

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

CRIMINAL WRIT PETITION NO. 743 OF 2017

Sayyed Sadeka Kalim,
Age : 24 Years, Occu: Household,
R/o. House No.7, Sahara Row Housing Society,
Tq. & Dist. Ahmednagar.

..PETITIONER

VERSUS

Sayyed Kalim Nazir,
Age : 26 Years, Occu. Service,
R/o. Near Chisti Masjid,
Tq. Rahuri Dist. Ahmednagar.

..RESPONDENT

...

Mr. P.V. Barde, Advocate, for the Petitioner.

Mr. N.B. Narwade, Advocate, for the respondent.

...

.....

CRIMINAL WRIT PETITION NO. 921 OF 2017

Sayyed S/o Kalim Najir,
Age : 28 Years, Occu: Service,
R/o. Near Chisti Masjid, Tq. Rahuri,
Dist. Ahmednagar.

..PETITIONER

VERSUS

Sayyed Sadeka Kalim,
Age : 26 Years, Occu. Nil,
R/o. H. No.7, Sahara Row Housing
Society, Mukundnagar, Ahmednagar.

..RESPONDENT

...

Mr. N.B. Narwade, Advocate, for the Petitioner.

Mr. P.V. Barde, Advocate, for the Respondent sole.

...

CORAM : PRAKASH D.NAIK, J.

DATE : 8th NOVEMBER, 2017

PER COURT :-

Since the both the petitions are inter-connected, the same were heard together and are being disposed of by common order.

2. The petitioner in Criminal Writ Petition No. 743 of 2017 has challenged the order dated 11th May, 2017 passed by the learned Additional Sessions Judge, Ahmednagar, in Criminal Revision Application No. 226 of 2015, whereas the petitioner in Criminal Writ Petition No. 921 of 2017 has challenged the order dated 10th August, 2015 in Criminal Misc. Application No. 44 of 2014 as well as the order dated 11th May, 2017 passed by the learned Additional Sessions Judge, Ahmednagar in Criminal Revision Application No. 226 of 2015.

3. The petitioners in both the petitions are related to each other as husband and wife. The petitioner in Criminal Writ Petition No. 743 of 2017 is the wife of the respondent in the said petition. The said

respondent husband is the petitioner in Criminal Writ Petition No. 921 of 2017.

4. The marriage between the parties was solemnized on 10th July, 2013, as per Muslim Personal Law. Thereafter, wife joined the matrimonial house of her husband. According to wife, the husband is employed with Indian Armed Forces and earning salary of Rs. 40,000/- per month. She has alleged that after the marriage, the husband dropped her to her parent's house and resumed his duty in the Army in Punjab State. Few days thereafter, she joined the respondent to cohabit with him in Punjab. However, the husband sent her back to her parent's house and thereafter did not allow to her to cohabit and on one or the other pretext, avoided to maintain her. It is further contended by the wife that she had no source of income and was dependent on her husband. The wife preferred Criminal Misc. Application No. 44 of 2014 as per the provisions of Section 125(1) of Code of Criminal Procedure. The said application was preferred in the Court of learned Judicial Magistrate, First Class, Ahmednagar and she claimed Rs. 12,500/- per month as

maintenance. The application was opposed by the husband on the ground that, the wife is not ready to cohabit with him.

5. Trial Court directed interim maintenance of Rs. 2500/- per month to be given to the wife by the husband. It is alleged by the wife that the said amount was not paid and she was required to initiate the recovery proceedings. Thereafter, the maintenance amount was being deducted from the salary of the husband. The application for maintenance was thereafter, allowed by the Court of 6th Joint C.J.J.D. and JMFC, Ahmednagar by Judgment and order dated 10th August, 2015 and the husband was directed to pay maintenance of Rs. 6,000/- per month to the wife.

6. The husband challenged the aforesaid Judgment and order by preferring Criminal Revision Application No. 226 of 2015 on the ground that he has lost his service in the Army and hence the order of maintenance may be set-aside. The Sessions Court vide Judgment and order dated 11th May, 2017, reduced the amount of maintenance from Rs.6,000/- to 4,500/- per month. Being aggrieved by the said

order dated 11th May, 2017 the wife has preferred Criminal Writ Petition No. 743 of 2017, whereas the husband is aggrieved by order passed by both the Courts and has therefore, preferred Criminal Writ Petition No. 921 of 2017.

