

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**Criminal Revision No. 4700 of 2017 (O&M)
Date of decision: 17.04.2018**

Mukesh Kumar

...Petitioner

Versus

Rekha Rani and another

...Respondents

CORAM: HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Animesh Sharma, Advocate,
for the petitioner.

Mr. Harkesh Manuja, Advocate,
for the respondents.

JAISHREE THAKUR, J.

1. Challenge in the present revision is to the order dated 08.11.2016 passed by learned Sessions Judge, Panipat whereby the revision petition filed by respondents has been allowed and maintenance of ₹ 4,000/- per month awarded to the respondents by the Judicial Magistrate Ist Class, Panipat has been enhanced to ₹ 15,000/- per month.

2. In brief, the facts as stated are that the petitioner solemnized a marriage with respondent No.1 Rekha Rani on 11.02.2010, out of which wedlock a minor daughter Naina – respondent No.2 was born. The respondent-wife alleged harassment at the hands of her husband, the petitioner herein, for not fulfilling a demand to bring a car and on account of this, she was subjected to cruelty and eventually turned out from her matrimonial home in October, 2011. The petitioner filed a petition under Section 9 of the Hindu Marriage Act for restitution of Conjugal rights and the respondent wife appeared there and

made a statement on 11.04.2012 that she was ready and willing to reside with her husband, however there was no change in his behaviour. She was eventually thrown out of her matrimonial home at the time when she was three months' pregnant. She gave birth to a female child at her parental home. On account of the fact that she was unable to sustain herself and her minor child, she filed a petition for grant of maintenance under Section 125 Cr.P.C. The matter was contested denying all the allegations therein while submitting that the respondent wife had herself withdrawn from his company without any reasonable cause. It was stated that the wife was earning about ₹ 10,000/- per month while doing tailoring work and taking tuition. The Judicial Magistrate Ist Class, Panipat on consideration of the evidence adduced held the complainant wife and the minor child entitled to maintenance @ ₹ 3,000/- and ₹ 1,000/- per month, respectively from the date of filing of the petition. Against the said order of maintenance, the complainant-wife and minor daughter preferred a revision before the Sessions Judge, Panipat, who enhanced the maintenance from ₹ 3,000/- and ₹ 1,000/-, respectively to ₹ 12,000/- per month to be paid to the complainant wife and ₹ 3,000/- per months to the minor daughter. This order dated 08.11.2016, was challenged by the husband by filing a petition before the High Court i.e. **CRM-M-3058-2017**, which was dismissed as withdrawn on 10.08.2017 on a statement made by the petitioner that efforts were being made for an amicable settlement of the entire dispute between the parties. After the dismissal of the said petition, the instant criminal revision has been filed with an application for condonation of delay of 310 days in filing the revision petition.

3. Mr. Animesh Sharma, learned advocate appearing on behalf of the petitioner contends that since there were chances of settlement being

negotiated between the parties and that is why the petition under Section 482 Cr.P.C. i.e. **CRM-M-3058-2017** was dismissed as withdrawn. It is only thereafter when settlement failed, that the petitioner was constrained to file this revision petition. It is further contended that the petitioner herein is an Agriculture Development Officer and his gross earning is ₹ 49,339/- per month. The salary slip as annexed with the record as Annexure P-6 would show that after deducting an installment of ₹ 9701/- towards housing loan, income tax of ₹ 2500/-, contribution towards National Pension Scheme (NPS) of ₹ 4715/- and miscellaneous recovery of ₹ 1,000/-, net salary of the petitioner is ₹ 31,363/- out of which he is, in fact, paying ₹ 12,165/- towards personal loan, ₹ 3,656/- for second personal loan for financing brother's marriage and ₹ 4,200/- towards a car loan from SBI, therefore, after all deductions he is left only ₹ 11,342/- per month and, therefore, is not able to pay a sum of ₹ 15,000/- per month as maintenance. It is also argued that the payment of the enhanced maintenance from the date of filing of the petition under Section 125 Cr.P.C. is also not sustainable. In fact, in case the order of maintenance is silent regarding payment from the date of the petition, it has to be construed that payment has to be made from the date of the order.

