

C.O.4386 of 2019

UPANITA DAS VS. ARUNAVA DAS

Mr. Srijib Chakraborty
Ms. Sudeshna Basu Thakur
..for the petitioner
Mr. Aniruddha Chatterjee
Mr. Sachit Talukdar
..for the opposite party

1. This revisional application arises out of an order dated August 8, 2019 passed by the learned Additional District Judge, Alipore, in Misc. Case No. 2 of 2016 arising out of Matrimonial Suit No. 44 of 2015. The wife is aggrieved with the quantum of maintenance.

2. Misc. Case No. 2 of 2016 is an application under Section 24 of the Hindu Marriage Act for maintenance pendente lite. In the application filed by the wife under Section 24 of the Hindu Marriage Act, maintenance pendente lite @ Rs. 30,000/- per month and Rs.75,000/- as litigation cost was prayed for.

3. Originally, the application was filed and the affidavit was affirmed by the petitioner, “by occupation service”. On detection of such mistake, a correction was inserted on the basis of an amendment application and the petitioner corrected the affidavit as by occupation “unemployed”. This amendment was not challenged by

the husband, and as such the controversy cannot be re-opened now.

4. It appears that in the application, the petitioner has elaborately quantified the expenses as follows :-

“That in view of the above your petitioner pray before your Honour Rs. 7,000/- per month for her square meal, Rs. 2,000/- per month for clothings, Rs. 4,000/- per month for conveyance, Rs. 500/- per month for her communication purpose, Rs. 3,000/- per month for medicine, and another Rs. 13,500/- per month towards cook, maid servants, washing and cleaning, cosmetics and toiletries, other daily miscellaneous hand expenses as per the status of her husband, your petitioner is entitled to get a alimony pendete lite @ Rs. 30,000/- per month and Rs. 75,000/- as Lump Sum amount towards litigation expenses.

The petition is made bonafide for the ends of justice. It is therefore humbly prayed that Your Honour would graciously be pleased to pass an order of alimony pendente lite directing the opposite party to pay alimony @ Rs. 30,000/- per month (including the monthly expenditure) and Rs. 75,000/- as Lump Sum amount towards litigation expenses and or may pass such other order or orders as Your Honour may deem fit and proper.

And your petitioner as in duty bound shall ever pray.”

5. The wife is aggrieved because the learned Court below allowed 1/5th of the income of the husband as maintenance pendente lite. The Court considered the husband's income to be Rs.60,000/- per month. According to the petitioner, the learned Court below proceeded as if maintenance pendente lite should be in the ratio of 1/5th of the husband's income as the standard rate. No other reasons for awarding maintenance of Rs.12,000/- per month has been

assigned.

6. It is submitted that the husband in his objection has not mentioned anything about his income. No evidence has been filed by the husband to prove his income or to deny the evidence and pleading of the wife. The wife has filed her written examination in chief in support of her contentions but such contentions of the wife has not been denied by any evidence on the part of the husband.

7. According to Mr. Chakraborty, the evidence and pleadings of the wife should be accepted as correct and uncontroverted in the absence of any contrary evidence. Thus he submitted that the wife should be paid at least 1/3 of the income of the husband.

8. Mr. Chatterjee, learned Advocate for the opposite party/husband points out to the cross examination of the wife in support of his contention that the wife had been employed in various educational institutions of repute in the past and as a corollary to this, it has been urged that she is still earning, but she has suppressed the fact. He submits that the learned Court below while considering the possibility of the fact that the wife may be in employment has rightly allowed Rs.12,000/- per month.

9. Mr. Chatterjee submits that the wife should be asked to produce her income tax returns and

employment status before this Court. He further submits that the husband's parents are dependent on the husband. The husband did not have any extra income over and above his expenses.

10. He submits that the Hon'ble Apex Court had laid down certain guidelines which required both the parties to file their affidavits of assets before the Trial Court where the proceeding for maintenance pendente lite was going on. Heard the parties.

11. The Hindu Marriage Act is a complete code which provides for the rights, liabilities and obligations arising from a marriage between two Hindus. Sections 24 and 25 make provisions for providing maintenance to a party who has no independent income sufficient for his or her support and necessary expenses. This is a gender-neutral provision, where either the wife or the husband may claim maintenance. The pre-requisite is that the applicant did not have independent income which is sufficient for his or her support during the pendency of the *lis*.

