

ORDER-SHEET FOR MAGISTRATES' RECORDS

DISTRICT MURSHIDABAD

IN THE COURT OF THE JUDICIAL MAGISTRATE OF LALBAGH

Maintenance Case No. 959 of 2022 [Ex Parte]

Josnara Bibi Versus Sarikul Sk. @ Islam

Serial No. of order.	Date.	Order with signature of the Magistrate.	Office notes as to action taken on order (if any) and date.
	02.07.24	The case record is taken up for the purpose of passing of Order. The date is fixed up for the purpose of passing of Final Order of this case record on Ex Parte. She has been examined on Ex Parte dated 04th of May of 2023 and she has accordingly been discharged. The evidence for the petitioner stood closed right on the last occasion itself. The affidavit of asset and liability remains filed and tagged within the case record. The non-appearance of the opposite party has bolstered the case record to be taken up for the purpose afore-stated. The petitioner has filed this application for the grant of maintenance for herself. It is stated by the petitioner that she is the legally married wife of the Opposite Party and that her marriage with the Opposite Party has been solemnized in terms of the Personal Law and observance of rituals and rites in this behalf. Post solemnization of the marriage, she was brought to her matrimonial house by her husband and here, she was cordially treated by the husband and the in laws alike for some time. Post marital affairs between the opposite party and the petitioner has not been well so much and she has been constantly pressurized from the end of the opposite party for bringing further cash inflow. It is submitted before the Court to the effect that the opposite party has been in the habit of seeking dowry from the petitioner and over the issue of harassment and torture for her inability to meet up with the said demand. The petitioner was not able to manage the said demand and she was ousted from off the matrimonial house by the opposite party. It is alleged by the petitioner that the financial ability of the opposite party is really sound with a monthly income to the extent of Rs. 50,000 - every month working as a Labour Contractor. It transpires from the Order sheet itself that after a proper service of the Notice upon the Opposite party would be noted by the Court in this behalf, that the case record would be decided to be heard on Ex Parte. Till to this date, the Opposite Party of this case record has not even appeared in respect of the impending claim floated on behalf of the petitioner in this behalf.	Copy received by the Ld. Counsel for the Petitioner

Accordingly, the evidence has been recorded by the Court on Ex Parte and the case record has reached this stage for disposal in absence of the Opposite Party as such.

The controvert of the petitioner is based on few premises being:

- The harassment and rendering of torture at the hands of the opposite party for and in connection with demand for dowry;
- The petitioner being driven out of the matrimonial house by the opposite party for her inability as referred to in first point.

The evidence of the petitioner is unchallenged. That is the sole consideration for acting upon the claim of the petitioner to the effect that she is the wife of the opposite party; that also is the sole consideration for acting upon the premise that she has been harassed and persecuted for and in connection with demand for dowry. Similarly, the facts and controvert placed in her Misc Petition is acted upon to the extent to which it is found believable only on the paramount consideration that the statement of the petitioner is made before the Court of Law and on Oath and not challenged in this behalf. The conduct on the part of the opposite party is also liable to be taken note of since the chance to contest the claim of the petitioner was never closed for the opposite party, save it is not for the Court to drag the matter in anticipation that perhaps one day, the opposite party shall turn up with his written objection. The totality of the scenario is liable to be considered as well.

It can be appreciated that there is not a single document filed from the end of the petitioner in respect of the controverts that have been raised from her end, save a stance taken by the Counsel to the effect that the petitioner being a lady is not able to come up with documents to prove her statements and that stance on the part of the petitioner is not at all acceptable. Law is equal for every person regardless their gender, even if it be so that a provision of a legislation be beneficial, sans the rules of evidence as enunciated in the Evidence Act cannot be given a total go by citing the gender of a litigant. Hence, this inability is apparent since the very inception of the case record and even while the application seeking interim relief was disposed of, the points for consideration have remained the same with no further documentation adduced from the end of the petitioner of this case towards the end of this litigation. There is no document filed from the end of the petitioner where from this Court would be able to appreciate the fact that the said opposite party is a Labour Contractor by his profession or that he earns Rs. 50,000/- every month as such. This much of income on the part of the Opposite party and the plethora of landed properties as claimed by her is liable to be specifically established and it is no defence to assert that the fact of the petitioner being a lady, she is rendered incapacitated from collecting the relevant documents. The petitioner has not stated in her examination in chief as to any methods adopted by her to acquire the concerned documents for processing her claim. Law cannot help those who sleeps over the procedure and does not make a reasonable effort to establish one's case. It ought to be appreciated that it is not the weakness of the defence that gives teeth to the contention of the claimant, but her pleading and her

own effort to establish the contention that ought to be treated as the yardstick for processing her statement and claim which to the opinion of this Court, she has drastically failed in the first place and she cannot take the refusal of the opposite party to accept the notice as a mark of acceptance of every statement that she has made unless and until she specifically establishes her controvert by herself.

