

**IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA:**

Cr.MMO No. 211 of 2014.

Order reserved on: 4.5.2016.

Date of Order: May 19,2016.

Smt. Surita Sharma wife of
Sh. Suresh Sharma and another.Petitioners.

Vs:

Sh. Suresh Kumar. ...Non-petitioner.

Coram:

The Hon'ble Mr.Justice P.S.Rana, Judge.

Whether approved for Reporting?¹yes.

For petitioners: Mr.B.S. Thakur, Advocate.

For Non-petitioner: Mr. Sanjay Parashar Advocate.

P.S.Rana, Judge.

ORDER: Present petition is filed under Section 482 Code of Criminal Procedure 1973 against order dated 1.4.2014 passed by learned Additional Sessions Judge-II Shimla HP in Cr. Revision Petition No. 1-S/10 of 2013 title Suresh Kumar Vs. Surita Sharma and another.

¹ Whether reporters of Local Papers may be allowed to see the judgment?yes

BRIEF FACTS OF THE CASE:

2. Smt. Surita Sharma wife of Sh Suresh Kumar and minor Km.Tania filed petition under Section 125 Cr.PC for grant of maintenance allowance. It is pleaded that marriage between Surita Sharma and Suresh Kumar was solemnized on 23.11.1999 at Aggarwal Dharmshala near RKMV Shimla HP. It is further pleaded that from wedlock of Surita Sharma and Suresh Kumar co-petitioner No.2 Km. Tania was born who is at present aged five years and is residing with Surita Sharma at her parental house at wooden market Shimla. It is further pleaded that co-petitioner No.2 Km. Tania minor is suffering from disease namely Cerebral palsy and undergoing routine check up from various hospitals i.e. IGMC Shimla, PGI Chandigarh and hospital at Delhi. It is further pleaded that relations between Surita Sharma and Suresh Kumar were cordial up to year 2003 and thereafter father of Suresh Kumar on one pretext or the other started quarreling with Surita Sharma. It is further pleaded that harassment and torture was continued on the part of late father of Suresh Kumar, younger brother of Suresh Kumar and his wife Smt. Anju. It is further pleaded that all

family members including married sister of Suresh Kumar and younger brother of Suresh Kumar and his wife always taunted Surita Sharma and told that she was brought to matrimonial house keeping in mind the poverty of parents of Surita Sharma and should not expect any respect and status of wife of Suresh Kumar who is earning in lacs per month in foreign country. It is further pleaded that Suresh Kumar despite having source of income stopped paying maintenance allowance and did not provide basic amenity of life to Surita Sharma and her minor daughter Km. Tania. It is further pleaded that on dated 9.1.2004 compromise was executed between Surita Sharma and Suresh Kumar for construction of house in the name of Km. Tania. It is further pleaded that Suresh Kumar agreed that he would pay maintenance allowance to minor Tania. It is further pleaded that Suresh Kumar agreed to pay maintenance allowance to the tune of Rs.3000/- (Three thousand) per month up to December 2005 but thereafter he stopped payment of maintenance allowance and told Surita Sharma to get divorce from him. It is further pleaded that Surita Sharma is residing with her parental house where two brothers of Surita Sharma are also residing with their families and old

mother of Surita Sharma is also residing with them. It is further pleaded that Surita Sharma has qualified her MA in Hindi from HP University but she is unemployed and has no independent source of income. It is further pleaded that Surita Sharma cannot join any job in view of the fact that a permanent attendant is required to look after co-petitioner No.2 Tania who is suffering from disease namely Cerebral Palsy. It is further pleaded that Suresh Kumar has neglected and refused maintenance allowance to Surita Sharma and minor daughter Km. Tania. It is further pleaded that Suresh Kumar is the owner of restaurant namely Pizza Fontana in Germany and earns sum of Rs.150000/- (One lac fifty thousand) per month as per Indian currency. It is further pleaded that Suresh Kumar has acquired plots of land at Hamirpur and is owner of a shopping complex near GPO Hamirpur HP. It is further pleaded that Suresh Kumar has ancestral property at village Chujhani post office Dhanvi Tehsil Bhoranj District Hamirpur HP. It is further pleaded that Surita Sharma and Km. Tania are legally entitled for maintenance allowance to the tune of Rs.20000/- (Twenty thousand) per month. It is further pleaded that Surita Sharma and Km. Tania has no source of income to maintain

themselves. It is further pleaded that Suresh Kumar has intentionally neglected Surita Sharma to provide maintenance allowance despite sufficient source of income. Prayer for grant of maintenance allowance to the tune of Rs.20000/- (Twenty thousand) per month with costs of litigation sought.

