

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****CRR No. 449 of 2012**

- Neel Kumari Sahu aged about 35 years W/o Basant Kumar Sahu, R/o Village Mahka , Tahsil Pamgarh , Distt. Janjgir Champa C.G.

---- Petitioner

**Versus**

- Basant Kumar Sahu aged about 45 years S/o Hirasai Sahu, caste Sahu R/o Semariya , P.S. And Tahsil Pamgarh , Distt. Janjgir Champa C.G.

---- Respondent

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| For Petitioner | : Ms. Meena Shashtri, Adv. |
| For Respondent | : Mr. Rakesh Pandey, Adv.  |

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**Order On Board****11/02/2016**

1. Heard on I.A. No. 1/15 for urgent hearing. The same is disposed of.
2. With consent of both the parties, the matter is heard finally.
3. Brief facts of the case are that in MJC No. 131/2009 (Neel Kumari Sahu -v- Basant Kumar Sahu) under Section 125 of the Cr.P.C. the court below ordered for maintenance amount of Rs. 2,000/- per month to the applicant/wife. Thereafter the non-applicant/husband had filed an application under Section 127 of the Cr.P.C. (deemed to be an application under Section 125(5) of the Cr.P.C.) for cancellation of the order of maintenance on the ground that the applicant is living in adultery. After taking evidence of both the parties, the court below/Judge, Family Court, Janjgir Champa vide order dated 23-5-2012 in MJC No. 224/2011 allowed the application and cancelled the order of maintenance passed earlier.
4. Against said order, applicant /wife has filed the instant criminal revision on the ground that the non-applicant has failed to prove the fact that she is living in adultery, despite the court below has cancelled the order of maintenance. Hence this court under the revisional jurisdiction vested in it under Section 19(4) of the Family Courts Act, 1984 may quash the impugned order and allow the revision.
5. Heard learned counsel for both the parties.
6. Learned counsel for the applicant submits that the non-applicant has not actually seen the applicant living in adultery. He is a hearsay witness for

the fact of adultery. The mother of the applicant Smt. Koshilya Bai also admitted in her cross-examination that she had not visited the house one Kishan Banjare and many persons informed her that the applicant and one Kishan Banjare are living like husband and wife, therefore, the said witness also is a hearsay witness. Witness No. 3 Ghanaram Sav is not very definite. Initially in para 2 he stated that the applicant is roaming along with one Banjare but specifically denied that he does not know that the applicant living in whose house. Thereafter he changed his version and submitted that the applicant is residing along with one Banjare. Learned counsel further submits that thereby it is not proved beyond all probable doubt that the applicant is living in adultery, on the other hand, the applicant in her statement before the court below had not admitted it. Witness Pavan Tandan also supported her on the fact that she had not married to anybody and the applicant is living in a rented house. Witness Smt. Bugali Bai also has not said anything against the applicant thereby since it is not proved beyond all probable doubt that the applicant is living in adultery, the order passed by the court below may be quashed.

7. On the other hand, learned counsel for the non-applicant submitted that Koshilya Bai in her examination in chief has stated that her daughter is living along with one Kishan Banjare at village Mahka like Chudi wife (a customary tradition) and also the non-applicant himself has stated regarding marriage which is also supported by A.W. 3 Ghangram Sav, thereby the non-applicant had proved that his wife is living in adultery hence there is no impropriety or illegality in the order passed by learned Family Court. Hence the petition may be dismissed.

8. For the purpose of appreciation regarding arguments advanced by both the parties, the evidence adduced by the parties before the court below are perused.

9. As per Section 125(5) of the Cr.P.C., on proof that wife is living in adultery, the Magistrate shall cancel the order. The word 'proof' is incorporated in the legislation in affirmative form which imposes burden of proof on the person who alleges regarding factum of adultery.

10. When we look into the entire evidence adduced by the non-applicant before the court below, it goes to show that there is no direct admissible evidence adduced by the non-applicant as to form proof as required. The

mother of the applicant though examined by the non-applicant has categorically in the cross-examination in para 2 admits that she was informed by many other people that her daughter was living like husband and wife along with one Kishan Banjare but again this piece of evidence is an hearsay evidence. Also when we examine the statement of A.W. 3 Ghanaram it goes to show, this witness at some point of time said something and immediately thereafter, has said different thing. Also from the entire statement, it does into indicate that he had seen the non-applicant living along with one Kishan Banjare. Therefore, in the considered view of this court, this witness also has not proved the factum of adultery committed by the non-applicant.

11. On due consideration, the findings of learned court below requires interference as the non-applicant failed to prove the factum of adultery. The court cannot go by surmises and conjecture. After all for cancellation of order, proof is required which is lacking in the evidence adduced by the non-applicant.

12. Consequently, the instant criminal revision is hereby allowed. The order passed by the court below in Misc. Cr. Case No. 224/2011 dated 23-5-2012 is set aside.

The revision is allowed. No order as to costs.

Sd/-  
Chandra Bhushan Bajpai  
Judge