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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.359 OF 2014

- | | | |
|--------------------------------|---|---------------------|
| 1. Sou. Laxmi Dnyanadeo Netke |] | |
| age: 45 years, Occn. Household |] | |
| |] | <u>Petitioners.</u> |
| 2. Vikas Dnyanadeo Netke |] | Original |
| age: 22 years, Occn. Education |] | Applicants. |
| Both are residing at: Manohar |] | |
| Zopadpatti, |] | |
| Puna road, Solapur |] | |

V/s.

- | | | |
|-------------------------------|---|--------------------|
| 1. Dnyanadeo Vitthal Netke |] | |
| age: 50 years, Occn. Service |] | |
| r/o RPF Office, Kurla Carshet |] | |
| near Vidyavihar station, |] | |
| Mumbai |] | <u>Respondents</u> |
| |] | Original |
| 2. Kum Nilam Dnyanadeo Netke |] | opponents. |
| Presently known as |] | |
| Sou. Nilam Shashikant Shinde |] | |
| age: 25 yrs. Occn. Household |] | |
| r/o 189 Budhwar Peth |] | |
| jai Malhar Chowk, Solapur |] | |

Mr. Shrishail Sakhare, for the Petitioners

Mr. Sharad T. Bhosale, for the Respondent
No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATED : 6th OCTOBER, 2017.

ORAL JUDGMENT :

- 1] Heard learned counsels for petitioners and respondents.
- 2] By this petition, the common order dated 17.7.2014, passed by Family Court, Solapur in Petition No.E-05 of 2012 and E-313/2012, is challenged by the petitioner wife and her minor son. By the impugned order, the trial Court has rejected her application for enhancement of maintenance and at the same time, allowed respondent's application for cancellation of maintenance.
- 3] The only ground on which the trial Court, appears to have cancelled the maintenance, earlier awarded to the petitioner at the rate of Rs.575/- per month, was that she is living in adultery. For this purpose, the trial Court has relied upon the evidence of the witness by name Gautam Pawar with whom according to trial Court, petitioner is living in adultery. In this respect, the trial Court has also relied upon the judgment dated 21.12.2006, in the earlier proceeding of the divorce bearing H.M.P. No.21 of 2004, and held that the divorce petition filed by the respondent husband was allowed on the ground of adultery. Though the petitioner pointed

out that she has preferred an appeal against said order and it was allowed, the trial Court held that as the petitioner has not produced copy of said judgment, this argument cannot be accepted.

4] However, as rightly submitted by learned counsel for the petitioner both the grounds on which the trial Court has rejected the application for enhancement of maintenance filed by the petitioner and allowed respondent's application for cancellation of maintenance, are totally against the evidence on record.

5] It is a matter of record that when the petitioner has filed Application for maintenance under Section 125 of Code of Criminal Procedure, bearing P.E.No.534 of 1998, at that time also, respondent herein has raised this contention that the petitioner was living in adultery with Gautam Pawar. However, categorical finding therein was recorded that the respondent has failed to prove the said ground and accordingly the petitioner was awarded maintenance under Section 125 of Code of Criminal Procedure.

6] Thereafter, the respondent has filed H.M.P. No.21 of 2004, for divorce against the petitioner. In the said proceeding, this

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Gautam Pawar was also made as co-respondent. The said petition was filed on two grounds that one that of petitioner living in adultery with Gautam Pawar and secondly that of desertion.

7] As regards the ground of adultery, issue No.1 was framed in the said proceeding as to, "*Whether the Opponent No.1 developed illicit relations with opponent No.2 in the year 1990?*". Perusal of the judgment passed in that petition on 21.12.2006, shows that the said issue was answered in the negative after considering entire evidence on record. Therefore, it is clear that respondent's petition for divorce on the ground of adultery was rejected. However, as the evidence on record proved that the petitioner has deserted him, his petition for divorce on the ground of desertion was allowed.

8] Against this judgment, petitioner has preferred an appeal in the District Court, Solapur. The copy of that judgment in Appeal No. 50 of 2007, is produced in this petition and it also goes to prove that the finding of the trial Court relating to the ground of adultery was confirmed therein and it was held that respondent has failed to prove that the petitioner was having illicit relations or

living in adultery with Gautam Pawar.

9] Thus, there are two concurrent findings recorded by the Civil Court; one was by the trial Court and the second by the appellate Court. There is also third finding recorded by the Criminal Court, in the P.E. No.313 of 2012, petitioner's application for maintenance holding that respondent has failed to prove that the petitioner is living in adultery with Gautam Pawar. Hence there was absolutely no scope for the trial Court in this proceeding to hold that the divorce was granted on the ground of adultery.

10] The submission of learned counsel for respondent is that the respondent has preferred Second Appeal against the judgment of District Court and in that Second Appeal, this finding is under challenge. However, till the Second Appeal is decided, at this stage, it would be preposterous to hold that respondent has proved that the petitioner is living in adultery.