3. Per contra response filed on behalf of Suresh Kumar pleaded therein that petition filed under section 125 Cr.PC is not maintainable because Surita Sharma has left her matrimonial house without any sufficient cause. It is further pleaded that Suresh Kumar is paying maintenance allowance regularly. It is further pleaded that petition filed under section 125 Cr.PC is also not maintainable due to act and conduct of Surita Sharma as she has deserted Suresh Kumar without any reasonable cause. It is further pleaded that family members of Suresh Kumar did not quarrel with Surita Sharma at any point of time. It is denied that Surita Sharma was harassed and tortured in her matrimonial house. It is further pleaded that nature of Surita Sharma is quarrelsome and she used to quarrel with Suresh Kumar and his family members without any reasonable cause. It is further pleaded that Surita Sharma and Suresh Kumar lives

as husband and wife at village Ghujhani post office Dharwin Tehsil Bhoranj District Hamirpur HP and housing board colony Hamirpur HP for 15 days only and during this period Surita Sharma abused parents and brothers of Suresh Kumar. It is further pleaded that Suresh Kumar is working at Germany. It is further pleaded that Surita Sharma used to abuse Suresh Kumar when he used to visit India. It is denied that compromise was executed between Surita Sharma and Suresh Kumar. It is further pleaded that Suresh Kumar is paying maintenance allowance to the tune of Rs.3000/- (Three thousand) per month regularly. It is further pleaded that when Surita Sharma has given birth to a female daughter then Suresh Kumar was not informed which cause mental and physical cruelty to Suresh Kumar. It is further pleaded that Suresh Kumar has filed divorce petition against Surita Sharma which is pending for adjudication. It is further pleaded that Suresh is paying maintenance allowance at the rate of Rs.4000/- (Four thousand) per month to Surita Sharma as per order of learned District Judge Hamirpur. It is denied that Suresh Kumar has acquired plot of land at Hamirpur. It is denied that Suresh Kumar is the owner of shopping complex near GPO Hamirpur. It is denied that

Suresh Kumar has ancestral property at village Chujhani post office Dhanvi Tehsil Bhoranj District Hamirpur HP. It is denied that Surita Sharma and Km.Tania are entitled for maintenance allowance to the tune of Rs.20000/- (Twenty thousand). It is further pleaded that Surita Sharma committed cruelty in her matrimonial house herself. It is further pleaded that Surita Sharma has threatened to Suresh to kill him when she would get proper time. It is further pleaded that Surita Sharma has filed a false complaint in police station Hamirpur. It is further pleaded that Surita Sharma has herself deserted Suresh Kumar intentionally since January 2002. It is further pleaded that Suresh is ready to keep and maintain Surita Sharma and minor daughter Tania. Prayer for dismissal of petition filed under Section 125 Cr.PC sought. Smt. Surita Sharma filed rejoinder and re-asserted allegations mentioned in petition.

4. Learned Judicial Magistrate Ist Class Shimla directed respondent to pay a sum of Rs.10000/- (Ten thousand) per month as maintenance allowance to Surita Sharma. Learned Judicial Magistrate Ist Class Shimla further directed respondent to pay maintenance allowance to

the tune of Rs.7000/- (Seven thousand) to minor daughter Km. Tania from the date of order.

5. Feeling aggrieved against the order passed by learned Judicial Magistrate Ist Class Shimla Suresh Kumar filed criminal revision petition under Section 397 of the code of criminal procedure and learned Additional Sessions Judge II Shimla partly allowed revision petition and modified maintenance allowance to the tune of Rs.14000/- (Fourteen thousand) per month. Learned Additional Sessions Judge II Shimla HP granted maintenance allowance at the rate Rs.8000/- (Eight thousand) per month to Surita Sharma and maintenance allowance to the tune of Rs.6000/- (Six thousand) per month to minor daughter Tania from the date of petition i.e. 9.3.2006.

6. Feeling aggrieved against the order of learned Additional Sessions Judge-II Shimla petitioner Surita Sharma and minor Km. Tania filed present petition under Section 482 of the Code of Criminal Procedure 1973.