12. In this case, it is the wife's application for maintenance pendete lite.

13. Reference is made to the decision of Rajnesh v. Neha and ors. passed by the Hon'ble Apex Court in Criminal Appeal No.730 of 2020 dated November 4, 2020. The famous judgment of Justice Krishna Iyer in

the matter of Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and ors. reported in (1978) 4 SCC 70, on the object of maintenance laws has been quoted:-

“9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that Sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker Sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause – the cause of the derelicts.”

14. While discussing the various judicial precedents on the point of maintenance, the Apex Court in *Rajnesh* (supra) discussed the various criteria for determining the quantum of maintenance and the relevant factors to be taken into consideration in order to quantify the amount. The object behind granting maintenance is to ensure that the dependent spouse was not reduced to destitution or vagrancy on account of failure of the marriage and not as a punishment to the other spouse. While discussing a decision of the Delhi High Court, the Apex Court also approved of the factors to be relevant. Such finding of the Apex Court is at paragraph 57 of the judgment. The relevant paragraph is quoted below:-

“(v) The Delhi High Court in *Bharat Hedge v Smt. Saroj Hegde* laid down the following factors to be

considered for determining maintenance :

1. Status of the parties.
 2. Reasonable wants of the claimant.
 3. The independent income and property of the claimant.
 4. The number of persons, the non-applicant has to maintain.
 5. The amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in the matrimonial home.
 6. Non-applicant's liabilities, if any.
 7. Provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant.
 8. Payment capacity of the non-applicant.
 9. Some guess work is not ruled out while estimating the income of the non-applicant when all the sources or correct sources are not disclosed.
 10. The non-applicant to defray the cost of litigation.
 11. The amount awarded u/s 125 Cr.PC is adjustable against the amount awarded u/ 24 of the Act. 17.
- (vi) Apart from the aforesaid factors enumerated hereinabove, certain additional factors would also be relevant for determining the quantum of maintenance payable.”

15. Unfortunately these factors were not taken into consideration by the learned court below.

16. The Apex Court also observed that the financial position of the parents of the wife, the education of the wife, the potential of the wife to earn money would not be relevant consideration for grant of maintenance. While granting maintenance pendente lite, neither the mere potential nor the actual earning of the wife would be sufficient to deny the claim of maintenance. In this case, the Apex Court has reiterated the principle that it was for

the husband to prove his income and substantiate that such income was not sufficient to provide the maintenance as claimed by the wife in her application under Section 24 of the Hindu Marriage Act. If he fails to do so, then adverse inference should be drawn.

17. In the case in hand, the wife's potential to earn may exist as she has a post graduate degree, but from the evidence which has emerged from the examination-in-chief and cross-examination of the wife, it appears that she has been out of employment since May, 2014. No contrary evidence is forthcoming from the husband. The records also reveal that in 2012, the husband had been appointed in DPS, Siliguri at a salary of around Rs.23,000/-. Past appointment in a foreign location has also been disclosed by the wife. It is expected that in the intervening period, the husband's income must have gone up by at least three times. The Apex Court has noted that some guess work cannot be ruled out while estimating the income of the non-applicant when the sources or correct sources are not disclosed. Thus the learned Trial Court rounded off the figure at Rs.60,000/- per month as the expected income of the husband at present. The expenses of the wife as enumerated in the application do not seem to be too extravagant or unreasonable. Although the wife has claimed Rs.30,000/-, this Court upon taking into

consideration the relevant factors thinks it prudent to award Rs.20,000/- per month to the wife as maintenance pendete lite.

18. The contention of Mr. Chatterjee, that the wife should be directed to disclose her present income and file the affidavit of assets as per the direction of the Apex Court does not impress this Court. The matter was adjudicated upon and order was passed by the learned Trial Judge before the decision of the Hon'ble Apex Court when there was no requirement to file the affidavit of assets. The evidence of the wife (both chief and cross) and the pleadings to the effect that the wife did not have any income of her own has been accepted by the learned Trial Judge. In the absence of any evidence on the part of the husband, this Court is of the opinion that taking into consideration the criteria as laid down by several judicial precedents on the subject from time to time, Rs.20,000/- as maintenance pendete lite per month is just and proper.

19. In the judgment Rajnesh (supra) it was held that even if the wife has an income, the same would not be a ground for reducing the maintenance determined to be payable by the husband. The relevant paragraphs are set out below:-

“62. The Courts have held that if the wife is earning, it cannot operate as a bar from being awarded maintenance by the husband. The Courts have

provided guidance on this issue in the following judgments.

