

GAHC010156982023



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

Case No. : Crl.Rev.P./272/2023

NABAJIT DAS
S/O SRI RAMENDRA NATH DAS, R/O NEAR A.G. OFFICE, KRISHNAPUR,
BELTOLA, P.S.-BASISTHA, GUWAHATI-781028, DIST- KAMRUP (M) (ASSAM)

VERSUS

STATE OF ASSAM AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:SMTI DEEPTI DAS
W/O SRI NABAJIT DAS
R/O MODOMIYA (SARAIMORIA
OPP. FIRE BRIGADE OFFICE
P.S.-NORTH LAKHIMPUR
PIN-787032
DIST- LAKHIMPUR
ASSAM
P/R/A HOUSE NO-4
BYE LANE NO-5
P.O.-SILPUKHURI
P.S.-CHANDMARI
PIN-781003
DIST- KAMRUP (M)
ASSA

Advocate for the Petitioner : MR D K BORDOLOI,

Advocate for the Respondent : PP, ASSAM, MS. T KHRO (R-2),MR A TEWARI R-2),MR. T ISLAM R-2)

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 19.04.2024

Date of Judgment & Order : 31.07.2024

JUDGMENT & ORDER (CAV)

Heard Mr. D. K. Bordoloi, learned counsel for the petitioner. Also heard Mr. K. K. Parasar, learned Additional Public Prosecutor for the State respondent No. 1 and Mr. T. Islam, learned counsel for the respondent No. 2.

2. This is an application under Sections 397/401 *read with* Section 482 of the Code of Criminal Procedure, 1973 against the impugned judgment and order dated 15.06.2022, passed by the learned Principal Judge, Family Court No. 1, Kamrup(M) at Guwahati in FC (CrI) Case No. 88/2018.

3. The brief facts of the case is that the petitioner and the respondent No. 2, herein, are the husband and wife and their marriage was solemnized on 31.06.1993 by registered as well as social marriage at Lakhimpur and they have 2 (two) children out of their wedlock. But subsequently the respondent No. 2 lodged an F.I.R. before All Women Police Station, which is registered as All Women P.S. Case No. 81/2015, alleging physical assault and mental torture on her. However, the case was compromised later on. Thereafter, the respondent No. 2 instituted a petition under Section 125 Cr.P.C. before the Court of learned

Principal Judge, Family Court, Kamrup(M), praying for maintenance, which was registered as FC (Crl) Case No. 88/2018. The petitioner, after receiving the notice, accordingly appeared and contested the case by filing his Written Statement denying all the allegations brought against him by the respondent No. 2 in her petition and it is elaborately stated in his Written Statement that after marriage, the respondent No. 2 used to behave rudely towards him and she used to go outside without informing him and under the compelling circumstances and with the consent of the respondent No. 2, he entered into 2nd marriage and he used to maintain both the wives and children and lived a happy conjugal life for more than 20 years. But subsequently, the respondent No. 2 deserted and started residing separately since August, 2016 and filed the case seeking maintenance.

4. It is stated that the petitioner used to work in a weekly market, which held twice in a week and he has a limited source of income which is around Rs. 4,000/- per month and apart from that, he has no other source of income. The petitioner has no property nor does he have any pig farm as claimed by the respondent No. 2. He is a petty businessman and he is somehow maintaining his family. More so, he has no rented house nor does he have any source of income as claimed by the respondent No. 2. The respondent No. 2 examined herself in support of his case and the petitioner also examined 2 (two) witnesses including himself to substantiate his plea. But the learned Principal Judge, Family Court No. 1, Kamrup, vide its judgment and order dated 15.06.2022, allowed the prayer of the respondent No. 2 and directed the present petitioner to pay Rs. 15,000/- per month to the respondent No. 2 from the date of filing the petition, i.e. 20.02.2018. Accordingly, on being aggrieved

and dissatisfied with the impugned judgment and order, the present revision petition has been filed by the petitioner.

