

**IN THE HIGH COURT AT CALCUTTA**

**(Criminal Revisional Jurisdiction)**

**APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Shampa Dutt (Paul)**

**CRR 7 of 2020**

**Annapurna Karmakar**

**Vs**

**Bisweswor Karmakar & Anr.**

**For the Petitioner/wife** : Mr. B. P. Mondal,  
Mr. Sukanta Mondal.

**For the Opposite Party No. 1** : Mr. Arnab Chatterjee.

**For the State** : Ms. Rita Dutta.

Heard on : 18.01.2023

Judgment on : 20.02.2023

**Shampa Dutt (Paul), J.:**

The revisional application has been filed against the judgment and order dated 04.09.2019 passed by the Learned Judicial Magistrate, 2<sup>nd</sup> Court, Diamond Harbour in case No. MR-237 of 2015 under Section 125 of the Code of Criminal Procedure, granting a sum of Rs. 3000/- as maintenance to the petitioner/wife and a sum of Rs. 1000/- for the child born in the year 2012.

The petitioner's case is that on 10.06.2015 the Wife/Petitioner filed an application registered as Case No. M-237 of 2015 under Section 125 of the Code of Criminal Procedure against the Husband/Opposite Party in the Court of Learned Additional Chief Judicial Magistrate, 2<sup>nd</sup> Court, Diamond Harbour, South 24 Parganas.

On 22.05.2011, the Marriage between the Petitioner and the Opposite Party was solemnised according to Hindu rites and custom by negotiation. The said marriage was duly registered on 30.08.2011.

After marriage, a male baby named Tamal alias Aniruddha Karmakar was born out of the wedlock on 17.10.2012. The son has been living with the petitioner/mother.

The Petitioner after marriage, found out that the Opposite party is a characterless person. He has illicit relation with one Shrabanti Karmakar, (his elder brother's wife).

The Petitioner requested the Opposite Party to stop his illicit relationship but he did not pay heed to the petitioner rather he started ill behavior and assault towards the petitioner.

After knowing about torture upon the Petitioner, her father's family members tried to convince the Opposite Party in many ways by conciliation at the police station to mend his bad habits but all were in vain rather he gradually increased torture upon the Petitioner.

The Petitioner tried her best to remain with her in-laws even in spite of being ousted after assault on many occasions.

On 25.09.2013 the Petitioner's father's family members having received information about torture upon the Petitioner by the Opposite Party and his family members, rescued the Petitioner and her son with the help of local police. Later on, she had to lodge a complaint with the police station for the cruel behavior of the Opposite Party and his family members.

The Opposite Party and his family members kept the Petitioner's valuables including a mobile phone.

The Petitioner has no personal income whereas the financial condition of the Opposite Party is very sound, his two storied ultra – modern residential house finished with mosaic stone and tiles is situated at village : Naba-Roynagar, Ranaghat. Beside this, he has

purchased valuable landed properties in different places. He has been carrying on a business of a big jewelry shop under the name and style “New S.N. Jewelers” at Ranaghat and also has been carrying on a big jewelry factory of gold and silver ornaments with the help of many employees for sale and purchase of ornaments and a business of mortgage of ornaments. He also has a garden, tank and paddy land measuring more than 10 to 15 Bighas. He also sells precious stones. His monthly income is at least Rs. 2,00,000/-.

The Opposite Party, in spite of having sufficient means, willfully neglects and denied to pay maintenance to the Petitioner and their son.

The Petitioner, according to the provisions of Section 125 of the Code of Civil Procedure, prayed for a direction upon the Opposite Party to pay maintenance at the rate of Rs. 25,000/- per month for herself and also for maintenance including expenditure of education and clothes at the rate of Rs. 25,000/- only per month for her son from the date of the application and also litigation cost of Rs. 1,000/- for each day of litigation.

Opposite Party having received a notice to show cause from the Court of Learned Additional Chief Judicial Magistrate, 2<sup>nd</sup> Court, Diamond Harbour, South 24 Parganas, in Case No. M-237 of 2015, appeared and denied the allegations of physical and mental torture upon the Petitioner.

