

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 553 of 2020

Samir Sarkar

Vs.

The State Of West Bengal & Anr.

with

CRR 1420 of 2020

with

CRAN 1 of 2020

Angana Sarkar

Vs.

The State Of West Bengal and Anr.

**For the Petitioner
(in CRR 553 of 2020)
and**

**For the Opposite Party No. 2
(in CRR 1420 of 2020)**

**: Mr. Kallol Mondal,
Mr. Krishan Ray,
Mr. Souvik Das,
Mr. Anamitra Banerjee,
Mr. Ayan Mondal,
Mr. Shamsheer Ansari.**

For the State

: Ms. Sujata Das.

**For the Petitioner
(in CRR 1420 of 2020)
and**

**For the Opposite Party No.2
(in CRR 553 of 2020)**

: Mr. Ankit Agarwal.

Heard on

: 06.06.2023

Judgment on

: 20.06.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceedings being Misc. Case No.173 of 2019 under Section 125 of the Code of Criminal Procedure pending before the learned Judicial Magistrate, 3rd Court, Barrackpore, North 24 Parganas.
2. The petitioner's case is that the petitioner got married to the opposite party no.2 on 11.02.2005 according to Hindu Rites and Customs. The first child was born out of the said wedlock on 11.05.2007. The said marriage is still subsisting.
3. In December, 2008 the wife of the petitioner left her matrimonial home along with her minor handicapped child and since then she is living with her parents. When the petitioner contacted the opposite party no.2 to know about the issue, the parents of the opposite party no.2 asked the petitioner to leave his house and to stay with the opposite party no.2 and their minor child in a rented place near the parental home of the opposite party no.2, at Ghola, Sodepur.
4. That after several fruitless efforts to resolve the issue, the petitioner served a letter to resume conjugal life with the opposite party no.2, through his advocate, dated 21.08.2009. In reply to the said letter, the opposite party no.2 also served a letter through her advocate, dated 02.09.2009, where the proposal of renting a house in Ghola, near the parental home of the opposite party no.2 was mentioned again.
5. When all these efforts of resuming the conjugal life, and having his minor son back from the parental house of the opposite party no.2 failed, the petitioner, with no alternative, filed a petition under Section 97 of the

Code of Criminal Procedure, before the learned Sub Divisional Magistrate, Ranaghat being Misc. Petition No.1071 of 2009. Written objection was filed on behalf of the opposite party no.2 in the said case, where it was claimed that the opposite party no.2 is staying with her parents at her own will. After hearing both the parties, the learned Sub Divisional Magistrate, Ranaghat opined that there is no reason to proceed further and the case was filed (disposed).

6. Thereafter, the opposite party no.2, filed an application claiming maintenance under Section 125 of the Code of Criminal Procedure before the learned Judicial Magistrate, 2nd Court, Barrackpore, being Misc. Case No.510 of 2009. In the said proceeding, by an order dated 06.10.2010, payment of an interim maintenance of Rs.1500/- to wife and Rs.2500/- to the child was directed upon the petitioner. The petitioner filed a revisional application before the High Court at Calcutta, challenging the order dated 06.10.2010 passed by the learned Judicial Magistrate, 2nd Court, Barrackpore, being C.R.R. No.44 of 2011, and by an order dated 15.03.2011, this Hon'ble Court was pleased to reduce the amount of interim maintenance to the extent of Rs.1500/- each to the wife and the child. The proceeding under Section 125 of the Code of Criminal Procedure, is still pending.

7. Subsequently, by an order dated 10.02.2017, the learned Judicial Magistrate, 2nd Court, Barrackpore was pleased to pass an order, where Misc. Case no. 510 of 2009 was dismissed for non prosecution.

8. In the proceeding in Misc. Case No.510 of 2009, the opposite party no.2 was examined as prosecution witness no.1, and she specifically stated

in her cross examination that, she is willing to go back to her husband, but she does not want to stay at her matrimonial home. Later, in the same cross examination she stated that she would go to her matrimonial house but only if the petitioner arranges the provisions required for her parents.

9. On 17.12.2009 the petitioner filed a petition under Section 9 of the Hindu Marriage Act, being Matrimonial Suit No.898 of 2009, before the learned District and Sessions Judge, Krishnagar, Nadia.

10. It is submitted by the petitioner that the case of the opposite party no.2 is that she was thrown out from her matrimonial home after being tortured in the year of 2008, but she did not lodge any complaint regarding the same before any authority. Subsequently, to fill up the lacuna in the maintenance proceeding on the point of torture, she lodged a complaint on 01.07.2015 with the Ranaghat Police Station against total nine persons including the aged parents, relatives of the petitioner and petitioner himself. Based on the said complaint Ranaghat Police Station Case No.238 of 2015 dated 01.07.2015 under Sections 498A/406/34 of the Indian Penal Code. The said proceeding is still pending.

11. That finally the efforts of the petitioner to resume his conjugal life with the opposite party no.2 became fruitful as the opposite party no.2 agreed to the proposal of the petitioner to stay in her matrimonial home with their minor disabled son. In the month of November, 2015, the opposite party no.2 came back to her matrimonial home with the child, and the couple started living together again.

