

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.272 OF 2002

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|--------------------------------------|---|-----------------|
| 1. Kusum @ Ujwala Abasaheb Waghmare |] | |
| Age : 24 Yrs., Occ.: Labourer |] | |
| R/of C/o. Fakkadrao Maruti Pacharne, |] | |
| R/of Karde, Tal. Shirur, Dist. Pune. |] | |
| |] | |
| 2. Rahul Abasaheb Waghmare |] | |
| 1 ½ Yrs., through Guardian |] | |
| Respondent No.1, |] | |
| C/of Fakkadrao Maruti Pacharne, |] | |
| R/of Karde, Tal. Shirur, Dist. Pune. |] | Applicants |

Versus

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|--------------------------------------|---|------------------|
| 1. Dharu @ Abasaheb Sukhdeo Waghmare |] | |
| 26 Yrs., Occu.: Agri., |] | |
| R/of Deo-Daithan Shrigonda, |] | |
| Dist. Ahmadnagar. |] | |
| |] | |
| 2. State of Maharashtra |] | Respondents |

Mr. Pramod Pawar for the Applicants.

Mr. R.P. Hake-Patil, i/by Mr. S.P. Kadam, for
Respondent No.1.

Mr. H.J. Dedia, A.P.P., for Respondent
No.2/State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 9TH DECEMBER 2015.

ORAL JUDGMENT :

1. This Criminal Revision Application takes an exception to the Judgment and Order dated 30th April 2001 of Additional Sessions Judge,

Pune in Criminal Revision Application No.272 of 1996. By the impugned Judgment and Order, the Sessions Court was pleased to set aside the Judgment and Order dated 25th April 1996 of the Judicial Magistrate, First Class, Ghodnadi, Dist. Pune, passed in Criminal Miscellaneous Application No.232 of 1995, under which the maintenance @ Rs.200/- per month and Rs.100/- per month was awarded to Applicant Nos.1 and 2 under the provisions of Section 125 of Cr.P.C.

2. Brief facts of the Revision Application can be stated as follows :-

The marriage of Applicant No.1 with Respondent No.1 had taken place in the year 1993 at Village Karde. After the marriage, she went to reside in the house of Respondent No.1. For an initial period of six months, there was peaceful co-habitation. Later on, mother of Respondent No.1 started quarreling with Applicant No.1. Respondent No.1 also started taking suspicion of her character at the instance of his mother. Her father tried to convince Respondent No.1 to treat Applicant No.1 properly. However, it was of no use. Applicant No.1 was compelled to reside in the cattle-shed and not allowed to enter into the house. Respondent No.1 was giving her meals in the late night and used to meet her. Meanwhile, Applicant No.1 became pregnant. It was ascertained whether the child in her womb was a female or a male and then, for her

delivery, she was sent to the house of her parents. She delivered a male child in the Municipal Hospital at Shirur. This fact was informed to Respondent No.1 and his family members, but no one came to see her or take her back for co-habitation. Finally, Respondent No.1 sent a notice to the Applicant No.1, three weeks after her delivery, making false allegations on her character. She sent a reply to the said notice vide Exhibit-20. Thereupon, Respondent No.1 sent another notice to her vide Exhibit-21, which was also replied by her. Respondent No.1 suspected the paternity of the child / Applicant No.2. As a result, he refused to accept her for co-habitation. Hence, since delivery, Applicant No.1 was constrained to reside along with Applicant No.2, her minor son, in the house of her parents.

3. According to her case, the financial condition of her parents is poor. She has no source of income and, therefore, unable to maintain herself and her child. As against this, Respondent No.1 is economically well placed. He is having 7 to 8 acres of agricultural bagayat land. Hence, he is earning the income of Rs.1 lac from cultivation. He is also having the business of dairy. Hence, Applicant No.1 claimed maintenance @ Rs.500/- per month for herself and Applicant No.2, her minor son.

4. This application of Applicant No.1 was strongly resisted by Respondent No.1 contending, inter alia, that Applicant No.1 has left his house of her own accord and has started residing in the house of her parents. She also had illicit relations with some third person and the child, i.e. Applicant No.2, is born out of the illicit relations. When he came to know about the pregnancy of Applicant No.1, immediately thereafter, she was taken to the Doctor to ascertain the paternity of the child and being convinced that the child does not belong to Respondent No.1, she was sent to the house of her parents. A specific plea is raised by him that Applicant No.1 went to reside in the house of her parents in November or December, 1993. She had stayed there upto 21st December 1994 and by the time she returned to the house of Respondent No.1, she was already seven months pregnant. When Dr. Marathe examined her on 22nd December 1994, the said pregnancy was revealed. Hence, according to Respondent No.1, the child born to Applicant No.1 is not belonging to him. Immediately after the delivery of Applicant No.1, when he came to know that his name was entered as father of Applicant No.2, he had given an application to Gram Panchayat not to enter his name. Thereafter, he had issued notices to Applicant No.1 bringing the said fact to her notice and denying his relations with her. Thus, according to Respondent No.1, he is not, in any way, liable to pay maintenance to Applicant No.1 or Applicant

No.2, as Applicant No.1 is proved to be living in adultery and Applicant No.2 is not born within the wed-lock. Respondent No.1, therefore, prayed for dismissal of her application.