7. Court heard learned Advocate appearing on behalf of petitioners and learned Advocate appearing on behalf of non-petitioner and also perused entire record carefully.

8. Following points arise for determination in present petition.

(1) Whether petition filed by Surita Sharma and minor Tania under Section 482 Cr.PC is liable to be accepted as mentioned in memorandum of grounds of petition?.

2. Final order.

9. Findings on point No.1 with reasons:

9.1 PW1 Purushotam Chand posted as Junior Assistant District Tourism Development office Dharamshala has stated that he brought summoned record. He has stated that hotel Fontana is located in forest area Bhagsunag and is operated by Suresh Chand who is resident of village Chujhani post office Dhanwin Tehsil Bhoranj District Hamirpur HP. He has stated that registration certificate is Ext PW1/A. He has stated that rate fixation order of hotel is Ext PW1/B. He has stated that certificate Ext PW1/C has been issued under Right to Information Act 2005 which is correct as per original record. He has stated that hotel is in operation but he could not state about income.

9.2 PW2 Surita Sharma has tendered in affidavit Ext PW2/A in examination-in-chief. There is recital in affidavit that marriage was solemnized on dated 23.11.1999 at

Aggarwal Dharamshala near RKMV college Shimla. There is further recital in affidavit that relations were cordial upto December 2003 and thereafter family members of Suresh Kumar on one pretext or the other quarreled with Surita Sharma. There is further recital in affidavit that compromise agreement was executed on dated 9.1.2004 wherein Suresh agreed that he would pay maintenance allowance to the tune of Rs.3000/- (Three thousand) per month and would also construct a house in the name of minor daughter Tania. There is further recital in affidavit that Suresh did not pay maintenance allowance as agreed and asked Surita Sharma to give divorce. There is further recital in affidavit that Surita Sharma and her minor daughter have no sufficient source of income to maintain themselves. There is further recital in affidavit that Suresh is the owner of restaurant and earns Rs.150000/- (One lac fifteen thousand) per month as per Indian currency. There is further recital in affidavit that Suresh is also owner of hotel Fontana located at Bhagsu Nag near Mcleodganj Dharamshala. There is further recital in affidavit that Suresh Kumar is also owner of shopping complex near GPO Hamirpur. There is further recital in affidavit that Suresh has acquired ancestral property at

village Chujhani post office Ghanvi Tehsil Bhoranj District Hamirpur HP.

9.3 Suresh Kumar did not appear in the witness box for the purpose of cross examination. Suresh Kumar did not adduce any rebuttal oral or documentary evidence. Case was listed for evidence of Suresh Kumar on 23.4.2011, 13.6.2011 and 22.6.2011 but Suresh Kumar did not adduce any evidence. Learned trial Court vide order dated 22.6.2011 closed evidence of Suresh Kumar by order of Court.

10. Following documentaries evidence adduced by Surita Sharma. (1) Ext PW1/A is the certificate of registration of tourism unit issued by District Tourism Development Officer Kangra at Dharamshala whereby hotel Fontana located in tourist area Bhagsunag is registered in the name of Suresh. (2) Ext PW1/B is the rate fixation order of hotel registered in the name of Suresh. (3) Ext PW1/C is the information sought under Right to Information Act 2005 relating to hotel situated at Bhagsunag near Mcleodganj owned by Suresh.

11. Submission of learned Advocate appearing on behalf of petitioners that co-petitioner No.1 is the wife of non-petitioner whose maintenance allowance is reduced without

any reasonable cause and co-petitioner No.2 is the minor daughter of non-petitioner who is suffering from Cerebral Palsy disease and her maintenance allowance is also reduced without reasonable cause and order of learned trial Court be restored is accepted for the reasons hereinafter mentioned. As per testimony of PW1 Purushotam Chand it is proved on record that non-petitioner is owner of hotel Fontana situated at Bhagsunag post office Bhanwin Tehsil Bhoranj District Hamirpur HP. As per document Ext PW1/B it is proved on record that rate of lodging of room No. 101 to 104 is Rs.500/-(Five hundred) and rate of lodging room No. 201 is Rs.700/-(Seven hundred) and rate of lodging of room No. 202 to 206 is Rs.300/-(Three hundred). There is specific recital in affidavit Ext PW2/A filed by Surita Sharma that Suresh Kumar is owner of restaurant, namely Pizza Fontana in Germany and earns a sum of Rs.150000/- (One lac fifteen thousand) per month as per Indian currency. There is further recital in affidavit Ext PW2/A filed by Surita Sharma that Suresh Kumar is also the owner of hotel Fontana located at Bhagsunag near Mcleodganj. Affidavit Ext PW2/A filed by Surita Sharma remained un-rebutted on record. There is no reason to disbelieve affidavit Ext PW2/A filed by Surita Sharma.