12. It is further submitted that while leading a peaceful and sweet conjugal life, the petitioner and the opposite party no.2 were blessed with

another child on 08.03.2017. The only coarseness in this otherwise happy relationship is that the opposite party no.2 curiously enough, did not take any steps to withdraw the said complaint dated 01.07.2015, for reasons best known to her.

13. The opposite party no.2 then used to pressurize him to provide assistance to her parents. Though with the birth of the second child, the financial burden increased on the petitioner, he was trying his level best to take care of the parents of the opposite party no.2 as well.

14. On 20.02.2019, without informing anyone, the opposite party no.2 again left her matrimonial home, leaving the two children behind. When the petitioner came back from work, and contacted the opposite party no.2 via telephone, the opposite party no.2 stated that she will come and take the children with her afterwards, to live at her parental home. The petitioner did not agree to the proposal and informed her that he does not want his children to live at the parental home of the opposite party no.2 and requested the opposite party no.2 to come back repeatedly. But the opposite party no.2 refused the request of the petitioner. Subsequently, a false General Diary was lodged with Ranaghat Women Police Station by the opposite party no.2, and by force of that she took away the second child with her, leaving the first child with special needs behind in the petitioner's custody.

15. In 2009 the opposite party no.2 lodged the present case, being Misc. Case No.173 of 2019, under Section 125 of the Code of Criminal Procedure, before the learned Judicial Magistrate, 3rd Court, Barrackpore claiming Rs.30,000/- and Rs.20,000/- per month for her and her second child

respectively, from the petitioner. Written objection was filed on behalf of the petitioner/husband.

16. By an order dated 27.12.2019 the learned Judicial Magistrate, 3rd Court, Barrackpore was pleased to direct the petitioner to pay a maintenance of Rs.3000/- to the opposite party no.2 and Rs.2,000/- for the child, totaling Rs.5,000/- per month.

17. The petitioner states that the opposite party no.2 is a working lady and she regularly files her income tax.

18. The petitioner is working in a Hardware Shop, earning about Rs.8,000/- per month. The aged parents of the petitioner and the first child with special need stay with the petitioner.

19. **Mr. Kallol Mondal, learned counsel for the petitioner (husband) in CRR 553 of 2020** has submitted that the order under revision has cause severe hardship on him. The Court also failed to take into consideration that the opposite party no. 2 left the petitioner's house on her own without just and sufficient reason and has her own source of income. Hence, the impugned procedure is bad in law and is liable to be set aside.

20. **Mr. Ankit Agarwal learned counsel for the petitioner (wife) in CRR 1420 of 2020** has preferred the revision **praying for enhancement** of the quantum of interim maintenance granted by the same order dated 27.12.2019, which the husband/petitioner has prayed for setting aside.

21. **Considering the materials on record the following facts are before this court:-**

i) The wife has left behind her child with special needs with the husband and left her matrimonial home with the healthy child on her own, without just and sufficient reasons.

ii) The order challenged is an interim order of maintenance **pending final adjudication.**

iii) In the order under revision, the learned Magistrate has observed that the wife has certain income.

iv) The husband's case is that the wife has deserted him and their helpless child willfully without just and sufficient reasons.

22. Considering all these facts, this Court directs that while disposing of the application under Section 125 Cr.P.C. **finally**, the Learned Magistrate can now follow the guidelines as laid down by the Supreme Court in ***Rajnesh Vs Neha, (2021 SCC 324)***.

23. The said Judgment raises the issue of maintenance as a whole. All the Acts providing the said benefit has been considered, discussed and guidelines laid down. The final Direction there in is as follows:-

“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.”

24. **Keeping with the said guidelines both the parties to the case will file their Affidavit of Disclosure of Assets and liabilities before the trial Court. Considering the stand of the parties that the husband has to look after his aged parents and a disabled child and that the wife is also a working woman. There is another factor to be considered by the Learned Magistrate at the time of final disposal of the case as to whether the wife was driven out from her matrimonial home or had she deserted her husband willfully, without any just and sufficient reasons. The husband though had filed a suit for restitution of Conjugal Rights.**

25. **The criteria determining quantum of maintenance as in *Rajnesh 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*³⁷ 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 Ahuja³⁸ (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.”

26. The order dated 06.10.2010 passed in Misc. Case No.173 of 2019 under Section 125 of the Code of Criminal Procedure by the learned Judicial Magistrate, 3rd Court, Barrackpore, North 24 Parganas, is hereby affirmed, subject to final adjudication/disposal of the proceedings under Section 125 Cr.P.C.

27. The Trial Court will decide the case finally as per the directions in the body of this judgment and make all endeavour to dispose of the case finally as expeditiously as possible.

28. CRR No. 553 of 2020 and CRR 1420 of 2020 are thus dismissed.

29. No order as to costs.

30. All connected applications stand disposed of.

31. Interim order, if any, stands vacated.

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

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

(Shampa Dutt (Paul), J.)