

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 670 of 2020

Ambarish Gajendra Mahapatra

Vs

Smriti Maity (Gajendra Mahapatra)

For the Petitioner : Mr. Arindam Jana,
Mr. S. Chatterjee.

For the Opposite Party : None.

Heard on : 05.12.2022

Judgment on : 04.01.2023

Shampa Dutt (Paul), J.:

This revision has been preferred against the judgment and order dated 27.01.2020 passed by the learned Sessions Judges, Purba Medinipur in Criminal Revision no. 48 of 2019 under Section 397/399 of the Code of Criminal Procedure thereby modifying the order dated 18.02.2019 passed by the learned Judicial Magistrate, 1st Court at Tamluk, Purba Medinipur in Misc. Case No. 433 of 2016 in a proceeding under Section 125 Code of Criminal Procedure, 1973.

The petitioner/husband's case is that the marriage between the parties was solemnized on 26.07.2011. The opposite party/wife filed an application under Section 125 Cr.P.C. claiming monthly maintenance of Rs. 25,000/- for self and Rs. 15,000 for their son with the allegation that she was mentally and physically tortured and when her in laws tried to cause her miscarriage, she fled to her parents house. A male child was born to her on 12.12.2012 (presently 10 years old). The petitioner/husband tried to pressurize her to give her child to the sister of the petitioner herein. The wife had gone back to her matrimonial home on 07.08.2013 but was again sent back on 18.01.2014. On returning there she was finally driven out on 09.01.2015.

The husband herein is a B.Tech Engineer. The wife has done her BSC and MBA but is not employed and thus unable to maintain herself and her son.

It is the claim of the petitioner/husband that the wife is running a well established English medium private school and is capable of earning Rs. 30,000 to 40,000 per month.

It is further stated that due to all these harassment of attending cases filed by the wife, the petitioner has lost his job and at present does not have a permanent job.

It is further submitted that the learned Magistrate rightly granted Rs. 2000/- as maintenance to the son only, but the session was wrong in granting a sum of Rs. 10,000/- to the wife in addition which is not in accordance with law and has caused severe miscarriage of justice and should be set aside in the interest of justice as the whole proceedings is gross abuse of the process of Court and law.

Mr. Arindam Jana, learned Counsel for the petitioner has submitted that the Session Court, Purba Medinipur failed to consider that the interim order passed by the Learned J.M., 1st Court, Tamluk is interlocutory in nature and modified that order under Section 397/399 of Cr.P.C. Section 397(2) clearly bars entertainment of an application which is interlocutory in nature. The Hon'ble Calcutta High Court on 23rd June, 2010 in its much celebrated judgment *Fatema Bibi vs. Ali Hossain Mondal* (CRR no. 1794 of 2009) had laid down guidelines on this regard. Hence the impugned order passed by Learned Session Court is quite unjust, erroneous and liable to be set aside. The learned Judge erred by not appreciating that though dwelling deep into the allegations and counter

allegations is not necessitated at the stage of granting interim maintenance, but prima facie satisfaction about any sort of negligence to maintain the applicant and also the allegation of voluntary desertion by the wife are to be looked into; in spite of the petitioner mentioning in his written objection that he is consistently paying maintenance granted to his son, the learned Judge neglected to dwell into the same and appreciating the conduct of the petitioner, went on to modify the order of the trial court; thereby rendering the impugned order bad in fact and law and thus the same is liable to be set aside. The Session Court did not consider that the opposite party even after being an able bodied, highly qualified woman, who used to work before marriage and present earnings from running their family business (English medium school) is motivated purposefully to incapacitating herself with an intention to take maintenance from husband by filing frivolous petition. The impugned order has deluged the petitioner with the burden of maintaining a deserting wife and as such is prejudicious to his rights, in the light of pendency of the trial of the instant case. Thus the impugned order is liable to be set aside. Merely there is an assertion that the opposite party herein is incapable to maintain herself, in spite of being a highly qualified lady does not automatically entitle herself to maintenance. Thus the impugned order is liable to be set aside. The learned Judge neglected to consider that she was maintaining herself well after separation and even refused pocket expenses sent to her by money order sometimes. Further there was no

prayer for granting maintenance from the date of filing of the application. The learned Judge miserably failed to appreciate that, while assailing the order of the learned trial court, the opposite party had nowhere whispered about any grievance due to the order of maintenance granted to the minor son from the date of order; thus the additional burden imposed upon the petitioner is unwarranted and beyond the scope of the prayer of the opposite party. The impugned order is thus liable to be set aside.

Inspite of due service, the opposite party has not appeared.

