

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

CRIMINAL APPLICATION NO. 1845 OF 2007

Ushabai Raghunath Patil,
Age. 35 years, Occ. Nil,
R/o. C/o. Bhaurao Bhagwat Patil,
Galwade (Khurd), Tal. Amalner,
Dist. Jalgaon.

...PETITIONER
(Orig. Applicant No. 1)

Versus

1. Shri. Raghunath Gaba Patil,
Age. 48 years, Occ. Agriculture,
R/o. Hedave, Taluka Amalner,
Dist. Jalgaon,
At present R/o. C/o. Gambhir
Vedu Patil Bangali File, Amalner,
Tal. Amalner, Dist. Jalgaon.
2. Avinash Raghunath Patil,
Age. 11 years, Occ. Nil,
Through his natural guardian mother
Ushabai Raghunath Patil,
Age. 35 years, Occ. Nil,
R/o. C/o. Bhaurao Bhagwat Patil,
Galwade (Khurd), Tal. Amalner,
Dist. Jalgaon.

...RESPONDENTS
(No. 1 Orig. Opponent,
No. 2 Orig. Applicant No. 2)

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Advocate for Applicant : Mr Girish Rane
Advocate for Respondent No. 1 : Mr R C Patil
Advocate for Respondent No. 2 : Mr S A Ambilwade h/f
Mr. A S Sawant

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CORAM : V.K. JADHAV, J.
Dated: November 28, 2016

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ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order dated 2.4.2007 passed by the Additional Sessions judge, Amalner in criminal revision application no.33/2006, the original applicant-wife has filed present criminal application.

2. Brief facts, giving rise to the present application are as follows :-

The applicant got married with the respondent in the year 1990 and the applicant no.2 in the original proceeding born to them out of their marital wedlock. Their relations are still subsisting. After marriage, they resided together however, in the year 2002, they started residing separately from joint family at Amalner. On 31.7.2004 the applicant Ushabai had gone to her parents house and issued notice thereby calling upon the respondent-husband to take her back for cohabitation. Respondent-husband filed a petition for restitution of conjugal rights before the Civil Judge Senior Division, Amalner bearing H.M.P. No.67/2004. However, before that, the applicant-wife had filed an

application for grant of maintenance. It has contended in the application for grant of maintenance that the applicant-wife was treated well for first 4-5 years, however, after delivery of original applicant no.2, she was subjected to ill-treatment. Respondent-husband has neglected and refused to maintain her and send her back to her parents house. In the year 2002, when they started residing at Amalner she was again subjected to ill-treatment and harassment at the hands of the respondent-husband. As such, she went to her parents house and issued notice to respondent-husband dated 31.7.2004. Applicant has therefore, claimed maintenance @ Rs.1,500/- for herself and the same amount of maintenance for her minor son.

3. Respondent-husband has strongly resisted the said application. It has contended that the applicant-wife was having extra affinity of her parents and she used to avoid household work. In the year 1999 he had issued one notice for resuming cohabitation. Even then, she has not resumed his society and, therefore, he had preferred a petition for restitution of conjugal rights

bearing H.M.P. No 18/1999, which was dismissed for default. However, after mediation, the petitioner wife resumed cohabitation in the year 2000. However, again she left the house within just two months. In the year 2002 she resumed cohabitation in response to the efforts taken by relatives of respondent-husband and stayed with the respondent- husband till the month of May 2003 and again returned to her parents house. Consequently, respondent- husband preferred H.M.P. No.67/2004 and it is held by the civil court that the applicant Ushabai is residing separately without any reasonable cause. In view of this, the applicant wife is not entitled for any maintenance. It has also contended that the respondent has no fixed income and he is not able to give separate maintenance.

4. Both the parties in support of their rival contentions adduced oral as well as documentary evidence. The learned Magistrate by judgment and order dated 29.6.2006 directed the respondent-husband to pay maintenance @ Rs.400/- pm. to applicant no.1 and Rs.200/- p.m. to applicant no.2 from

the date of application alongwith the costs of Rs. 500/- to the applicants. Being aggrieved by the same, the respondent-husband has preferred criminal revision 33/2006. The learned Additional Sessions judge, Amalner by its impugned order dated 2.4.2007 partly allowed the revision and thereby quashed and set aside the order passed by the Magistrate to the extent of grant of maintenance to the applicant-wife and further confirmed the order of grant of maintenance passed in favour of applicant no.2-son. The applicant-wife has approached this Court to the extent of rejection of her application for grant of maintenance by the revisional court by filing present criminal application.

