

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

CRIMINAL WRIT PETITION NO. 862 OF 2013

1. Renuka W/o Dhanraj Dumane,
Age. 32 Years, Occu. Household,
R/o. Tambala, Tq. Nilanga, Dist. Latur,
Now Residing at House of
Sidramappa Shankarappa Hatte,
R/o. Tambala, Tq. Nilanga, Dist. Latur.
2. Nitesh S/o Dhanraj Dumane,
Age. 2½ Years,
U/g of his natural mother i.e. petitioner No. 1 ...Petitioners

Versus

1. Dhanraj S/o Shankarappa Dumane,
Age. 35 Years, Occu. Service,
R/o. Tambala, Tq. Nilanga, Dist. Latur
Now residing at S.T. Department,
Paithan, Tq. Paithan, Dist. Aurangabad.
2. The State of Maharashtra. ...Respondents

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Advocate for Petitioners : Mr. C.R. Deshpande and Mr. H. V. Tungar,
Advocate for Respondent No.1 : Mr. Sunil B. Kakde
APP for Respondent No.2 : Mr. A.R. Kale

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**CORAM : V. K. JADHAV, J.
DATED : 17th OCTOBER, 2016**

ORAL JUDGMENT:-

1. Rule. Rule returnable forthwith. By consent, heard finally at admission stage.
2. Being aggrieved by the judgment and order dated 7.4.2012 passed by J.M.F.C. Nilanga in criminal Misc. Criminal Application

No. 113 of 2010 and the judgment and order passed by the Additional Sessions Judge, Nilanga dated 12.7.2013, in criminal revision No. 10 of 2012, thereby confirming the order passed by the Magistrate, the original applicants have filed present writ petition.

3. Brief facts giving rise to the present criminal writ petition are as follows:-

a) The petitioner No.1 wife has married with respondent No.1 husband. Petitioner No.2 is their son born out of their marital wedlock. The marriage of petitioner No.1-wife and respondent No.1-husband was solemnized in the year 2007. After the marriage she was treated well for a period of two months and thereafter she was subjected to ill-treatment on various counts. Respondent No.1 husband started suspecting about her character and used to beat and abuse her on that count. Petitioner No.1 became pregnant and she went to her parents house in March, 2008. She gave birth to petitioner No.2. However, respondent husband went to her parents house and told them that his first wife could not conceive for 7 years and how she could conceive within a year from the date of marriage. The respondent husband further questioned the paternity of the said child. Even he had beaten the petitioner-wife in presence of her parents. Respondent husband has refused and neglected to maintain

the petitioner wife and her son though having sufficient means. Thus, the petitioner wife and her minor son constrained to file an application bearing criminal Misc. application No. 113 of 2010 before the Magistrate for grant of maintenance of Rs.4000/- p.m. to petitioner No.1 wife and Rs.1500/- p.m. to petitioner No.2 son. Respondent husband has not filed any say to the said application for grant of maintenance nor examined himself before the court. The respondent husband has filed certified copy of judgment and order passed in H.M.P. No. 36 of 2010 by the civil Court, wherein the decree for restitution of conjugal rights came to be passed in his favour. The learned Magistrate by his impugned order dated 7.4.2012, partly allowed the application and thereby directed the respondent husband to pay Rs.1000/- (Rs. one thousand) p.m. as maintenance to petitioner No.2 (minor son). However, the application of petitioner No.1 for grant of maintenance came to be rejected on the ground that the respondent husband got decree for restitution of conjugal rights and thus, it is now concluded that the respondent wife herself deserted respondent husband and she is staying with her parents without any just cause. Being aggrieved by the same, the petitioners approached the Sessions Court, Nilanga by filing Criminal Revision No. 10 of 2012. The learned Additional Sessions Judge, by impugned judgment and order dated 12.7.2013 dismissed the revision. Hence, this writ petition.