It is noted that save and except for what is stated in the body of the original Misc Petition which the Court took note of at the time of disposing of the application interim relief, nothing prima facie accountable for the accuracy of the factual matrix therein stated has been brought to the attention of the Court. The same points for consideration as disposed of based on the facts before the Court remain the same even at the stage of the appreciation of the facts as enunciated in the Misc Petition. There is apparently no proof that the petitioner has filed for the proper appreciation of the facts that she has contended. Suffice it to be held here that there is literally no difference between what was the scenario at the stage when the Court had to dispose of the application seeking interim relief and the stage when the Court is called to appreciate the evidence. The materials based on which the evidence shall be appreciated by the Court are missing. What is stated in the Misc Petition is nothing but facts narrated on pen and paper without any corresponding proof. Hence, there is practically no difference between the factual scenario as the Court had while it disposed of the matter pertaining to the grant of interim relief and what it is to appreciate at this stage. It is nothing but a demand from the Opposite party for factual allegation which the petitioner has only narrated, sans proof and that is a glaring concern for the Court to ponder upon. It is the only the absence of the Opposite party and the plea of the Counsel for the petitioner that the absence shall be read as acceptance of the controvert of the petitioner cannot be honoured from any corner of fact. It is the exclusive liability of the petitioner to stand on her own and weakness of the Opposite Party is of no advantage to her. This is one aspect which the petitioner has to appreciate at all cost. She cannot expect that merely because the Opposite party has absented himself from the course of the legal proceeding, he has accepted every single controvert, it would be a wrong interpretation of fact.

The petitioner has since filed her affidavit of assets and liabilities. What is expected of the parties is to adduce cogent and viable documents in support of the materials since stated in the relevant column(s) of the said affidavits. The purport and aim of the said affidavit is to assist the Court to arrive at a conclusion as to the sources of income, the existence of landed properties by either of the sides, the monthly expenditures and spending for and on behalf of the dependents in this behalf and against the statement in this regard, the same has to be supported with cogent and viable documents so that the same may be substantiated. However, it is sadly seen from the case record that the affidavits filed by the respective parties have been laxly filled up and in most of the cases completely without any supporting documents. The submission on the part of the Counsels for the parties to the effect that it was impossible for the parties to come up with relevant documents to substantiate the

claim since laid down in the body of the affidavits was totally against the spirit of the decision of the Supreme Court. Such affidavits do not serve their intended purposes, but to increase vexation further. Their aim is to assist the Court to determine the quantum of maintenance and not to further cause vexation. It is witnessed in the said affidavits that petitioner has reflected the same information as laid down in her Misc. Petition, minus the relevant documents to substantiate her claim. It is the Law that whosoever desires the Court to believe in the existence of a fact and to pass an order based on the said factual aspect as averred, it is the liability of that party to prove the factual existence of the same. Petitioner in having averred to the extent of her husband earning a specific amount of money coupled with a specific source of income, it is her bounden task to establish the same and that liability extends to the prima facie establishment as well. it was wrong to hold that the petitioner would aver anything and everything and the opposite party was burdened to prove the same. Law does not operate in that direction and that Section 106 of The Evidence Act, 1872 cannot and ought not to be interpreted like that. Special knowledge of a party does not burden him to establish a fact that has been averred by his adversary. It is not the liability of the opposite party to prove the claim of the petitioner, inasmuch as it is his sole liability to prove his on income as he claims in this behalf. The petitioner has not filed any document to substantiate the claim of existence of landed properties nor of the profession of the opposite party either. That apart, mere existence of properties does not give a preemptive right to state that income is being generated therefrom. It is only in the case where amount as rent or premium is generated that ownership or possession of properties may be cited as a source of income and otherwise, the mere existence of such properties does not serve any purpose. That apart, it is the opinion of the Court that such existence of properties has to be specifically established by the claimant in this behalf which the petitioner has miserably failed to do so and her statement in this regard in the affidavit does not inspire a bit of confidence of the Court. The question now arises is whether petitioner has justified ground to reside separately and claim separate maintenance. It is in this respect that the Court opines that the absence of the opposite party has forced the Court to otherwise leave this issue to be determined as "Not proved". In absence of the evidence in this behalf, it may not be conclusively held that the petitioner has been justified to stay separately away from the opposite party nor does it allow room in favour of the Court to otherwise infer in favour of the opposite party. Perhaps the presence of the opposite party would have better assisted the Court to ascertain the issue. Nevertheless, the Court in light of this scenario is construed to hold that the said issue has to be left as not determined and the Court has to proceed based on the principal which governs the provision of Ss. 125 of the Cr.P.C. as such. In this context, the Court must point out that provision under section 125 Cr.P.C. is incorporated to prevent vagrancy and destitution. The evidence of the petitioner otherwise signifies that she is otherwise unable to sustain herself and that her husband has been reluctant to

provide for her. There is no controvert to counter the proposition of the petitioner in this behalf.