7. The Trial Court, while deciding the application preferred by the wife had considered the factual aspects in the matter and had opined that wife has no source of income, which is undisputed by the husband and that the husband is permanently employed in the Army and earning salary of Rs. 35,000/- per month, which is also not disputed by him. It was also observed that the husband has no other liability and, therefore, the wife is entitled for maintenance. On the basis of the finding arrived by the trial Court, the husband was directed to pay Rs. 6,000/- per month towards the maintenance to the wife from the date of order i.e. 10th August, 2015. In the revision application preferred by the husband, it was contended by the husband that the trial Court has not appreciated the evidence in proper perspective and the fact that wife has deserted the husband. It was also contended that prior to filing of the application for

maintenance by the wife, the husband had filed the suit for restitution of conjugal rights. It is contended that wife did not show inclination to join the matrimonial home, it was also stated that his parents are dependent on him and hence the order of maintenance may be set-aside. The Sessions Court vide order dated 11th May, 2017 has reduced the maintenance to Rs. 4500/- per month. It was observed that the wife did not show any inclination for cohabitation, although the husband had filed petition for restitution of conjugal rights. It was also observed that the husband has performed second marriage, and he has begotten two children out of that wedlock. This change of circumstances amounts to cruelty inflicted by the opponent on the applicant. It was further observed that when the application for maintenance was decided by the learned Magistrate, the opponent was serving at the border in Siachen in Jammu and Kashmir and was getting special allowance towards it and hence at that time, his salary was Rs. 43,331/-, but later on, when he was posted in Punjab, his salary was reduced to Rs. 28,052/- per month. It was further observed that, on 19th January, 2017, husband was discharged from his service and at present he is unemployed. Taking into

consideration the change in the circumstances that the opponent is unemployed and also considering his duty to maintain his parents, the order passed by the Trial Court is required to be re-considered. The Court also considered that the cost of living is increased and the husband is unemployed and is also required to maintain his second wife and children, the amount of maintenance was reduced to Rs. 4500/- per month towards the maintenance to wife.

8. The learned counsel appearing for the wife submitted that the Sessions Court had committed an error in passing order, which is under challenge. The Court ought not to have modified the order passed by the learned Magistrate on the basis of change in the circumstances. It is submitted that the Sessions Court has confirmed the finding of the trial Court with regard to entitlement of maintenance by wife. But at the same time order was modified by taking into consideration the circumstances enumerated therein. It is submitted that the husband had remedies under law to prefer appropriate application in the event of change in the circumstances before appropriate Court and that was not the ground for modifying

the said order by the Revisional Court. It is submitted that change in the circumstances, which is considered by the revisional court, is also not justifiable as the husband cannot be absolved from paying maintenance to the wife. The quantum of maintenance was arrived at after taking into consideration all the aspects by the trial Court and, therefore, the revisional court should not have interfered in the said order. It is submitted that in the event of change in the circumstance, husband could have preferred an application under Section 127 of the Code of Criminal Procedure and the revisional court could not have exercised the powers under Section 127 of the Code of Criminal Procedure, for modification of the order. It is submitted that, even change in the circumstance considered by the Sessions Court is not justifiable and no case was made out for reduction of the amount of the maintenance. The learned counsel for the wife relied upon the decision of the Supreme Court in the case of **Shamima Farooqui Vs., Shahid Khan AIR 2015 (SC) 2025** and also relied upon the decision of Bombay High Court in the case of **Vittharao Marotrao Awadhut Vs. Smt. Ratnaprabha Awadhut and others 1978 Cri. L.J. 1406** and decision in the case of **G. Balraj Vs. Smt.**

Mallamma and another Andhra Pradesh High Court 1984 CRI.**L.J. 1170**

9. The learned counsel for the husband appearing for respondent in Criminal Writ Petition No. 743 of 2017 and the petitioner in Criminal Revision Writ Petition No. 921 of 2017 submitted that both the orders require interference. It is submitted that the wife has not made out the case for maintenance. There is sufficient evidence on record to indicate that the husband has not neglected the wife and in fact she has refused to cohabit with the husband. The husband had preferred the petition for restitution of conjugal rights, which clearly shows that he is interested in the cohabitation, but wife was negligent to join the matrimonial home. It is submitted that the wife had cohabited with the husband for a very short period and thereafter, she did not join him. It is therefore, submitted that the findings of both the courts that the wife is entitled for maintenance are contrary to evidence on record and the same are required to be set-aside. The husband is unemployed, as he has been discharged from his employment. This factor is also required to be considered by the Court. In the absence of any evidence to show that there is any

willful negligence on the part of the husband to maintain his wife, the trial Court as well as the revisional Court ought not to have awarded the maintenance to her. It is submitted that though the Sessions Court has modified the order and reduced maintenance in the facts and circumstances of the present case, the order passed by the Trial Court ought to have been set-aside, since the wife is not entitled for any maintenance. It is submitted that, evidence on record indicates that the wife had neglected to cohabit, which is brought on record in the cross-examination of the wife. It is submitted that in spite of service of notice, the wife did not join the matrimonial home and resume cohabitation with the husband. The husband was discharged from the service with effect from 19th January, 2017 and it is not possible for him to pay the maintenance. It is therefore, submitted that both the orders be set-aside.

