

**IN THE HIGH COURT OF SIKKIM : GANGTOK**

(Criminal Revisional Jurisdiction)

**RP (FAM.C.T.) No. 02 of 2019**

Suk Bir Chettri,  
Aged about 51 years,  
Son of Tika Ram Chettri,  
Resident of Dodak, P.O. & P.S. Soreng,  
West Sikkim.

... Petitioner

Versus

Jamuna Chettri,  
Aged about 44 years,  
Resident of Timburbong,  
P.O. & P.S. Soreng,  
West Sikkim.

... Respondent

**BEFORE  
HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.**

For the Revisionist: Ms. Gita Bista, Advocate.

For the respondent: Mr. Tashi Norbu Basi, Legal Aid Counsel.

Date of hearing : 23.10.2019

Date of judgment: 08.11.2019

**JUDGMENT**

(Arup Kumar Goswami, CJ)

1. Heard Ms. Gita Bista, learned counsel for the petitioner and Mr. Tashi Norbu Basi, learned Legal Aid counsel appearing for the respondent.

2. In this Revision Petition under Section 19 (4) of the Family Courts Act, 1984, for short, 'the Act', the petitioner has put to challenge the order dated 28.06.2019 passed by the learned Judge, Family Court, East Sikkim at Gangtok in F.C. (Crl.) Case No. 37 of 2018, whereby, on a petition filed by the respondent

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under Section 125 of the Code of Criminal Procedure, 1973, for short, 'Cr.P.C.', the learned Court below directed the petitioner herein to pay monthly maintenance allowance of Rs.8,000/- only to the respondent with effect from the month of July, 2019.

3. The marriage between the parties herein was solemnized in the year 1989 and three daughters, namely, Apsana Chettri, Asha Chettri and Anisha Chettri were born out of the wedlock. The eldest daughter had completed her course in Civil Engineering, the second daughter had completed her course in Computer Engineering and the third daughter was studying in Class VII when the petition under Section 125 Cr.P.C. came to be filed. The petitioner, at the time of filing of the petition, was serving as a Constable with Sikkim Police drawing a salary of Rs.50,931/-. It appears from the evidence of the petitioner as DW1 that he was working as a Head Constable when he deposed.

4. The case set out in the petition under Section 125 Cr.P.C. is that the petitioner used to physically and mentally torture her after the birth of their first daughter. The petitioner was in the habit of making false allegations about the respondent that she was having extra-marital affairs with other persons including having an illicit relationship with one Sachin Rai. It is alleged that the petitioner with the help of the second daughter (name is wrongly indicated as Anisha Chettri instead of Asha Chettri) threw her out of her matrimonial home as a result of which she was compelled to reside with her brother. It is further stated that the petitioner had filed an FIR before the Soreng Police Station on the basis of which Sachin Rai was arrested and a letter dated 27.05.2018 was prepared by the brother of the petitioner stating that from that day onwards the respondent would be the wife of Sachin Rai and that Sachin Rai was forced to sign the said document. The respondent was also called by the Station House Officer of Soreng Police Station to sign the aforesaid document and when she came to learn about the contents of the said letter from the Station House Officer, Soreng Police Station, she refused to sign the same and she had also refused to be present

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before the area Panchayat when she was called upon to appear before it based on the aforesaid letter dated 27.05.2018.

5. The petitioner had filed written statement, wherein, while admitting the marriage between the parties, it is pleaded that at the time of filing of the petition, respondent was not his legally married wife. While denying that he physically and mentally tortured the respondent, it is stated that on 25.05.2018, Asha Chettri had lodged an FIR before Soreng Police Station and on the basis of the said FIR, Sachin Rai was arrested by Soreng police, who, later on, released him on bail of Rs.5,000/-. It is further stated that an undertaking (Exhibit-C) was given by Sachin Rai on 27.05.2018 stating that as he and the respondent were found to be sleeping together and the respondent, on her free will, had eloped with him, it was his responsibility to look after the respondent. It is stated that 'Zari' was demanded by the petitioner in view of the fact that Sachin Rai and the respondent had eloped during the subsistence of marriage between the parties and in that context it is denied that he, with the help of the second daughter, had thrown out the respondent from the house. It is also stated that he was drawing a salary of Rs.30,000/-. It is averred that the petitioner had taken a loan of Rs.15 lakhs and out of the said amount, Rs.2 lakhs as well as 5 tolas of gold were stolen by the respondent. Accordingly, prayer was made to dismiss the petition.

6. During the course of trial, the respondent had examined herself as PW1 and had adduced the evidence of her brother as PW2. The petitioner herein had examined himself as DW1 and Asha Chettri had deposed as DW2.

