

29.08.2023
sl No.32
Court No.3
sk

***Circuit Bench of Calcutta High Court
At Jalpaiguri***

CRR 28 of 2022

In the matter of : Beauty Banu

-Petitioner.

Mr. Debjit Kundu

...for the petitioner.

Mr. Aditi Shankar Chakraborty, Ld. APP.

Mr. Abhijit Sarkar

...for the State.

This is an application under Section 482 read with Section 401 of the Code of Criminal Procedure that impeaches the judgement and order dated 30th May, 2019 passed by the learned Additional Sessions Judge, 3rd Court, Cooch Behar, thereby dismissing the Criminal Appeal No. 3 of 2017.

Briefly stated Beauty Banu, the petitioner is a legally married wife, the opposite party no. 2, Nazrul Haque who filed an application seeking maintenance, depicting herself as a neglected wife of opposite party no. 2 and initially a sum of Rs. 7,000/- was awarded taking into consideration the salary of the opposite party no. 2 which was subsequently enhanced to Rs. 9,000/- per month.

The petitioner filed an application before the Judicial Magistrate under Section 12 of the Protection of Women from Domestic Violence Act, 2005 seeking enhancement of maintenance which was turned down by the learned Chief Judicial

Magistrate, Cooch Behar. The petitioner preferred an appeal challenging the said order of learned Chief Judicial Magistrate, Cooch Behar. Learned Additional Sessions Judge, 3rd Court, Cooch Behar refused to interfere with the order of learned Chief Judicial Magistrate taking into consideration the income of the husband as Rs. 28,796/- which was the gross salary of the husband in the month of July 2016. The appeal was disposed of on 30th May, 2019. Learned Appellate Court could not have decided the appeal relying upon the document indicating the income of the husband that he used to earn three years previous to the disposal of the appeal. It goes without saying the income of the opposite party/husband is within his special knowledge and Section 106 of the Evidence Act imposes onus upon him to prove his income. The judgment impugned therefore, cannot be sustained and should be set aside.

While going through the impugned judgment I find that the opposite party, Nazrul Haque is found to have married for the second time. He is a Government servant as submitted by Mr. Kundu, learned counsel for the petitioner and service rule does not allow polygamy unlike personal law. Therefore, whether that aspect should be considered or not is a point to ponder. This finding of learned Appellate Court should be revisited while deciding the appeal afresh.

The revisional application is thus disposed of.

The Criminal Appeal No. 3 of 2017 is sent back on remand for fresh adjudication.

Learned trial court shall decide the appeal taking into consideration the present income of the husband and if the husband fails to produce the document to show his income, the learned Appellate Court shall be at liberty to draw adverse inference and shall decide the quantum of maintenance based on the income as disclosed by the appellant.

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

(Siddhartha Roy Chowdhury,J)