The Petitioner/wife willfully did not come back to the house of the Opposite Party.

The Opposite Party is a poor day labour and works in the house of people in the town and village having an average monthly income of Rs. 1000-1200/- only and is otherwise unemployed. He maintains his old parents somehow.

On the Other hand, the Petitioner earns more than Rupees seven to eight thousands per month at her father's house from the works of Jari and Chikan and tailoring with sewing machine with the help of labours and leads her life capriciously with comfort.

The Opposite Party loves his wife more than his own life and wants to live with her peacefully. If the Petitioner comes to live with him and behaves like ideal wife, the Opposite Party agrees to maintain her but he has no capacity to give her maintenance separately.

The Learned Judicial Magistrate, 1<sup>st</sup> Class, 2<sup>nd</sup> Court at Diamond Harbour, South 24 Parganas having considered the exhibited documents, evidences adduced by the parties and having heard the arguments of the both the parties, disposed of MR 237 of 2015 under Section 125 of the Code of Criminal Procedure on contest without cost by a judgment dated 04.09.2019 directing the Opposite Party to pay a cumulative monthly maintenance amount of Rs. 3000/- only to the Petitioner and Rs. 1000/- only for her minor son on and from the date

of the judgment i.e. on 04.09.2019 within the 20<sup>th</sup> day of every succeeding month.

The quantum of maintenance for both the Petitioner and her minor son appears to be very paltry sum not only for their maintenance in these days of price hike but also for the growing need of minor son's educational expenses beside their medical treatment.

The Opposite Party explicitly admitted in his pleading that their marriage was settled on the basis of an advertisement published in the Annandabazar Patrika and the contents of the said news paper reveals that the Opposite Party claimed to be a well established gold merchant earning Rs. 50-60,000/- per month. Unfortunately this admission as to income as to Opposite Party could have been a guiding factor to enable the Learned Magistrate to decide the quantum of maintenance more effectively inasmuch as the Learned Magistrate held the following inter alia:-

- i) The Petitioner has miserably failed to prove the existence of landed properties and earning from business of the husband.
- ii) The Opposite Party has hidden his true income.

In view of the conduct of the husband/Opposite Party, his income could be held as Rs. 50-60,000/- only per month in view of

Exhibit 1/4 and the quantum of the maintenance should have been determined accordingly for the ends of justice.

**Mr. B. P. Mondal learned counsel for the Petitioner** has submitted that the Learned Judicial Magistrate, 2<sup>nd</sup> Court at Diamond Harbour, South 24 Parganas ought to have considered that the income of the husband/Opposite Party is at least Rs. 50-60,000/- only as advertised in the matrimonial column of the said news paper i.e Exhibit- 1/4. But the husband /Opposite party has hidden his income by describing himself as day labour.

That both the lives of the wife/petitioner and her minor son are at stake due to inadequacy of the quantum of maintenance.

The wife/petitioner and her son will be in serious distress unless the quantum of maintenance is enhanced by this Hon'ble Court considering the monthly income as disclosed by the husband /opposite party in the Exhibit 1/4 i.e. Matrimonial advertisement of the Annandabazar Patrika.

**Mr. Arnab Chatterjee, the learned counsel for the opposite party/husband** has submitted that the opposite party is still willing to live a happy and peaceful conjugal life with his wife and child. But the opposite party does not have the means to maintain another family as he has several liabilities, including his aged mother and mentally ill sister.

**Both the parties have filed their affidavit of assets and liabilities.**

**The affidavit shows that the opposite party/husband has an yearly profit of Rs. 6,70,526.88/- (Monthly income Rs. 55,877.24).**

**The copy of the bank passbook filed by the wife petitioner shows that at present she has Rs. 1320.35/- in her account after withdrawing Rs. 3000/- for her son's (10 years old) school uniform. The wife presently resides in her parent's home with her brothers.**

The materials on record including the document marked exhibit 1/4 which is the "Matrimonial advertisement" by the opposite party/husband shows his income as Rs. 50,000/- to 60,000/- per month and the said statement is corroborated by the copies of income tax return annexed to the opposite party/husband's affidavit of assets and liabilities.

