 40क व 41क प्रस्तुत करते हुए याचिका के कथनों का समर्थन किया गया है। जिसका खण्डन विपक्षी की तरफ से नहीं किया गया है। इस तरह पत्रावली पर उपलब्ध अस्वीकृत प्रकथनों के आधार पर यह साबित होता है कि मुन्नालाल तथा श्रीमती बबीता की शादी हिन्दू रीति रिवाज से 30.5.1993 को सम्पन्न हुई थी। जबावदावा दाखिल करने के उपरान्त विपक्षी उपस्थित नहीं आई और याचिका में प्रस्तुत साक्षीगण से जिरह नहीं की गई है तथा साक्ष्य का खण्डन नहीं किया है।

धारा 9 हिन्दू विवाह अधिनियम का स्पष्टीकरण इस प्रकार है कि–

"जहां यह प्रश्न उठता है कि क्या साहचर्य के प्रत्याहरण के लिए युक्तियुक्त प्रतिहेतु है, वहां युक्तियुक्त प्रतिहेतु साबित करने का भार उस व्यक्ति पर होगा जिसने साहचर्य से प्रत्याहरण किया है।"

प्रस्तुत केस में विपक्षी श्रीमती बबीता ने याची के साहचर्य से प्रत्याहरण किया है। ऐसी दशा में युक्तियुक्त हेतुक साबित करने का भार विपक्षी श्रीमती बबीता पर है। विपक्षी की अनुपस्थिति के कारण उसने याची

के साहचर्य से प्रत्याहरण के लिए युक्तियुक्त प्रतिहेतु को साबित नहीं किया है। याची द्वारा दिए गए शपथ पत्रों का खण्डन नहीं किया गया है। ऐसी स्थिति में याची द्वारा प्रस्तुत शपथ पत्रों पर विश्वास किया जाना विधिक रूप से उचित है और याची के पक्ष में विपक्षी के विरूद्ध दाम्पत्य अधिकारों के प्रत्यास्थापन के लिए आज्ञप्ति एक पक्षीय रूप से दिया जाना न्याय संगत व समीचीन होगा। इस तरह यह वैवाहिक याचिका एक पक्षीय रूप से डिक्री किए जाने योग्य है।

आदेश

प्रस्तुत वैवाहिक याचिका अन्तर्गत धारा 9 हिन्दू विवाह अधिनियम एक पक्षीय रूप से डिक्री की जाती है। विपक्षी सं0 1 को निर्देश दिया जाता है कि वह याची के साथ दाम्पत्य अधिकारों का प्रत्यास्थापन करे।

दिनांक–23.4.2013.

(दिनेश चन्द) 23.4.13
अपर जिला जज न्या0 सं0–2
हमीरपुर।

निर्णय एवं आदेश आज खुले न्यायालय में मेरे द्वारा हस्ताक्षरित, एवं दिनांकित करके सुनाया गया।

दिनांक–23.4.2013.

(दिनेश चन्द) 23.4.13
अपर जिला जज न्या0 सं0–2
हमीरपुर।

मुन्ना लाल

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Distt. Judge's Court
Hamirpur (U.P.)

FINDINGS

24. A perusal of the same reveals that in the said judgment, the Learned Judge has clearly mentioned the contents of reply filed by the Petitioner herein giving details of the atrocities committed upon her and the demands of dowry made as well as the reason as to why despite her best efforts she was not able to live with the Respondent. Further, it is also mentioned in the reply filed before the court under Section 9 HMA that the Petitioner herein was trying her best even now to stay with the Respondent/husband but he was not ready to accept her back. It is the case of the Petitioner herein that due to non-availability of funds and legal assistance she was not able to appear before the court, moreover she was also stopped and threatened from appearing before the said court.

25. It is thus, clear that the Petitioner herein had already put up her case before the Learned Judge where Petition for Restitution of conjugal rights had been filed before the impugned judgment was passed. However, due to her peculiar circumstances and the fact that she had no assistance or financial capability to appear before the court at Hamirpur, she had been proceeded ex-parte. Resultantly, a decree for Restitution of conjugal rights was passed in favour of Respondent/husband which was not on merits but was an ex-parte decree. The Learned Judge held that since after filing of reply entailing atrocities committed upon her by the husband, the Petitioner herein did not lead evidence in the proceedings under Section 9 of HMA, therefore decree was being passed against her. The issue regarding the

Petitioner leaving the company of the Respondent herein was not decided on merits but due to non-appearance of the Petitioner herein.

