

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

CRIMINAL REVISION APPLICATION NO. 71 OF 2017

1. Bharti w/o Ratan Suradkar,
Age: 36 years, Occ.: Household,
R/o Gat No. 90/2, Plot No. 27,
Takshashila Nagar, Satara Area,
Aurangabad.
2. Miss Sumedha d/o Ratan Suradkar,
Age: 17 years, Occu. Education
3. Master Jeevak s/o Ratan Suradkar,
Age: 13 years, Occu. Education,
Applicants No. 2 and 3 are minor
and under guardian of applicant no.1
R/o Gat No. 90/2, Plot No. 27,
Takshashila Nagar, Satara Area,
Aurangabad.

... APPLICANTS

Versus

Ratan s/o Anandrao Suradkar,
Age: 53 years, Occu. Nayab Tahsildar,
R/o Entertainment Tax Department,
Collectorate Office, Jalgaon,
Dist. Jalgaon.

... RESPONDENT

Mr. Rahul O. Awasarmol, Advocate for the Applicants.
Mr. Y.L. Bidve, Advocate h/f. Mr. A.R. Rathod for the Respondent

CORAM : MANGESH S. PATIL, J.
RESERVED ON: 04.07.2018
PRONOUNCED ON: 08.08.2018

JUDGMENT:

Rule. The Rule is made returnable forthwith. The learned advocate for the respondent waives service. With the consent of the parties the matter is heard finally.

2. This is a revision under Section 397 read with Section 401 of the Code of Criminal Procedure being aggrieved and dissatisfied by the judgment and order passed by the learned Judge of the Family Court, Aurangabad in Criminal M.A. No. 50 of 2014 dated 17.01.2017, allowing the application but refusing to enhance the maintenance under Section 127 of the Code of Criminal Procedure to the extent as claimed by the petitioners against the respondent and also being aggrieved by the direction making such increase from the date of the order.

3. The marriage between the applicant no.1 and the respondent was solemnized on 28.06.1998. The applicant no.2 was born on 10.04.1999 and the applicant no.3 was born on 08.03.2002 out of the wedlock. Both the children are with the applicant no.1. After initial bickering the couple got separated and proceedings for maintenance under Section 125 of the Code of Criminal Procedure were lodged by her. It was subsequently enhanced to Rs. 1100/- per month to the applicant no.1 and to Rs. 800/- per month each to

the applicant nos.2 and 3 with effect from 11.07.2008, under Section 127 of the Code of Criminal Procedure. Alleging that there were change in material circumstances qua the applicants as well as the husband, the present proceeding was initiated once again under Section 127 of the Code of Criminal Procedure. By the impugned order the learned Judge allowed the application but increased the maintenance to Rs. 2000/- per month to each of the applicants but awarded it from the date of the order i.e. 17.01.2017. Hence this revision praying to enhance the maintenance up to Rs. 15,000/- per month for each of the applicants and for providing such increment from the date of the application i.e. 28.08.2014 instead from the date of the impugned order.

4. The learned advocate for the applicants submitted that ignoring the relevant facts the learned Judge has not increased the maintenance proportionate to the increase in the need of the applicants as well as increase in the income of the respondent. He would submit that in spite of rightly arriving at a conclusion that during the intervening period the suspension of the respondent from his government service was revoked and he was taken on a regular pay roll and his gross salary for the month of April-2016 was Rs. 54,299/-, the learned Judge has erred in deducting non statutory outages which is not permissible. If the respondent has taken advance of Rs. 9,583/- from the Provident Fund, that being not a statutory deduction, the Judge should not have given any allowance in that respect. Similarly the learned Judge also erred in similarly giving him allowance in respect of his contribution of Rs. 8,000/- towards the Government Provident Fund. Giving

such inadmissible allowances to the tune of Rs. 17,589/-, the learned Judge has calculated the net salary of the respondent to be Rs. 27,966/- whereas it should have been 45,549/-.

5. The learned advocate would further point out that since the applicants have been claiming increase since the date of the application i.e. 28.08.2011, even in June 2014 his net salary was Rs. 27,689/-, but since the learned Judge has taken into account inadmissible deduction towards his contribution towards G.P.F. of Rs. 6,250/-, the net salary including this contribution would come to Rs. 33,939/-. If that was the case, when the learned Judge had already held that due to the growing needs of the children towards education and increase in the costs of living the applicants were entitled to an enhancement in maintenance, without there being any cogent and relevant reason, the learned Judge has not increased the maintenance proportionately and has further erred in directing it to be paid only from the date of the order. Therefore the impugned order to this extent is perverse, arbitrary and capricious and this Court should intervene in the revisionary jurisdiction.

6. The learned advocate would point out that the earlier maintenance that was increased to Rs. 3,300/- in aggregate to the applicants was from 20.04.2010 when the respondent was under suspension. During that period of suspension his salary was considered as Rs. 16,880/- and after the deduction of Rs.2,000/- was allowed to him as he was paying that much as maintenance to his mother, his net income was considered to be Rs.

14,880/-. Since thereafter he has been reinstated with full wages. He must have received arrears in lump sum which also should have been taken into consideration but has been over looked by the learned Judge simply by referring to the salary slips which according to the learned Judge did not reflect such payment of arrears. Even otherwise, from his net salary of Rs. 14,880/- which he was earning in the year 2009-2010, his net salary has gradually increased to Rs.45,549/-. However, the learned Judge has not given a proportionate increase to the applicants and has meagerly enhanced it by another 2,700/- and in aggregate to Rs. 6,000/- per month.

7. The learned advocate for the respondent supported the order and the conclusion of the learned Judge in restricting the quantum of the increase as well as its operation.