4. Per contra, Mr. Harkesh Manuja, learned counsel appearing on behalf of the respondents argues that there is no proper explanation of delay of 310 days in filing the revision petition. In fact, no such effort had been made to settle the dispute, rather the petitioner filed a petition under Section 13 of the Hindu Marriage Act for dissolution of marriage before the Sessions Judge, Panipat. It is also argued that the conduct of the petitioner is such that he would not be entitled to any relief from this Court on account of the fact that the petitioner on an earlier occasion had made a statement and given an

undertaking to deposit all arrears of maintenance but failed to do so and is continuously avoiding making payment of maintenance. It is also argued that the payments that have been made towards personal loans taken, cannot be excluded from his source of income.

5. I have heard learned counsel for the parties and perused the record of the case.

6. Admittedly, a marriage was solemnized between the parties, out of which wedlock a minor child was born. There has been a series of litigation between the parties amongst them being FIR No. 863 dated 17.11.2012 registered under Sections 498-A, 323, 406 and 506 IPC, a petition under Section 9 of the Hindu Marriage Act as well as a divorce petition under Section 13 of the Hindu Marriage Act. These proceedings arises out of the order passed in a petition filed under Section 125 Cr.P.C. wherein the amount of maintenance made payable to the respondents herein has been enhanced from ₹ 3,000/- to the respondent wife and ₹ 1,000/- per month of the minor child to ₹ 12,000/- and ₹ 3,000/- respectively from the date of the petition.

7. The first question that has to be dealt with is whether the instant criminal revision would be maintainable in view of the fact that the petitioner herein had already approached this Court by filing a petition under Section 482 Cr.P.C. i.e. **CRM-M-3058-2017**, which was dismissed as withdrawn on the ground that there was a possibility of an amicable settlement between the parties.

8. An application has been preferred seeking condonation of delay of 310 days in filing of the present criminal revision and an objection has been taken that a second revision petition is not maintainable under Section 125 Cr.P.C. The first petition i.e. **CRM-M-3058-2017** had been filed invoking the

inherent powers of the Court under Section 482 Cr.P.C. whereas the instant revision has been filed under Section 401 Cr.P.C. by the husband against the order enhancing maintenance which is a statutory right available to him. Section 401 Cr.P.C. of the Code gives the power of revision to the High Court. The basic object behind the Code in section 401 is to empower the High Court to exercise the powers of an Appellate Court to prevent failure of justice in cases where the Code does not provide for appeal. The power, however, is to be exercised only in exceptional cases where there has been a miscarriage of justice owing to a defect in the procedure or a manifest error on the point of law, excess of jurisdiction, abuse of power. Moreover the petitioner herein has a right to contest the order of enhancement which was allowed on an revision filed by the respondent wife. There was no adjudication of the rights of the petitioner in proceedings that had been withdrawn. Therefore, the revision petition is maintainable. The argument raised that the conduct of the petitioner is such that the delay should not be condoned, cannot be a ground to deny him relief if it can be established that there was sufficient cause in not filing the revision within time. The delay in filing the revision has to be explained. It is submitted that the delay was on account of trying to effect a compromise with the respondent -complainant which did not fructify. The **CRM-M-3058-2017** was filed within time and got dismissed as withdrawn on 10.08.2017 and thereafter the instant petition has been filed after compromise talks failed. Therefore, the delay can easily be condoned since the petitioner was not negligent or tardy in pursuing his case.