26. Interestingly, the husband played hide and seek before the Learned Trial Court where petition for grant of maintenance was pending and he was proceeded ex-parte first on 01.10.2012 and again on 06.10.2015. He never expressed his willingness to either stay with her or maintain her.

27. The Respondent knew about ex-parte evidence being led in the case filed under Section 125 Cr.P.C. as it is evident from his application filed under Section 126 Cr.P.C.

28. The Learned Trial Court granted several opportunities to the Respondent to cross-examine the Petitioner, however, the Respondent did not cross-examine the Petitioner and the evidence led by the Petitioner remained uncontroverted before the Learned Trial Court.

29. The Learned Trial Court did not pay any attention or appreciate the uncontroverted evidence led by the Petitioner regarding harassment and physical injuries suffered by her due to which she was not staying with the Respondent. Rather, the learned Trial Court relied upon an ex-parte decree though it was not in dispute that the Petitioner was unrepresented before the court where the petition under Section 9, HMA was filed, and there was no finding on merit regarding the issue of the Petitioner deserting the Respondent/husband.

30. In this case the Learned Judge should have also taken note of agony of a woman who was poor, is daughter of a mason, not very

affluent and could not even afford a lawyer. She was fighting for grant of maintenance in Delhi, with services of legal aid counsel.

31. It is a case which itself tells a story as to how a claim for maintenance became a battle for maintenance as it extended to nine long years before several courts. This is a case of a woman who filed case for maintenance in the year 2009, who was to take care of two children on her own in the poor financial position that she was in. She was expected to travel to another State to contest a case under Section 9, HMA. Unfortunately, devoid of the capacity to engage a lawyer for another State, the dilemma before her must have been, how to look after herself and the growing children, and also to contest cases. In these circumstances, when she was faced with a choice between her survival and looking after and trying to give a decent life to her children and running to another State without any legal assistance, it would have been a very difficult situation. As a mother, she had chosen the better option of looking after the children and fighting for her right to maintenance. Unfortunately, the legal battle which started in 2009 for grant of maintenance was decided against her after nine long years in the year 2018. Irrespective of the fact that it was decided against her, the fact that it took nine long years to decide a petition under Section 125 Cr.P.C speaks a lot about the efforts one has to put in and the need for sensitization to dispose of such cases at the earliest.

32. The children of the Petitioner were aged 9 years and 13 years at the time of filing of the petition in 2009, and as per her petition the Petitioner was thrown out of matrimonial home on 21.10.2006. The age of the children at that time would have been about 6 years (son) and 10

years (daughter). The journey as a single parent would have been difficult, more so, when the husband was also questioning the paternity of the children. The Learned Trial Court should have kept the above background in mind while deciding the case and should have discussed the evidence led before it by the wife instead of deciding her case only on the basis of a decree which was not on merit but was an ex-parte decree.

33. The object behind proceedings under Section 125 Cr.P.C and under Section 9 of HMA is different. In the present case, the Respondent and his relatives have been ill-treating the Petitioner/wife. The reply of the Petitioner/wife giving details of the ill-treatment suffered by her and her desire to stay with the husband is not only part of the record in proceedings under Section 125 Cr.P.C. but also under Section 9 of HMA. The statement of the Petitioner on oath before the Learned Family Court describing ill-treatment and atrocities gave the wife reasonable excuse to live separately from the husband and claim maintenance.

34. The conduct of the husband of cruelty and attributing immorality to his wife and even questioning the paternity of the children born from the wedlock, would justify her to live separately and claim maintenance. With this background when this court examines the facts of the present case as to whether she was entitled to maintenance or not, the answer has to be in affirmative. The husband can be held to be not obliged to maintain his wife if she is not willing to live with him and discharge her marital obligations without justification. In the present case, however, the wife has taken a stand in every court that she is

ready to live with him and discharge her marital obligations; however, the husband has refused to take her back.