5. In support of her case, Applicant No.1 has examined herself and her father; whereas, Respondent No.1 has examined himself, his mother, his maternal uncle and Dr. Marathe. On appreciation of their evidence, the Trial Court was pleased to allow the application of Applicant No.1 holding that Respondent No.1 has failed to prove that Applicant No.1 was living in adultery and the child was born within the wed-lock. Accordingly, the Trial Court granted maintenance @ Rs.200/- per month to Applicant No.1 and Rs.100/- per month to Applicant No.2 from the date of filing of the application.

6. This Judgment was challenged in the Revision Application filed by Respondent No.1. The Sessions Court by its impugned Judgment and Order held that, as during the period from December 1993 till 21st December 1994, Applicant No.1 was proved to be staying in the house of her parents and by the time she returned, she was found to be carrying pregnancy of seven months, when Dr. Marathe examined her in March, 1994, the child is not conceived within the wed-lock and as such not from

Respondent No.1. The Sessions Court, accordingly, set aside the order of the Trial Court and dismissed the application for maintenance preferred by Applicant No.1.

7. This order of the Sessions Court is the subject matter of this Revision Application. The learned counsel for Respondent No.1 has, at the outset itself, challenged the very maintainability of the Revision Application on the ground that second revision is not maintainable. In support of his submission, he has relied upon two authorities of the Supreme Court; one that of ***Jagir Singh Vs. Ranbir Singh, 1979 (1) SCC 560***, and second is that of ***Krishnan Vs. Krishnaveni, 1997 (4) SCC 241***. Both the authorities are interpreting and confirming the provisions of Section 397(3) of Cr.P.C. and reiterating that second revision filed by the **same person** shall not be maintainable in view of the clear bar laid down under Section 397(3) of Cr.P.C.

8. At this stage, it would be relevant to quote Section 397(3) of Cr.P.C., which provides that, if an application under this Section has been made by any person either to the High Court or to the Sessions Judge, **no further application by the same person** shall be entertained by the either of them. The emphasis in Section 397(3) of Cr.P.C. is, thus, on the word “the

same person". Therefore, if Revisional Applicant before the Sessions Court and the High Court is the same person, then only the bar under Section 397(3) of Cr.P.C. becomes applicable. In both the above said authorities, this legal position is confirmed by observing that, "*sub-section (3) of Section 397 of Cr.P.C. bars second revision, which is preferred by the same person*".

9. In the instant case, the revision preferred before the Sessions Court was of Respondent No.1, whereas, the present revision is preferred by Applicant No.1 and, therefore, the Revision Applicants in both the Revision Applications are not one and same persons, but they are two different persons i.e. two different parties.

10. The very object of incorporating sub-section (3) of Section 397 in Cr.P.C., as laid down in the above-said two authorities, is to prevent a multiple exercise of revisional powers and to secure early finality to the orders. Any person aggrieved by an order of inferior criminal court is given the option to approach either the Sessions Judge or the High Court and once he exercises the option, he is precluded from invoking the revisional jurisdiction of the other authority. The language of Section 397(3) of Cr.P.C. to that effect is clear and peremptory and it does not admit any

other interpretation. Therefore, it is clear that, by this provision, the same party is prohibited or estopped from invoking revisional jurisdiction of, both, the Sessions Court and the High Court. He has to exercise that option at the earliest stage only; whether to approach Sessions Court or the High Court.

11. Here in the case, Applicant No.1 has not approached the Sessions Court, but it was Respondent No.1, who has approached the Sessions Court and, therefore, this bar is clearly not attracted in the present case. Moreover, Applicant No.1 is not challenging the order passed by the Trial Court, which was the subject matter of the Revision Application before the Sessions Court, but by this Revision Application, she challenges the order passed by the Sessions Court in the Revision Application preferred by Respondent No.1 and, therefore, such Revision cannot, at all, be barred by any law as such, as such this Revision is maintainable.

12. Here in the case, the marriage between Applicant No.1 and Respondent No.1 is not disputed at all. Its continuance and validity is also not challenged. The factum of their co-habitation is also not disputed. The only aspect on which Respondent No.1 has challenged the maintainability of her application for maintenance was that, for some period of one year,

she had stayed separately from him in the house of her parents and when she returned, she was found to be pregnant of seven months and, therefore, the child in her womb could not have been conceived within the wed-lock.

