

GAHC010029282023



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : CRP(IO)/51/2023

GHANA SHYAM DAS
S/O LATE ABANI DAS, R/O CHANDARIA, GOALPARA TOWN, WARD NO. 9,
P.S. AND DIST-GOALPARA, ASSAM

VERSUS

MULE BALA DAS
D/O KUNJA MOHAN DAS, VILL AND P.O.-PORAGAON, P.S. AND DIST-
BONGAIGAON, ASSAM, PIN-783380

Advocate for the Petitioner : MR. A M KHAN

Advocate for the Respondent : MRS. M BARMAN

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 22.01.2024

Heard Mr. A.M. Khan, the learned counsel for the petitioner and also heard Dr. GJ Sharma, learned counsel for the respondent.

- 2) By filing this application under Article 227 of the Constitution of India, the petitioner, who is the estranged husband of the respondent, has assailed the legality of the order dated 25.02.2022, passed by the learned Addl.

District Judge, Goalpara in Misc. (J) Case No. 05/2021. The said order was passed in connection with an application filed by the respondent- wife under section 24 of the Hindu Marriage Act, 1955, seeking *pendente lite* maintenance and expenses of proceeding.

3) The case of the respondent in the said case was to the effect that they were living in official quarter allotted to the petitioner. The respondent claimed that on certain specific grounds, which are not narrated herein, along with their minor son, she was compelled to leave the company of the petitioner on 13.05.2015 and that she along with their minor son, who was born on 11.01.2011, are now residing at her parental home.

4) The respondent had instituted a maintenance proceeding against the petitioner under Section 125 Cr.P.C., which was numbered as Misc. Case No. 45/2015, was tried by the learned Court of Chief Judicial Magistrate, Bongaigaon. On conclusion of trial, by order dated 23.12.2016, the said learned Court had directed the petitioner to pay a sum of Rs.4,000/- per month to the respondent and a sum of Rs.3,500/- per month to their son as maintenance. The said order was unsuccessfully challenged by the petitioner before the learned Sessions Judge, Bongaigaon as well as before this Court.

5) It was alleged by the respondent that the petitioner had not been paying the maintenance as directed. It was further projected that she had admitted their son in a private school and thus, she was compelled to live a hand to mouth existence.

6) It appears from the impugned order dated 25.02.2022, passed by the learned Addl. District Judge, Goalpara in Misc. (J) Case No. 5/2021 that the petitioner had defaulted in paying regular maintenance as directed by the learned Chief Judicial Magistrate, Bongaigaon in Misc. Case No. 45/2015. It also

appears from the reply to a pin-pointed query of the Court as to whether the petitioner had submitted an affidavit regarding disclosure of assets and liabilities in the proceeding of Misc. (J) Case No. 5/2021, the learned counsel for the petitioner had submitted that the same was not done. Thus, the learned Addl. District Judge, Goalpara appears to have correctly recorded in the impugned said order that the petitioner had not participated in the said proceeding.

7) Thus, by taking note of the fact that (i) the petitioner was an employee of Railways; (ii) that he had not yet cleared arrear maintenance of Rs.1,13,000/- (Rupees One lakh thirteen thousand only); and (iii) that the respondent had no source of income, the learned Addl. District Judge, Goalpara by the impugned order dated 25.02.2022, passed in Misc. (J) Case No. 5/2021, directed the petitioner to pay a sum of Rs.15,000/- (Rupees Fifteen thousand only) to the respondent per month, which was in addition to the maintenance already ordered by the learned Chief Judicial Magistrate, Bongaigaon in Misc. Case No. 45/2015.

8) The learned counsel for the petitioner had submitted that the gross salary of the petitioner was Rs.54,888/- per month, and a sum of Rs.16,500/- was being deducted from his salary under various heads and that by virtue of orders passed by the learned Chief Judicial Magistrate, Bongaigaon and Court of learned Addl. District Judge, Goalpara, a further sum of Rs.25,000/- was kept attached. Thus, after adjustment of all deductions, as per the pay-slip for the month of November, 2022, a net-pay of Rs.13,388/- had been released to the petitioner. It was submitted that such take home salary was insufficient for the petitioner to manage his living and to take care of his aged mother, who was alone in his permanent residence at Goalpara Town.

