

IN THE HIGH COURT AT CALCUTTA
(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 3343 of 2019

Aliya Begum

Vs

The State of West Bengal & Anr.

For the Petitioner : Mr. Sandip Ghosh,
Mr. Partha Sarkar,
Ms. Mousumi Chatterjee.

For the State : None.

For the Opposite Party No. 2 : None.

Hearing concluded on : 04.03.2024

Judgment on : 08.04.2024

Shampa Dutt (Paul), J.:

1. The present revisional application is against an ex-parte order of maintenance in Misc Case No.141 of 2019 dated 17.10.2019 by the Learned 5th Judicial Magistrate, Burdwan Court.
2. Petitioner's case is that she was married to Harun Rasid Sk. on 5th of Jaistha 1416 B.S. as per Muslim Shariat. After one year of such marriage the O.P. as per instigation of his relatives demanded further cash of Rs. 3,00,000/- from the father of the petitioner for purchasing tractor. As the father of the petitioner expressed his inability so the O.P. and his family members started to inflict physical and mental torture upon the petitioner. O.P. used to assault the petitioner everyday because of instigation by his family members. In the mean time the petitioner gave birth to her minor daughter who is presently 5 years of age. After birth of the girl child, the torture upon the petitioner increased. Ultimately on 13.03.2019 at night the petitioner was severely tortured by O.P. and his relatives after snatching away all her Stridhan Properties, they strangled the petitioner and poured Kerosene oil upon the petitioner under impression that the petitioner has died. Hearing hue and cry, the father of the petitioner and other persons rushed to the place of occurrence and they rescued the petitioner and her minor daughter from there. The petitioner was taken to Hospital for medical treatment. From then the petitioner

along with her minor daughter are residing at her father's house. The petitioner has no source of income.

3. The petitioner/wife's case is that she now works as a maid servant and **has got an ex parte interim order** in Misc. Case No. 141 of 2019 by the order dated 17.10.2019 passed by the Learned Judicial Magistrate, Burdwan where upon the Learned Magistrate awarded maintenance of Rs. 3,000/-per month to the applicant/petitioner herein along with her minor daughter.
4. It is stated that the opposite party no. 2 is a Government Contractor and has a monthly income of Rs. 40,000/- per month and also has 20 bighas of agricultural land.
5. The petitioner is a thalasamia patient undergoing the treatment at Burdwan Medical College and Hospital, and being a maid servant earns only rupees 1000 per month. The petitioner is now separately living with her minor daughter in her father's house, having no source of income for her livelihood.
6. Being aggrieved by and dissatisfied with the order passed in Misc. Case No. 141 of 2019 by the Learned Judicial Magistrate, Burdwan, the revision has been preferred praying for enhancement of the amount of maintenance.
7. **In spite of due service, there is no representation on behalf of the opposite party/husband.**

8. The petitioner has relied upon the judgment in **Dr. Arvind Kishore vs Neha Mathur, on 22.09.2022**, the Rajasthan High Court at Jodhpur,

held:-

“24. This Court further observes, that the judgment impugned was passed, while keeping into consideration the judgment rendered by the Hon'ble Apex Court in the case of Rajnesh v. Neha & Anr. (supra). The judgment relied upon by on behalf of the applicant-husband in K.N. v. R.G (supra) do not render any assistance to his case.

For the sake of brevity, the relevant portion of Rajnesh v. Neha & Anr. (supra) is reproduced as hereunder:-

"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.

(15 of 16) [CRLMA-243/2022] In Shailja and Anr. v. Khobbanna, 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 and 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 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."

- 9. The order under revision is an ex-parte interim order of maintenance. The matter has to be heard finally by the learned Magistrate.**
- 10.** While disposing of an 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 & Anr., ((2021) 2 SCC 324)***.
- 11.** 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.”

12. The criteria determining quantum of maintenance as in *Rajnesh*

Vs Neha & Anr. (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 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 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.”

- 13. Accordingly considering the materials on record,** the order of ex-parte interim maintenance under revision dated 17.10.2019 passed by the Learned 5th Judicial Magistrate, Burdwan Court in Misc. Case No. 141 of 2019 does not require any interference at this stage.
- 14. 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 on hearing both sides, in case the opposite party herein, appears during the final hearing of the case.**
- 15. CRR 3343 of 2019 is thus dismissed.**
- 16.** All connected applications, if any, stand disposed of.
- 17.** Interim order, if any, stands vacated.
- 18.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 19.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)