

GAHC010018522021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

CRIMINAL REVISION PETITION No. 239/2021

Shohidul Islam,
S/O Billal Hussain,
R/O Vill-No. 3 South Rangapani,
P.O.-Badla Bazar, P.S.-Boko,
Dist-Kamrup(R), Assam.

-Petitioner

-Versus-

Mehera Khatun
D/O Afsar Ali,
R/O Vill- No. 2 South Rangapani,
P.O.-Badla Bazar, P.S.-Boko,
Dist- Kamrup(R), Assam.

-Respondent

For Petitioner(s) : Mr. M.U.Mahmud.

For Respondent(s) : Mr. M. Rahman

Date of hearing : 27.04.2023

Date of judgment : 03.05.2023

JUDGMENT AND ORDER

– BEFORE –

HON'BLE MR JUSTICE MRIDUL KUMAR KALITA

1. This Criminal Revision Petition has been registered on filing of an application, under section 397/401/482 of the Code of Criminal Procedure, 1973 read with Article 227 of the Constitution of India, by the petitioner Shohidul Islam, impugning the Judgment dated 08.11.2019, passed in F.C.(Crl.) Case No. 677/2018, by the learned Principal Judge, Family Court No. 2, Guwahati, whereby the present petitioner was directed to pay monthly maintenance allowance of Rs. 3000/- (Rupees Three Thousand) to the present respondent from the date of the said Judgment. The present petitioner was also directed, by the impugned Judgment, to clear the payment of entire arrear interim maintenance allowance within 2(two) months from the date of the Judgment.

2. The facts relevant for adjudication for Criminal Revision Petition in brief are as follows:-

- (i) That the present respondent Mustt. Mehera Khatun married the present petitioner, on 22.07.2013, as per Islam Shariat and their marriage was also registered before Qazi with Registration No. DQ/RAESNT/65/37/3237/2013. However, after a few months of peaceful matrimonial life, the relationships between the respondent and the present petitioner soured and allegations and counter allegations of matrimonial discord were levelled against each other. The present respondent approached Family Court No.2, Kamrup (M), by filing a petition under section 125 Cr.P.C., praying

for maintenance from her husband, i.e. the present petitioner alleging that she was without any source of income to maintain herself and that she was subjected to mental and physical torture and was compelled to leave her matrimonial home in the month of August 2015.

- (ii) On the basis of her petition under section 125 Cr.P.C., F.C. (Crl.) Case No. 677/2018 was registered in the Family Court No.2, Kamrup (M), Guwahati.
- (iii) Notices were issued to the present petitioner, by the Family Court in the proceeding under section 125 Cr.P.C.,. The present petitioner appeared before the Family Court No.2, Kamrup(M), Guwahati, on 22.02.2019 and prayed for some time for filing written statement, which was allowed. By the same order, the matter was referred to the Counsellor, Family Court No.2, Kamrup (M), Guwahati for making an effort to settle the dispute between the parties through conciliation. However, after a couple of sitting before learned Counsellor, Family Court, Guwahati, the conciliation attempt failed and on 25.02.2019, the matter was again referred back to Principal Judge Family Court No. 2 for adjudication. The matter was also taken up in the *Lok Adalat*, on 09/03/2019, however, there also both the parties failed to arrive at an amicable settlement.
- (iv) Thereafter, on 06.05.2019, after hearing both the parties, the Principal Judge, Family Court No.2, Kamrup(M), Guwahati directed the present petitioner to pay an interim maintenance allowance of Rs. 2000/-(Rupees Two Thousand only) per month, to the present

respondent during the pendency of F.C. (Crl.) Case No. 677/2018.

(v) Thereafter, the matter was again referred to *Lok-Adalat* on 13.07.2019. However, both the parties failed to reach at amicable settlement and the case was again referred back for adjudication.

(vi) Thereafter, on several consecutive dates, i.e. on 30.08.2019, 18.09.2019, 21.10.2019, 30.10.2019, 04.11.2019 and 08.11.2019, the present petitioner remained absent. Though on 30.08.2019, a petition was filed on behalf of the present petitioner showing cause of his absence and learned Principal Judge, Family Court No. 2 allowed him time for the last chance and directed him to remain present positively before the Court, on the next date, and also clear the payment of arrear interim maintenance allowance. However, on the next date, i.e. on 18.09.2019, the present petitioner again remained absent by filing a petition bearing No. 1092/2019 praying for some more time. The learned Principal Judge, Family Court No. 2, by order dated 18.09.2019 rejected the said petition and proceeded to examine the petitioner. On the next date, i.e. on 30.09.2019, the present petitioner again remained absent and on that day, one witness was examined by the learned Principal Judge.