5. Mr. Bordoloi, learned counsel for the petitioner, has submitted that the learned Court below had mechanically passed the order without going into the merit of the case and without appreciating the evidence in its true perspective. The learned Court below failed to consider the fact that there is no evidence adduced by the respondent No. 2 in regards to income of the petitioner. But, without considering the said fact, the learned Principal Judge, Family Court No. 1, Kamrup(M) at Guwahati granted an exorbitant maintenance allowance @ Rs. 15,000/- per month. Further he submitted that the petitioner is a BPL Card holder for last 20 years and he also exhibited his BPL Card as Exhibit-A. The said fact could not be rebutted by the respondent No. 2, rather she admitted in her cross-examination that the petitioner is a BPL Card holder. Though the P.W.-1/respondent No. 2 also claimed in her evidence that the petitioner is a Mohaldar at Beltola Market, but she failed to produce any document to substantiate her plea. On the other hand, the petitioner, as D.W.-1, deposed before the Court that he worked under lessee of Beltola Bazar and used to get Rs. 5-6 thousand per month. His evidence was also corroborated by the D.W.-2. Further he submitted that from the cross-evidence of the P.W.-1/respondent No. 2, it also reveals that she has not furnished any document regarding the property/income/source of income of the 2nd party/petitioner. But, without any documents in that regard, an exorbitant amount of Rs. 15,000/- per month was awarded by the learned Principal Judge, Family Court No. 1, Kamrup(M) at Guwahati. Accordingly, the present petition has been filed for setting aside and quashing of the order of maintenance passed by the Principal Judge, Family

Court No. 1, Kamrup(M) at Guwahati, vide judgment and order dated 15.06.2022, in FC (Crl) Case No. 88/2018.

6. The learned counsel for the petitioner further submitted that the learned Principal Judge, Family Court No. 1, Kamrup(M) at Guwahati also did not follow the mandate/guideline of the Apex Court in **Rajnesh Vs. Neha & Anr. [(2021) 2 SCC 324]**, and the respondent No. 2 also did not file her affidavit disclosing her assets and liabilities for the proper assumption of the maintenance. Further he submitted that the petitioner already furnished the bank statement, wherefrom also it reveals that he earned only Rs. 2-3 thousand per month and hence, he is not in a position to pay the amount of maintenance as awarded by the learned Principal Judge, Family Court No. 1, Kamrup(M) at Guwahati.

7. Mr. Bordoloi further relied on a decision of this Court passed in **Crl. Pet. No. 120/2024**, wherein a co-ordinate Bench of this Court, in paragraph Nos. 8 & 9, has relied on the decisions of Apex Court in the case of **Aditi Alias Mithi Vs. Jitesh Sharma**, reported in **2023 SCC OnLine SC 1451**, as well as **Rajnesh (supra)**, which reads as under:

"8. It is to be mentioned here that while dealing with the issue of payment of interim maintenance, Hon'ble Supreme Court in paragraphs 64 and 65 of Rajnesh (supra) had stated as under:

"64. In the first instance, the Family Court in compliance with the mandate of Section 9 of the Family Courts Act, 1984 must make an endeavour for settlement of the disputes. For this, Section 6 provides that the State Government shall, in consultation with the High Court, make provision for counsellors to assist a Family Court in the discharge of its functions. Given the

large and growing percentage of matrimonial litigation, it has become necessary that the provisions of Sections 5 and 6 of the Family Courts Act are given effect to, by providing for the appointment of marriage counsellors in every Family Court, which would help in the process of settlement. If the proceedings for settlement are unsuccessful, the Family Court would proceed with the matter on merits.

65. The party claiming maintenance either as a spouse, or as a partner in a civil union, live-in relationship, common law marriage, should be required to file a concise application for interim maintenance with limited pleadings, along with an Affidavit of Disclosure of Assets and Liabilities before the court concerned, as a mandatory requirement. On the basis of the pleadings filed by both parties and the Affidavits of Disclosure, the court would be in a position to make an objective assessment of the approximate amount to be awarded towards maintenance at the interim stage."

9. Further, in the case of Aditi Alias Mithi (supra), the Hon'ble Supreme Court in paragraphs 14, 15 and 16, had observed as under:

"14. A perusal of the order passed by the High Court shows that the amount of maintenance awarded to the appellant was reduced from Rs. 20,000/- to Rs. 7,500/- per month, merely noticing that earlier, the respondent was in business. However, at that point in time he was in debt and in financial distress, hence, not able to pay huge amount of maintenance to the minor daughter. The respondent is not represented before this Court to justify the stand taken by him before the High Court. The Family Court had passed a detailed order giving reasons.

