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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**CRIMINAL REVISION APPLICATION NO.14 OF 2015**

Paraji @ Subhash s/o Manohar Panchal  
Age: 39 years, Occ: Agri.,  
R/o. Borgaon (Bk), Tq. Palam,  
District Parbhani. ..APPLICANT

VERSUS

1. Anusayabai w/o Paraji  
@ Subhash Panchal,  
Age: 36 years, Occ: Household,  
R/o. Borgaon (Bk), Tq. Palam,  
Presently R/o. Goundgaon,  
Tq. Gangakhed, District Parbhani.
2. Ku. Bhagyashree d/o Paraji  
@ Subhash Panchal,  
Age: 12 years, Minor u/g of  
mother Respondent No.1,  
R/o. As above.
3. The State of Maharashtra,  
Through the Police Station  
Pimpaldari, Tq. Gangakhed,  
Dist. Parbhani. ..RESPONDENTS

Mr M.P. Tripathi, Advocate for applicant;  
Mr N.L. Jadhav, Advocate for respondent No.1;  
Mr R.V. Dasalkar, A.P.P. for respondent No. 3

**CORAM : N.W. SAMBRE, J.**

**DATE : 13th OCTOBER, 2016**

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**ORAL ORDER :**

Based on the relationship of marriage with present applicant, respondent No.1 along with daughter Bhagyashree initiated the proceedings being Misc. Application No. 207 of 2012 under the Protection of Women from Domestic Violence Act, 2005 (for short 'D.V. Act') claiming relief under Sections 18, 19 and 20 in an application preferred under Section 12 of the D.V. Act. Learned Judicial Magistrate, First Class, Gangakhed, while dealing with the said claim, pursuant to the resistance shown by the applicant, rejected the application vide judgment and order dated 12<sup>th</sup> December, 2013. In an appeal under Section 29 of the D.V. Act being Criminal Appeal No. 3 of 2014, learned Additional Sessions Judge, Gangakhed, vide judgment and order dated 11<sup>th</sup> November, 2014 allowed the claim under D.V. Act and directed present applicant to pay monetary relief of Rs.2000/- per month to present respondent No.1. As such, present revision application.

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2. Mr. Tripathi, learned Counsel for the applicant submits that present applicant was married with Sunita on 12<sup>th</sup> May, 1995. It is after his marriage, since Sunita was not keeping well, he had extra marital relations with respondent No.1 and out of said relations, child Bhagyashree was born, to whom the applicant is ready and willing to maintain. According to Mr Tripathi, learned Counsel for the applicant, respondent No.1 was well aware about subsistence of first marriage of the applicant and in spite of the same, she has permitted to have relationship with the present applicant. In the above referred back ground, the provisions of D.V. Act, particularly claim by the respondent cannot be suited to provisions of Section 2(f) 'domestic relationship', as according to him, relationship with the applicant cannot be stretched to such extent. He would then further add that the applicant is already paying maintenance to daughter Bhagyashree. However, so far as the claim of respondent Anusayabai is concerned, same was already negated in Regular Civil Suit No.359 of

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2002 in a suit for partition and separate possession in the Court of Civil Judge, Junior Division, Gangakhed vide judgment and order dated 22<sup>nd</sup> January, 2007. According to him, specific issue was framed as regards the status of the respondent as that of legally wedded wife of the applicant and same was answered in the negative, as present respondent has failed to prove the same. In addition, Mr. Tripathi, learned Counsel would urge that the claim put forth under Section 125(1) of the Code of Criminal Procedure, out of relationship for grant of maintenance was also turned down by learned Judicial Magistrate, First Class, Gangakhed in Misc. Application No. 18 of 2005 by judgment and order dated 17<sup>th</sup> December, 2007, in which also findings as regards relationship of the applicant with that of respondent was recorded in the negative. He would rely upon the judgment of the Apex Court in the matter of **D. Velusamy vs D. Patchaiammal** reported in **A.I.R. 2011 S.C. 479**, particularly paragraph Nos.33, 34, 35 and 36 thereof, which read thus :

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*"33. In our opinion a relationship in the nature of marriage is akin to a common law marriage. Common law marriages require that although not being formally married :-*

*(a) The couple must hold themselves out to society as being akin to spouses.*

*(b) They must be of legal age to marry.*

*(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.*

*(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.*

*(see Common Law Marriage in Wikipedia on Google)*

*In our opinion a relationship in the nature of marriage under the 2005 Act must also fulfill the above requirements, and*

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*in addition the parties must have lived together in a shared household as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a domestic relationship.*

*34. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a keep whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'*

*35. No doubt the view we are taking would exclude many women who have had a live in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression relationship in the nature of marriage and not live in relationship. The Court in the grab of interpretation cannot change the language of the statute.*

36. In feudal society sexual relationship between man and woman outside marriage was totally taboo and regarded with disgust and horror, as depicted in Leo Tolstoy's novel *Anna Karenina*, Gustave Flaubert's novel *Madame Bovary* and the novels of the great Bengali writer Sharat Chandra Chattopadhyaya".

3. In addition, he would further rely upon the judgment of the Apex Court in the matter of **Indra Sarma vs. V.K.V. Sarma** reported in **2014(1) All.M.R. (Cri) 319**, particularly paragraph Nos. 65, 66 and 67 thereof, which read thus :

"65. We are, therefore, of the view that the appellant, having been fully aware of the fact that the respondent was a married person, could not have entered into a live-in relationship in the nature of marriage. All live-inrelationships are not relationships in the nature of marriage. Appellant's and the respondent's relationship is, therefore, not a "relationship in the nature of marriage" because it has no inherent or essential

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characteristic of a marriage, but a relationship other than "in the nature of marriage" and the appellant's status is lower than the status of a wife and that relationship would not fall within the definition of "domestic relationship" under Section 2(f) of the DV Act. If we hold that the relationship between the appellant and the respondent is a relationship in the nature of a marriage, we will be doing an injustice to the legally wedded wife and children who opposed that relationship. Consequently, any act, omission or commission or conduct of the respondent in connection with that type of relationship, would not amount to "domestic violence" under Section 3 of the DV Act.