**The Supreme Court in *Rajnish vs Neha*, (2021 SCC 324), dealt with the issue and laid down the guidelines and directions:-**

**"VI**

***Final Directions***

*In view of the foregoing discussion as contained in Part B – I to V of this judgment, we deem it appropriate to pass the following directions in exercise of our powers under Article 142 of the Constitution of India : (a)*  
***Issue of overlapping jurisdiction***

*To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being*

*passed in different proceedings, it has become necessary to issue directions in this regard, so that there is uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. We direct that:*

- (i) where successive claims for maintenance are made by a party under different statutes, the Court would consider an adjustment or setoff, of the amount awarded in the previous proceeding/s, while determining whether any further amount is to be awarded in the subsequent proceeding;*
- (ii) it is made mandatory for the applicant to disclose the previous proceeding and the orders passed therein, in the subsequent proceeding;*
- (iii) if the order passed in the previous proceeding/s requires any modification or variation, it would be required to be done in the same proceeding.*

***(b) Payment of Interim Maintenance***

*The Affidavit of Disclosure of Assets and Liabilities annexed as Enclosures I, II and III of this judgment, as may be applicable, shall be filed by both parties in all maintenance proceedings, including pending proceedings before the concerned Family Court / District Court / Magistrates Court, as the case may be, throughout the country.*

***(c) Criteria for determining the quantum of maintenance***

*For determining the quantum of maintenance payable to an applicant, the Court shall take into account the criteria enumerated in Part B – III of the judgment. 56 The aforesaid factors are however not exhaustive, and the concerned Court may exercise its discretion to consider any other factor/s which may be necessary or of relevance in the facts and circumstances of a case.*

**(d) Date from which maintenance is to be awarded**

*We make it clear that maintenance in all cases will be awarded from the date of filing the application for maintenance, as held in Part B – IV above.*

**(e) Enforcement / Execution of orders of maintenance**

*For enforcement / execution of orders of maintenance, it is directed that an order or decree of maintenance may be enforced under Section 28A of the Hindu Marriage Act, 1956; Section 20(6) of the D.V. Act; and Section 128 of Cr.P.C., as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the CPC, more particularly Sections 51, 55, 58, 60 r.w. Order XXI.”*

**The criteria determining quantum of maintenance as in**

***Rajnish Vs Neha (Supra) is:-***

**“III Criteria for determining quantum of maintenance**

*(i) The objective of granting interim / permanent alimony is to ensure that the dependant spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.*

*The factors which would weigh with the Court inter alia are the status of the parties; reasonable needs of the wife and dependant children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to*

*maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife.*

*In **Manish Jain v Akanksha Jain (2017) 15 SCC 801** this Court held that the financial position of the parents of the applicant-wife, would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income, sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is dependent upon factual situations; the Court should mould the claim for maintenance based on various factors brought before it.*

*On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependant family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The Court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications.*

(ii) A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home.

The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

(iii) Section 23 of HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance. Sub-section (2) of Section 23 of HAMA provides the following factors which may be taken into consideration : (i) position and status of the parties, (ii) reasonable wants of the claimant, (iii) if the petitioner/claimant is living separately, the justification for the same, (iv) value of the claimant's property and any income derived from such property, (v) income from claimant's own earning or from any other source.

(iv) Section 20(2) of the D.V. Act provides that the monetary relief granted to the aggrieved woman and / or the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home.

(v) The Delhi High Court in *Bharat Hedge v Smt. Saroj Hegde*<sup>37</sup> 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.*

**(a) Age and employment of parties**

*In a marriage of long duration, where parties have endured the relationship for several years, it would be a relevant factor to be taken into consideration. On termination of the relationship, if the wife is educated and professionally qualified, but had to give up her employment opportunities to look after the needs of the family being the primary caregiver to the minor children, and the elder members of the family, this factor would be required to be*

*given due importance. This is of particular relevance in contemporary society, given the highly competitive industry standards, the separated wife would be required to undergo fresh training to acquire marketable skills and re-train herself to secure a job in the paid workforce to rehabilitate herself. With advancement of age, it would be difficult for a dependant wife to get an easy entry into the work-force after a break of several years.*

**(b) Right to residence** Section 17 of the D.V. Act grants an aggrieved woman the right to live in the “shared household”. Section 2(s) defines “shared household” to include the household where the aggrieved woman lived at any stage of the domestic relationship; or the household owned and rented jointly or singly by both, or singly by either of the spouses; or a joint family house, of which the respondent is a member.