13. In this respect, it is deposed by Applicant No.1 that her marriage with Respondent No.1 had taken place in the year 1993. Initially, for six months period, she was treated properly, but thereafter, at the instance of his mother, Respondent No.1 started subjecting her to harassment and cruelty; as a result of which, for some days, she was compelled to stay in the cattle-shed. During that period also, Respondent No.1 was providing meals to her in the late night. According to her evidence, she became pregnant and thereafter she was sent to the house of her parents, where she gave birth to Applicant No.2. Since then, Respondent No.1 never bothered to bring her back or to care for her maintenance. Conversely, he challenged paternity of Applicant No.2. The Trial Court accepted the case of Applicant No.1, whereas, the Sessions Court accepted the defence of Respondent No.1 that as Applicant No.1 was staying away from him separately for a period of about one year, she cannot become pregnant from Respondent No.1 and, therefore, the child, which was born to Applicant No.1, cannot belong to Respondent No.1.

14. While arriving at this finding, the Sessions Court has mainly relied upon the fact that Applicant No.1 has left the house and went to reside in the house of her parents in December 1993. Then her parents and maternal uncle of Respondent No.1 convinced both the parties and thereafter she came to reside in the house of Respondent No.1 on 22nd December 1994. She was examined by Dr. Marathe, for the first time, on 26th March 1995 and at that time she was found to be seven months pregnant. According to the Sessions Court, the testimony of Respondent No.1, his mother, PW-4 Kishan, his maternal uncle, and Applicant No.1 sufficiently proves that Applicant No.1 was brought to the house of Respondent No.1 only on 22nd December 1994. The evidence of Dr. Marathe is also relied upon to prove that, at the time of examination of the Applicant No.1, on 26th March 1995, she was found to be seven months pregnant. Applicant No.2, admittedly, was born on 4th June 1995 and that too, after completion of full term of pregnancy, on the due date of delivery, as given by Dr. Marathe. Hence, according to the Sessions Court, the medical evidence supports the case of Respondent No.1. The subsequent conduct of Respondent No.1 of giving application to Gram Panchayat on 6th June 1995 itself not to enter his name as father of Applicant No.2 in the record, according to Sessions Court, corroborates his defence. Further, his immediate giving application to Municipal Council at Shirur on 12th

June 1995 to that effect and two subsequent notices denying the paternity of Applicant No.2, were, according to the Sessions Court, eloquent and corroborates his defence and disproves the case of Applicant No.1 that Applicant No.2 was born to her from Respondent No.1.

15. In my considered opinion, however, while arriving at this finding merely on the basis of separate residence of Applicant No.1 and Respondent No.1, the Sessions Court has committed a serious legal error as it has ignored the presumption, as laid down under Section 112 of the Indian Evidence Act. Section 112 of Evidence Act clearly lays down that, *“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten”*.

16. This provision is particularly incorporated in the Evidence Act to uphold the legitimacy of the children and to deprecate the practice of branding the children as bastards. The law presumes strongly in favour of legitimacy of off spring. The principle underlying the Section is that on the ground of public policy, it is undesirable to enquire into the paternity of a

child whose parents have access to each other. The presumption of legitimacy arises from birth in wed-lock and not from conception. Though the presumption is rebuttable, it can be rebutted only by very strong and clear proof of non-access. This presumption of law is considered to be the strongest of legal presumptions and is not lightly to be repelled by mere balance of probabilities and the evidence repelling that presumption must be strong, distinct and satisfactory. Mere fact that both husband and wife are residing separately in two different houses or at two different places is insufficient to prove non-access. "Access" and "non-access" mean the existence or non-existence of opportunities of sexual intercourse, it does not mean actual co-habitation. As per this presumption, thus, when any person is born during the continuance of a valid marriage between his mother and any man and within 280 days after its dissolution, the mother remaining unmarried, then the said fact is conclusive proof that he is a legitimate son of the man. Only exception provided to this conclusive presumption is that, the parties to the marriage had no access to each other at any time when the child could have been born. Therefore, as per this presumption, once the validity and continuance of marriage is proved on record and if the child is born during the continuance of the marriage, then that child has to be presumed as the legitimate child of the husband, unless, of-course, the non access of the parties to each other is proved

and the burden to prove non-access is on the party which alleges the same.

