

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.REV.P. 767/2010**

Reserved on: 05.04.2011

Date of Decision: 26.05.2011

IN THE MATTER OF :  
CHANDNI SHARMA

..... Petitioner

Through: Ms. G.A. Arife, mother of the petitioner-in-person

versus

GOPAL DUTT SHARMA ..... Respondent

Through: Ms. Gita Dhingra and Mr. M.G. Dhingra,  
Advocates

**CORAM**

**\* HON'BLE MS.JUSTICE HIMA KOHLI**

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|--------------------------------------------------------------------------|-----|
| 1. Whether Reporters of Local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not?                                | Yes |
| 3. Whether the judgment should be reported in the Digest?                | Yes |

**HIMA KOHLI, J.**

1. The present revision petition is filed by the petitioner, through her mother who is her natural guardian, under Sections 397/401 read with Section 482 of the Cr.PC praying *inter alia* for revising the order dated 13.02.2009, passed by the learned Metropolitan Magistrate directing the respondent herein, father of the petitioner, to pay her a sum of ₹1,000/- p.m. from 24.9.2001 to 31.3.2005 and a sum of ₹1,500/- p.m. from 1.4.2005 to 22.8.2007, as maintenance.

2. The brief relevant facts of this case are that the petitioner's mother had alleged that she had got married to the respondent on 3.12.1988, and from this union, the petitioner was born 22.8.1989. However, the fact of the marriage was denied by the respondent, who subsequently got married to another lady. The respondent further denied being the father of the petitioner. Since the petitioner was a minor, hence a petition for maintenance under Section 125 Cr.PC was filed on her behalf by her mother and natural guardian, Ms. G.A. Arife. By the impugned order dated 13.2.2009, the said petition was disposed of by the learned MM, in the aforementioned manner.

3. It is mentioned in the impugned order that by an earlier order dated 5.5.1993 passed by the learned MM, the petitioner was awarded interim maintenance at the rate of ₹300/- p.m. Later on, the matter came up before the High Court and as the respondent disputed being the father of the petitioner, he was directed to undergo a DNA test, to determine the paternity of the petitioner, which test confirmed the fact that the respondent was the father of the petitioner. In the aforesaid case registered as Crl.MM no. 3029/1993, the High Court vide order dated 29.4.2003 awarded to the petitioner, interim maintenance at the rate of ₹500/- p.m. The difference of ₹200/- per month was paid by the respondent in three installments. Till 24.9.2001, the highest amount of maintenance that could have been awarded under the statute was ₹500/-. The said provision came to be

amended w.e.f 24.9.2001, as a result of which, the monetary limit placed on the amount of maintenance that could be awarded, was removed. The petitioner filed an application for enhancement of maintenance on 8.12.2003. In the impugned order, the learned MM observed that since the petitioner had attained majority on 22.8.2007, hence the period for which maintenance was required to be determined in the petition was for the period from 24.9.2001 till 22.8.2007. The same period concerns this court for determination of maintenance, in the event an enhanced sum is found to be due and payable to the petitioner. The learned MM also observed that the respondent had not disputed the report of the DNA test for the purposes of the petition by the petitioner filed seeking maintenance. On the basis of the materials placed on record and the testimonies of the petitioner's mother and the respondent, maintenance was granted to the petitioner at the rate of ₹1,000/- p.m. from 24.9.2001 to 31.3.2005 and at the rate of ₹1,500/- p.m. from 1.4.2005 to 22.8.2007, while directing that the interim maintenance already paid to her be deducted from the amount so awarded.

4. The petitioner, appearing through her mother, Mrs. G.A. Arife has challenged the impugned order on the limited point of quantum of maintenance granted to her and has sought an enhancement thereof. In the course of arguments, the mother of the petitioner further expressed that she did not wish to press the relief, with regard to the non-disposal of an application filed by the petitioner before the court below, for action to be

taken against the respondent under Sections 174 and 193 IPC, which submission was duly recorded in the order of this court dated 15.2.2011. Ms. Arife had also brought to the notice of this court the order of the Supreme Court dated 13.12.2010, requesting that the present revision petition be disposed of on or before 31.01.2011. As the petition came to be listed before this court only two days before 31.1.2011, i.e. on 28.1.2011, that date could not be met. However, the matter has been heard and disposed of with reasonable despatch.

5. The argument advanced on behalf of the petitioner was that the respondent had failed to disclose his correct income before the learned MM and consequently, the maintenance that was granted under the impugned order was erroneous and inadequate. It was further urged that the maintenance granted was not proportionate to the actual monthly income earned by the respondent during the relevant time period. It was also stated that the income that was disclosed by the respondent was after deductions had been made from it towards income tax, home and car loans, provident fund, etc., which was not permissible. It was contended that since these did not qualify as statutory deductions, they should not have been permitted to be deducted from the income of the respondent, for the purposes of calculating the maintenance payable to the petitioner.