5. Learned counsel for the applicant submits that, the applicant made an attempt for cohabitation purpose by issuing a notice dated 31.7.2004 Exh.16 and she had shown her willingness to cohabit with the respondent-husband. Though the applicant-wife has stated that she is ready and willing to cohabit on condition of giving good treatment to her, the revisional court has misconstrued said condition and thereby held that the

applicant-wife was not ready and willing for cohabitation. Learned counsel submits that a decree for restitution of conjugal rights passed by the civil court in H.M.P. No.67/2004 is challenged before the Appellate Court and even the Appellate Court has stayed the effect of the said decree. Learned counsel submits that, the respondent-husband has filed said H.M.P. within a short period after the applicant-wife initiated the maintenance proceedings before the Magistrate. In order to defeat the maintenance proceedings, the respondent-husband has preferred HMP and only on the basis of said decree the respondent-husband has raised a contention that the applicant wife is guilty of desertion and she is not entitled for maintenance. Respondent-husband has not made any efforts to resume cohabitation by executing the said decree of restitution for conjugal rights. Learned counsel submits that, revisional court has not considered this material aspect and thus erroneously rejected the application of applicant for grant of maintenance.

6. Learned counsel in order to substantiate has placed his reliance on following cases :-

1. Amina Mohammedali Khoja Vs. Mohammedali Ramjanali Khoja & Another reported in 1985 (2)Bom.C.R. 267.

2. Lata Vishwanath Gawade Vs. Vishwanath Jaywant Gawade reported in 2009 (1) Bom.C.R. (Cri.) 199.

7. The learned counsel for respondent-husband submits that after contest civil court has passed decree of restitution of conjugal rights in favour of respondent husband. The learned Judge of the revisional court has rightly held that the applicant-wife is guilty of desertion and she is not entitled for the maintenance. On the basis of the evidence adduced by the parties, the learned Judge of the revisional court has rightly held that offer made by the respondent-husband for further cohabitation to the applicant-wife is bonafide and genuine. The learned Judge of the revisional court has also rightly held that mere filing of the appeal against decree of restitution of conjugal rights is not a good ground to hold that respondent-husband has neglected to maintain the applicant-wife. No interference is

required. Criminal application is devoid of any merits and thus the same is liable to be dismissed.

8. I have also heard the learned counsel for respondent no.2.

9. On careful perusal of the impugned judgment and order passed by the learned Additional Sessions Judge, it appears that the learned Additional Sessions Judge has allowed said revision mainly on the ground that decree of restitution of conjugal rights was passed by the civil court in favour of the respondent-husband and the applicant-wife has been directed to resume cohabitation by the above order. The learned Additional Sessions judge has not examined other factual aspects and come to the aforesaid conclusion only on the basis of the decree passed by the civil court about restitution of conjugal rights in favour of the respondent. Even, the learned Additional Sessions Judge has failed to consider that aggrieved by the same, the applicant-wife has preferred an appeal before the appellate authority and the appellate court has also stayed the effect of the

decree of restitution of conjugal rights passed in favour of the respondent-husband.

10. In a case Lata Vishwanath Gawade Vs. Vishwanath Jaywant Gawade reported in 2009 (1) Bom.C.R. (Cri.) 199 in identical facts this Court has held that sessions court has erroneously interfered with the order passed by the Judicial Magistrate First Class by taking into consideration the decree for restitution of conjugal rights which, in fact, was never executed by the husband at any point of time. This conduct of the husband would indicate that his desire was merely to defeat the claim for maintenance rather than to actually bring his wife back to the matrimonial home.

11. In the instant case, after initiation of the maintenance proceedings by the applicant-wife respondent-husband has filed said HMP No. 67/2004 for restitution of conjugal rights. Even after obtaining decree, respondent husband never attempted to execute the said decree. Thus, conduct of respondent-husband in this case also indicates that filing of HMP for a decree

of restitution of conjugal rights was merely to defeat the claim of the maintenance rather than actually to bring back the applicant-wife to the matrimonial home. In the year 2004, the applicant-wife has stated in her notice that she is ready to cohabit with respondent-husband on condition of giving good treatment to her. On the basis of said condition, the learned Revisional Court has held that the applicant-wife is not ready and willing to join the company of the respondent-husband. It appears that the learned Additional Sessions Judge has misconstrued the contention raised by the applicant-wife and thus erroneously rejected the application for grant of maintenance. The learned Magistrate has rightly granted maintenance @ Rs.400/- p.m. to applicant-wife by considering the financial status of the parties and income source of the respondent husband.

In view of the above, I proceed to pass the following order.

ORDER

- I. Criminal Application is hereby allowed with costs.

- II. The judgment and order dated 2.4.2007 passed by the Additional Sessions Judge, Amalner in Criminal Revision No.33/2006 to the extent of rejecting the application for grant of maintenance to the applicant-wife is hereby quashed and set aside.
- III. The judgment and order dated 29.6.2006 passed by the Judicial Magistrate First Class, Amalner in Criminal M.A. No.471/2004 stands confirmed.
- IV. Rule is made absolute in above terms.
- V. Criminal Application accordingly disposed off.

(V.K. JADHAV, J.)

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aaa/-