

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 30.04.2020

+ **CRL.REV.P. 523/2019 & CRL.M.A. 9437/2019**

AJAY GUPTA

..... Petitioner

versus

SONIA GUPTA

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Kanishk Ahuja and Ms Neha Bhatia,
Advocates.

For the Respondent: Mr Shailendra Babbar and Ms Siddhi Mittal,
Advocates along with the respondent in
person.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning an order dated 14.03.2019 (hereafter the 'impugned order') passed by the learned Principal Judge, Family Courts, Tis Hazari Courts (the Family Court) in Maintenance Petition No. 142/2014 titled '*Sonia Gupta v Ajay Gupta*'. By the impugned order, the Family Court, *inter alia*, rejected the petitioner's application under Section 126 of the Code of Criminal Procedure, 1973 (hereafter 'Cr.PC') praying that the evidence filed by the respondent by way of an affidavit (Ex.PW1/A) be struck off and the respondent be directed to

examine herself in accordance with the procedure prescribed under Cr.PC.

2. The petitioner contends that the proceedings under Section 125 Cr.PC are required to be conducted in accordance with the procedure prescribed under Section 126 Cr.PC. It is the petitioner's case that in terms of sub-section (2) of Section 126 of Cr.PC, all evidence is required to be taken in presence of the person against whom an order for payment of maintenance is proposed to be made and is to be recorded in the manner prescribed for a summons case. Therefore, an affidavit by way of evidence, in substitution of recording the examination-in-chief, is not permissible.

3. The limited controversy to be addressed is whether it is open for the learned Family Court to accept the claimant's evidence by way of affidavit.

4. The present controversy arises in the following factual context:

4.1 The respondent filed a petition under Section 125 of the Cr.PC, being Maintenance Petition No. 142/2014, before the Family Court, *inter alia*, seeking maintenance from the petitioner under Section 125 of the Cr.PC. The respondent also filed an application seeking interim maintenance. On 16.04.2012, the Court considered the said application and issued notice to the petitioner.

4.2 The respondent's application for interim maintenance was rejected by an order dated 02.03.2015 passed by the learned Family Court.

4.3 Aggrieved by the same, the respondent preferred a revision petition before this Court (Crl.Rev. No. 245/2015), which was allowed. By an order dated 15.03.2017 passed by this Court, the order dated 02.03.2015 passed by the learned Family Court was set aside and the matter was remanded to decide afresh in the light of various decisions.

4.4 In compliance with the said order, the learned Family Court considered the respondent's application afresh and rejected the same by an order dated 22.05.2017. However, on 22.05.2017 the learned Family Court also directed that "*advance copy(ies) of the affidavit/s to be tendered in evidence on behalf of the petitioner be supplied to counsel for the respondent [the petitioner herein] before the next date*".

4.5 On 04.07.2017, the respondent was unwell and the matter was adjourned to 07.11.2017. On that date (07.11.2017), the matter was deferred on joint request of counsel for the parties to 20.11.2017 and thereafter, it was adjourned to 21.11.2017. On that date, the matter was deferred to 22.11.2017 to explore the possibility of a settlement between the parties.

4.6 On 22.11.2017, the respondent sought an adjournment, which was allowed and the matter was listed on 30.11.2017. The Court granted a last opportunity for recording of the petitioner's evidence.

4.7 The order dated 30.11.2017 records that examination-in-chief of PW1, Sonia Gupta, was partly recorded and further examination-in-chief was deferred for want of original documents. The matter was thereafter listed on 04.12.2017 but was adjourned on that date.

4.8 Thereafter, the matter was deferred on various occasions as this Court had, by an order dated 09.01.2018, directed that the matter be fixed before the Trial Court after the mediation proceedings before Delhi High Court Mediation and Conciliation Centre, are concluded.

4.9 On 28.05.2018, the Trial Court passed an order awarding interim maintenance of ₹15,000/- per month in favour of the respondent. The matter before the Trial Court was listed on several dates. However, it is not necessary to refer to those proceedings, as they are not relevant for the purposes of the present petition.

4.10 The petitioner states that in December 2017, the respondent filed another affidavit. This was in addition to the evidence by way of affidavit filed earlier.

4.11 On 07.01.2019, the respondent (PW1) was further examined and at the request of the learned counsel for the petitioner, her cross-examination was deferred. The learned Family Court listed the matter

on 21.02.2019 for the respondent's cross-examination as well as recording of the evidence of the petitioner herein.