6. On the other hand, the counsel for the respondent refuted the arguments advanced on behalf of the petitioner, and laid much stress on the

fact that the respondent had, on his part, disclosed his correct income before the learned MM, who had taken into consideration the deductions and granted maintenance accordingly, hence the amount awarded should not be enhanced. Counsel for the respondent further challenged the maintainability of the revision petition on the grounds *inter alia* that the scope of a revision petition is limited and also that the revision petition was filed with a delay of 425 days, with no explanation for the same forthcoming from the petitioner. She relied upon a decision in the case of Ashish Aggarwal v. BSES Rajdhani Power Ltd. in **Crl. Rev. P No. 513/2007** decided on 20.8.2007, to urge that where the petition is filed with a delay, each day's delay would have to be explained, for the same to be condoned. The *locus standi* of the mother of the petitioner to file the revision petition on behalf of the petitioner was also questioned and it was asserted that as the petitioner has attained majority, it was for her to file such a petition in her own right.

7. This court has heard both the petitioner's mother and the counsel for the respondent. At the outset, the question of maintainability of the revision petition is required to be dealt with. The argument urged on behalf of the respondent that the mother of the petitioner could not have appeared on behalf of the petitioner, who is now a major, in the absence of a power of attorney executed in her favour, does not find favour with this court as it is to be noticed that the interests of Ms. Arife, the mother and natural guardian of the petitioner, are not antithetical to her interests. In

fact the mother has not sought any maintenance from the respondent for herself and her sole interest lies in getting maintenance for the wellbeing of the petitioner. Further, records reveal that the maintenance petition was being contested by the mother of the petitioner in the court below, even after the petitioner had attained majority and a perusal of the order dated 13.12.2010 passed by the Supreme Court, shows that in the said proceedings also the petitioner was being represented by her mother, and she was permitted to do so. In light of the facts and circumstances of this case, the argument advanced, on behalf of the respondent regarding *locus standi* of the mother of the petitioner, cannot be accepted and is turned down.

8. Insofar as the maintainability of the present petition, filed with a delay of 425 days, without any specific explanation offered in the application for condonation of delay is concerned, a pointed query was directed towards the petitioner's mother regarding the explanation for the delay in filing of the petition. Ms. Arife explained that delay occurred in filing due to the protracted litigation between her and the respondent in the divorce proceedings initiated by her, under the Hindu Marriage Act. She stated that the petitions filed by her, for seeking divorce and permanent alimony respectively, were rejected by the learned ADJ vide order dated 9.4.2010. The two matrimonial appeals filed by her in the High Court also came to be dismissed, vide a common order dated 13.08.2010. She submitted that the

SLP preferred by her to the Supreme Court, was dismissed on 13.12.2010. Ms. Arife further stated that she had been personally pursuing the aforesaid cases, as she could not afford to engage a counsel, therefore she was able to file the present petition only on 8.12.2010. Keeping in mind the fact that the mother of petitioner has been appearing in all proceedings in person, without engaging the services of a counsel, this court considers the explanation, offered for the delay, just and sufficient and in exercise of its inherent powers, deems it appropriate to condone the delay of 425 days, as prayed for, thus deciding the question of maintainability of the petition, on the ground of limitation, in favour of the petitioner.

9. Counsel for the respondent also challenged the very basis of the maintenance being granted to the petitioner, by stating that the purpose of granting maintenance is to prevent vagrancy and destitution of the dependant. She canvassed that at the present time, the petitioner, who is now a major and has pursued her studies in engineering, is quite capable of supporting herself and is no longer in a state of vagrancy or destitution to claim any maintenance . This argument of the counsel for the respondent is found to be untenable and cannot be accepted as the respondent being the father of the petitioner cannot be permitted to shirk his responsibility towards her, merely because her mother somehow managed to eke out the resources to support the petitioner's education. Further, the decision of the Supreme Court in the case of Kirtikant D. Vadodaria v. State of Gujarat

reported as **(1996) 4 SCC 479** and of this court in the case Harish Cander & Anr. v. Santosh Kumari & Ors. reported as **1(1985) DMC 355**, relied on by the counsel for the respondent, cannot come to the aid of the respondent as these judgments do not lay down a mandatory negative prescription, i.e., where destitution or vagrancy is not shown, maintenance cannot be granted. Rather, based on the facts and circumstances of a case, where existence of destitution or vagrancy would be a dominant factor for consideration, maintenance can be granted.