66. We have, on facts, found that the appellant's status was that of a mistress, who is in distress, a survivor of a live-in relationship which is of serious concern, especially when such persons are poor and illiterate, in the event of which vulnerability is more pronounced, which is a societal reality. Children born out of such relationship also suffer most which calls for bringing in remedial measures by the Parliament, through proper legislation.

*67. We are conscious of the fact that if any direction is given to the respondent to pay maintenance or monetary consideration to the appellant, that would be at the cost of the legally wedded wife and children of the respondent, especially when they had opposed that relationship and have a cause of action against the appellant for alienating the companionship and affection of the husband/parent which is an intentional tort."*

4. Per contra, Mr. Jadhav, learned Counsel for the respondent-original applicant would urge that the moment daughter Bhagyashree's paternity as biological father is admitted by the present applicant, the respondent *ip-so-facto* is entitled for protection under the D.V. Act. Apart from above, according to him, the findings recorded in civil suit and criminal proceedings under Section 125 of the Code of Criminal Procedure will not operate as *res-judicata* as against the applicant, particularly in view of status of respondent as a mother of child of applicant. According to him,

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remedies under the D.V. Act are in addition to common law remedies. Mr. Jadhav, learned Counsel would urge that if cogent reading of definition of 'domestic relationship' with that of 'aggrieved person' under Section 2(f) and 2(a) of the D.V. Act, covers within the ambit of case of present respondent. He would then submit that present application needs to be rejected.

5. Having bestowed my thoughts to the submissions made, admitted facts as could be noticed from the factual matrix as narrated herein above are as under :-

That, present applicant was married to Sunita on 12<sup>th</sup> May, 1995 and out of the said wedlock, the applicant was already blessed with two children, one boy and a girl.

Out of relationship with present respondent, the applicant has already blessed with daughter i.e. female child Bhagyashree, who is

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granted maintenance under the provisions of Section 125 of the Code of Criminal Procedure.

The date, place and time of the marriage of respondent with that of applicant is not at all proved in any of the proceedings and it is rather proven fact that there was no marriage between applicant and respondent.

The civil suit for partition and proceedings under Section 125 of the Code of Criminal Procedure initiated by present respondent after claiming relationship as legally wedded wife of present applicant were turned down by respective Courts by recording finding that the respondent is not legally wedded wife.

6. In the above referred back ground, if this Court proceed to consider rival submissions and entitlement of respondent No.1 for the benefit under the provisions of D.V. Act, it is to be observed herein that there was no marriage of the

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present applicant with that of respondent proved in any of the proceedings. Rather, relationship as has been sought to be canvassed by respondent No.1 with that of present applicant is post marriage of the applicant with Sunita in 1995. The fact remains that respondent remained in relation with present applicant, who was already married. In the above referred back ground, during subsistence of first marriage of applicant, the respondent established the relationship with applicant and it is out of the said relationship, proceedings under D.V. Act are sought to be initiated.

7. The moment, the respondent has permitted the applicant to have relationship in spite of his first marriage, the respondent has exposed her to the risk, particularly as regards her entitlement under various statutory provisions to claim maintenance. Apart from above, the Apex Court, while considering similar issue, has also dwelt upon the rights of legally wedded wife and children born out of such legally relationship qua claim for

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maintenance put forth by a person who has no recognition in law. The fact remains that the subsistence of first marriage of applicant with Sunita was well within knowledge of the non applicant, still she has proceeded to establish relation with the applicant.

8. While making the above referred observations, appropriate support can be drawn from the judgment of the Apex Court in the matter of **Indra Sarma** (supra). The Apex Court, while dealing with the issue of relationship in the nature of marriage which is akin to a common law marriage has considered, if the couple holds themselves out to society as being akin to spouses and are of legal age to marry and are otherwise qualified to enter into a legal marriage and have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time, then relationship in the nature of marriage under the Act of 2005 could be considered. What is noticed from factual matrix of the present case is

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the respondent-wife has not spelt out in clear terms as to her date of place and time of marriage with that of applicant. It is rather brought on record that in 1995 present applicant was married to Sunita and Sunita has given birth to two children. As such, the fact remains that present applicant, in the above referred back ground, was not qualified to enter into a legal marriage and rather was not unmarried on the date of alleged relationship with present respondent. Paragraph-33 of the judgment in the case of **D. Velusamy** (supra), in my opinion, is worth referring to.

9. Apart from above, in the matter of **Indra Sarma** (supra), the Apex Court, while dealing with the corresponding rights of legally wedded wife and children while considering grant of claim under the D.V. Act of woman who is not legally wedded wife, has observed that if in the given set of facts like present one, benefits under the D.V. Act are to be extended, the same amounts to doing injustice with legally wedded wife and children born out of the said wedlock.

10. These parameters are laid down by the Apex Court are at all not considered by learned appellate Court in the present matter and has proceeded to pass order of grant of maintenance. In my opinion, the order impugned is not sustainable. As such, the Court below in appellate jurisdiction has exceeded powers by granting maintenance. Criminal Revision Application, as such, needs to be allowed. The order impugned dated 11<sup>th</sup> November, 2014 passed in Criminal Appeal No. 3 of 2014 by learned Additional Sessions Judge, Gangakhed is hereby quashed and set aside.

11. Criminal Revision Application stands allowed in above terms.

**(N.W. SAMBRE, J.)**