4.12 Thereafter, on 09.02.2019, the petitioner filed an application, which was disposed of by the impugned order. The petitioner contended that proceedings under Section 125 of the Cr.PC are in the nature of a criminal trial and in terms of Section 273 of the Cr.PC, evidence during the course of the trial is required to be taken in the presence of the accused. According to the petitioner, the respondent's evidence was required to be recorded in presence of the petitioner and could not be accepted by way of an affidavit. The petitioner relied on the provisions of Section 126 of the Cr.PC in support of his contention.

4.13 Before the learned Family Court, the petitioner contended that the affidavit filed by the respondent contained unnecessary details that were not required for the disposal of the case and, therefore, the affidavit ought to be rejected. It does not appear that the petitioner advanced any other contention before the learned Family Court. The Court considered the above application and partly allowed the same by directing that the paragraphs of the affidavit of the respondent, which are not necessary for the purposes of a petition under Section 125 of the Cr.PC, would not be considered and, consequently, the petitioner is also not required to cross-examine the respondent on those issues.

Submissions

5. Mr Ahuja, the learned counsel appearing for the petitioner relied upon the decision of the Andhra Pradesh High Court in ***V.D. Solomon v. V. Solomon Mary and Ors.: Criminal Revision Case No. 1865/2002, decided on 13.07.2003***; the decision of the High Court of Karnataka, Gulbarga Bench, in ***Sunanda and Ors. v. Bharat Naik: ILR 2011 Karnataka 1040***; the decisions of the Bombay High Court in ***Anil Ambashankar Joshi v. Reena Anil Joshi and Ors.: Writ Petition No. 4243/2015, decided on 05.12.2016*** and ***Aniket Subhash Tupe v. Piyusha Aniket Tupe and Ors.: Writ Petition No. 2938/2017, decided on 22.03.2018***; and the decision of the Karnataka High Court in ***Gayathri v. Ramesh: ILR 1993 Karnataka 1857***, in support of his contentions.

6. Mr Babbar, learned counsel appearing for the respondent countered the submissions made on behalf of the petitioner. He submitted that proceedings before the Family Court are not in the nature of criminal proceedings and, therefore, there is no infirmity in the procedure to accept evidence by way of an affidavit. He relied upon the decision of the High Court of Karnataka (Dharwad Bench) in ***Zaheeda and Ors. v. Rajmohammed: ILR 2019 Karnataka 1141***; the decision of the High Court of Rajasthan at Jodhpur in ***Saraswati v. Narayan: S.B. Civil Writ Petition No. 6667/2015, decided on 24.07.2015***; the decision of the High Court of Punjab and Haryana in ***Surma v. Santra, Crl. Revision (F) No. 182/2017, decided on 17.09.2018***; the decision of the Allahabad High Court in ***Jagdish Prasad v. IVth Additional Sessions Judge and Ors.: C.M.W.P.***

21600/1994, decided on 13.02.1995; and the decision of the Supreme Court in ***Vijay Kumar Prasad v. State of Bihar and Ors.***: AIR 2004 S.C. 2123.

Reasons and Conclusion

7. Before proceeding further, it would be relevant to refer to Section 126 of the Cr.PC and the same is set out below:-

“126. Procedure.—(1) Proceedings under section 125 may be taken against any person in any district—

(a) where he is, or

(b) where he or his wife resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.”

8. The language of sub-section (2) of Section 126 is unambiguous and all evidence relating to proceedings under Section 125 of the Cr.PC is required to be taken in the presence of the person against whom the order for payment of maintenance is proposed to be made.

9. It is also relevant to refer to Section 273 of the Cr.PC, which reads as under:

“273. Evidence to be taken in presence of accused.—Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader:

Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

Explanation.—In this section, “accused” includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.”

10. As is apparent from the plain language of Section 273 Cr.PC, it also mandates that except as otherwise expressly provided, all evidence in the course of the Trial Court or other proceedings is

required to be taken in presence of the accused or when his/her attendance is dispensed with, in presence of his/her pleader.

11. In view of the express provisions of Section 126 of the Cr.PC, there can be no controversy that a Magistrate, while dealing with the application under Section 125 of the Cr.PC, is required to follow the procedure as specified in Section 126 of the Cr.PC and all evidence is required to be taken in presence of the person against whom an order of maintenance is proposed to be made. However, the proceedings in the present case are not before a Magistrate but before a Family Court established under Section 3 of the Family Courts Act, 1984.

