

**IN THE COURT OF THE ADDL SESSIONS JUDGE (FTC) BONGAIGAON:::::**  
**BONGAIGAON**

**CRIMINAL Revision NO-6(1)/2013.**

Sri Sajeeb Biswas  
S/O Late Adhir Ch. Biswas  
Resident of vill. Nilibari  
P.O. Simlaguri,  
P.S Dhaligaon, Dis. Chirang(BTAD), Assam.  
..... Petitioner.

-----VS-----

1. State of Assam  
Represented by its;  
Public Prosecutor.
2. Smt. Sujaya Biswas  
W/O Sri Sajeeb Biswas  
D/O Late Suranjan Purakayastha  
Resident of Rly.qtr.No.N/551/c  
North West Colony, P.O. New Bongaigaon,  
P.S. Bongaigaon, Dist. Bongaigaon, Assam.  
.....Respondents.

**PRESENT :-** Smt. R. Kar.  
Addl Sessions Judge (FTC).  
Bongaigaon.

**APPEARANCE :-** Sri. Kunal Sarkar.  
.....Ld. Counsel for the Petitioner.

Sri. S.N. Brohmo Chaudhury.  
.....Ld. Counsel for the Respondent No.2.

**Date of Hearing :- 25-11-14.**

**Date of Judgment :-23 -12-14.**

## **J U D G M E N T**

This revision under section 397/399 Cr. P.C. has been directed against the judgment and order dated 7/12/12 passed by the learned Chief Judicial Magistrate, Bongaigaon in Misc. Case No.11/2012 allowing the petition U/S 125 Cr. P.C.

1. Brief fact of the case leading to this revision is that Respondent No.2 as petitioner filed a petition U/S 125 Cr. P.C. in the court of learned Chief Judicial Magistrate, Bongaigaon, claiming monthly maintenance of Rs. 9,000/- for herself and her two minor children against petitioner/opposite party. The petitioner /2<sup>nd</sup> party after receiving the notice appear and contested the case by filing his written statement. The respondent No.2/petitioner adduced evidence and examined two witnesses including herself and the petitioner/opposite party also examined two witnesses including himself. Learned trial court after recording the evidence and hearing argument of both sides allowed the petition vide judgment and order dated 7-12-12.

2. Being highly aggrieved and dis-satisfied with the said judgment and order the petitioner has preferred this revision on various ground for setting aside the impugned judgment and order. Gist of some of the grounds in the petition are as follows:-

a) It is contended that learned court below has erred in law as well as in facts while passing the impugned judgment and order.

b) It is also contended that the respondent No.2/petitioner earlier filed another petition U/S 125 Cr. P.C. being Misc. Case No.07/2009 and the said case was dismissed vide order dated 6/8/09 and there after the petitioner has filed the instant Misc. Case No.11/2012 which is barred by the principle of “Res Judicata”.

c) It is also contended that learned court below has failed to appreciated the entire evidence on record in respect of the allegation of cruelty against the petitioner by producing independent witnesses.

d) It is also contended that respondent No.2/ petitioner filed a divorce case vide T.S(D) case No. 18/2012 U/S 13(1)(ia)(ib) of the Hindu Marriage Act, 1955 on the same day on which application U/S 125 Cr. P.C. was filed and in the said divorce case the respondent No. 2 alleged some different grounds as well as different cause of action for granting the decree of divorce, which are missing in the application U/S 125 Cr. P.C. and the learned trial court has failed to appreciate the said aspect in the impugned judgment.

e) It is also contended that learned court below has failed to appreciate the evidence of D.W-2.

3. On other ground also it is prayed to set aside the judgment and order.

4. I have heard submission of both sides . I have gone through the evidence and materials on record as well as impugned judgment and order.

5. *Learned court below has taken up following points for determination:-*

a) Is the case not tenable ?

b) Is the 1<sup>st</sup> party/ petitioner legally married wife of the 2<sup>nd</sup> party ?

c) Are the minor children of the 1<sup>st</sup> party/petitioner the legitimate/illegitimate children of the 2<sup>nd</sup> party/opp.party ?

d) Is the 1<sup>st</sup> party unable to maintain herself and her minor children ?

e) Is the 2<sup>nd</sup> party having sufficient means refusing or neglecting to provide maintenance to the 1<sup>st</sup> party for herself and her minor children ?

f) Is the 1<sup>st</sup> party entitled to getting monthly separate maintenance from the 2<sup>nd</sup> party for herself as prayed for ?

6. Learned counsel for the respondent No.2 has submitted that the learned court below has appreciated the evidence of both the parties and also taken into consideration all aspects while passing the judgment and order and as such the same does not require any interference.

