

GAHC010116152019



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

Case No. : Crl.Rev.P./219/2019

MD. AZGAR ALI
S/O- MD. ABED ALI,
PERMANENT RESIDENT OF VILL.- BHANGNAMARI,
P.O. AND P.S. BHANGNAMARI,
DIST.- NALBARI, ASSAM,
PIN- 781126
AND
PRESENTLY RESIDING AT VILL.- GHARUBAHA,
P.O. MUGDI,
P.S. MUKALMUA,
DIST.- NALBARI, ASSAM,
PIN- 781312.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE P.P., ASSAM,
GAUHATI HIGH COURT, GUWAHATI- 7810001.

2:MISS ASMINA KHATUN
D/O- MD. AMZAD ALI
R/O- VILL.- KANDHBARI
P.S. MUKALMUA
DIST.- NALBARI
ASSAM
PIN- 781126

Advocate for the Petitioner : MS. D SAIKIA(Amicus Curiae)

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN
JUDGMENT**

30.05.2023

Heard Ms. D. Saikia, learned Amicus Curie; Mr. P.S. Lahkar, learned Addl. P.P. for the State respondent No. 1; and Mr. R. Islam, learned counsel for the respondent No. 2.

2. In this petition, under sections 397/401 read with section 482 of the Cr.P.C., the petitioner has to put to challenge the judgment and order, dated 22.04.2019, passed by the learned Additional Sessions Judge No. 2, Kamrup [M], Guwahati, in Criminal Appeal No. 86/2018. It is to be noted here that vide impugned judgment and order, dated 22.04.2019, the learned Additional Sessions Judge No. 2, Kamrup [M], Guwahati has dismissed the appeal preferred by the petitioner under section 29 of the Protection of Women from Domestic Violence Act, 2005. It is also to be noted here that vide impugned order, dated 22.05.2018, the learned Judicial Magistrate First Class, Kamrup [M], Guwahati in D.V. Case No. 116^M/2017, directed the petitioner to pay a sum of Rs. 5,000/- per month, as interim maintenance to the respondent No. 2.

3. The background facts leading to filing of the present petition are adumbrated here in below:-

“The respondent No. 2, Miss Asmina Khatun got married with the petitioner on 23.02.2017, by executed one marriage agreement and performed Nikah before a Moulana, namely, Rahis Uddin of Gandhi Basti, Guwhati-3, in presence of the friends, guardian of the respondent No. 2 and some local people of the society. After solemnization of the marriage the respondent No. 2 proceeded to

the house of the petitioner situated at village Gharuabaha, under Mukalmua Police Station of Nalbari District and started conjugal life. Thereafter, on 30.03.2017, the petitioner, who happened to be an Advocate of Nalbari Court, went to attend his duty then suddenly a lady namely, Mariyom Begum arrived at residence of the petitioner and demanded herself as the wife of the petitioner and started quarrel with her and thereafter, the petitioner arrived at there on being called and then only she came to know that the said lady is the first wife of the petitioner and he kept the matter concealed and the respondent No.2 was in complete dark about the first marriage of the petitioner. Thereafter, she was compelled to live with the first wife of the petitioner at his house and after two days she suffered mental shock, agony and headache for which she was taken to the Nalbari Hospital. On the next day, the petitioner declared that she is a barren lady like his first wife and subjected her to torture and rebuked her with abusive words, and having been threatened, she left the matrimonial house and thereafter, an effort was made to settle the matter amicably, but, the same failed to yield any result and being left with no option she filed a petition under section 12 of the Domestic Violence Act, 2005 before the learned Chief Judicial Magistrate, Kamrup [M] which was registered as DV Case No. 116m/2017, and later on, the same was transferred to the court of learned Judicial Magistrate, Kamrup [M] Guwahati for disposal.

On receipt of notice the petitioner appeared before the court below and submitted his written objection. Thereafter, the Protection Officer, Kamrup [M] Guwahati also submitted one Domestic Incident

Report (herein after DIR) dated 10.10.2017. Thereafter, on 08.02.2018, the respondent No. 2 had preferred one petition, under section 23 of the Domestic Violence Act, 2005 for granting interim maintenance, which was opposed by the petitioner on the ground that there was no valid marriage between her and the petitioner. Thereafter, the learned court below, after hearing both the parties, vide impugned order dated 22.05.2018, directed the petitioner to pay interim maintenance @ of Rs. 5,000/- per month to the respondent No. 2.