Petitioner has not been able to prove the income of her husband. The petitioner has failed to prove the existence of landed properties and of the business as stated in the Misc Petition R/w the affidavit as filed in this behalf. It is true that the petitioner has filed an affidavit of asset and liability in support of her contention. It is the duty of the petitioner to establish conclusively that the income of the opposite party is Rs. 50,000/- every month and this fact is something that the petitioner has to prove alone and the opposite party may not be expected to prove his income as such claimed from the end of the petitioner and to lay a submission to that extent is also a wrong approach that is expected from the Court to allow. The petitioner has filed no proof of prima facie income as contemplated by her in the affidavit of asset and liability and that being the scenario, the Court is of the considered opinion that the question of extent of income of the opposite party remains "not proved". The Court has to decide the extent of the maintenance purely based on a guesswork.

The Opposite party has not in the end contested this case per se. There is no evidence to dispute the controvert of the petitioner and perhaps that os the only positive side to the case of the petitioner since otherwise, she too has literally failed to establish major points in her favour after all. There is no ounce of evidence from the end of the opposite party to establish the fact that the case otherwise is bad in terms of the provision of Section 125(4) of the Cr.P.C. If there be any negating circumstance, the opposite party has to be prove the same. To that effect, there is hardly any doubt in the mind of the Court that there is enough of void which the opposite party could not fill up. That apart, the opposite party has not been able to prove that the petitioner is otherwise capable of maintaining herself and that she has been maintaining herself accordingly and that she is equally financially well off and that she does not require any financial assistance from the end of the opposite party of this case record.

In the alternative, the opposite party has not established any incapacity inflicting him that renders him unable to look after himself sans his ability to separately look after his wife and minor son so as to speak of. These are the lacuna that the opposite party has not been able to fill up with. His absence from off the case record is disastrous as far as determination of the fate of the case record is concerned. Cumulative scenario does not allow the Court to otherwise infer against the controvert of the claim of the petitioner.

There is nothing on the record otherwise to disprove the contention of the petitioner that she is otherwise unable to maintain herself. That is a factor that has to be reckoned as well.

The Court does take note of the facts as averred and claimed from the end of the petitioner, save the same shall definitely be established at the time of trial through evidence and that opinion of the Court is for the time being held up for subsequent consideration.

The opposite party apparently is an able-bodied man and that as such, it is his bounden duty to maintain his wife. Not having rendered the same since not established by him, this Court is of the opinion that he has led her/*them* to a state of penury and drudgery

and that exactly something which it was the aim and purport of Section 125 of the Code of Criminal Procedure to avoid in the first place and that as such, the application is allowed save the extent of the amount since claimed by the petitioner.

The purpose of the provision is benevolent. The negating factors as envisaged U/s 125(4) of the Cr.P.C. has not been established from the end of the opposite party and that fact is also noted. The reasons for which the maintenance in favour of the petitioner shall be denied have not been effectively established. The financial ability of the petitioner is also not known to this Court. The totality of the scenario calls for the intervention to the extent that the petitioner may lead a decent life. With that much observation, the claim of the petitioner is allowed and she is prima facie found entitled to Rs. 1,000/- each as her maintenance as well as for the maintenance of her children named **Sarjina Khatun, Beauty Khatun & Rtiyaj Sk.** Respectively every month. Like already observed by this Court, there is no development in the manner in which the petitioner has sought for establishing her controvert in the very first place. Apart from what she has orally narrated before the Court, she has literally failed to prove a single of her controverts. As such, the Opposite Party is directed to pay Rs. 4,000/- in cumulative in favour of the petitioner with the break up as referred to above from the date of the filing of this case record being 08.09.2022. Taking note of this eventuality, the arrears accrued in favour of the petitioner is Rs. 88,000/-. Hence, the accumulated amount in favour of the petitioner being Rs. 88,000/- shall be paid off in her favour by an equitable installment of Twenty Two (22) and thereafter to continue to make payment at the usual rate since referred to above by the 20th of every succeeding month.

The liability to maintain the minor children named in the evidence shall extend to the time that they each attain their respective age of majority that is the age of eighteen years and the cessation shall be automatic and without any hindrance or fetter in this behalf and the certificate of birth if filed in this behalf by either of the sides shall be read in evidence as it is without any fetter in this behalf.

The liability to maintain shall cease in case of the minor daughter forthwith on her attaining the age of eighteen years of age as well keeping in view the direction in this behalf of the decision of the Supreme Court as rendered in Abhilasha V/s Prakash.

That any Case seeking execution U/s 125(3) of the Cr.P.C. shall only be filed if at all the concerned payment in favour of the petitioner be not paid off within the time as stipulated above for the first time that is by 20.07.2024.

Copy of this Order be forthwith provided for information of the Petitioner free of cost.

The case record is disposed of on Ex Parte accordingly.

Sd/- Judicial Magistrate
Lalbagh, Murshidabad