IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 2344 of 2022

Swagato Biswas
Versus
The State of West Bengal & Ors.

For the Petitioner	:	Mr. Sujit Bhattacharya, Adv. Mr. Suman Chatterjee, Adv.
For the Opposite Party No. 2	:	Mr. Somnath Banerjee, Adv. Mr. Pronojit Roy, Adv.
Heard on	:	20.12.2023
Judgment on	:	17.01.2024

Ajay Kumar Gupta, J:

1. This revisional application has been filed by the petitioner/husband under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 challenging the correctness, legality and propriety of an order dated 9th June, 2020 passed by the learned Magistrate, 5th Court at Serampore in Misc. Case No. 1 of 2020 thereby the learned Magistrate rejected the petitioner's prayer for reducing the quantum of maintenance allowed earlier by the learned Magistrate in Misc. Case No. 3 of 2017, on the ground that the petitioner/husband's income has been reduced after his superannuation from service.

FACTUAL MATRIX:

2. The brief fact of the instant case is that earlier an application under Section 125 of the Cr.PC had been filed by opposite party no. 2/wife seeking for maintenance being Maintenance Case No. 198 of 2013. The Ld. Magistrate, after hearing the parties, passed an order of maintenance to the tune of Rs. 18,000/- per month against the petitioner but petitioner did not prefer any appeal or revision against the said order and accept the said order by paying the maintenance in time to his wife.

3. The opposite party no. 2/wife further filed an application for enhancement of the maintenance allowance under Section 127 of the Cr.PC being Misc. Case No. 3 of 2017. After hearing both the parties, the Ld. Magistrate enhanced the order of maintenance from Rs. 18,000/- to Rs. 23,000/- per month on 29.12.2017. Even then enhanced maintenance allowed by the Ld. Magistrate has been accepted by the petitioner and continued to pay the same in time. However, in the meantime, the petitioner superannuated from his service on and from 31.08.2019 and his salary reduced to a pension of Rs. 32,029/- after statutory deduction of income tax. Pension effected on and from 01.09.2019. Apart from that, it is the contention of the petitioner that the petitioner has no any other source of income. Accordingly, the petitioner has filed an application praying for reduction of maintenance allowance under change circumstances. The Ld. Magistrate has, however, delayed in disposal of the said Misc. Case. No. 1 of 2020 and for that reason, the petitioner had to file a revisional application for early disposal vide CRR No. 1734 of 2021 before the Hon'ble High Court. The said revisional application was disposed of by the Co-ordinate Bench on 10.09.2021 observing therein, inter alia, as follows:

> *"……… The reduction of the income of the petitioner due to his retirement is an important factor to be considered in fixing the quantum of maintenance.*
>
> *Thus, the application is disposed of with a direction upon the Learned Magistrate in the Court below to dispose of the said Misc. Case being No. 1 of 2020 within a period of six months from date………"*

4. Thereafter, matter was heard by the Learned 5th Judicial Magistrate, Serampore, Hooghly in presence of the parties and finally rejected the Misc. Case No. 1 of 2020 on 09.06.2022 without considering the petitioner's case and further ignored the pension amount, getting after superannuation and changed circumstances on account of superannuation and reduction of salary.

5. The Ld. Magistrate has accounted the retiral benefits while considering the income of the petitioner. Though the provision is very clear whenever any changed circumstances, the Court can consider prayer under Section 127 of the Cr.PC. It took a long time for disposal. In the meantime, the opposite party/wife filed so many Misc. Execution cases on different dates and time to time he is paying the arrear maintenance though maintenance amount ought to have reduced as per the present income of the petitioner. Hence the instant revisional application.

ARGUMENTS ON BEHAL OF THE PETITIONER/HUSBAND:

6. Learned advocate appearing on behalf of the petitioner submitted that it is a settled law that when the income is reduced on change circumstances, the amount of maintenance allowance also should be reduced according to the proportion of reduction of income. It is admitted fact that the petitioner is superannuated on and from

31st August, 2019 and he is getting pension after statutory deduction to the tune of Rs. 32,029/- per month. Ld. Magistrate has allowed the maintenance allowance to the tune of Rs. 23,000/- on and from 29.12.2017, when he was in service and his income was higher. Now, the petitioner's pension is Rs. 32,029/- per month. So, the maintenance allowance should have reduced by the Ld. Magistrate but Ld. Magistrate mechanically rejected the prayer of the petitioner. The Ld. Magistrate while considering the application filed under Section 127 of the Cr.PC not only the pension but also considered the interest accrued from the deposits of total amount of retiral benefits though the retiral benefits should not be calculated while granting maintenance as the retirement benefit are exempted from net salary. Interest accrued from savings of retirement benefits is also exempted from net income as per the Income Tax Rules.

7. It is further submitted that as per Section 10 (10) of the Income Tax Act, the retiral benefits are exempted from net salary, as such interest accrued from savings of retirement benefits is also exempted from net income since it categorised as other source of income. Accordingly, the amount of retirement benefits cannot be considered while assessing the actual maintenance allowance. As such, the impugned order is liable to be set aside and amount of maintenance should be reduced as per the present total income of the petitioner.

8. To bolster his contention, the learned advocate places reliance two judgments as follows:

i) T. Kausalya Vs. T. Narayana Reddy and Anr., 1997 (6) ALD 537, 1997 (2) ALD Cri 740, 1998 (1) ALT Cri 254, 1998 CriL 1795.

ii) Sh. Sudhir Diwan vs. Smt. Tripta Diwan and Anr., 147 (2008) DLT 756, I (2008) DMC 481.