35. Under Section 125(4) Cr.P.C., no wife is entitled to receive any allowance from her husband under Section 125 Cr.P.C. if she is living in adultery or if without any sufficient reason refuses to live with the husband or if they are living separately by mutual consent. In the present case, it has not been proved that she has been living in adultery and she has not refused to live with the husband. She is willing to live with him and has stated so in her pleadings and she has sufficient reason as mentioned on oath in her evidence before the learned Trial Court as to why she is not being able to live with the husband.

36. It is admitted case of the husband that the Petitioner/wife is working as a house-help in few houses in Delhi. The case of the husband is that he is totally unemployed and is dependent on his own parents whereas the wife is earning money by working as a house-help in different houses. The learned Trial Court should have also paid attention to this aspect while deciding the present case. The Petitioner/wife was trying to make two ends meet having been left uncared for and unattended with two minor children aged about 6 and 10 years who were to be educated and brought up. The husband in this case on the one hand, wants the children and the wife back as stated in the petition under Section 9 HMA and on the other hand, states that he himself is completely dependent on his parents. It is strange that though he has a decree of restitution of conjugal rights and the wife is willing to live with him he did not take her back and rather started questioning

the paternity of the children. These aspects should not have escaped the attention of the Trial Court.

37. The Trial Court should have also appreciated the evidence before it that the Petitioner/wife could not go to another State to defend herself as she was a working as house help in different houses, had no financial help from the husband. Had she missed working frequently in various households, it would have rather taken away the only source of livelihood that she had.

38. For the Petitioner/wife it was a question of daily survival. She chose the path of rather earning herself so that her children will have two meals a day, than run to another State and lose her livelihood.

39. In ***Sunita Kachwaha v. Anil Kachwaha (2014) 16 SCC 715,*** the Apex Court had occasion to observe how to exercise the discretionary jurisdiction under Section 125 of the Cr.P.C. It was observed as under:

> *"6. The proceeding under Section 125 Cr.P.C. is summary in nature. In a proceeding under Section 125 Cr.P.C., it is not necessary for the court to ascertain as to who was in wrong and the minute details of the matrimonial dispute between the husband and wife need not be gone into. While so, the High Court was not right in going into the intricacies of dispute between the appellant-wife and the Respondent and observing that the appellant-wife on her own left the matrimonial house and therefore she was not entitled to maintenance. Such observation by the High Court overlooks the evidence of appellant-wife and the factual findings, as recorded by the Family Court.*
>
> *7. Inability to maintain herself is the pre-condition for grant of maintenance to the wife. The wife must positively aver and prove that she is unable to maintain herself, in addition to the fact that her husband has sufficient means to maintain her and that he has neglected to maintain her. In her evidence, the appellant-wife*

has stated that only due to help of her retired parents and brothers, she is able to maintain herself and her daughters. Where the wife states that she has great hardships in maintaining herself and the daughters, while her husband's economic condition is quite good, the wife would be entitled to maintenance."

40. The court has to be cautious in depriving maintenance to a wife under Section 125 (4) Cr. P.C., holding that non-compliance of decree of restitution will be held as a ground for denial of maintenance under Section 125(4) Cr.P.C. While doing so, the conduct of the wife as to whether she had sufficient reasons to not stay with husband or husband creating such circumstances that she will not be able to stay with him have to be carefully assessed by the Court. The evidence led by the Petitioner/wife will be crucial to decide the extent of application of bar under Section 125(4) Cr. P.C. As per principles of law of interpretation of statutes, the courts have to make endeavour to interpret law which will achieve the legislative and social purpose of statue.

41. The Respondent/husband in his petition under Section 9 HMA before the concerned court at Hamirpur took a plea that he loved his wife and children and that she had been staying with children in the matrimonial home for 12 years where he had kept her with love and affection. He further mentioned in the petition that he continued to love his wife and wanted her to return to join his company as he was being deprived of her love and affection. He further mentioned in the said petition that after marriage, two children were born from the relationship. He also mentioned in the proceedings that the wife was a hard-working woman who was earning by working in various homes