12. In terms of sub-section (2) of Section 7 of the Family Courts Act, 1984 (hereafter ‘the FC Act’), a Family Court would exercise the jurisdiction, which is exercisable by a Magistrate under Chapter IX of the Cr.PC captioned “*order for maintenance of wife, children and parents*”. The said Chapter includes Sections 125 to 128 of the Cr.PC.

13. By virtue of Section 8(b) of the FC Act a Magistrate is proscribed from exercising any jurisdiction or power under Chapter IX of Cr.PC in relation to an area where a Family Court is established.

14. Chapter IV of the FC Act contains provisions relating to procedure to be followed by the Family Courts. Section 10 of the FC Act provides for the procedure to be generally followed and is set out below:

“10. Procedure generally.”-(1) Subject to the other provisions of this Act and the rules, the provisions of the

Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.”

15. In terms of sub-section (2) of section 10 FC Act, the provisions of Cr.PC or the Rules made thereunder, are applicable to the proceedings under Chapter IX of Cr.PC. However, sub-section (3) of Section 10 of the FC Act contains a *non obstante* provision and expressly provides that nothing in sub-section (1) or sub-section (2) of Section 10 of the FC Act would prevent a Family Court from laying down its own procedure, *inter alia*, with a view to arrive at the truth of the facts alleged by one party and denied by the other. It is also relevant to refer to Section 14 of the FC Act, which expressly enables a Family Court to receive in evidence any report, statement, documents, information or matter that may, in the opinion of the Family Court, assist it to deal with the dispute irrespective of whether

such evidence is otherwise relevant or admissible under the Indian Evidence Act, 1872.

16. Section 16(1) of the FC Act expressly provides that the evidence of a formal character may be given in an affidavit and may be read in evidence in any suit or proceedings before a Family Court. Sub-section (2) of Section 16 of the FC Act also enables the Family Court to examine any person as to the facts contained in his affidavit.

17. Section 20 of the FC Act enacts a *non obstante* clause and provides that provisions of the said Act would have the effect notwithstanding anything inconsistent contained in any other law for the time being in force or any instruction having effect by virtue of any law. Thus, by virtue of Section 20 of the FC Act, the provisions of the FC Act, have an overriding effect and in case of any repugnancy between the provisions of the FC Act and any other law, the provisions of the FC Act are required to be given effect to.

18. In view of the above, the Family Courts are required to follow the procedure as set out in the FC Act for determining the matters placed before it notwithstanding the procedure as may be stipulated in the Cr.PC.

19. Sub-section (3) of Section 10 of the FC Act expressly provides that a Family Court is not precluded from laying down its own procedure notwithstanding anything contained in Sub-section (1) or sub-section (2) of Section 10 of the said Act. Thus, the key question is whether the width of sub-section (3) of Section 10 should be curtailed

to conform to the scheme of Sub-section (2) of Section 10 of the FC Act read with Section 126 of the Cr.PC?

20. Chapter IX of the Cr.PC, which contain provisions for making an order regarding provision of maintenance and enforcement thereof have been placed in Cr.PC notwithstanding that such matters are, essentially, of a civil nature. This is for good reason. The obligation to ensure that the wife, children and parents are not left destitute is important from the perspective of social justice and, therefore, cannot be viewed only as a private *lis*. But that does not change the essential nature of the provision. There is no imputation of culpability on a person against whom an order of maintenance is proposed to be made. He is not considered as an accused but is merely a respondent to a claim for maintenance, which in the given circumstances is recognized as his obligation.

21. In ***Vijay Kumar Prasad v. State of Bihar and Ors.*** (*supra*), the Supreme Court had referred to Section 125 of the Cr.PC and held as under:

“The proceedings under this Section are in the nature of civil proceedings, the remedy is a summary one and the person seeking that remedy as we have pointed out, is ordinarily a helpless person. So that words should be liberally construed without doing any violence to the language.”

22. It is essential to bear the aforesaid in mind while determining the question whether a Family Court can adopt a procedure in variance with the procedure for taking evidence as is prescribed under Section 126 Cr.PC read with Section 273 of the Cr.PC.