(vii) On 04.11.2019, the arguments were heard and on 08.11.2019, the Judgment was delivered in F.C. (Crl.) Case No. 677/2018 in absence of the present petitioner and the said Judgment is impugned in this Criminal Revision Petition.

3. Mr. M.U. Mahmud, learned counsel for the petitioner has submitted that

the present petitioner was unaware of the impugned Judgment dated 08.11.2019, which was passed *ex-parte*, as "his" *Amicus Curiae* gave wrong dates to him and when the petitioner came to know about the Judgment, he filed a petition for certified copy of the impugned Judgment on 22.11.2019 and he received the same on 03.12.2019. It is further submitted that petitioner fell ill and from 02.09.2019, he was suffering from fever and jaundice. It is further submitted that, thereafter, the petitioner handed over all the documents to his newly engaged "*Amicus Curiae*" for vacating the *ex-parte* order dated 18.02.2020. However, he was informed that his petition may not be entertained therefore, he could not approach Family Court No. 2 for vacating the *ex-parte* order.

4. Mr. M.U. Mahmud, learned counsel for the petitioner has also submitted that the respondent was earlier married to one Haidor Ali from whom she was separated after receiving an amount of ₹ 70,000, however, as she was not legally divorced from her earlier husband and hence her subsequent marriage with the present petitioner is not valid. It is also submitted that the respondent pronounced talaq by an affidavit dated 04.02.2016 and also filed a Domestic Violence Case against the present petitioner, which was dismissed by the Court of Judicial Magistrate First Class, Kamrup by order dated 17.09.2018 passed in D.V. Case No. 33^M/2016. It is also submitted that the respondent had also filed another criminal case the section 417/468/471 of Indian Penal Code, against the present petitioner, at Barpeta Police Station in which the present petitioner got anticipatory bail from this court in AB No. 3310/2019. Learned counsel for the petitioner has also submitted that conduct of the respondent does not qualify her to get any maintenance allowance from the present petitioner. Learned counsel for the petitioner has submitted that the *Amicus Curiae* with whom the

petitioner was communicating did not inform him proper dates of the F.C. (Crl.) Case No. 677/2018 and also did not advise him properly for which he was prevented from pursuing his defence in the F.C. (Crl.) Case No.677/2018 and therefore, the petitioner has prayed for setting aside the impugned order and allow him to adduce evidence in his defence before Family Court No. 2.

5. On the other hand, Mr. M. Rahman, learned counsel for the respondent has submitted that by squarely blaming his engaged counsel for his default, the petitioner is only attempting to escape from his liability. It appears that in spite of the order dated 06.05.2019 passed by the learned Principal Judge, Family Court No. 2 in F.C.(Crl.) No. 677/2018 to pay interim maintenance allowance of Rs. 2,000/-(Rupees Two Thousand), during the pendency of the proceeding under section 125 Cr.P.C as well as after passing of the impugned judgement directing the present petitioner to pay maintenance allowance of Rs. 3,000/-(Rupees Three Thousand) per month to the respondent from the date of impugned order, not a single penny has been paid by the respondent as maintenance allowance. Learned counsel for the respondent has also submitted that an amount of Rs. 1,35,000/-(Rupees One Lakh Thirty-Five Thousand) has been accumulated as arrear, against the present petitioner and he has miserably failed to honour the directions given by the learned Family Court No.2, Kamrup(M), Guwahati to pay maintenance to the respondent in spite of the fact that no stay on payment of either interim maintenance allowance or final maintenance allowance has been granted by any Court till date. The present respondent Mustt. Mehera Khatun has also filed an Interlocutory Application which was registered as I.A. (Crl.) No. 318/22, wherein she has prayed for issuing direction to the present petitioner for clearing the arrears maintenance allowance. The questions raised in the said interlocutory application are also

dealt with in this criminal revision petition itself.

6. Section 126 of the Code of Criminal Procedure, 1973 lays down the procedure to be adopted in a proceeding under section 125 of the Code of Criminal Procedure, 1973. For the sake of convenience same is quoted herein 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 proceed 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 at 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."