and since her parents were greedy and wanted the money, it was due to his parents-in-law that the wife was not able to return back to him. Interestingly, the petition under Section 125 Cr.P.C filed by the Petitioner/wife and the petition under Section 9 HMA filed by the Respondent/husband were going on almost parallelly. The Respondent had also appeared and had filed his reply in the petition under Section 125 Cr.P.C. However, in a complete summersault and contrary to his stand in the petition under section 9 HMA before the Hamirpur court, the Respondent in Section 125 Cr.P.C. proceedings took a plea that the wife was guilty of extra marital affair and that she wanted to stay in Delhi due to that reason. He further questioned the paternity of the two children and even filed an application for conducting DNA test of the children in the year 2016. Therefore, on a bare perusal of these facts, it is visible that in the petition for restitution of conjugal rights the Respondent claims his love and affection for the wife and the children and does not raise a whisper or doubt about her character or paternity of the children, but during the same period in another proceeding to which he was a party under Section 125 Cr.P.C., he goes on to question the paternity of the children and also pleads that the application for grant of maintenance be rejected as he is not the biological father of the children and the applicant/wife is guilty of carrying on an extra marital affair.

42. This reflects how desperate he was to defeat the claim of the wife for grant of maintenance and he had obtained a paper decree of restitution of conjugal rights which was ex-parte and used it effectively in the Trial Court to claim bar under Section 125(4) to deny maintenance to the wife. The learned Trial Judge did not even look into

the contents of the ex-parte decree, relying on which he was denying maintenance to the wife as in case he would have done so, he could have observed what has been observed above by this Court.

43. Questioning the paternity of the children and humiliating her publicly, and harassing the children by questioning their paternity when they were more than 16 years of age, after not having ever raised this question not even at the time of filing of petition under Section 9 of the HMA in itself tells a story unworthy of listening to. In any case, the wife/Petitioner herein had categorically and specifically leveled allegations of mental and physical cruelty and injuries suffered by her at the hands of the Respondent/husband not only in her written statement filed before the Court at Hamirpur but also in her petition filed before the learned Trial Court for grant of maintenance. She has specifically stated that the husband had tried to burn her on 11.09.2006 and further in October, 2008 had hit her so badly that her ear was badly damaged, apart from other incidents of physical and mental cruelty inflicted upon her by the husband and his family members. The learned Trial Court also totally ignored that Petitioner in her petition under Section 125 Cr.P.C, in her replication in these proceedings as well as in her written statement in proceedings under Section 9 HMA, had categorically stated that in case the Respondent/husband will not demand dowry and will not inflict injuries on her, she was still willing and ready to stay with him. This shows that she had not deserted him and the decree of restitution had been passed as an ex-parte decree without she being heard.

44. Furthermore, the conduct of the Respondent as noted in the proceedings under Section 125 Cr.P.C., makes it clear that he had no interest in the proceedings and he has not only been proceeded ex-parte twice but has appeared only once through counsel to file an ex-parte decree for restitution of conjugal rights on the basis of which the impugned order was solely based. It speaks volumes of his intent that he wanted to thwart the proceedings under Section 125 Cr.P.C.

45. Another aspect which should have been kept in mind by the learned Trial Court was that it should have satisfied itself that the husband was prepared to give effect to the decree of restitution of conjugal rights.

46. Interestingly, if the husband was so keen to have the wife back and was armed with a decree of restitution of conjugal rights in his favour, he should have filed execution proceedings to execute the said decree to call upon the wife to resume conjugal relations. In case the husband would have filed execution of decree and would have prayed for the wife to be called upon to resume conjugal relations, either the wife would have refused to resume the conjugal relations or would have joined him as she always took a stand before both the courts. In case of non-obeying, she could have at least given the reason as to why she was not able to join the society of the husband or as to why it is not unjustified on her part to join him. The wife was ready to go with him on assurance of safety to her life as pleaded in her written statement filed in Section 9 HMA proceedings. He did not take her back, rather his only aim was to obtain a paper decree. His own reluctance to file execution proceedings makes it apparent. The Respondent herein was

avoiding being exposed in the above terms. Though he had obtained an ex-parte decree for restitution of conjugal rights on the ground he loved his wife but he himself took a ground that he doubted her character and was not ready to take her back in proceedings under Section 125 Cr.P.C. That is the reason, he had not called upon the wife to resume conjugal relations with him even after obtaining an ex-parte decree for restitution of conjugal rights, therefore, it was not justified to hold that she had withdrawn from his society without reasonable cause or excuse. In this Court's opinion, therefore, in light of the facts and circumstances of the present case, an ex-parte decree for restitution of conjugal rights held by the husband wherein no execution proceedings have been filed will not be a bar to wife's claim for being granted maintenance. The liability to maintain the wife and the children arises from the solemn duty towards wife and children.