9) It was submitted by the learned counsel for the petitioner that the

respondent had left the companionship of the petitioner and moreover, she was earning a handsome income in a private institution and as such she was not entitled to any maintenance from the petitioner.

10) It was submitted that the learned Addl. District Judge, Goalpara had not given any opportunity to the petitioner to contest the proceeding of Misc. (J) Case No. 5/2021 and that copy of the said application was also not served on him, but it has been recorded in the impugned order that the petitioner had not participated in the proceeding.

11) It was further submitted that the petitioner had suffered two Court orders for maintenance, Rs.7,500/- per month by the learned Chief Judicial Magistrate, Bongaigaon and Rs.15,000/- by the learned Addl. District Judge, Goalpara and therefore, he was ordered to pay a total maintenance of Rs.22,500/- per month. It was submitted that the gross salary of the petitioner for the month of November, 2022 was Rs.54,888/-, and after usual deductions of Rs.16,500/-, his net salary would have been Rs.35,888/-. However, on attachment of a sum of Rs.25,000/-, his net salary for the month of November 2022 was Rs.13,388/-. Moreover, it was submitted that the learned Addl. District Judge, Goalpara did not take into consideration the maintenance awarded by the learned Chief Judicial Magistrate, Bongaigaon.

12) Per contra, the learned counsel for the respondent has submitted that the learned Addl. District Judge, Goalpara took note of the maintenance awarded by the learned Chief Judicial Magistrate, Bongaigaon in the impugned order. Therefore, it is not a fact that the maintenance awarded under section 125 Cr.P.C. was not considered in the impugned order.

13) It was submitted that the petitioner did not comply with the directions contained in the case of *Rajnesh v. Neha & Anr., (2021) 2 SCC 324,*

where the Supreme Court of India had laid down the law that it was mandatory for the parties to file their respective affidavit regarding disclosure of assets and liabilities. It was also submitted that in the said case, it has been held by the Supreme Court of India that the power of the Courts to grant maintenance under the provisions of section 125 Cr.P.C. as well as section 24 of the Hindu Marriage Act, 1955 can both stand together and such remedy has also been held to be a measure of social justice to prevent wives from falling into destitute and vagrancy.

14) Moreover, it was submitted that the petitioner has not displayed his bona fide intention before the Court as he is a persistent defaulter in paying monthly maintenance and therefore, it has been submitted that the petitioner is not entitled to any relief.

15) Considered the submissions and also perused the applications and documents annexed hereto. The petitioner has not annexed copy of relevant order-sheet of the proceedings of T.S. (Divorce) Case No. 37/2019 as well as Misc. (J) Case No. 5/2021, which has been filed in the said divorce proceeding. Thus, the petitioner has not been able to show that he was not served with a copy of the said Misc. (J) Case No. 5/2021 arising out of T.S. (Divorce) Case No. 37/2019.

16) Therefore, the Court has no material to disbelieve the correctness of the impugned order dated 25.02.2022 to the effect that the petitioner had not contested the proceeding and did not file any affidavit of disclosure of assets and liabilities. Moreover, from the certified photocopy of the petition no. 333/21, which was registered as Misc. (J) Case No. 5/2021 arising out of T.S.(D) No. 37/2019, it is noted that there is a signed acknowledgement by someone regarding receipt of a copy of the said petition with illegible signature with date

of 19.04.2021. The learned counsel for the petitioner is unable to inform the Court as to who had received a copy of the said Misc.(J) Case No. 5/2021.