4. Learned counsel for the petitioners submits that, after obtaining the decree for restitution of conjugal rights, the respondent husband did not take any effective steps to get the decree satisfied. The respondent husband has not made any genuine, sincere and honest efforts to resume further cohabitation. Even respondent husband has not filed his say to the application filed by the petitioner No.1 wife for grant of maintenance and, even, he has not bothered to examine himself before the Court on the point that despite genuine, sincere and honest efforts made by him, the petitioner wife refused to cohabit with him. In absence of such evidence, merely on the basis of decree for restitution of conjugal rights, application for maintenance cannot be rejected. The petitioner No.1 wife has examined herself on oath before the Court. She has deposed before the court that the respondent husband is serving in MS.R.T.C. at Paithan on monthly salary of Rs.10,000/- and Rs.2000/- p.m. for additional work. Further, the petitioner wife has also produced on record the property tax extract of residential house and further produced on record the 7/12 extract of the agricultural land owned and possessed by the family of the respondent husband. The said documents are marked at Exh. 26 and 25 respectively. The respondent husband has not denied the same. The approach of both the courts below is erroneous and not in accordance with law.

Learned Magistrate ought to have granted maintenance to petitioner No.1 wife. The learned Magistrate has granted maintenance at the rate Rs.1000/- p.m. only to the minor son. Learned Additional Sessions Judge without considering this legal aspect also confirmed the said order.

Learned counsel for the petitioners, in order to substantiate his submissions, places reliance on the judgments in the following cases.

- i) Amina Mohammedali Khoja vs. Mohammedali Ramjanali Khoja and Anr, reported in [1985 Mh.L.J. 988],
- ii) Ashok vs. Chayabai, reported in 1988-BCR-4-25,
- iii) Deelip Kumar Barik vs. Smt. Usharani Barik, reported in AIR 2007 Orissa 83.

5. Learned counsel for the respondent-husband submits that, the respondent husband has filed H.M.P. No. 36 of 2010 before the Civil Court for restitution of conjugal rights and after contesting the same, Civil Court has granted decree for restitution of conjugal rights in favour of the respondent husband. The learned Judge of the Civil Court has recorded a finding that the petitioner No.1 wife has deserted the respondent husband without any just cause and accordingly the decree for restitution of conjugal rights came to be passed in favour of the respondent husband. The Magistrate has, therefore, rightly recorded the finding to the effect that the petitioner

wife has no just cause to live separate and claim maintenance. There is no evidence of salaried income of respondent husband and, considering the age of minor petitioner No.2, the Magistrate has reasonably granted maintenance at the rate of Rs.1000/- p.m. to him. Learned Additional Sessions Judge has considered these aspects and accordingly confirmed the order passed by the Magistrate. No interference is required in the impugned orders.

6. On perusal of the judgment and order passed by both the courts below, it appears that the petitioner wife was subjected to cruelty by the respondent-husband by suspecting about her character. He used to beat and abuse her on that count. Even on one occasion, he had denied the paternity of the minor son-petitioner No.2. However, respondent husband has not filed his say to the application filed by the petitioner wife for grant of maintenance. In view of this, there is no specific denial about the allegations made by the petitioner-wife in respect of ill-treatment, as aforesaid. The respondent husband has only produced before the Court the certified copy of the judgment and decree in H.M.P. No. 36 of 2010.

7. In the case of ***Amina Mohammedali Khoja vs. Mohammedali Ramjanali Khoja and Anr (supra)***, relied upon by the learned counsel for the petitioner, this Court has held that after

obtaining decree for restitution of conjugal rights, the husband did not take any effective steps to get the decree satisfied in the sense that he did not make genuine, honest and sincere efforts to see that the wife should come back to him. It has further held that, the order of maintenance can always be passed in favour of the wife even if the husband had obtained the decree for restitution of conjugal rights against her unless it is established that he had willfully deserted her husband and was not willing to stay with him without reasonable cause or sufficient reasons.