*The right of a woman to reside in a “shared household” defined under Section 2(s) entitles the aggrieved woman for right of residence in the shared household, irrespective of her having any legal interest in the same. This Court in Satish Chander Ahuja v Sneha Ahuja<sup>38</sup> (supra) held that “shared household” referred to in Section 2(s) is the shared household of the aggrieved person where she was living at the time when the application was filed, or at any stage lived in a domestic relationship. The living of the aggrieved woman in the shared household must have a degree of permanence. A mere fleeting or casual living at different places would not constitute a “shared household”. It is important to consider the intention of the parties, nature of living, and nature of the household, to determine whether the premises is a “shared household”. Section 2(s) read with Sections 17 and 19 of the D.V. Act entitles a woman to the right of residence in a shared household, irrespective of her having any legal interest in the same. There is no requirement of law that the husband should be a member of the joint family, or that the*

*household must belong to the joint family, in which he or the aggrieved woman has any right, title or interest. The shared household may not necessarily be owned or tenanted by the husband singly or jointly.*

*Section 19 (1)(f) of the D.V. Act provides that the Magistrate may pass a residence order inter alia directing the respondent to secure the same level of alternate accommodation for the aggrieved woman as enjoyed by her in the shared household. While passing such an order, the Magistrate may direct the respondent to pay the rent and other payments, having regard to the financial needs and resources of the parties.*

**(c) Where wife is earning some income**

*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.*

*In **Shailja & Anr. v Khobbanna, (2018) 12 SCC 199** 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.*

*In **Sunita Kachwaha & Ors. v Anil Kachwaha (2014) 16 SCC 715** 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.

The Bombay High Court in **Sanjay Damodar Kale v Kalyani Sanjay Kale 2020 SCC Online Bom 694** 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.

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 position to earn sufficiently to maintain his family, as held by the **Delhi High Court in Chander Prakash Bodhraj v Shila Rani Chander Prakash, AIR 1968 Delhi 174**. 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.

This Court in **Shamima Farooqui v Shahid Khan, (2015) 5 SCC 705** cited the judgment in **Chander Prakash (supra)** with approval, and held that the obligation of the husband to provide maintenance stands on a higher pedestal than the wife.

#### **(d) Maintenance of minor children**

The living expenses of the child would include expenses for food, clothing, residence, medical expenses, education of children. Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support. Albeit, it should be a reasonable amount to be awarded for extra-curricular / coaching classes, and not an overly extravagant amount which may be claimed.

*Education expenses of the children must be normally borne by the father. If the wife is working and earning sufficiently, the expenses may be shared proportionately between the parties.*

**(e) Serious disability or ill health**

*Serious disability or ill health of a spouse, child / children from the marriage / dependant relative who require constant care and recurrent expenditure, would also be a relevant consideration while quantifying maintenance.”*

Thus considering the fact that:-

**The affidavit shows that the opposite party/husband has an yearly profit of Rs. 6,70,526.88/- (Monthly income Rs. 55,877.24) and the copy of the bank passbook filed by the wife petitioner shows that at present she has Rs. 1320.35/- in her account after withdrawing Rs. 3000/- for her son's (10 years old) school uniform. The wife presently resides in her parent's home with her brothers, the quantum of maintenance is enhanced to Rs. 10,000 each, total Rs. 20,000/- to be paid by 10<sup>th</sup> of each month and from the date of filing (Rajnish vs Neha (Supra)). Monthly arrear on equal monthly instalment with monthly maintenance from March, 2023 onwards.**

**CRR 7 of 2020 is thus allowed.**

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

**(Shampa Dutt (Paul), J.)**