ARGUMENTS ON BEHALF OF OPPOSITE PARTY/WIFE:

9. Per contra, learned advocate appearing on behalf of the opposite party no. 2 strenuously argued and submitted that it is admitted fact that the petitioner had superannuated from his service and his pension was Rs. 32,029/- at the time of retirement but now he is getting pension to the tune of Rs. 48,906/- not only that he is also getting interest of Rs. 16,500/- monthly income from investment, which was received at the time of retirement as retiral benefits to the tune of Rs. 16,13,898/- as Death-cum-Gratuity benefit, Rs. 9,76,400/- as leave salary, Rs. 63,205/- as G.I.S., Rs. 3,11,557/- as G.P.F., Rs. 16,44,045/- as Commutation of Pension. So, it is admitted fact that the petitioner received an aggregate sum of Rs.

46,09,105/-. Out of those amounts not a single rupee has been paid to opposite party/wife and he has invested entire amount to the bank. Both interest and pension amount should be calculated as total income. It would come to Rs. 65,406/- as his income per month. So, the learned Magistrate has rightly rejected the prayer for reduction of monthly allowance as such instant application is liable to be dismissed with costs.

DISCUSSION AND FINDINGS OF THIS COURT:

10. Having heard the submissions of both sides and on perusal of the application along with annexure thereto including the order passed by the Ld. Magistrate, this Court finds the learned counsel appearing on behalf of the petitioner tried to impress upon this Court that the Ld. Magistrate should not have considered the interest accrued from the investment of retirement benefits. The Ld. Magistrate should have considered only the actual pension as receiving by the petitioner. He also places reliance of Section 10 of the Income Tax Act to substantiate his contention that while computing the total income of the petitioner, retirement benefits and its interest should not be calculated with income of the petitioner.

11. It is further argued that the pension is a part of deferred salary which can only be considered as actual income for allowing maintenance. But this Court does not convince with the submission made on behalf of the petitioner. It appears from the impugned order, Ld. Magistrate while considering the income of the petitioner calculated pension plus interest received from the investment of retirement benefits. Income Tax Act is applicable only for assessing the income for the purpose of calculating income tax. It is true that the retiral benefits do not come or calculate for assessment of income tax because those amounts are not considered as the income of the individual, those benefits are accumulation of money during his entire service period as such those are exempted from tax subject to certain conditions but while considering the liability of the maintenance to the wife, the entire income of the petitioner should be assessed either income from the salary/pension or any property or other source of income. Interest from investment or bank deposits is other source of income is taxable. The Court should consider the actual present income of the husband. As such, the argument advanced by the learned advocate appearing on behalf of the petitioner is merit less and feeble.

12. This Court does not repose confidence on the argument made on behalf of the petitioner. In the said referred case, **T.**

Kausalya vs. T. Narayana Reddy and Anr.[1] the husband was receiving monthly pension of Rs. 3,000/- and considering his pension, the Ld. Judge reduced the maintenance amount from Rs. 500/- to Rs. 100/- per month and later the Hon'ble Andhra Pradesh High Court enhanced to Rs. 250/- per month instead of old rate of Rs. 500/- per month which was affected from 16.02.1996 that is date of order passed in MC No. 7 of 1996. There was no any reflection about other source of income of the husband i.e. interest from investment or bank deposits as such referred judgment is not applicable in the instant case as the facts and circumstances of this case is different.

13. So far as another judgment is concerned i.e. **Sh. Sudhir Diwan Vs. Smt. Tripta Diwan and Anr.**[2] In the said judgment also, no question arises regarding other source of income from investments or bank deposits. The Hon'ble Delhi High Court only considered that at least 1/3rd of the total income should be granted as maintenance amount. Out of Rs. 30,000/- monthly income Rs. 20,000/- would be led with the husband for his personal expenses.

14. In the present case, if this Court considers the total income of the petitioner, it comes to Rs. 65,406/- (Pension plus Interest) and

[1] 1997 (6) ALD 537, 1997 (2) ALD Cri 740, 1998 (1) ALT Cri 254, 1998 CriLJ 1795
[2] 147 (2008) DLT 756, I (2008) DMC 481

if it calculates 1/3rd amount of the total income of the petitioner then it would come to Rs. 21,802/- whereas the Ld. Magistrate has awarded a sum of Rs. 23,000/- which is slightly higher.

FINAL DECISION

15. In the light of the above observations, this Court is hereby reduced the maintenance amount to the tune of Rs. 21,800/= after making rounding it off instead of maintenance amount of Rs. 23,000/-.

16. Accordingly, **CRR 2344 of 2022** is allowed in part without order as to costs. Petitioner shall pay a sum of Rs. 21,800/= per month from the date of getting pension i.e. on and from 01.09.2019. Amount already paid more than the aforesaid awarded maintenance allowance would be adjusted by Rs. 1,200/- per month in every current month till final adjustment.

17. Impugned order dated 9th June, 2020 passed by the learned Magistrate, 5th Court at Serampore in Misc. Case No. 1 of 2020 is hereby modified to the aforesaid extent.

18. Let the copy of this judgment and order be sent to the learned Court below for information and taking necessary action.

19. Parties shall act on the server copies of this order uploaded on the website of this Court.

20. Urgent photostat certified copy of this judgment, if applied for, is to be given as expeditiously to the parties on compliance of all formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)