Being aggrieved by the impugned order, the petitioner preferred an appeal under section 29 before the learned Additional Session Judge No. 2, Kamrup [M] Guwahati and after hearing both the sides the learned Additional Sessions Judge No. 2, Kamrup [M] Guwahati has dismissed the appeal vide impugned judgment and order dated 22.04.2019.

4. Being aggrieved the petitioner approached this court by filing the present revision petition with a prayer to set aside the impugned order on the following grounds:-

(I) That, the learned courts below erred in law and in facts while passing the impugned order, dated 22.04.2019, whereby it has not framed preliminary issue regarding validity of marriage between the parties as well as the issue of living in share household prior to dispose of the petition;

(ii) That, the court has failed to consider the petition filed by the petitioner on 19.03.2018, for framing preliminary issue in respect of marriage and shared household;

- (iii) That, court below has failed to consider the fact that the party had never lived in a share household for a single day;
- (iv) That, there was no valid marriage between him and the respondent No. 2 and the learned court below has failed to consider the DIR submitted by the Protection Officer;
- (v) That, there is no provision of granting interim maintenance in the Domestic Violence Act in a petition filed under section 12 of the DV Act;
- (vi) That, the learned court below has failed to consider that the petitioner has been working as a Teacher in a venture school without any salary and he has been suffering from diabetes and he has the burden of looking after his ailing parents and adopted minor son and daughter and widowed sister;

5. The respondent No.2 also filed one Affidavit on 26.02.2020, denying the averments made by the petitioner in the petition.

6. Ms. Saikia, learned Amicus Curie has advanced threefold arguments. Firstly, she submits that the petitioner has filed a petition for framing a preliminary issue for deciding the marriage between the parties. But, instead of deciding the validity of the marriage, the learned court below has passed the impugned order. Secondly, she submits that the learned court below has never call for any DIR and the learned court below has also never considered the same while passing the impugned order. Thirdly, she submits that the quantum of interim maintenance is in higher side and the petitioner; being a teacher of a venture school is unable to provide maintenance at the aforementioned rate. Ms. Saikia has also referred following case laws in support of her above submission:-

- [I] Amir Khan vs. State of Rajasthan** reported in **MANU/RH/0501/2019;**
- [ii] Monjit Talukdar Vs. Rita Talukdar and Ors. in Criminal Revision Petition No. 86/2020 MANU/GH/0749/2021, and**
- [iii] Parveen Tandon vs. Tanika Tandon in Criminal M.C. No. 264/2021 MANU/DE/1046/2021.**

7. On the other hand, Mr. R. Islam, learned counsel for the respondent No. 2 submits that a DIR is available on the record and that consideration of the DIR is not mandatory and that the petitioner has solemnized the marriage with the respondent No. 2 on 23.02.2017, and lived together as husband and wife for 1 month and that the petitioner is not a school teacher rather he is a practicing Advocate of Nalbari Bar Association and he approached this court by suppressing the aforesaid facts and as he has not approached this court with clean hand and the petition is liable to be dismissed on this ground alone. Mr. Islam further submits that he has enclosed the vakalatnama of the Bar Association, Nalbari which reflects the name of the petitioner as lawyer and the Secretary of the Nalbari Bar Association has gave one certificate to the effect that the petitioner is a practicing lawyer and his enrollment No. is 1357/2006-07 dated 12.01.2007, also he has enclosed one certificate issued by the Gaonburha to the effect that as claimed by the petitioner no Pre-Senior Madrasa is in existence at Gharuabaha Gaon, and therefore, it is contended to dismiss the petition.

8. Having heard the submission of learned counsel for both the parties, I have carefully gone through the petition as well as the documents placed on record and also perused the impugned order dated 22.05.2018, passed by the

learned Judicial Magistrate First Class, Kamrup [M], Guwahati in DV Case No. 116^M/2017 and also perused the impugned judgment and order dated 22.04.2019, passed by the learned Additional Sessions Judge No. 2 Kamrup [M] Guwahati in Criminal Appeal No. 86/2018, and also carefully gone through the case laws referred by Ms. D. Saikia, learned Amicus Curie.