10. Furthermore, the fact that the petitioner attained majority, while maintenance proceedings were pending, cannot prejudice her rights qua the respondent, as the application for enhancement of maintenance was filed by her mother as early as on 8.12.2003 when the petitioner was still a minor, and the order of the learned MM dated 13.02.2009 was subsequent to the petitioner attaining majority on 22.08.2007. It is also significant to note that there are decisions of the Supreme Court, where maintenance has been awarded to unmarried daughters till the date of their marriage, even after their having attained majority. Without going into the question of entitlement of the petitioner to any future maintenance subsequent to the attainment of majority, the scope of the present petition is confined to the period, before the petitioner attained majority. This court is, therefore, firmly of the opinion that nothing would turn on the factum of the petitioner attaining majority during the pendency of the present proceedings, so as to

disentitle her from claiming an enhanced maintenance from the respondent.

11. Counsel for the respondent also contended that the learned MM had erroneously directed the respondent to pay maintenance to the petitioner from the date of the amendment made in Section 125 of the Criminal Procedure Code, 1973 i.e. from 24.9.2001, by taking into consideration the fact that the original application for maintenance was filed prior to the amendment, and hence maintenance beyond the statutory limit of ₹500/- would be paid from the date of the amendment. She urged that such a view would be incorrect as the relevant date was 8.12.2003, on which date an application for enhancement of maintenance was filed by the petitioner, and it would be this date from which the respondent would be required to pay maintenance, and not prior thereto, as awarded in the impugned order. At the outset, it may be noted that such an argument would not lie in the mouth of the respondent, as it is not he who has come in revision to this court against the impugned order, but the petitioner, who has filed the present petition. If the respondent was aggrieved by the impugned order, he had a legal remedy available to him, which he has failed to avail of, and furthermore, he has complied with the impugned order by paying to the petitioner, the maintenance for the periods as fixed by the learned MM, thus clearly accepting the said order, and waiving his right to contest the same.

12. Furthermore, not only on the point of lack of locus of the

respondent, but also on merits, the aforesaid argument is found to be devoid of merits. A perusal of Section 125(2) of Cr.PC shows that the provision envisages that maintenance would be paid either from the date of application or from the date of the order, if so ordered. It has to be seen that the date of institution of the maintenance proceedings before the learned MM was 28.9.1990, and the said matter was still pending and had yet not been finally adjudicated upon, when the provision was amended. Had the application for enhancement been filed subsequent to the final order on the maintenance petition but before the amendment had taken place, then the argument of the counsel for the respondent could perhaps have cut some ice. But in the facts of the present case, no benefit can be claimed on this count by the respondent.

13. The final argument advanced by the counsel for the respondent was that the scope of a revision petition preferred under the Cr.PC is very limited and unless a palpable illegality or irregularity or perversity can be demonstrated on the face of the record, this court should not interfere with the order of the court below. It was vehemently argued that that no such illegality or irregularity or perversity has been shown by the petitioner in the impugned judgment to deserve interference. In support of her submission, learned counsel for the respondent relied on a decision of the Supreme Court in the case of Southern Sales & Services v. Sauermilch Design & Handels GMBH reported as **(2008) 14 SCC 457**.

14. There is no gainsaying the fact that the scope of revisionary power of this court is indeed limited and should be exercised with restraint. However, it has also been held by the Supreme Court in the case of T.N. Dhakkal v. James Basnett reported as **(2001) 10 SCC 419**, that such a power is discretionary in nature and is to be exercised to correct miscarriage of justice and further, whether or not, there is *justification* for the exercising such power, would depend upon the facts and circumstances of each case. In the present case, it is quite clear that the calculation of the income of the respondent, for the purposes of determination of maintenance payable to the petitioner, was done erroneously by excluding all deductions, both statutory and voluntary in nature. It is to correct this material irregularity that this court proposes to exercise its powers of revision to enhance the maintenance granted to the petitioner, on the basis of the correct income of the respondent, for the relevant period.

15. Coming to the merits of the case, the mother of the petitioner has sought interference in the impugned order, for enhancement of the quantum of maintenance, on the ground that the respondent misled the learned MM into excluding all deductions, both voluntary and statutory, from his income, and due to this error, the maintenance granted in the impugned order was not proportionate to the real income of the respondent. She argued that only those deductions that are statutory in nature could have been excluded from the income of the respondent such as income tax, and

not the voluntary deductions such as monthly installments towards the house and car loans or the provident fund, as the respondent would eventually benefit from such deductions. This court is inclined to accept the petitioner's argument that in calculating the net income of the respondent, while the deductions towards income tax being statutory deductions can be excluded, however voluntary deductions such as house building allowance cannot be excluded. Furthermore, it has to be seen that the voluntary deductions are of such a nature which would eventually benefit the respondent and his family. There is no good reason as to why the petitioner should be prejudiced in this regard, at the stage of determination of maintenance, just because she does not happen to be a part of the respondent's family. Based on such reasoning, vide order dated 21.2.2011, this court had calculated the net income of the respondent for the month of December 2002 to be ₹13,300/- (as the gross monthly income of the respondent was admittedly ₹24,470/- excluding income tax of ₹7,869/- while retaining the component of house building allowance), and not ₹5,614 as erroneously calculated in the impugned order. In the light of the above, the submission made on behalf of the petitioner for enhancement of the maintenance fixed in the impugned order, is accepted and it is held that the same is liable to be revised.