9. The second question that requires to be considered is whether the Sessions Judge has erred in enhancing the maintenance payable from ₹ 4,000/- per month to ₹ 15,000/- per month. The quantum depends upon the status of

the parties including financial position of the husband and the reasonable demands of the claimant. Various factors have to be taken into consideration while determining the quantum of maintenance payable. It is submitted that the petitioner herein is paying income tax, contribution towards National Pension Scheme and apart from this, is also paying a car loan and two personal loans and, therefore, after deductions has only an amount of ₹ 11,342/- in hand which is not sufficient to pay maintenance of ₹ 15,000/- as assessed by the Sessions Judge, Panipat. It is argued that only ₹ 11,342/- in hand, it is not possible for the petitioner to sustain himself, his brother and his wife.

10. Section 125 Cr.P.C. stipulates that if any person having sufficient means neglects or refuses to maintain his wife, his legitimate or illegitimate minor child, who are otherwise unable to maintain themselves, shall be obligated to do so. A moral duty and a statutory obligation is cast upon the husband to maintain his wife, minor children, parents who otherwise are not capable of maintaining themselves. A person cannot be permitted to wriggle out of his statutory liability by way of availing huge loans and reducing a substantial amount of his salary for repayment of the same every month. Deductions that are made from the gross salary towards long term savings, which a person would get back at the end of his service and such as deductions towards Provident Fund, General Group Insurance Scheme, L.I.C. Premium, State Life Insurance can be deemed to be an asset that he is creating for himself. In arriving at the income of a party only involuntary deductions like income tax, provident fund contribution etc. are to be excluded. Therefore, such deductions cannot be deducted or excluded from his salary while computing his “means” to pay maintenance. In the case of ***Dr. Kulbhushan***

Kunwar v. Raj Kumari 1971 AIR (SC) 234 while deciding the question of quantum of maintenance to be paid, the argument raised that deduction not only of income-tax but also of house rent, electricity charges, the expenses for maintaining a car and the contribution out of salary to the provident fund of the appellant was not allowed. Only deductions towards income-tax and contributions to provident fund which had to be made compulsorily were allowed. The relevant portion of **Dr. Kulbhushan Kunwar's** case (supra) reads as under :-

“19. It was further argued before us that the High Court went wrong in allowing maintenance at 25% of the income of the appellant as found by the Income Tax Department in assessment proceedings under the Income Tax Act. It was contended that not only should a deduction be made of income-tax but also of house rent, electricity charges, the expenses for maintaining a car and the contribution out of salary to the provident fund of the appellant. In our view some of these deductions are not allowed for the purpose of assessment of “free income” as envisaged by the Judicial Committee. Income Tax would certainly be deductible and so would contributions to the provident fund which have to be made compulsorily. No deduction is permissible for payment of house rent or electricity charges. The expenses for maintaining the car for the purpose of appellant's practice as a physician would be deductible only so far as allowed by the income-tax authorities i.e. in case the authorities found that it was necessary for the appellant to maintain a car.”

In a nutshell, a husband cannot be allowed to shirk his responsibility of paying maintenance to his wife, minor child, and parents by availing loans and paying EMIs thereon, which would lead to a reduction of his carry home salary.

11. In the present case, the carry home salary of the petitioner after deduction of installment of housing loan, income-tax, National Pension

Scheme is only ₹ 31,363/- and rest of the deductions that have been made are towards personal loans taken. The contention raised that he has the responsibility of looking after his brother and the wife of his brother, is not sustainable. Neither brother nor his wife are dependent upon the petitioner herein, whereas the respondents are. Deduction from the gross pay would only be those which are statutorily allowed. Any repayment of loans taken for the marriage of the brother of the petitioner, EMI @ ₹ 4,200/- towards a car loan from SBI, or personal loan taken to pay maintenance as alleged, cannot be used as a legitimate deduction from his net salary.

12. The question of quantum had been decided by the Hon'ble Supreme Court in *Kalyan Dey Chowdhury vs. Rita Dey Chowdhury Nee Nandy, (2017) 14 Supreme Court Cases 200*, wherein it has been held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the respondent-wife. The petitioner herein has a responsibility towards his wife and the minor child and, therefore, keeping in view the carry home salary of the petitioner to be ₹ 31,363/- the maintenance amount payable to the respondent wife would be ₹ 7,000/- and ₹ 4,000/- per month to the minor daughter .