15. Nothing is evident from the record or even pointed out by the learned counsel for the appellant at the time of hearing that affidavits were filed by both the parties in terms of judgment of this Court in Rajnesh's case (supra), which was directed to be communicated to all the High Courts for further circulation to all the Judicial Officers for awareness and implementation. The case in hand is not in isolation. Even after pronouncement of the aforesaid judgment, this Court is still coming across number of cases decided by the courts below fixing maintenance, either interim or final, without their being any affidavit on record filed by the parties. Apparently, the officers concerned have failed to take notice of the guidelines issued by this Court for expeditious disposal of cases involving grant of maintenance. Comprehensive guidelines were issued pertaining to overlapping jurisdiction among courts when concurrent remedies for grant of maintenance are available under the Special Marriage Act, 1954, Section 125 Cr.

P.C., the Protection of Women from Domestic Violence Act, 2005, Hindu Marriage Act, 1955 and Hindu Adoptions and Maintenance Act, 1956, and Criteria for determining quantum of maintenance, date from which maintenance is to be awarded, enforcement of orders of maintenance including fixing payment of interim maintenance. As a result, the litigation which should close at the trial level is taken up to this Court and the parties are forced to litigate.

16. As in the case in hand, the impugned order passed by the High Court is cryptic and is bereft of reasons. In our opinion, the same deserves to be set aside and the matter is liable to be remitted to the High Court for consideration afresh. Ordered accordingly. As the respondent remained unrepresented, the High Court may issue notice for his appearance on the date so fixed by it."

8. On the other hand, Mr. T. Islam, learned counsel for the respondent No. 2, has submitted in that regard that the learned Court below rightly passed the order of maintenance allowance against the present petitioner after considering the evidence on record adduced by both the petitioner as well as the respondent No. 2. More so, the petitioner/2nd party admitted his 2nd marriage in his Written Statement. Further, from the evidence of the petitioner, it is seen that he admitted the fact that he married one Nitumoni Garo Das as 2nd wife, however he stated that his family from the 2nd wife is maintained by his father. It is also stated by the petitioner in his cross-evidence that the elder daughter from his 2nd wife is studying at NERIM and other 2 (two) children are studying in Disneyland school. He also admitted that the vehicles in his possession are private cars and used commercially. Further in cross-examination, he also stated that his daughters are studying in Miles Bronson School. Accordingly, Mr. Islam submitted that the learned Principal Judge rightly held that from the expenditure statement of the petitioner, it reveals that he incurred a handsome expenditure in a month which otherwise establishes the fact that he has

sufficient source of income.

9. In support of his submission, Mr. Islam also relied on the decision of Supreme Court reported in **(1999) 6 SCC 326 (Rajathi Vs. C. Ganesan)** and emphasized on paragraph Nos. 6 & 7 of the judgment, which reads as under :

"6. If we refer to proviso to sub-section (3) of Section 125 where a husband offers to maintain his wife on the condition of her living with him and she refuses to live with him a Magistrate may consider any ground of refusal stated to her and nevertheless make an order notwithstanding such offer, if the Magistrate is satisfied that there is just ground for so doing. Explanation to the proviso states that if a husband has contracted marriage with any other woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

7. In the present case wife alleged that her husband had contracted a second marriage on January 4, 1990. She filed a complaint for an offence under [Section 494](#) of the Indian Penal Code. It is stated that the complaint was dismissed and husband was acquitted. High Court took this circumstance against the wife and adversely commented on her refusal to live with her husband. High Court, it would appear, lost sight of the fact how it would be difficult for the wife to prove the second marriage. This Court has held that to prove the second marriage as a fact essential ceremonies constituting it must be proved and if second marriage is not proved to have been validly performed by observing essential ceremonies and customs in the community conviction under [Section 494](#) IPC ought not to be made. The fact, however, remains in the present case that the husband is living with another woman. Proviso to sub-section (3) would squarely apply and justify refusal of the wife to live with her husband. There can be, however, other grounds for the wife to refuse to live with her husband, e.g., if she is subjected to cruelty by him. It was a case where the husband neglected or refused to maintain his wife. High Court did not consider the question if husband was having sufficient means. It rather unnecessarily put the burden on the wife to prove that she was unable to maintain herself. The words "unable to maintain herself" would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after the desertion to survive somehow. Section 125 is enacted on the premise that it is obligation of the husband to maintain his wife, children and parents. It will, therefore, be for him to show that he has no sufficient means to discharge his obligation and that he did not neglect or refuse to maintain them or any one of them. High Court also observed that the wife did not plead as to since when she was living separately. This is