16. For the purposes of calculating the maintenance payable to the petitioner, accurate figures of the respondent's monthly income and

deductions were required. In the month of February 2011, the respondent retired from his service as the Principal Director, Integrated Headquarters, Ministry of Defence (Navy). As the figures of his monthly income furnished by the respondent himself for the relevant period were found to be somewhat ambiguous and incoherent, the Deputy Director (Claims), Naval Headquarters, Ministry of Defence, the former employer of the respondent, was summoned and called upon to furnish a summary of the pay and allowances of the respondent for the relevant period. The statement so furnished, with an advance copy to both sides, was taken on record on 4.4.2011.

17. As observed in the decision of the Supreme Court in the case of Jasbir Kaur Sehgal v. District Judge, Dehradun & Ors. reported as **(1997)7 SCC 7**, it is settled law that no set formula can be laid down for fixing the amount of maintenance payable and the calculation of the same would always depend upon the facts and circumstances of each case. In the facts of the present case, the methodology adopted in the cases of Annurita Vohra v. Sandeep Vohra reported as **110(2004) DLT 546** and S.S. Bindra v. Tarvinder Kaur reported as **112(2004) DLT 813** has been found to be a useful tool to determine the monthly salary of the respondent, in order to calculate maintenance payable to the petitioner. In the aforesaid cases, after taking into account the compulsory deductions from the salary, the remaining income was divided equally by the court between all the family

members entitled to maintenance, with one extra portion/share being allotted to the earning spouse solely for the extra expenses that would necessarily occur. In the present case, other than the petitioner and the respondent himself, there are three dependants entitled to maintenance, i.e. petitioner's wife and two children. Therefore, no extra portion needs to be allotted to the respondent as all extra expenses can be accommodated in the separate allotments made to the three dependants and the respondent himself. As a result, the net monthly salary of the respondent for the relevant years, would be liable to be divided in five equal portions, with one-fifth part of the salary going to the share of the petitioner towards maintenance.

18. As per the salary statement of the respondent furnished by his employer, the following amounts are found to be payable to the petitioner towards maintenance for the relevant blocks of time period, arrived at on the basis of the upward revision of the emoluments received by the respondent from time to time:-

| S. No | Blocks of time period |            | No. of Months in the block (a) | Monthly Salary less Income Tax deducted (b) (₹) | Salary for the block less income tax deducted (c) = a X b (₹) | Maintenance to petitioner for the block (d) = 1/5 <sup>th</sup> of c (₹) |
|-------|-----------------------|------------|--------------------------------|-------------------------------------------------|---------------------------------------------------------------|--------------------------------------------------------------------------|
| 1.    | 24.9.2001             | 31.12.2002 | 15                             | 19,560                                          | 2,93,400                                                      | 58,680                                                                   |
| 2.    | 1.1.2003              | 28.2.2003  | 2                              | 19,560                                          | 39,120                                                        | 7,824                                                                    |

|    |          |           |    |        |          |          |
|----|----------|-----------|----|--------|----------|----------|
| 3. | 1.3.2003 | 29.2.2004 | 12 | 22,461 | 2,69,536 | 53,907   |
| 4. | 1.3.2004 | 28.2.2005 | 12 | 24,106 | 2,89,266 | 57,853   |
| 5. | 1.3.2005 | 28.2.2006 | 12 | 30,116 | 3,61,389 | 72,278   |
| 6. | 1.3.2006 | 28.2.2007 | 12 | 37,973 | 4,55,673 | 91,135   |
| 7. | 1.3.2007 | 22.8.2007 | 6  | 40,615 | 2,43,688 | 48,738   |
|    | TOTAL    |           |    |        |          | 3,90,415 |

19. The aforesaid revised amount as calculated would be payable by the respondent to the petitioner as maintenance, after deducting the maintenance amount already received by the petitioner from the respondent in compliance with the impugned order. The said amount shall be paid by the respondent to the petitioner within six weeks from today. Failure to pay the maintenance, as calculated above, shall attract simple interest at the rate of 10% p.a. The revision petition is allowed and the impugned order is modified as indicated above, with costs quantified at ₹5,000/-.

MAY 26, 2011  
pm

**(HIMA KOHLI)**  
JUDGE