Learned counsel for the respondent No.2, while countering the argument of the petitioner side on the point of “Res Judicata” has submitted that it is settled position of law that the principle of “Res Judicata” is not applicable to the criminal proceeding including the proceeding U/S 125 Cr. P.C. In support of this contention learned counsel has placed reliance on the decision of Madhay Pradesh High court in M.Cr.C No.2439 of2011( Kamlesh Kumar Patel VS Smti. Madhu Lata). Learned counsel for the respondent No.2 has submitted that the respondent No.2/petitioner has not voluntarily left the house of the petitioner/opposite party rather she was compelled to leave the house of her husband due to his cruel behavior which is evident from the evidence on record and learned court below has appreciated the matter properly.

7. Learned counsel for the revision petitioner has placed reliance on the decision of Hon'ble Gauhati High Court in Cri.Rev.pet.No.36/2010(Md. Rahamat Ali VS Mst. Jainunnessa). It appears from the impugned judgment that plea of “Res Judicata” was also taken before the trial court and learned court below while deciding the point (a) has decided the matter by holding that in the earlier case no relevant issue for awarding separate maintenance to the first party/ petitioner for herself and her minor children was decided. Learned court below keeping in view the observation and discussion made by Hon'ble High court in para-23 of the said judgment did not found force in the submission of learned counsel for the opposite party.

8. I have also gone through the decision of Hon'ble High Court so referred by the learned counsel for the petitioner/opposite party. It appears that the earlier case filed by the respondent No.2/petitioner was withdrawn as such it cannot be said that earlier case filed by the respondent No.2/petitioner U/S 125 Cr. P.C. was decided on merit in respect of any of the issue involved in this case and thus the earlier case being Misc. No. 7/2009 did not attain its finality in respect of any right or remedy of the respondent No.2/petitioner.

I am of the opinion that learned court below has arrived at just finding keeping in view the observation of Hon'ble High Court as made in para-23 of the judgment. Citation referred by learned counsel for the petitioner/opposite party is not applicable in that instant case.

9. Learned court below while deciding point No.(e)&(f) has discussed the evidence and arrived at the finding that the opposite party having sufficient means refused or neglected to provide maintenance to the petitioner for her and her minor children.

10. Now so far as the question of proving the allegation of cruelty is concerned, section 125 Cr. P.C. provide for proof of neglect or refusal to maintain one. It is not necessary that the allegation of cruelty must be proved by producing independent witness. Learned court below on the basis of evidence of PW-1, the petitioner and PW-2 the mother of the petitioner and also considering other aspects arrived at the finding that although there is no evidence of record showing serious physical torture on the petitioner but the court found that the second party raising allegation of bad character in para-14 of his W/S and by giving suggestion in this regard in course of cross-examination of PW-1 has not given due respect and dignity to the petitioner as a wife. Learned court also held that the petitioner is not in a position to stay with the second party and as such she is entitled to get separate maintenance.

11. I have gone through the evidence adduced by both the parties. From the cross-examination PW-1, the petitioner and cross-examination of DW-1, the second party it appears that apart from the paying the Auto fare the second party failed to show that he has paid any amount to the petitioner and her minor children towards their maintenance. From the evidence it also appears that the second party has raised allegation of bad character against the petitioner. The petitioner has alleged that the second party mis behaved with her. Second party could not prove the fact that the first party allowed some unwarranted youth of the locality to visit their rented house in the absence of the second party.

Hence the petitioner/responded No.2 has sufficient reason to live separately from the second party/petitioner. Learned court below has appreciated the evidence in its proper perspective and decided point No.(e)&(f) correctly.

12. Now so far as the contention of the petitioner side that grounds taken in the petition for divorce filed by the petitioner in TS(D) case No.18/2012 are different from the case filed under section 125 Cr. P.C. is concerned this ground has taken for the first time in the revision. This plea was neither taken in the W/S nor in the evidence of DW-1, nor even in course of PW-1, and as such this ground is not tenable at this stage.

13. Now so far as the quantum of maintenance is concerned learned court below on the basis of the evidence has fixed the quantum. I have gone through the petition as well as the written statement filed by the parties. The petitioner in para-5 of her petition has stated that the income of the opposite party is Rs. 20,000/- per month. The opposite party on the other hand has denied the averment made by the petitioner in respect of his income but at the same time he has not disclosed his actual income or source of income. In his evidence as DW-1, the second party clearly in his examination in chief has stated that he earn sufficient money monthly so that he can provide sufficient maintenance to the first party and his children. Since the second party has not disclosed his actual income as such learned court below on the basis of evidence and materials has rightly fixed the quantum of maintenance which does not at all appears to be exorbitant in the present scenario of price index of essential commodities. After considering all aspects I have arrived at the conclusion that the learned court below has not committed any illegality or infirmity in passing the impugned judgment and order and as such same does not require interference in revision.

14. In the result revision is dismissed.

send back the LCR along with copy with the judgment.

The Judgment is given on **this 23<sup>th</sup> day of December, 2014** and under my hand and seal of this court.