not quite a relevant consideration. Even though wife was unable to prove that husband has remarried, yet the fact remained that the husband was living with another woman. That would entitle the wife to live separately and would amount to neglect or refusal by the husband to maintain her. Statement of the wife that she is unable to maintain herself would be enough and it would be for the husband to prove otherwise."

10. Mr. Islam accordingly submitted that the ground of 2nd marriage of the present petitioner can be considered as a just and reasonable ground for his 1st wife, respondent No. 2 herein, for refusal to live with him. Further he submitted that it is an admitted fact that the respondent No. 2 has no source of income of her own and she is totally dependent on the petitioner and the petitioner is duty bound to provide maintenance to his wife and children. Accordingly, he submitted that the learned Court below rightly passed the judgment and order and assessed the maintenance award which needs no interference of this Court. Further he submitted that the scope of interference is very limited under Section 397/401 of the Code of Criminal Procedure and in the instant case, the case is not suffered from any illegality, impropriety and correctness to make any interference by this Court.

11. After hearing the submissions made by the learned counsels for both sides, I have perused the case record as well as the judgment passed by the learned Court below.

12. It is not disputed that the petitioner and the respondent No. 2 are husband and wife and they have 2 (two) children out of their wedlock and it is also an admitted fact that presently the respondent No. 2 is residing separately from the present petitioner.

13. It is the case of the respondent No. 2 that she was subjected to mental cruelty by the petitioner and he also used to inflict physical torture on her in the drunken condition and subsequently she left her matrimonial house as she could not bear the torture on her. But, after 4 (four) months, she again return back to her matrimonial house with an assurance from the opposite party/petitioner and they started living at Itanagar where their 2nd child was born. But on 01.09.1997, the petitioner came home with a woman, namely, Ritumoni Roy, in a wedding dress and she disclosed her identity as 2nd wife of the petitioner. But since the entry of the 2nd wife, the petitioner started neglecting the respondent No. 2 and her 2 (two) daughters and even stopped giving maintenance and also refused to provide them adequate food and other basic expenses, though the respondent No. 2 provide all the comforts to his 2nd wife and 3 (three) children. Apart from that, the petitioner used to bring girlfriend at his house in front of the respondent No. 2 and used to do sexual intercourse with her. On her protest, the petitioner used to assault her, however somehow she escape from the house of the petitioner and lodged an F.I.R. before All Women Police Station. As per the petitioner, the 2nd party/present petitioner is a financially sound person and have sufficient landed property and business from where he earns around Rs. 1,60,000/- per month. More so, he has some landed property at Guwahati as well as in other parts of the Assam. She gave some details about his source of earnings from his business and different rented house etc. Accordingly, it is the case of the respondent No. 2 that finding no other alternative, she had to institute the petition under Section 125 Cr.PC. seeking maintenance for her and for her daughters. It is further contended that her elder daughter is studying LLM and the younger daughter is pursuing MBA. But

the petitioner refused to provide their basic needs and educational expenses. To substantiate her plea, she also adduced evidence as P.W.-1 and narrated the entire story under what circumstances she had to leave her matrimonial house and had to live separately from her husband. However, the evidence of the P.W.-1, i.e. the respondent No. 2 herein, could not be rebutted by the petitioner by cross-examining her.

14. On the other hand, it is the case of the petitioner that the petitioner has very limited source of income and he used to work in a weekly market and his monthly income is only Rs. 4,000/- and apart from that, the petitioner has no source of income to provide maintenance to the respondent No. 2 as awarded by the learned Principal Judge, Family Court No. 1, Kamrup(M) at Guwahati. Further the case of the petitioner is that he is a BPL Card holder for last 20 years and exhibited the same as Exhibit-A, which is also admitted by the respondent No. 2. More so, the respondent No. 2 could not produce any document to substantiate her plea in regards to the income of the present petitioner or to substantiate the plea that he has sufficient landed property. So, basically the petitioner's claim is that the learned Principal Judge, Family Court No. 1, Kamrup(M) at Guwahati passed the impugned judgment and order arbitrarily without considering the income of the petitioner and without considering the fact that he is a BPL Card holder and awarded the exorbitant amount @ Rs. 15,000/- per month which cannot be paid by the petitioner as he has no sufficient source of income. Further it is the claim of the petitioner that he furnished the bank statement wherefrom also it can be seen that his income is only Rs. 2-3 thousand per month.