17) Be that as it may, it would be relevant to mention herein that in the case of *Sanjay Kumar Sinha v. Asha Kumari & Anr.*, (2018) 5 SCC 333: (2018) 0 Supreme(SC) 310, the Supreme Court of India had held to the effect that the orders passed by the Court under section 24 of the Hindu Marriage Act, 1955 would supersede the order of maintenance passed under section 125 Cr.P.C. The relevant finding as reported in (2018) 0 Supreme(SC) 310 is extracted below:-

6. *The respondent (wife) filed an application under Section 24 of the Act in the aforesaid Divorce petition and claimed from the appellant (husband) pendente lite monthly maintenance for herself and her daughter. The appellant contested it.*

7. *By order dated 15.07.2016, the Family Judge awarded Rs.8000/-per month to the wife and Rs.4000/-per month to her minor daughter towards the maintenance and Rs.2500/-per month towards the litigation expenses.*

8. *It may be mentioned here that the respondent (wife) had also filed one application under Section 125 of the Criminal Procedure Code, 1973 (hereinafter referred to as "Cr.P.C") seeking maintenance before the Principal Judge, Family Court, Samastipur. By order dated 03.01.2011, the Family Judge allowed the application and awarded Rs.4000/-per month to the wife (petitioner therein) and Rs.2000/-per month to the daughter towards the maintenance and Rs.5000/-towards the litigation expenses.*

9. *The appellant (husband) felt aggrieved by the order dated 15.07.2016 by the Family Judge and filed civil miscellaneous application in the High Court at Patna. By impugned order, the Single Judge upheld the order dated 15.07.2016 of the Family Judge, Begusarai and dismissed the application filed by the appellant herein, which has given rise to filing of the present appeal by way of special leave before this Court by the husband.*

* * *

11. *Having heard learned counsel for the parties and on perusal of the record of the case, we are inclined to dispose of the appeal finally as under:*

* * *

13. *Second, consequent upon passing of the maintenance order dated 15.07.2016 under Section 24 of the Act by the Family Court, the order passed by the Family Court, Samastipur under Section 125 of Cr.P.C. stands superseded and now no longer holds the field. Indeed, this fact was conceded by the learned counsel appearing for the respondent (wife).*

18) Thus, it is seen from the said case of *Sanjay Kumar Sinha (supra)* that maintenance granted earlier under section 125 Cr.P.C. will stand superseded by later award of maintenance under section 24 of the Hindu Marriage Act, 1955. This aspect of the matter appears to have escaped the notice of the learned Trial Court.

19) Therefore, in light of the discussions above and in view of the decision of the Supreme Court of India in the case of *Sanjay Kumar Sinha (supra)*, the Court is of the considered opinion that the impugned order dated 25.02.2022, passed by the learned Addl. District Judge, Goalpara in Misc. (J) Case No. 05/2021 suffers from jurisdictional error in so far as relates to non-consideration of superseding of maintenance awarded in the proceeding under section 125 Cr.P.C. Accordingly, the said impugned order is hereby set aside and quashed.

20) However, as an interim measure, and till further order is passed by the learned Trial Court, in order to save the respondent from penury and destitution and to enable her to provide quality life to the minor child of the parties, the Court is inclined to direct that the petitioner shall continue to be liable to pay *ad-interim* maintenance of Rs.15,000/- (Rupees Fifteen thousand only) per month from the month of February, 2022, being the month when the impugned order dated 25.02.2022 was passed in Misc. (J) Case No. 5/2021 till the month end of February, 2024. It is clarified that any award of maintenance that would be passed by the learned Trial Court shall prevail over this *ad interim* direction.

21) The proceedings of petition no. 333/21, registered as Misc. (J) Case No. 05/2021 is restored back to the file of the learned Addl. District Judge, Goalpara in Misc. (J) Case No. 05/2021, who would hear the matter afresh in

accordance with law, and while deciding the matter, the learned Trial Court shall also take into consideration one aspect of the maintenance granted under section 125 Cr.P.C., which is the award of maintenance of the minor son of the parties.

22) On a perusal of the scanned copy of the case record of T.S.(D) No. 37/2019 and Misc.(J) Case No. 5/2021, the Court could not find any order-sheet by which copy of Misc.(J) Case No. 5/2021 was ordered to be served on the petitioner and opportunity was granted to the petitioner to file an objection and/or to respond to it. Therefore, it would be open to the petitioner to raise a plea that he had not been served with a copy of the said misc. case and it is provided that if such a plea is raised, the learned Trial Court shall examine the records and consider the said plea in accordance with law.

23) It is needless to mention that the proceedings of Misc. (J) Case No. 05/2021 shall be adjudicated without being influenced by any observation contained in this order.

JUDGE

Comparing Assistant