7. The learned court below had framed the following points for determination:

“(1) Whether the Respondent despite having sufficient means has been neglecting or rejecting to maintain the Petitioner? (OPP)

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- (2) Whether the Petitioner had eloped with one Sachin Rai or had inappropriate relations with him thereby disentitling her from claiming maintenance from the Petitioner? (OPR)
- (3) Whether the Petitioner had herself left the Respondent and as such had refused/has been refusing to live with him? (OPR); and
- (4) Whether the Respondent can avoid his liability to pay maintenance to the Petitioner on the above grounds or any other ground? (OPR)”

The petitioner and respondent referred to hereinabove, is the respondent and the petitioner, respectively, in the present case.

8. On consideration of materials on record including the documents exhibited by the parties, point nos. 2 and 3 were decided in the negative. While coming to the aforesaid decision, the learned trial court had observed that there were material contradiction in deposition of DW2 and that her evidence does not inspire confidence and can be accepted, at the most, to the extent that the respondent and Sachin Rai were together in a room on 25.05.2018, which, by itself, does not lead to an assumption that they were committing adultery. It was opined that the evidence of DW2 does not go to show that the respondent had eloped with Sachin Rai or she had left with Sachin Rai at any point of time. Exhibit-C, a Kararnama Patra, ('undertaking' as stated in the written statement), stated to have been executed by Sachin Rai, was not relied upon as none of the witnesses in Exhibit-C was examined to prove that the statement of Sachin Rai was voluntary as Sachin Rai could have easily been pressurized by the petitioner being the Sub-Inspector of the same Police Station. It is, however, apposite to place on record at this juncture that the observation that the petitioner was the Sub-Inspector of Soreng Police Station where Sachin Rai was called and where he had executed Exhibit-C is not correct. It was concluded that the fact that Sachin Rai was in the room of the respondent on a particular night is not sufficient to hold that respondent was living in adultery with Sachin Rai. The point nos. 2 and

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3 having been decided in negative, the point no. 4 was also decided in the negative.

9. With regard to point no. 1, the learned court below observed that the respondent was totally dependent on her brother and that the respondent had been forced out of her matrimonial home. It is noted that there was no basis for the petitioner to say that he was drawing only Rs.30,000/- when the computer generated salary voucher showed his monthly salary was about Rs.50,000/-.

10. Ms. Bista, learned counsel for the petitioner submits that evidence of DW2 goes to show that Sachin Rai was found inside the bedroom of her mother at night and this fact itself demonstrates that the respondent had committed adultery and, therefore, the learned court below was not justified in directing the petitioner to grant maintenance to the respondent. There is no reason as to why the daughter should depose falsely against her own mother and the learned court below was, thus, not justified in not wholly relying upon her testimony. It is submitted by her that there is no acceptable evidence on record to hold that the petitioner had neglected or refused to maintain the respondent and on the contrary, it is borne out of the evidence that it was the respondent, who had left the husband on her own volition and had refused to live with him and therefore, the findings recorded by the court below are not sustainable in law. She has relied upon a decision rendered by this Court in the case of **Smt. Mala Rai vs. Bal Krishna Dhamala [RP (FAM.CT.) No. 02 of 2015]** decided on 22.09.2016.

11. Mr. Tashi Norbu Basi, on the other hand, has submitted that the judgment of the learned court below does not warrant interference. It is contended by him that evidence of DW2 was not accepted in its entirety by the learned court below as in Exhibit-A, which is an FIR lodged by DW2, there is no reference to the allegations attributed against the respondent and Sachin Rai in her deposition. He has submitted that committing of adultery by the respondent has not been proved and placing reliance upon Section 125 (4) Cr.P.C., he

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submits that wife can be denied maintenance only if she is living in adultery, which is not the same thing as a single lapse from virtue. He relies upon the decisions in the cases of ***M.P. Subramaniyam vs. T.T. Ponnakshiammal***, reported in ***1958 CriLJ 397***, ***Laxman Naik vs. Nalita @ Lalita Naik***, reported in ***2002 CriLJ 3418*** and ***Naranath Thazhakuniyil Sandha vs. Kottayat Thazhakuniyil***, reported in ***1999 CriLJ 1963***, in support of his contentions.

12. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

13. A perusal of Exhibit-A goes to show that the second daughter of the parties had filed an FIR on 25.05.2018 stating that, at night around 2.00 am, the respondent and Sachin Rai were found in the room and he took away the respondent. No case was registered on the basis of said FIR or on the basis of a Missing Entry Report (Exhibit-B) given by the petitioner on 25.05.2018 to the Soreng Police Station. In this context it is relevant to note that the petitioner in his Missing Entry Report had stated that his wife was missing since the previous evening. The same is in contradiction with the stated version in the FIR, Exhibit-A. It is also not on record which information was prior in point of time. However, there appears to be no dispute that Sachin Rai was called to the police station. Exhibit-C was, admittedly, executed in the police station by Sachin Rai on being summoned by police without registration of any case. As no witness to the said document had been examined, the learned trial court was justified in not placing any reliance on the said Exhibit-C.