15. So, it is the admitted position that both the petitioner and respondent No.

2 are husband and wife and they have 2 (two) daughters out of their wedlock and from the evidence of the first party/respondent No. 2, it is seen that her elder daughter is doing her LLM and the younger daughter is pursuing her study in MBA. In the same time, it is not disputed that the respondent No. 2 has no source of income of her own to maintain herself as well as to bear the educational expenses of her daughters. Though it is claimed by the petitioner that he has a very limited source of income and as per him, he only earns Rs. 5-6 thousand per month by working in a weekly market, but from the evidence of the P.Ws. and D.Ws., it is seen that the present petitioner married another women and from the 2nd wife, the petitioner has 3 (three) children and he himself admitted in his cross-evidence that the elder daughter of his 2nd wife is studying in NERIM and other 2 (two) children are studying in Disneyland School and he also admitted that presently his daughters are studying in Miles Bronson School. Thus, it is seen that though the petitioner claimed himself to be a poor person of BPL Card holder, but from his own evidence it is seen that he is maintaining his 2nd wife and children by bearing all the educational expenditure of his 3 (three) children from his 2nd wife and they are also studying in a reputed school of Guwahati and for which, he had to spend quite a good amount. More so, he also admitted that he is the owner of the vehicles which are private cars, but those were used for commercial purpose. The learned Principal Judge in his judgment also considered the assets and liabilities submitted by the opposite party and accordingly, it is held that the petitioner used to incurred a handsome expenditure in a month and thus, he has a sufficient source of income.

16. It is a fact that the respondent No. 2 did not file her affidavit in regards to assets and liabilities which is required as per the guideline of the Apex Court passed in the case of **Rajnish Vs. Neha (supra)**, but from the judgment passed by the learned Principal Judge, it is seen that she refused to submit her assets and liabilities affidavit stating that she has no such landed property or accommodation nor there is any source of income to submit her affidavit on assets and liabilities. However, the petitioner/2nd party filed his affidavit on assets and liabilities along with bank statement which otherwise reveals that he earns good amount of money monthly. More so, from the discussion made above, it is seen that the petitioner is maintaining his 2nd wife and 3 (three) children providing them comfort in every aspects and also bearing good amount of money towards the educational expenditure of the 3 (three) children from his 2nd wife and it is not at all believable that a person, who is a BPL Card holder, has the ability to maintain his family giving them all comfort and also expending good amount of money for the education of his children. Further it is seen that the learned Principal Judge observed that the name of the petitioner contained in the Entry since November, 2019 and hence, it cannot be accepted that the petitioner is a BPL Card holder for last 20 years. It is a fact that he accepted exhibited the BPL Card as Exhibit-A, but it is evident that he is providing a comfortable life to his 2nd wife and his 3 (three) children from his 2nd wife. Further it is seen that the elder daughter of the respondent No. 2 is pursuing her LLM course and younger daughter is also pursuing her MBA course for which the respondent No. 2 requires good amount of money for their education. The petitioner cannot abstain himself from paying maintenance and it is his bounden duty of a husband to provide a reasonable comfort as per the status of

the respondent No. 2. More so, the 2nd marriage of the present petitioner can also be considered as a just and reasonable ground for the 1st party/respondent No. 2 for her refusal to live with him.

17. In view of above discussions and also considering the entire aspects of the case, I am of the view that the petitioner has not made out any case to make interference in the judgment and order dated 15.06.2022, passed by the learned Principal Judge, Family Court No. 1, Kamrup(M) at Guwahati in FC (Crl) Case No. 88/2018. Consequently, the present criminal revision petition stands dismissed being devoid of merit.

18. In terms of above, this Criminal Revision Petition stands disposed of.

JUDGE

Comparing Assistant