47. The husband very conveniently after filing a copy of the decree of restitution of conjugal rights again absented himself and he did not participate in proceedings thereafter for the second time, which shows that he was only waiting for the ex-parte decree to be passed. The conduct of the husband in proceedings under Section 125 Cr.P.C. finds mention in the operative portion of the judgment and reads as under:

> "…2. *After disposal of the interim maintenance application, the case reached at evidence stage but the Respondent did not take any interest in cross examining the Petitioner no. 3. Despite various opportunities, even by imposing costs twice, the Respondent did not came forward to conduct cross examination of the Petitioner no.3. Even at one stage the Respondent moved an application for conducting DNA test of Petitioner no.l & 2 but it was not*

pursued further. The Respondent become exparte again on 06.10.2015. Sometimes, he or his counsel used to appear in the court but neither any application was moved to set aside the exparte order nor opted to cross examine the witness. Even at final argument's stage, new counsel for the Respondent appeared on 14.12.2017 and took time to file the application for setting aside exparte order but no application was moved. It clearly shows that Respondent conducted his defence in highly negligence manner and did not take interest in the case…"

48. The same speaks a lot about the conduct of the Respondent/husband before the learned Trial Court and his intentions.

49. The Trial Court itself held that there was uncontroverted evidence regarding mental and physical cruelties committed upon the Petitioner/wife and she not being able to maintain herself and the two children, but instead of relying on the said evidence and treating the ex-parte decree of restitution of conjugal rights as at best piece of evidence treated it as if the same acted as a bar under Section 125 (4) Cr.P.C.

50. In such circumstances, the learned Trial Court could not have held that the wife was living away from the Respondent without any reasonable cause as the atrocities committed upon her, his conduct and his decision to not take her back and even questioning her character and paternity of the children after decades of marriage in itself should have persuaded the learned Trial Court Judge to reach a conclusion that the wife had justifiable reason not to live with the husband.

51. The discretion granted to Trial Court Judge trying a case under Section 125 Cr.P.C. has to be exercised judiciously. The Trial Court was bound to satisfy itself that the husband was prepared to give effect to the decree of restitution and was prepared to take her back. The Civil

Court had passed an ex-parte decree solely on the ground that other party was not present before it. The Trial Court seems to have surrendered its own discretion to give effect to an ex-parte decree. In failing to appreciate evidence before it the learned Trial Court Judge gave sanctity to an ex-parte decree which was based on premise that wife could not lead evidence and thus give benefit to husband, without any intention of husband to give effect to it.

52. Even a bare reading of ex-parte judgment under Section 9 HMA would have disclosed entirely contradictory stands taken by husband in both the proceedings the learned Trial Court should have appreciated the evidence led before it and should have given reasons for disbelieving the Petitioner and should have passed a reasoned order as to why he was rejecting her claim despite her leading evidence before it. Needless to say, even after giving reasons and appreciating evidence, the Court may have arrived at the same decision as it has arrived at now. However, it would not be solely on a ground of an ex-parte decree which, in any case, does not bar grant of maintenance to a wife under Section 125 Cr.P.C.

53. The learned Trial Court, in the proceedings under Section 125 Cr.P.C, had to conduct an independent inquiry since it was supposed to and was duty bound to appreciate evidence which was before it to reach a conclusion as to whether the complainant had been able to make out her case fulfilling the conditions for grant of maintenance under Section 125 Cr.P.C or not, and thereafter could have decided as to whether on the basis of ex-parte decree of restitution of conjugal rights, she had disentitled herself from grant of such relief.

MERE DECREE OF SECTION 9 HMA DOES NOT DISENTITLE GRANT OF MAINTENANCE UNDER SECTION 125 CR.P.C.

54. There is nothing in law to debar grant of maintenance under Section 125 Cr.P.C. in case a decree of restitution of conjugal rights is possessed by the husband.

55. There is no express bar to grant maintenance to a wife, against whom a decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act has been passed. There is, therefore, no bar to entertain application for grant of maintenance.