14. In her evidence as DW2, she had stated that though she had knocked at the door of the respondent couple of times as she was suffering from stomach pain, the door was not opened and the same aroused a suspicion that Sachin Rai, with whom her mother had an affair before, might be in the bedroom. Significantly, in her evidence, the DW2 does not mention any time. When she forced the respondent to open the door, according to her, she found her mother

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and Sachin Rai naked in the room. It is highly improbable that if a mother opens the door after persistent knocking of the daughter she would come out naked and allow any other person in the room to remain in a naked condition. The learned Family Court rightly did not rely upon that part of the evidence of DW2. It is relevant to note in this context that though in Exhibit-A it was stated that Sachin Rai had gone away with the respondent, the DW2 was conspicuously silent on this aspect in her evidence.

15. PW2 had deposed that the petitioner had ill-treated the respondent and the petitioner had sought to emphasize the fact that he was a police personnel. He had also deposed that the petitioner was spreading rumours about the respondent having extra-marital affairs with other persons including one Sachin Rai and the petitioner had not spared even his brothers including himself while making such allegations. This evidence of PW2 had remained unimpeached.

16. In the written statement the petitioner had gone on say that the respondent had stolen Rs. 2 lakhs and also 5 tolas gold. No documentary evidence has been led to establish that the petitioner had taken a loan of Rs.15 lakhs, out of which Rs. 2 lakhs had been stolen. In his evidence, DW 1 had stated that on the relevant day, the respondent and Sachin Rai were planning to elope along with the cash and ornaments. In his cross-examination, DW1 had categorically stated that he did not witness anything which he had stated in his examination in chief. That apart, though he has referred to complaints against the respondent, he has not even indicated who had raised issues or complaints against the respondent.

17. From the evidence of PW1, it appears that she used to sell liquor in a shop which was opened by the petitioner at Dodok and the petitioner used to link her with the customers of the shop also.

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18. If there is constant insinuation and allegation about the character of the wife without substance and in such circumstances, if the wife leaves the matrimonial house, it cannot be said that there is no sufficient reason for the wife to refuse to live with her husband.

19. In the written statement, the petitioner had stated that the respondent was no longer his married wife. It is not the case of the petitioner that they had been divorced. In his evidence as DW1, though he had not taken the stand that the respondent is no longer his wife, a stand was taken that as the respondent was maintaining extra-marital affairs, she is not entitled to any maintenance allowance from him.

20. In ***M.P. Subramaniam (supra)***, the Karnataka High Court was considering the term “living in adultery” appearing in clause (4) of Section 488 of Cr.P.C., 1898. It is to be noted that Section 125 (4) of the present Cr.P.C. also uses the very same expression. The Division Bench of the Karnataka High Court, relying on judgments of various High Courts, had observed that it is not a stray act or two of adultery that disentitles a wife from claiming maintenance from her husband; but it is a course of continuous conduct on her part by which it can be called that she is living an adulterous life that takes away her right to claim maintenance. It was emphasized that the wording of Section 488 (4) of Cr.P.C. is not “if she commits adultery” but “if she is living in adultery”.

21. In ***Laxman Naik (supra)***, the Orissa High Court has also taken the same view when it held that the allegation with regard to a single instance of adultery will not be sufficient to refuse maintenance under Section 125 Cr.P.C.

22. In ***Naranath Thazhakuniyil Sandha (supra)***, Kerala High Court, on consideration of various judgments referred to therein had held that phrase “living in adultery” used in Section 125 (4) of the present Cr. P.C. and in Section 488 (4) of the Cr.P.C.1898 contemplates a continuous course of conduct on the part of the wife with the adulterer or the paramour, as the case may be, and a



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single act of unchastity or a few lapses from virtue will not disentitle the wife from claiming maintenance from her husband under Section 125 of the Cr. P.C.

23. I am in complete agreement with the view taken in the aforesaid judgments.

24. Merely because Sachin Rai was in the bedroom of the respondent in a house where two daughters of the parties were staying, it cannot be said that the respondent had committed adultery with him. Even if for the sake of argument it is accepted that the respondent had committed adultery, then also there is no evidence of a continuous course of conduct demonstrating that the respondent was living in adultery.

25. In ***Mala Rai (supra)***, this Court, while dismissing the appeal preferred against refusal to grant maintenance by the learned Family Court, had relied upon a decision rendered in the divorce case in between the same parties wherein it was held that the petitioner therein was in an adulterous relationship, which is not the case herein and therefore, the aforesaid judgment does not advance the case of the petitioner.

26. In view of the above discussion, I find no merit in this application and accordingly, the same is dismissed.

27. Registry will send back Lower Court Record.

**CHIEF JUSTICE**

Approved for reporting: Yes

jk /ak Internet: Yes