

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 978 of 2019

Shilpi Lenka

Vs

Susanta Kumar Lenka & Anr.

For the Petitioner : Mr. Kamalesh Ch. Saha,
Ms. Payel Mitra,
Ms. Mishuk Saha.

For the Opposite Party No. 1 : Mr. Arnab Chatterjee,
Mr. Biplab Chatterjee,
Mr. Vijay Verma.

For the State : None

Heard on : 06.01.2023

Judgment on : 30.01.2023

Shampa Dutt (Paul), J.:

The present revision is against an order dated 12.02.2019 passed by the Learned Judicial Magistrate, 2nd Court at Barrackpore, District – North 24 Parganas in connection with M-479 of 2017 under Section 125 of the Code of Criminal Procedure, 1973.

The parties were married on 09.08.2006. They have a daughter who is now aged about 9 years. It is the case of the petitioner that she was inflicted with mental and physical torture immediately after her marriage. The opposite party joined the Air force leaving behind the petitioner and their daughter alone. It is stated that the parties did not live together after few days of marriage as the opposite party/husband left to join the Air force.

Further case of the petitioner is that on 15.05.2017 the opposite party deserted the petitioner and their daughter and started living alone.

It is stated that the opposite party gets a pension of Rs. 18000/- from his service in the Air force and presently he earns Rs. 40,000/- in addition by working in bank.

The petitioner had the filed an application under Section 125 of the Cr.P.C. praying for maintenance of Rs. 20,000/- for self and Rs. 5000/- for their daughter.

The opposite party's case before the Learned Magistrate was that all the allegations made by the petitioner is false. The petitioner left her matrimonial home on her own will. It is further stated that admittedly he was an employee of the Indian Air force but **his pension has been blocked due to the complaint made by the petitioner to the authorities.**

Documents relating to the school fees (book) of the minor child and other documents relating to the opposite party's salary slip, returned money order, tenancy agreement and investment slips were filed before the Learned Magistrate.

The Learned Magistrate held that a husband is bound to maintain his wife and family. The Magistrate further held that the object of the said provision of law is to prevent vagrancy and destitution. Finally the magistrate came to the finding that the opposite parties income was a sum of Rs. 24,494.28/- per month after all deductions and granted a sum of Rs. 4000/- per months as maintenance to the petitioner/wife and Rs. 3000/- as maintenance per month to their minor daughter.

Hence this revision.

Mr. Kamallesh Saha Learned Advocate for the petitioner has submitted that the petitioner/wife has no source of income and also has a minor daughter to maintain. The trial court did not apply his judicial

mind nor consider the documents in accordance with law and thus passed an order, which is to be modified and the amount of maintenance granted is to be enhanced for ends of justice. The amount granted being insufficient for the maintenance of the petitioner and her daughter, should be enhanced so that they can live a life befitting the status of the opposite party.

Mr. Arnab Chatterjee, learned counsel for the opposite party has submitted that the petitioner left her matrimonial home on her own as she did not want to live her conjugal life with the opposite party. The **pension of the opposite party from the Indian Air force has been blocked** because of the complaint filed by the petitioner with the Air Force Authorities. As such the present income of the opposite party is so less that he somehow maintains himself and his other responsibilities being his parents and other family members. It is difficult for him to maintain a separate establishment for his wife and child who are not willing to live with him. The opposite party is still willing to live with the petitioner and his child and lead a happy family life, but the petitioner is not happy with the life that he is able to provide. The counsel for the opposite party has thus prayed that the revisional application be dismissed.

Considering the materials on record, the submissions of the Learned Counsels for both sides and the order of the Learned

Magistrate granting interim maintenance, it is found that admittedly the pension of the opposite party has been blocked due to the complaint filed by the petitioner. This has caused a huge reduction in the amount of income received by the opposite party. As it is for the conduct of the petitioner that the income from Air Force has been blocked, the extent and amount of maintenance to be granted in favour of the petitioner will also be proportionately effected. It is for the petitioner to take necessary steps to ensure that the pension from the Air Force is released in favour of the opposite party so that the prayer for enhancement of maintenance for the petitioner can be considered.

The opposite party cannot be burdened, when it is the conduct of the petitioner herself because of whom the pension from the Air Force has been blocked.

This is a case where a wife blocks a substantial source of income of the husband and then claims an enhancement of maintenance, a really difficult situation for the husband.

This clearly amounts to an abuse of process of law and is also against the interest of Justice. Both the parties are equal in the eye of law and the court has to ensure that none of the parties suffer injustice.

The child of the parties in this case is now aged around 13 years. Presently she is a student of class VIII.

The amount of maintenance of Rs. 3,000/- per month granted to **the child is clearly not sufficient** to maintain a school going child and thus requires the interference of this court by exercising its inherent powers.

Thus the amount of maintenance granted in favour of the child is enhanced to a sum of Rs. 5000/- per month (as claimed by the petitioner before the Trial Court).

The amount of maintenance granted to the petitioner wife remains unchanged subject to the final adjudication by the Magistrate as to whether the petitioner/wife has left her matrimonial home without just and sufficient reasons. All these factors shall be taken into consideration by the Learned Magistrate at the time of final disposal of the case along with the decision as to the criteria and quantum of maintenance (as per the decision of the Supreme Court in **Rajnesh vs Neha on 04.11.2020, in Criminal Appeal 730 of 2020 (2021SCC 324)**) to which the petitioner and her daughter may be entitled and the amount which the opposite party will be liable to pay.

Learned Magistrate will not be influenced by the order of this Court.

The Judgment in **Rajnesh vs Neha (Supra)** raises the issue of maintenance as a whole. All the relevant 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.”

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, which shall be considered by the learned Magistrate as per guidelines of the Supreme Court in Rajnesh vs Neha (supra).

There is another factor to be considered by the Learned Magistrate at the time of final disposal of the case as to whether the petitioner was driven out from her matrimonial home or had she deserted her husband without any just and sufficient reasons.

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 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. 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.”

Accordingly considering the Materials on record, the order of interim maintenance under revision dated 12.02.2019 passed by the Learned Judicial Magistrate, 2nd Court, Barrackpore, North 24 Parganas in M. - 479 of 2017 U/s. 125 of the Code of Criminal Procedure, 1973, is modified to the extent as directed.

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.

Accordingly, CRR 978 of 2019 is disposed of.

All connected Application stand disposed of.

Interim order if any stands vacated.

There will be no order as to costs.

A copy of this judgment be sent to the learned 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.)