56. Thus, this Court holds that the view held by the learned Trial Court that an order of a Civil Court granting ex-parte decree of restitution would automatically put an end to her right to grant on maintenance under section 125 Cr.P.C. is incorrect. In case it was contested by both the parties and then would have been decided in favour of the husband and being in default in not returning, in these circumstances it could become a ground to deny maintenance to her. An ex-parte decree for restitution of conjugal rights is not an absolute bar for consideration of application under section 125 Cr.P.C. In case the court is satisfied on the basis of evidence before it that the wife had justifiable grounds to stay away from the husband, maintenance can be granted. In the case at hand, the learned judge clearly mentioned in the order that the wife had led evidence to prove that she had every reason to stay away from the husband as there was risk to her life at the hands of the husband. The learned Judge should have in that case decided the case based on the said evidence, which unfortunately, he did not even assess or appreciate. If the evidence on record shows that due to

husband's conduct the wife has not been able to live with him and he has denied to maintain her and the minor children, maintenance cannot be refused to her.

57. A decree of a Civil Suit can be held to be binding qua leaving company of husband without reasonable cause, only if proceedings before the Civil Court 9 of HMA dealing with case under Section specific issue has been framed in this regard and the parties have been given opportunities to lead evidence and specific findings are recorded by the Civil Court on contested merit. However, in cases where the husband has obtained an ex-parte decree of conjugal rights from a Civil Court, it cannot be held to be binding on the court exercising jurisdiction under Section 125 Cr.P.C.

58. The mere presence of a decree of restitution of conjugal rights against the wife does not disentitle her to claim maintenance if the conduct of the husband is such as to ensure that she is unable to obey such a decree or it was the husband who had created such circumstances that she could not stay with him.

59. Another aspect of this case is that if one will examine the non-compliance of decree of restitution of conjugal rights, it may result into a divorce. It is settled law that even a divorced wife is entitled to claim maintenance. In these circumstances, it is improper and unfair to deny maintenance to the wife. However, she has to independently establish her claim under Section 125 Cr.P.C. of the Code and fulfill all the conditions laid therein.

60. The repercussions of ex-parte decree if not challenged would follow qua her, under HMA, but her non-appearance in those

proceedings cannot take away her right to maintenance, if she is able to make out a case on merit on its own strength. It was improper not to pass a judgment on the strength of evidence of petition under Section 125 Cr.P.C.

61. While appreciating cases under Section 125 Cr.P.C., the Trial Court has to be sensitive and cautious that each case has to be decided on its own peculiar facts and circumstances as edifice of every such case is different.

62. In these circumstances, it is apparent that the learned Trial Court has committed an error in holding that the wife was not entitled to maintenance as an ex-parte decree for restitution of conjugal rights was passed in favour of the husband, without appreciating the evidence before it regarding the conduct of the Respondent and the willingness of the Petitioner to stay with him as well as ill-treatment and atrocities committed by the Respondent/husband. The same were disregarded in totality by the learned Trial Court.

CONCLUSION

63. In view of the foregoing discussion, the judgment passed by the learned Trial Court is set aside. The learned Trial Court will pass a judgment afresh on the basis of evidence led before it and since it is an old case, it be disposed of within two months from the date of receipt of this order. The learned counsel for both the parties will appear on the date and time fixed by the learned trial Court.

64. Therefore, this court would by way of reiteration hold that mere existence or non-compliance of a decree of restitution of the conjugal rights by itself would not debar or disentitle the wife within the

meaning of Section 125 of Cr.P.C. from getting an order of maintenance.

65. Before parting with this case, this Court wants to observe that the Judges dealing with such cases should keep in mind the objective behind Section 125 Cr.P.C and the need to give a dignified existence to people who need to be maintained lawfully by the persons bound by law to maintain them expeditiously and with sensitivity. The canvas of every individual's life portrayed in every case is not similar and therefore every judgment though filed under the same section cannot be painted and penned with the same stroke of a brush and pen. Every case and every life portrayed therein needs to be dealt with according to the circumstances of that case.

66. With these directions, the present petition stands disposed of.

SWARANA KANTA SHARMA, J

AUGUST 22, 2022/zp

Corrected and uploaded on 21.09.2022.