63. In *Shailja & Anr. v Khobbanna*, this Court held that merely because the wife is capable of earning, it would not be a sufficient ground to reduce the maintenance awarded by the Family Court. The Court has to determine whether the income of the wife is sufficient to enable her to maintain herself, in accordance with the lifestyle of her husband in the matrimonial home.⁴⁰ Sustenance does not mean, and cannot be allowed to mean mere survival.

64. In *Sunita Kachwaha & Ors. v Anil Kachwaha* the wife had a postgraduate degree, and was employed as a teacher in Jabalpur. The husband raised a contention that since the wife had sufficient income, she would not require financial assistance from the husband. The Supreme Court repelled this contention, and held that merely because the wife was earning some income, it could not be a ground to reject her claim for maintenance.

65. The Bombay High Court in *Sanjay Damodar Kale v Kalyani Sanjay Kale* while relying upon the judgment in *Sunita Kachwaha* (supra), held that neither the mere potential to earn, nor the actual earning of the wife, howsoever meagre, is sufficient to deny the claim of maintenance.

66. An able-bodied husband must be presumed to be capable of earning sufficient money to maintain his wife and children, and cannot contend that he is not in a *Chander Prakash Bodhraj v. Shila Rani Chander Prakash*. The onus is on the husband to establish with necessary material that there are sufficient grounds to show that he is unable to maintain the family, and discharge his legal obligations for reasons beyond his control. If the husband does not disclose the exact amount of his income, an adverse inference may be drawn by the Court."

20. Having considered the rival contentions of the respective parties, it appears that no where in the objections filed by the opposite party has he mentioned anything about his income. It is for the husband to prove his income as it is within his personal knowledge. The

wife's contention is that the husband is earning something around Rs.80,000/- per month. The learned Court below having considered the pleadings and evidence tendered on behalf of the wife, came to the conclusion that the husband has failed to prove his own income. In the examination in chief, the wife has categorically mentioned that the husband has other income from other sources. In the cross examination, the wife has said that she had been working as a school teacher and also on temporary basis as a lecturer in some institutions of repute but on and from May, 2014, she was not employed. The statement is quoted below :-

“From the year 2014, I have been out of employment. Volunteers: Lastly I worked at Adamas International School at Belgharia on and from the month of June or July in the year 2013 up to the month of May, 2014.

Lastly, I received Rs.17,400/- per month (Approximately) from that school.”

21. In her further cross-examination, she also has stated that on and from May, 2014, she applied for jobs in several places including educational institutions. In support of her contentions, she had also filed some documents before the court but according to her, in spite of the applications she had not been offered any job in any educational institution.

22. When such evidence is on record and no contrary evidence had been put forward by the husband, this court sitting in jurisdiction under Article 227 of the

Constitution of India cannot re-appreciate the evidence which are already on record. The learned Court below also did not disbelieve any statement or contention of the wife but erred in calculating the amount of maintenance pendente lite as 1/5th without any reasons as if it was the standard rate prescribed by judicial precedents. The ratio could be between 1/3 to 1/5 of the husband's income depending on the facts of a given case.

23. It has been settled that while calculating the maintenance pendente lite the income of the wife has to be taken into account. Here, in this case, what has emerged from the evidence of the wife is that she has been out of employment since 2014. The husband has not produced any contrary evidence. The cross-examination of wife has already mentioned hereinabove. The husband has also not been able to show the expenses that he has to incur for himself and his parents. Maintenance pendente lite for the wife has to be allowed by taking into consideration certain parameters which include food, clothing, shelter, medical expenses, rent and other out of pocket expenses.

24. The wife should be able to live in the status and condition at par with the husband. If the husband was a senior school teacher as would appear from the evidence produced by the wife with regard to the status of the husband, in my opinion, Rs.20,000/-, that

is, 1/3 of Rs.60,000/- as maintenance pendente lite should be justified for the expenses of a lady, who comes from a good middle class background and is well educated. There is no evidence to show that the husband does not have any income to support his wife.

25. The order impugned is modified to the above extent. With regard to the direction for payment of maintenance pendente lite and arrear they will remain the same. The amount awarded shall be inclusive of any amount which has already been directed to be paid in any other proceeding. The current maintenance shall be paid with effect from April, 2021 within 20th of the month. Thereafter on and from May 2021 the maintenance shall be paid within 15th of every month as directed by the learned court.

26. With the above observations, this revisional application is disposed of.

27. There will be however no order as to costs.

Urgent photostat certified copy of this order be given to the parties on priority basis, if the same is applied for.

(Shampa Sarkar,J.)