23. In *Gayathri v. Ramesh* (*supra*), the Karnataka High Court had reasoned that there was no provision in Cr.PC enabling a Magistrate to take an affidavit as evidence in a summons case and such procedure was completely unknown to the provisions of Cr.PC. The Court was also of the view that provisions of Section 126 Cr.PC are required to be followed as they stand incorporated in the FC Act by virtue of sub-section (2) of Section 10 of the said Act. Undisputedly, the Family Courts can follow the procedure as prescribed under Section 126 of the Cr.PC or take evidence as is required to be done in a summons case because the provisions of Section 126 Cr.PC are applicable to the proceedings under Chapter IX of the Cr.PC before the Family Court. But the question, essentially, is whether the court can depart from that procedure or is otherwise bound to follow the same.

24. This Court is of the view that the answer to the aforesaid question lies in examining the width of the *non obstante* clause as contained in sub-section (3) of Section 10 of the Family Courts Act. Considering that the proceedings before a Family Court are not criminal in nature, there would be little rationale in insisting that it is mandatory to follow the said procedure. Clearly, it is unnecessary to fetter the discretion of the Family Court to adopt an apposite procedure, by insisting that the procedure as stipulated in Cr.PC be followed.

25. At this stage, it would also be necessary to refer to the statement of objects and reasons for enacting the FC Act. The relevant extract is set out below:

“Several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules or procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial.”

26. The statement of objects and reasons for enacting the FC Act, also indicates that the Act also seeks “*simplify the rules of evidence and procedure so as to enable the Family Court to deal effectively with a dispute*”.

27. If the provisions of Chapter IV of the FC Act are read bearing the aforesaid in mind, it would be at once clear that sub-section (3) of Section 10 of the FC Act must be read in an expansive manner and a Family Court would not be precluded from laying down a procedure, which is in variance with the procedures prescribed under the Cr.PC, to deal with the subject matter before it.

28. It was contended on behalf of the petitioner that provisions of Section 10 must be read in conjunction with the provisions of Section 16 of the FC. Since Section 16 of the Family Court Act expressly provides that evidence of a formal character can be taken on affidavit, it would imply that evidence, which is not of a formal character, must not be accepted by way of an affidavit.

29. This Court is not persuaded to accept the aforesaid contention. A closer examination of the Scheme of Section 10 of Chapter IV of the FC Act clearly indicates that the Family Court is required to evolve a procedure to effectively address the issues placed before it and has been vested with a wide discretion for the aforesaid purpose.

30. Section 16 of the FC Act is merely an enabling provision, which expressly enables the Family Courts to accept evidence of formal character on an affidavit but that does not imply that the Family Court is otherwise precluded from accepting other evidence on affidavit. Section 16 of the FC Act cannot be read in isolation and must be understood in the context of other Sections under Chapter IV of the FC Act. In terms of Section (1) of Section 9 of the FC Act, a Family Court is required to endeavour to assist and persuade the parties in arriving at a settlement in respect of a subject matter of the suit or proceedings instituted before it. For this purpose, the Family court may, subject to any rules made by the High Court, follow “*such procedure as it deems fit.*”

31. Sub-section (1) and sub-section (2) of Section 10 of the FC Act provides that provisions of Code of Civil Procedure would apply to suits and proceedings – other than proceedings under Chapter IX of Cr.PC – before the Family Court and provisions of Cr.PC shall apply for proceedings under Chapter IX of Cr.PC. However, sub-section (3) of Section 10 of the Act contains the *non obstante* clause and expressly provides that nothing contained in sub-section (1) and sub-section (2) of Section 10 of the FC Act would prevent the Family

Court from laying down its own procedure with the view to arrive at a settlement in regard to the subject matter of the suit or proceedings or at the truth of the facts alleged by one party and denied by the other. Sub-section (1) of Section 9 and sub-section (3) of Section 10 of the FC Act underscore the substratal scheme that confers the Family Court with a wide discretion to evolve its own procedure to effectively address the matters placed before it. This is clearly apparent from other provisions of Chapter IV of the FC Act as well.

32. Section 12 of the FC Act entitles the Family Court to seek assistance of medical experts or other persons as the Court may think fit, for the purposes of discharging its functions under the FC Act. This is a clear departure from the normal procedure of recording expert evidence. The scope of Section 12 of the FC Act is much wider and the Family Court can take assistance of medical experts and other persons in any manner as it deems fit.