8. In the case of **Ashok vs. Chayabai (supra)**, this court has again taken a similar view with observations that the application for maintenance under Section 125 of Cr.P.C. cannot be resisted merely on the ground by husband that he has obtained a decree for restitution of conjugal rights against wife under Section 9. It has further held that, the husband will have to satisfy the court after obtaining such decree he has taken effective steps for getting such decree satisfied in the sense that he has made genuine, honest and sincere efforts to bring the wife back.

9. In the instant case, except filing certified copy of the judgment and decree passed in H.M.P. No. 36 of 2010, the respondent husband has not bothered to examine himself before the court below.

He failed to satisfy the Magistrate that after obtaining said decree, he has made the honest and sincere efforts to bring the petitioner-wife for further cohabitation. On the other hand, oral evidence adduced by the petitioner-wife unmistakably points out that she is subjected to beating and abusing by respondent husband by suspecting about her character and, thus, she constrained to stay with her parents' house. It is a matter of record that the respondent-husband has not paid any amount towards maintenance to the petitioner-wife and their minor son. In view of this, the petitioner-wife is also entitled for the maintenance. However, both the courts below have not considered the same and, accordingly, rejected the application of the petitioner-wife for grant of maintenance.

10. The petitioner-wife has examined herself by filing affidavit of evidence at Exh.14 and further produced on record 7/12 extract of agricultural land owned by the respondent husband and the same is marked at Exh.25. Further, she has also produced the property tax extract of the house owned and possessed by the family of the respondent husband and the same is marked at Exh. 26. The petitioner-wife has also stated in her application for grant of maintenance and led her oral evidence before the court that the respondent husband is serving in M.S.R.T.C. at Paithan on monthly salary of Rs.10,000/- and Rs.2000/- for doing the additional work.

This position is not denied by the respondent husband. The petitioner wife has deposed before the court that the respondent-husband is getting Rs.1,00,000/- per annum from his agriculture land and he is getting Rs.5,00,000/- per annum from all sources. Since there is no specific denial to the same. The Income of the respondent husband is required to be considered as alleged by the petitioner wife.

11. The learned Magistrate considering the age of petitioner No.2 (minor son) rightly awarded the maintenance at the rate of Rs.1,000/- p.m.. However, considering the income of respondent-husband, the petitioner-wife is entitled for maintenance at the rate of Rs.3,000/- p.m (Rs. Three thousand only). It is a matter of record that, petitioner No.1 has no independent source of income and she is unable to maintain herself and her minor son. Thus, considering the living standard of respondent-husband and his family, it would be just and appropriate if the petitioner No.1 wife is granted maintenance at the rate of Rs.3000/- p.m. The original application came to be filed for grant of maintenance in the year 2010 and even after six years the petitioner-wife is not getting any maintenance. It would be thus inappropriate to refer the matter again to the Magistrate for determination of the quantum. Accordingly, I proceed to pass the following order:-

O R D E R

- I. Criminal Writ Petition is hereby partly allowed.
- II. The judgment and order passed by the Judicial Magistrate First Class, No.2, Nilanga, dated 7.4.2012 in Misc. Criminal Application No.113/2010 and the judgment and order dated 12.7.2013 passed by the Additional Sessions Judge, Nilanga in Criminal Revision No. 10 of 2012 are quashed and set aside to the extent of rejection of the application for grant of maintenance filed by petitioner No.1 wife.
- III) Criminal Misc. application No. 113 of 2010 is hereby partly allowed and the respondent husband is hereby directed to pay maintenance at the rate of Rs.3000/- (Rupees Three thousand only) to petitioner No.1-wife from the date of application.
- IV) Rest of the judgment and order passed by the Judicial Magistrate First Class, Court No.2, Nilanga, granting maintenance to petitioner No.2-son at the rate of Rs.1,000/- p.m. stands confirmed.
- V) Rule is made absolute in above terms. Criminal writ petition is accordingly disposed of.

(V. K. JADHAV, J.)