7. Main contention of the learned counsel for the petitioner, in this Criminal Revision Petition, is that the petitioner was misled by his *Amicus Curie*. Though, the petitioner has alleged dereliction of duty on the part of *Amicus Curiae*, however, on perusal of the case record of F.C. (Crl.) Case No. 677/2018, it appears that no *Amicus Curiae* was ever appointed by learned Principal Judge, Family Court No. 2, Kamrup (M) in the said case. Section 13 of the Family Courts Act, 1984 provides as follows:

"Section 13. Right to legal representation.

Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner:

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curiae."

Thus, under the above quoted provision, it is for the Family Court to appoint an *Amicus Curiae*, however, in the instant case, it transpires from the order sheets of F.C.(Crl.) Case No. 677/2018 that no such *Amicus Curiae* was ever appointed in that case. The petitioner has also not disclosed the identity or any other details of the so-called *Amicus Curiae*, hence this plea of the petitioner that he was misled by the *Amicus Curiae* does not inspire confidence.

8. Moreover, it appears from the order sheets of F.C. (Crl.) Case No. 677/2018, as well as from paragraph No. 5 of the impugned judgement that as the opposite party remained absent on several consecutive dates, the case proceeded *ex parte* against him. It is also important to note that the remedy of setting aside an *ex parte* order passed under Section 125 of the Code of Criminal Procedure, 1973 is available in Code of Criminal Procedure, 1973 itself.

Under proviso to section 126(2) of the Code of Criminal Procedure, 1973, an aggrieved person may approach the concerned Magistrate, within three months from the date of the said order, by showing good cause for setting aside the *ex-parte* order. As per section 10(2) of the Family Courts Act, 1984 subject to the other provisions of said 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. However, instead of availing appropriate remedy under proviso to Section 126(2) of the Code of Criminal Procedure, 1973 the present petitioner rushed to this Court by attributing irregularity and illegality in the impugned order. Further, the conduct of the petitioner is also questionable, in as much as learned counsel for the petitioner has admitted that the petitioner has not paid any maintenance allowance, either interim or final, to the respondent as was directed by the Family Court No.2, Kamrup (M), Guwahati in F.C. (Crl.) Case No. 677/2018.

9. On perusal of materials on record, it appears that the learned Principal Judge, Family Court No.2, Kamrup(M), Guwahati proceeded *ex-parte* only after the present petitioner failed to remain present in the proceeding section 125 of the Code of Criminal Procedure, 1973 before it, in spite of specific direction to do so. The finding arrived at in the impugned judgement by learned Principal Judge, Family Court No.2, Kamrup(M), Guwahati, that the present respondent is the wife of the present petitioner and in spite of having sufficient means, the present petitioner has neglected to maintain his wife, who is unable to maintain herself, is on the basis of uncontroverted testimony of two witnesses who deposed on behalf of the present respondent in the proceeding section 125 of the Code of Criminal Procedure, 1973 before the Family Court. The findings of learned Principal Judge, Family Court No.2, Kamrup (M), Guwahati are based on

the evidence available on record.

In view of above, this court has no hesitation to hold that no illegality or irregularity is found in the impugned judgement justifying any interference by this court. This Criminal Revision Petition is therefore, liable to be dismissed.

However, as discussed hereinbefore, as the petitioner has not pursued appropriate remedy which was available to him under proviso to Section 126(2) of the Code of Criminal Procedure, 1973, he shall be at liberty to approach Family Court No.2, Kamrup (M), Guwahati, subject to payment of arrears maintenance allowance to the respondent, seeking appropriate remedy from that court, if so advised. In the event, the petitioner chooses to do so, the delay caused due to the time spent in pursuing the present Criminal Revision Petition before this Court may be condoned by the Family Court No.2, Kamrup(M), Guwahati. It is also made clear that the observations made hereinbefore shall not, in any manner, affect the powers of the Family Court to enforce payment of maintenance allowance by the present petitioner to the respondent by taking recourse to provisions under section 125(3) of the Code of Criminal Procedure, 1973.

10. With above observations, this Criminal Revision Petition is here by dismissed. Send back the LCR along with a copy of this judgment to the Family Court No.2, Kamrup (M), Guwahati.

JUDGE

Comparing Assistant