Admittedly the order under revision is against an interim order of maintenance. The judgment in **Rajnesh vs. Neha (2021) 2 SCC 324** is an **appeal against an application and order for interim maintenance.**

The Supreme Court in **Prasanta Kumar Dey vs. State of West Bengal & Anr.**

“2. Learned Counsel for the appellant has relied the decision of this Court in Krishnan & Anr. V. Krishnaveni & Anr. JT 1997 (1) SC 657=I (1997) CCR 146 (SC), to contend that what is prohibited under Sub-section (3) of Section 397, Cr.P.C. is a simultaneous revision, but the inherent power of the High Court is still available under Section 482 of the Code and it is paramount power of continuous superintendence of the High Court, and the High Court is justified in interfering with and order leading to miscarriage of justice and in setting aside the order of the Courts below, if necessary to serve the ends of justice.

3. In the facts and circumstances of the present case, we are of the opinion that the present one is a fit case where the High Court ought not to have dismissed the revision preferred before it solely on the ground of non-maintainability but should have gone into the merits so as to find out if it was a fit case calling for

interference of the High Court, shorn of technicalities under Section 401 read with Section 482 of the Cr.P.C.”

In view of the said judgment of the Supreme Court the present case is maintainable.

Regarding the challenge that the courts erred in allowing the maintenance from the date of filing, the same has been clearly laid down by the Supreme Court in **Rajnish vs. Neha (2021) 2 SCC 324** that “maintenance in all cases will be amended from the date of filing the application for maintenance.

Guidelines /Directions on maintenance therein is as follows:-

“Maintenance laws have been enacted as a measure of social justice to provide recourse to dependant wives and children for their financial support, so as to prevent them from falling into destitution and vagrancy.

Article 15(3) of the Constitution of India provides that :

“Nothing in this article shall prevent the State from making any special provision for women and children.”

Article 15 (3) reinforced by Article 39 of the Constitution of India, which envisages a positive role for the State in fostering change towards the empowerment of women, led to the enactment of various legislations from time to time.

Justice Krishna Iyer in his judgment in Captain Ramesh Chander Kaushal v Mrs. Veena Kaushal & Ors. 1 held that the object of maintenance laws is :

“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.”

The legislations which have been framed on the issue of maintenance are the Special Marriage Act 1954 (“SMA”), Section 125 of the Cr.P.C. 1973; and the Protection of Women from Domestic Violence Act, 2005 (“D.V. Act”) which provide a statutory remedy to women, irrespective of the religious community to which they belong, apart from the personal laws applicable to various religious communities.”

Criteria for determining quantum of maintenance has been also laid down in **Rajnish vs. Neha (supra)**.

(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 Hegde³⁷ 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*³⁸ (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. 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.

In the present case, their child is now aged 10 years. He goes to school and is now at a crucial growing stage where his expenditure is an essential requirement. Learned Magistrate on interim basis granted only Rs. 2000/- to the child, a child whose father is a B.tech engineer and mother holds a MBA degree.

Though interim, the quantum of maintenance has to be reasonable and logical, on taking the facts and circumstances of each case into consideration.

The amount of Rs. 2000/- is not only extremely low but will also not meet even the minimum requirement of a child in such an established family. The amount of Rs. 2000/- is absolutely without application of mind and not judicious. The said amount of interim maintenance towards the child needs to modify to a certain extent in the interest of justice subject to the final decision by the Trial Court.

Accordingly the amount of maintenance for the child is enhanced to Rs. 10,000/- per month from the date of application. The amount of Rs. 10,000/- per month as maintenance towards the wife as granted by the learned Session Judge is suspended (as it has been stated that she runs a English medium school and also refused the money orders sent by the petitioners) till the final decision by the learned Magistrate, who will decide the same as per guidelines in **Rajnesh vs. Neha (supra)** by filing of affidavit of assets and liabilities by both the parties.

The order dated 27.01.2020 passed by the learned Sessions Judges, Purba Medinipur in Criminal Revision no. 48 of 2019 and the order dated 18.02.2019 passed by the learned Judicial Magistrate, 1st Court, at Tamruk, Purba Medinipur in Misc. Case No. 433 of 2016 **are modified accordingly.**

It is made clear that the learned Magistrate will come to his/her independent findings without being influenced by the order of this Court, as to the quantum/entitlement etc. of maintenance of both the wife and son which may be enhanced or reduced as per evidence and materials before the Court learned Magistrate will make all endeavor to dispose of the case expeditiously.

CRR 670 of 2020 is accordingly disposed of.

No order as to costs.

All connected applications stand disposed of interim order if any stands vacated.

Let a copy of the judgment along with the lower court records (if any) be sent to the Trial Court at once.

Urgent Photostat Certified copy of this Judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)