17. Here in the case, the validity and continuance of the marriage between Applicant No.1 and Respondent No.1 is neither disputed nor denied. Admittedly, even till the birth and thereafter till the filing of this proceeding also, the marriage between the parties is continued and it was a valid marriage, as validity of the same is not denied by Respondent No.1 even in this proceeding. Admittedly, Applicant No.2 was born during continuance of this valid marriage and, therefore, there was a conclusive presumption that he was the legitimate son of Respondent No.1.

18. The burden was naturally upon Respondent No.1 to prove that during the period in which Applicant No.2 was conceived, Applicant No.1 and he himself had no access to each other. Now this exception of non-access required a strict proof of evidence. Mere allegation that she had gone to reside in the house of her parents and, therefore, there was no access can hardly be accepted as proof of it. In this respect, the evidence on record was required to be scrutinized by the Session Court, especially, while setting aside legal and valid findings given by the Trial Court to that effect. The Trial Court, in para 7 of its Judgment, has categorically stated that, admittedly, the distance between the place where Respondent No.1

was residing and the place where Applicant No.1's parents were residing was about 4 kms. only. It is also proved on record that Respondent No.1 was having number of relatives at Village Karde, where Applicant No.1 was residing with her parents. It does not appear probable or at-least it is not proved through the evidence on record that, during this period of one year, in which Applicant No.1 was residing in the house of her parents at Village Karde, Respondent No.1 has not at all visited her at any time. Especially, when, according to his case, Applicant No.1 has voluntarily, of her own accord, went to reside in the house of her parents, does not appeal to reason that Respondent No.1 will not make any efforts to bring her back for co-habitation. At-least, he would have tried to ascertain what was the cause for her to reside separately from him.

19. Therefore, if one has regard to the physical distance between the two places and the entire facts, circumstances and evidence on record, it cannot be said that Respondent No.1 has proved his plea of total non-access with Applicant No.1 during this period of one year. As stated above, the non-access has to be proved with strict proof, which is conspicuously lacking in the instant case.

20. In my considered opinion, the Sessions Court has, therefore, committed a grave error in accepting the said plea merely on ipse dixit of

Respondent No.1 that, during for a period of one year, Applicant No.1 was residing separately from him; hence, child/Applicant No.2 was born out of the wed-lock.

21. It is also pertinent to note that, in the present case, there was no other evidence on record like the D.N.A. test to prove that Applicant No.2 was not born from Respondent No.1. There is nothing on record to show that Respondent No.1 had, at any time, applied to the Court for calling upon the Applicant No.1 to undergo such D.N.A. test, which could have conclusively proved one way or the other. No such effort was made either by Respondent No.1 or even by the Sessions Court before branding Applicant No.2 as illegitimate son of Respondent No.1. Hence, the finding of the Sessions Court, being perverse, in the sense being against the evidence on record and also against the legal provision, has to be quashed and set aside.

22. The learned counsel for Applicant No.1 has also rightly relied on ***Chandrakant Gangaram Gawade Vs. Sulochana Chandrakant Gawade, 1996 (2) Mh.L.J. 341***, to submit that, in order to deny the maintenance to Applicant No.1, there should have been a clear finding that she was living in adultery. No such finding is arrived at by the

Sessions Court and despite that, the Sessions Court has rejected her application. In this authority, it is clearly laid down that as per Section 125(4) of Cr.P.C., wife is not entitled to maintenance from her husband only if she is “living in adultery” and in order to prove it, the husband has to prove a continuous course of adulterous conduct. A single lapse on the part of the wife is not sufficient to bring her conduct within the meaning of the expression “living in adultery”, as used in Section 125(4) of Cr.P.C. Here in the present case, there is no such pleading or the evidence adduced by Respondent No.1. For that matter, even the name of the person, with whom Applicant No.1 is alleged to be having illicit relations, is also not mentioned either in his written say or even brought on record in the evidence.

23. Despite this clear-cut evidence on record and despite the legal provisions being in favour of Applicant No.1 and the Judgment of the Trial Court also holding in her favour on proper appreciation of entire evidence and legal provisions on record, the Sessions Court has, in its revisional jurisdiction, set aside the said finding, that too, on the reasons, which are not tenable or valid in law. The said finding by the Sessions Court, being perverse in nature, as ignoring the basic and fundamental principles of law, is liable to be quashed and set aside.

24. Consequently, this Revision Application is allowed. The impugned Judgment and Order dated 30th April 2001, passed by the Additional Sessions Judge, Pune in Criminal Revision Application No.272 of 1996, is hereby quashed and set aside and the Judgment and Order dated 25th April 1996 passed by the Judicial Magistrate, First Class, Ghodnadi, Dist. Pune, in Criminal Miscellaneous Application No.232 of 1995, allowing the application of Applicant No.1 herein and granting maintenance to her and Applicant No.2, her minor son, is restored.

[DR. SHALINI PHANSALKAR-JOSHI, J.]