11] In such circumstances, it is apparent that the trial Court committed a grave error in holding that respondent has proved that the petitioner is living in adultery and for that purpose relied upon

the judgment in H. M.P. No.21 of 2004. Merely because divorce is granted in the said H.M.P No.21 of 2004, the trial Court has without reading the said judgment assumed that it was on the ground of adultery. The least expected from the trial Court was to peruse the said judgment to know that divorce was granted only on the ground of desertion and not on the ground of adultery at all. The trial Court has also failed to take into consideration the earlier judgment, passed in Misc. Criminal Application No.534 of 1998 filed under Section 125 of Code of Criminal Procedure, wherein also the finding to this ground of adultery was given in negative.

12] Further finding recorded by the trial Court in this proceeding is that respondent has examined Gautam Pawar and his evidence has remained unchallenged; therefore, it proves that the petitioner is living in adultery. However, this finding is also not based on the material on record and it is in that sense totally perverse.

10] Learned counsel for the petitioner has produced on record the certified copy of the Roznama of the proceeding of the Trial Court, which shows that Gautam Pawar has filed affidavit in-lieu of examination-in-chief, but he failed to remain present for his

cross-examination. Hence, initially on 20th March, 2014 bailable warrant was issued against him. Despite that he remained absent. Hence non bailable warrant was issued against him on 28.5.2014. However, he failed to remain present and then ultimately, without taking any consequential steps or taking the matter to its logical conclusion, the trial Court has closed the evidence and proceeded to pronounce the judgment and order.

11] Thus, it is apparent that the evidence of Gautam Pawar could not have been read or relied upon by the trial Court as he has not made himself available for cross examination. In such situation, the trial Court has committed another grave error in holding that as his evidence has remained unchallenged, it should be relied upon and accordingly held that the petitioner is having illicit relations with Gautam Pawar and therefore, dis-entitled her from getting amount of maintenance.

Thus, it is apparent that the trial Court has not at all appreciated the evidence on record properly and drawn the conclusions which were not borne out from the material. The trial court should have taken sufficient care before branding the

petitioner with the stigma of “*living in adultery*” when it was to be not proved by the courts in earlier three proceedings. Hence, the cancellation of the amount of maintenance, awarded to her on that count is totally illegal and unjust. The impugned order of the trial Court, therefore, cancelling her amount of maintenance allowance by allowing respondent's petition E-313 of 2012, being illegal is quashed and set aside.

12] As regards the petitioner's claim for enhancement of maintenance, it appears that at the time of filing of the application before trial Court, she was getting maintenance at the rate of Rs.575/- per month in view of the order passed in Criminal Revision Application No.155 of 2004 on 10.8.2006. Thereafter this application for enhancement was filed in the trial court in the year 2008 and it is decided in the year 2014. Therefore, there is definitely change in the circumstances from the year 2006 till 2014. During this period, not only the prices of essential commodities have increased, but even salary of the respondent is also increased. He is working as Police Constable in Railway Department and therefore, as observed by the trial Court itself, respondent has got minimum four increments within four years from 2006 to 2010 and thereafter

from 2012 to 2017, he must have received further increments and his salary must have been increased. Therefore, having regard to this change in the circumstances, the petitioner becomes entitled to get enhanced amount of maintenance.

13] At this stage, learned counsel for respondent submits that parents of the respondents are dependent on him. Hence taking into consideration the approximate income of respondent from his salary and his liability, coupled with the requirement of the petitioner herself, having regard to the inflation in the prices of essential commodities, reasonable sum of maintenance at the rate of Rs.3,500/- per month to petitioner No.1 would be just and proper. Accordingly amount of maintenance to petitioner No.1 is enhanced from Rs.575/- per month to Rs.3,500/- from the date of application filed before the trial Court i.e. 08.01.2008.

14] As regards the maintenance to her son Vikas, who is petitioner No.2, his birth certificate is produced on record which shows that he was born on 14.4.1990. Therefore, as on the date of filing of the application 08.01.2008, he was minor and therefore, only till he attained the majority, he would be entitled to get

maintenance at the rate of Rs.3,000/- per month.

15] Accordingly, this revision is allowed.

16] The impugned order passed by the trial Court is quashed and set aside.

17] The Petitioner's application for enhancement of maintenance is allowed.

18 Respondent is directed to pay maintenance at the enhanced rate of Rs.3,500/- per month to the petitioner No.1 from the date of application before trial Court i.e. 08.01.2008.

19] Respondent is further directed to pay maintenance at the rate of Rs.3,000/- per month to petitioner No.2 Vikas from the date of application till he attains majority i.e. on 13.4.2008.

(DR. SHALINI PHANSALKAR-JOSHI, J.)