Affidavit Ext PW2/A filed by Surita Sharma is trust worthy, reliable and inspires confidence of Court. Affidavit Ext PW2/A filed by Surita Sharma is corroborated by independent witness PW1 Purushotam Chand who is posted as junior assistant in District Tourism Development office Dharamshala. PW1 Purushotam Chand has proved certificate of registration Ext PW1/A placed on record and also proved rate fixation order Ext PW1/B placed on record. Testimony of PW1 Purushotam Chand is trust worthy, reliable and inspires confidence of Court. There is no reason to disbelieve testimony of PW1 Purushotam Chand.

12. Non-petitioner Suresh Kumar did not appear in witness box for the purpose of cross examination. Non-petitioner Suresh did not adduce any rebuttal evidence. Evidence adduced by Surita Sharma remained un-rebuttal on record. Adverse inference under Section 114 (g) of Indian Evidence Act 1872 is drawn against Suresh Kumar in present case for non appearance in court in person for purpose of cross examination. See AIR 1999 SC 1441 title Vidhyadhar Vs. Mankikrao and another. Also see AIR 1999 SC 1341 title Iswar Bhai C.Patel Vs. Harihar Behera and another.

13. It is well settled law that maintenance includes food, clothing, shelter and medical expenses. It is well settled law that quantum of maintenance is to be awarded on the basis of income of earning capacity of husband, his liabilities, basic needs of wife and status of parties. It is well settled law that proper maintenance allowance should be awarded to minor child so that minor may be brought up properly by mother and may not become a victim of the disruption of marital life of the parents. It is well settled law that the conduct of husband in relation to his wife and children, his financial capacity to pay and other circumstances must be considered while fixing maintenance allowance. See 2005 (10) SCC 299 title Naresh Chandra Singhania Vs. Deepika.

14. Submission of learned advocate appearing on behalf of respondent that Surita Sharma has voluntarily left her matrimonial house without any reasonable cause and Surita Sharma did not perform her matrimonial obligations in her matrimonial home and Surita Sharma abused and maltreated non-petitioner and on this ground petition filed under Section 482 Cr.PC be rejected is devoid of any force for the reasons hereinafter mentioned. Non-petitioner Suresh

did not appear in the witness box for the purpose of cross-examination and non-petitioner did not adduce any oral and documentary evidence on record. The plea of non-petitioner is defeated on the concept of ipse dixit (Assertion made without proof). The object of Section 125 of the Code of Criminal Procedure 1973 and its social purpose are to prevent vagrancy and destitution. In view of the fact that co-petitioner No.2 namely Km.Tania aged five year is suffering from Cerebral Palsy (Condition in which a person has difficulty in controlling or moving their muscles caused by brain damage) and in view of the fact that non-petitioner Suresh Kumar is running a hotel Fontana located at Bhagsunag near Mcleodganj Dharamshala District Kangra HP and in view of fact that non-petitioner did not appear in the witness box personally for the purpose of cross-examination and in view of the fact that oral and documentary evidence adduced by petitioners remained unrebutted on record it is expedient in the ends of justice to restore the order of learned trial Court. Point No.1 is decided in favour of petitioners.

Point No.2 (Final order).

15. In view of findings on point No.1 petition is allowed. Order of learned trial Court announced in maintenance petition No. 82-4 of 2008/06 dated 28.6.2011 is restored and order of learned Additional Sessions Judge-II Shimla announced in revision petition No.1-S/10 of 2013 dated 1.4.2014 is set aside. File of learned trial Court and learned Additional Sessions Judge-II Shimla HP be sent back forthwith along with certified copy of order. Petition is disposed of. All pending application(s) if any also disposed of.

**(P.S.Rana),
Judge.**

May 19,2016(R)