13. The counsel for the petitioner has submitted that the amount of maintenance has to be assessed from the date of passing of the order. The JMIC, Panipat while deciding maintenance, had awarded that the amount would be paid from the date of the application, and in revision filed by the wife, the maintenance was enhanced to ₹ 15,000/- per month, however the order was silent as on what date the same would be made effective. Whereas counsel for the respondents submits that the enhancement too would be from the date of the application and failure to mention would not make it

payable from the date of the order.

14. Section 125(2) stipulates '*Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.*'

15. The supreme court in the matter of ***Shail Kumari Devi v. Krishan Bhagwan Pathak (2008) 9 SCC 632*** decided the question “*whether the applicant-wife and her daughter are entitled to maintenance from the date of the order passed by the Family Court or from the date of application made by them under [Section 125](#) of the Code*” and after much deliberation held “*We, therefore, hold that while deciding an application under [Section 125](#) of the Code, a Magistrate is required to record reasons for granting or refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary. No special reasons, however, are required to be recorded by the Court. In our Judgment, no such requirement can be read in sub section (1) of [Section 125](#) of the Code in absence of express provision to that effect.*” Further Hon'ble the Supreme Court in the case referred as ***Jaiminiben Hirenghai Vyas & Anr vs Hirenghai Rameshchandra Vyas & another (2015)2 SCC 385*** held :-

“5. Section 125 Cr.P.C., therefore, impliedly requires the court to consider making the order for maintenance effective from either of the two dates, having regard to the relevant facts. For good reason, evident from its order, the court may choose either date. It is neither appropriate nor desirable that a court simply states that maintenance should be paid from

either the date of the order or the date of the application in matters of maintenance. Thus, as per Section 354(6) CrPC, the court should record reasons in support of the order passed by it, in both eventualities. The purpose of the provision is to prevent vagrancy and destitution in society and the court must apply its mind to the options having regard to the facts of the particular case.

6. In *Shail Kumari Devi v. Krishan Bhagwan Pathak (2008) 9 SCC 632*, paras 39-41 this Court dealt with the question as to from which date a Magistrate may order payment of maintenance to wife, children or parents. In *Shail Kumari Devi* this Court considered a catena of decisions by the various High Courts, before arriving at the conclusion that it was incorrect to hold that, as a normal rule, the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance. It is, therefore, open to the Magistrate to award maintenance from the date of application. The Court held, and we agree, that if the Magistrate intends to pass such an order, he is required to record reasons in support of such order. Thus, such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. **For awarding maintenance from the date of the application, express order is necessary.” (emphasis supplied)**

16. There is no such express order passed by the Session Judge, Panipat in respect to allowing maintenance from the date of the petition. Argument raised by counsel that the order so passed is in continuation to the order of the JMIC, can not be sustained in view of the fact that judgment rendered in ***Jaiminiben Hirenghai Vyas & Anr*** (Supra) relying on ***Shail Kumari Devi v. Krishan Bhagwan Pathak (2008) 9 SCC 632***, specifically

hold that failure to specify the date from when payment will become due

would necessarily mean that it would be from the date of the order.

17. Resultantly, the maintenance amount of ₹ 15,000/- per month to the respondent wife and the minor daughter being excessive is reduced to ₹ 11,000/- per month and the impugned order is modified and this revision is partly allowed. The maintenance of ₹ 11,000/- per month is payable to the respondents on or before 10th of every succeeding English calendar month and that too from the date of the order as passed by the Addl. Sessions Judge, Panipat.

18. Petition stands allowed accordingly.

17.04.2018

Satyawan

**(JAISHREE THAKUR)
JUDGE**

Whether speaking/reasoned

Yes.

Whether reportable

No.