33. Section 13 of the Act contains a *non obstante* clause and provides that no party to a suit or proceedings would be entitled as a matter of right to be represented by a legal practitioner. However, the proviso enables the Family Court to seek assistance of a legal expert as an *amicus curiae* if the Court considers it necessary to do it in the interest of justice. As is apparent from the plain language of Section 13 of the FC Act, it confers a wide discretion on the Family Court not only to permit (on deny) the parties the assistance of a legal practitioner but also to independently seek such assistance as it deems necessary.

34. Section 14 of the FC Act is also couched in very wide terms. It enables the Family Court to receive in evidence any report, statement, documents, information or matter that may in its opinion assist it to deal effectively with the dispute. This is irrespective of whether such evidence is relevant or admissible under the Indian Evidence Act, 1872. This is in conformity with the scheme of conferring power on the Family Court to evolve such procedure as is necessary to effectively discharge its functions.

35. Section 15 of the FC Act provides that it would not be necessary to record evidence of witnesses at length but the judge shall record a memorandum of substance of what the witness has deposed. The import of Section 15 is not that the judge must record a memorandum of substance in every case. Section 15 is an enabling provision, which makes it explicitly clear that it is not necessary for oral testimony to be recorded at length and the Court has an option of hearing the testimony of the witness and recording the substance of his/her testimony.

36. The provisions of Section 16 of the FC Act must be considered in the light of the scheme of the other provisions of chapter IV of the FC Act. Therefore, it must be construed as enabling the Family Court to accept formal evidence by way of affidavit and not limiting the discretion of the Court to evolve its own procedure including accepting evidence, which is otherwise not of a formal character, on affidavit.

37. The decision of the High Court of Mysore in ***Gurunath Rao v. Venu Bai: Manu/KA/0153/1968*** does not further the case of the petitioner. The said decision was rendered under Section 488 of the Cr.PC (New Section 125 of the Cr.PC) as applicable to the proceedings before a Munsif Magistrate. The said decision was not in the context with the FC Act; in fact, it was rendered much prior to its enactment.

38. The reliance placed by the petitioner on the decision of the Bombay High Court in ***Aniket Subhash Tupe v. Piyusha Aniket Tupe and Ors.: 2018 Cri.LJ 3316***, is misplaced. This court is of the view that the said decision does not support the stand of the respondent but quite to the contrary.

39. The decision in *Aniket Subhash Tupe's* case was rendered in the context of the Protection of Women from the Domestic Violence Act, 2005 (hereafter 'DV Act'). The question that fell for consideration of the Court was whether an applicant, who had filed an application under Section 12 of the DV Act, could be permitted to file an affidavit in evidence.

40. The petitioner (husband) had relied on the provisions of Section 28(1) of the DV Act and contended that the proceedings under the DV Act were to be dealt in the same manner as laid down under Section 125 of the Cr.PC: the evidence in the proceedings was required to be taken in the presence of a person against whom an order is proposed to be made and was required to be recorded in the manner as prescribed in the case of summons case. The petitioner therein also relied on Sub-

rule (5) of Rule 6 of the Protection of Women from Domestic Violence Rules, 2006, which expressly provided that “*applications under Section 12 shall be dealt with and the orders enforced in the same manner laid down under Section 125 of the Cr.PC, 1973 (2 of 1974)*”.

41. It would also be relevant to refer to Section 28 of the DV Act and the same is set out below:

“28 Procedure.-(1) Save as otherwise provided in this Act, all proceedings under Section 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)

(2) Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under Section 12 or under sub-section (2) of section 23.”

42. The Bombay High Court upheld the decision of the Magistrate to accept evidence by way of an affidavit and held as under:

“19. The question in the instant case is whether section 28(2) of the D.V. Act enables the court to permit the parties to file affidavit-in-evidence in the proceedings filed under Section 12 of the Domestic Violence Act. A cumulative reading of Sub-section (1) of Section 28 r/w. Sub Rule (5) of Rule 6 indicates that in deciding the application under Section 12, the Court has to follow the procedure prescribed under Section 126 of the Cr.P.C. and thus, record evidence in presence of the parties. It is however to be noted that Sub-section (2) of Section 28 clearly provides that-“Nothing in Sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under Section 12 or under Sub-section (2) of Section 23”. The opening

words of Sub-section (2) of Section 28 viz.-“Nothing in Sub-section (1) shall prevent the Court” clearly indicate that notwithstanding the procedure prescribed in 28(1) r/w. Rule 6(5) the Court is empowered to lay down its own procedure in deciding the application under Section 12 or 23(2) of the D.V. Act.