10. On perusal of the order passed by the trial Court granting maintenance, it is evident that the Court has taken all the aspects into consideration. The Court has appreciated the evidence on record and after taking into consideration the claim and counter claim of

both the parties, the Court had come to the conclusion that wife is entitled for maintenance, as directed by the said Court. The Court has appreciated the evidence in proper perspective. It was observed by the trial Court that there is no evidence to support the contention of the husband that he used to send the money to the wife for day to day expenses and for her livelihood. She was residing at her parental house out of compulsion as she had no other option. It was the responsibility of the husband to maintain her, which is not fulfilled by him. The defence of the husband that he had made several attempts through his relatives to pursue the wife for cohabitation is unsupported by any evidence. It was also observed that while wife was residing at her parental home, the husband was on leave during the period from 1st September, 2013 to 29th September, 2013 and although he visited his house at Rahuri, he did not enquire about well being of his wife nor he took her to the matrimonial home. Initiation of the proceeding for restitution of conjugal rights, which were withdrawn by the husband, and his contention that the wife was not ready to cohabit, cannot be accepted and no inference can be drawn that he was all the time willing to cohabit with the wife. It was

also observed that wife had sent the notice dated 4th December, 2014 for seeking maintenance and after the receipt of the said notice, the husband had apparently filed the said petition for restitution of conjugal rights and with intention to absolve from payment of maintenance. It is also observed that the said petition was withdrawn by him when the question of payment of maintenance arose. The notice forwarded by the husband was also after the demand of maintenance was made by the wife by issuing notice. The trial Court thereby came to the conclusion that wife has no source of income and that the husband is employed with Army and earning Rs. 35,000/- per month, were not disputed and that there is no evidence that any other person was dependent on him. In view of the above-said factors, there is no reason to disturb the order passed by the trial Court granting maintenance to the wife.

11. It is pertinent to note that the revisional Court has confirmed the finding of the trial Court about entitlement of maintenance by the wife. However, the revisional Court has passed order by taking into consideration the change in the circumstances that the opponent is

presently unemployed as he has lost his employment and that he is required to maintain his second wife and the children. The Sessions Court ought not to have entered into the arena of change in the circumstance, which were based on oral submissions of the parties and unsupported by any evidence. The order of the Sessions Court therefore is required to be set-aside. The Sessions Court has confirmed the fact that it is duty of the husband to maintain his wife which he has neglected to do so. In the aforesaid circumstance, the submissions advanced by learned counsel for the husband cannot be accepted and there is no reason to set-aside the order passed by both the Courts.

12. The order of the Sessions Court modifying the order passed by the trial Court is based on the change in the circumstances that the husband is presently discharged from his service and that he is unemployed. The Court has also taken into consideration the submissions advanced by the parties that the husband has performed the second marriage and he is having two children, who are dependent on him. The said circumstance could not have been

considered by the Sessions Court for modification the order. However, it was open to the husband to prefer appropriate application under Section 127 of the Code of Criminal Procedure before the trial Court.

13. In the case of Shamima Farooqui Vs. Shahid Khan (supra) it was observed that there was no justification to reduce the maintenance to the wife on the ground that husband has retired . In the case of **Vithalrao Marotrao Awadhut Vs. Smt. Ratnaprabha Awadhut and others** it is observed by this Court that Section 127 of the Code of Criminal Procedure is exercised on proof of a change in the circumstances if any person, receiving maintenance under Section 125, a monthly allowance, or ordered under the same Section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit. The magistrate as contemplated under Section 127 of the Code is the Magistrate who passed initial order. The effect of alteration in the allowance made under this provision will be to modify the earlier order. Any other Court cannot pass order which amounts to modification of the earlier order.

14. Similar observations were made by *Andhra Pradesh High Court in the case of G. Balraj Vs. Smt. Mallamma and another*. It was held that the application under Section 127 of the Code of Criminal Procedure is for alteration in the amount of maintenance. It provides a proof of change in the circumstances of any person, receiving under Section 125 of the Code of Criminal Procedure.

15. In these circumstance, the Sessions Court ought not to have exercised the power stipulated under Section 127 of the Code of Criminal Procedure for Change in the circumstance that the too on oral submissions. The parties have to produce the proof to the satisfaction of the Court, for alteration of order. However, taking into consideration the fact that the husband contends change in the circumstances, the liberty could be granted to him to prefer an application under Section 127 of the Code of Criminal Procedure. If case such an application is preferred, the Trial Court shall decide the same in accordance with the law. Hence, I pass the following order :-

ORDER

(i) The order dated 11th May, 2017, passed by the learned Additional

Sessions Judge, Ahmednagar in Criminal Revision No. 226 of 2015, modifying the order dated 10th August, 2015, passed by 6th Jt. Civil Judge, Junior Division, Ahmednagar, in Criminal Misc. Application No. 44 of 2014 is quashed and set-aside.

(ii) Liberty is granted to the respondent/husband in Criminal Writ Petition No. 743 of 2017, to prefer an application, under Section 127 of the Code of Criminal Procedure, 1973 before the Trial Court.

(iii) In case, any application under Section 127 of the Code of Criminal Procedure is preferred by the husband i.e. the respondent in Criminal Writ Petition No. 743 of 2017, the same shall be dealt with in accordance with law.

(iv) The Criminal Writ Petition No. 921 of 2017 is rejected.

[PRAKASH D.NAIK, J.]