9. The materials so placed on record, specially the affidavit submitted by the respondent No. 2 on 26.02.2020, reveals that her marriage was solemnized on 23.02.2017, at Gandhi Basti and a marriage agreement was also entered into by the petitioner and her in presence of her friends and guardian and some local people of the society. Further it appears that after solemnization of the marriage the respondent No. 2 started her conjugal life with the petitioner in his native place at village Gharuabaha under Mukalmua Police Station in the Nalbari district till 30.03.2017, and thereafter, the first wife of the petitioner appeared there.

10. It also appears from the said affidavit that after 2 days when she became ill she was taken to Nalbari Hospital for treatment and on the next day she was subjected to torture and rebuked with slang words by the petitioner and his first wife on the ground that she is a barren lady. Further it appears from the said affidavit that one DIR is also submitted by the Protection Officer on 09.10.2017, which is available on the record. Besides, it also reveals that the petitioner is a practicing lawyer at Nalbari Bar Association and the Secretary of the Nalbari Bar Association has given one certificate to the effect that the petitioner is a practicing lawyer and his enrollment No. is 1357/2006-07, dated 12.01.2007. And the Gaonburah also submitted one report to the effect that no Senior/Pre-Senior Madrasa at Ghoruabaha is in existence, though the petitioner had claimed having served in the same as Teacher.

11. It is to be noted here that the aforesaid contention of the respondent No. 2, so made in her affidavit, have not been disputed by the petitioner. And the same goes a long way to show that a prima-facie case is made for granting any interim maintenance to the respondent No. 2. Section 23 of the Domestic Violence Act provides for interim maintenance, which read as under :-

“[i] In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

[ii] If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20 section 21 or, as the case may be, section 22 against the respondent.”

A bare reading of the aforesaid section indicates that the Magistrate has to fix interim maintenance taking a prima-facie view of the matter only. This being the position, the submission of Ms. Saikia, the learned Amicus Curie, that there is no provision for awarding interim maintenance, left this court unimpressed. If such a prayer is being considered in the light of the statement, object and reason of enacting the Domestic Violence Act, this court is of the view that the learned court below is also not required to decide the validity of the marriage, if challenged, before granting the same. What is required to be done is to see a prima-facie case being made out or not.

12. Though it is contended that the amount, so awarded by the impugned order, is in higher side, yet, it is not disputed that petitioner is a

practicing lawyer of Nalbari Bar Association. It is also not in dispute that the respondent No. 2 has no income of her own, and she is dependent upon income of others for a two square meal a day.

13. I have carefully gone through the case laws, so referred by the learned Amicus-curie. In the case **Amir Khan (supra)**, the Rajasthan High Court dealt with maintainability of revision against interlocutory order. In **Monjit Talukdar (supra)**, a co-ordinate bench of this court dealt with Domestic Incident Report and in the case of **Parveen Tandon (supra)** the High Court of Delhi has dealt with domestic relationship and aggrieved persons. And I find that the ratio, so laid down therein, has to be treated to be restricted to its own fact and the same would not advance the case of the petitioner, in view of existence of a DRI herein this case and in view of the fact that the respondent No.2 has successfully established living with the petitioner as husband and wife, in a shared house hold after the marriage, so as to satisfy the requirement of the Act.

14. In the result, I find that the petitioner has failed to show how the impugned order, dated 22.04.2019, passed by the learned Additional Sessions Judge No. 2, Kamrup [M], Guwahati, in Criminal Appeal No. 86/2018, suffers from any illegality or infirmity requiring any interference of this court. Accordingly, I find no merit in this petition and accordingly, the same stands dismissed.

15. Interim order, if any stands vacated. Now, the learned trial court shall endeavour to dispose of the D.V. Case No. 116M/2017, within the stipulated period, so prescribed in the Domestic Violence Act, without being influenced by any of the observation made herein above as the same are made only for the purpose of disposing of this revision petition. The parties have to

bear their own cost.

16. Before parting with the record, I would like to acknowledge the invaluable service rendered by the learned Amicus curie, in disposing of this petition. The Registry shall pay the remuneration, as per the rule, to the learned Amicus curie, on production of a copy of this judgment and order.

JUDGE

Comparing Assistant