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29. Thus, keeping in mind the aim and object of the Act and scope of Section 28(2), in my considered view the Court can deviate from procedure prescribed under Sub-section (1) of Section 28 r/w. Rule 6(5) and devise its own procedure, which would include permitting evidence by way of an affidavit. In other words, the court in its discretion can allow evidence on affidavit and permit cross examination to test veracity of the evidence.”

43. The Bombay High Court also referred to a decision of the Karnataka High Court in *Sri K. Manjunath Reddy v. Smt. Latha A.C.: Criminal Petition No. 1726/2016*, wherein the Karnataka High Court held as under:

“3. Having regard to the object of and the scope of the legislation, the prescription of such enabling provision is obviously not to cramp the style of the court which requires to address issues with some expedition. Therefore, the section providing that the court can form its own procedure, would also over-ride sub-section (1) of Section 28 to rule 6(5) of the Rules as well.

4. There is no illegality, as the court in exercise of its inherent power while prescribing the procedure for disposal of the application, would even permit evidence by way of an affidavit in such cases. And where the deponent would be available for cross-examination to test the veracity of the

evidence, there is no miscarriage of justice or other illegality in such a procedure being adopted.”

44. A similar view was expressed by the Patna High Court in ***Manish Kumar Soni and Ors. V. State of Bihar and Anr.:*** ***Manu/BH/0919/2015***, wherein the Patna High Court had observed as under:

“27. Hence, though the provision under Section 28(1) of the Act stipulates that the proceeding under Section 12 of the Act shall be governed by the provisions of the Code of Criminal Procedure, but the same is directory in nature and any departure from the provisions of Code of Criminal Procedure will not vitiate the proceeding initiated under Section 12 of the Act.”

45. It is thus clear that the decision of the Bombay High Court in ***Aniket Subhash Tupe v. Piyusha Aniket Tupe and Ors.*** (*supra*) does not in any manner support the case of the petitioner. On the contrary, the decision supports the interpretation that the Family Court can deviate from the prescribed procedure and devise its own procedure considering the objects of the Act.

46. In ***Zaheeda and Ors. V. Rajmohammed*** (*supra*), the Karnataka High Court rejected the contention that a Family Court cannot accept an affidavit by way of evidence as examination-in-chief. The Court did not follow the decision of its division Bench in ***Gayathri v. Ramesh*** (*supra*) as it held that the said decision was rendered on the basis that the proceedings before the court were in the nature of criminal proceedings and therefore Cr.PC and Rules made thereunder were applicable to the proceedings. The Court held that the said

decision was rendered prior to the decisions of the Supreme Court in *Badshah v. Sou. Urmila Badshah Godse and Anr.*: (2014) 1 SCC 188; and *Iqbal Bano v. State of U.P. and Anr.*: (2007) 6 SCC 785, wherein the Supreme Court had expressly held that the proceedings under Section 125 of the Cr.PC are civil in nature.

47. In *Jagdish Prasad v. IVth Additional Sessions Judge* (*supra*), the Allahabad High Court held as under:

“....There is no illegality if the learned Magistrate either directs or permits the applicant or any witness to file an affidavit in proof of the facts contained in the application under Section 125 of the Cr.PC. If the opposite party appears he can have the right of cross examination of the deponent in respect of the averments made in the affidavit. But if he does not appear, there is no illegality in relying upon the affidavit as the evidence.”

48. In *Sunanda and Ors. v. Bharat Naik* (*supra*), the Karnataka High Court had followed the decision of its Division Bench in *Gayathri v. Ramesh* (*supra*) and held that the procedure under Section 126 of the Cr.PC was required to be followed. In *Anil Ambashankar Joshi v. Reena Anil Joshi and Ors.* (*supra*), the Bombay High Court also referred to the decision in *Gayathri v. Ramesh* (*supra*) and held that the weight of judicial pronouncements was in favour of the procedure under Section 126 of the Cr.PC being followed.

49. This Court is, with much respect, unable to concur with the said view.

50. In view of the above, this Court finds no infirmity with the decision of the Family Court in accepting evidence by way of an affidavit; permitting the respondent to tender the same in her examination-in-chief; and providing an opportunity to the petitioner to cross-examine the respondent.

51. The petition is, accordingly, dismissed. The pending application is also disposed of.

April 30, 2020
RK

VIBHU BAKHRU, J