8. Since the powers of this Court under Section 397 read with Section 401 of the Code of Criminal Procedure are being invoked, one need to examine whether the observations and the conclusions of the learned Judge are perverse, arbitrary and capricious.

9. At the outset, it is necessary to note that the respondent has not impugned the judgment and the order of the learned Judge in increasing the maintenance. Even no attempt was made by the learned advocate for the respondent to demonstrate as to how the observations and the conclusions of the learned Judge firstly in arriving at a conclusion that by the passage of time the needs of the applicants have increased and secondly, on the other hand

even the income of the respondent has increased are not sustainable on facts. He has not made any attempt to assail the observations and the conclusions of the learned Judge in this regard and therefore one need to proceed safely on the premise that there is no such challenge.

10. Even otherwise, the observations and the conclusions of the learned Judge in this regard are unassailable. She has elaborately considered the need of the applicants. The increase in cost of living which is inevitable. The children had grown up. The educational expenses also had increased and even there was increase in the salary of the respondent. Needless to state that by passage of time, in any economy where there exists some inflation, the cost of living would also increase proportionately and the respondent being in government employment even there would have been certain increase in the salary.

11. It is pertinent to note that in spite of the admitted fact that the respondent was suspended when the maintenance was increased last time around and when he was certainly not being paid the entire salary and when admittedly he was exonerated and must have been able to recover the entire salary, one could not have insisted for a strict proof that too from the applicants. In view of the principle of burden of proof contained in Section 106 of the Indian Evidence Act, in fact, it was the respondent who must have been having the knowledge about such payment of difference and which he ought to have himself proved. That having not been done, the learned Judge has clearly erred in observing that there was no material led by the applicants

to show that he was paid any arrears being the difference between the actual salary which he should have been paid but for his suspension.

12. In this regard one only need to emphasis that the Court should have taken judicial notice of the fact that a government servant under suspension is never paid full salary and if at all he is exonerated of the charges and is reinstated, unless there is a specific order refusing to pay him the difference for the period under suspension, he is usually paid that sum. A specific order in that regard has to be passed by the disciplinary authority. Therefore, the burden was on the respondent to have established all these facts and that having not being done, the learned Judge has clearly erred in holding that he had not received anything towards arrears.

13. Be that as it may, even otherwise, as is pointed out by the learned advocate for the applicants, when the applicants were granted increased maintenance last time around his net salary was of Rs. 16,880/-, whereas gradually it has gone up to Rs.45,549/- in the year 2016. The learned Judge though she was legally right in increasing the maintenance, *ex facie* the increase is not proportionate either to the need of the applicants or increase in the income of the respondent. From Rs. 3,300/- per month in aggregate, the Judge has increased it barely to Rs. 6,000/- per month by increasing it by Rs. 2,700/- in aggregate. Whereas his net salary has increased from Rs.16,880/- to Rs.45,549/-. Apparently, the salary was increased by almost two and a quarter times but the increase in the maintenance is barely 0.75 times. Without resorting to mathematical calculations, in my considered view, the

learned Judge has grossly erred in arriving at a mean while increasing the maintenance. The observations and the conclusions in this regard are clearly perverse, arbitrary and capricious. The maintenance to the applicants need to be enhanced to Rs.7,000/- per month to each aggregating Rs.21,000/- per month.

14. As regards the direction to pay the maintenance from the date of order is considered, one needs to refer to Sub-section (2) of Section 125 of the Code of Criminal Procedure which reads thus:

“Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order; or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.”

A bare reading of the provision would clearly indicate that the restriction imposed therein is applicable to the orders which are passed under Sub-section (1) of Section 125 of the Code of Criminal Procedure whereas, any increase maintenance which is permissible under Section 127 of the Code of Criminal Procedure is regulated by a different provision. There is no such restriction placed on the orders passed under Section 127 of the Code of Criminal Procedure regarding increase in the maintenance to be made operational only from the date of the order. Therefore, the restriction placed under Sub-section (2) of Section 125 of the Code of Criminal Procedure cannot be read into the provision contained in Section 127 of the Code of

Criminal Procedure.

15. Even otherwise, Sub-section (2) of Section 125 enables a Magistrate to make the maintenance payable from the date of the application. Therefore, it is imperative on the part of the Magistrate to record reasons in either case, when he directs operation of the order from the date of the application and even when he restricts it to the date of the order.

16. In view of such legal position, if one examines the impugned judgment and order passed by the learned Judge in the matter in hand, she has not assigned any reason as to why she was restricting the operation of the order and the increase in the maintenance to the date of the order. In this respect she has simply referred to the decision of the Supreme Court in the case of **Suman Narayan Niphade & Anr. V/s. Narayan Sitaram Niphade & Anr; 1995 Supp (4) SCC 243**, and has vaguely observed that the applicants were already receiving maintenance till the date (of the order) and therefore in view of the Supreme Court judgment she was restricting the increase to be effective from the date of the order.

17. A careful reading of the judgment of the Supreme Court would clearly reveal that the learned Judge has not considered the decision in the proper perspective. A careful reading of the order of the Supreme Court reveals that it does not lay down as a ratio that any increase in maintenance under Section 127 of the code of Criminal Procedure can be allowed only from the date of the order. On the contrary it has been laid down that

whether to allow such increase from the date of the application or from the date of the order is within the discretion of the Court. If that be so, the learned Judge has clearly erred in interpreting it to mean that enhancement can be only from the date of the order.

18. As is laid down in the case of **Suman Narayan Niphade** (supra) it is a matter of discretion as to since which date the increase in the maintenance can be made effective from. Needless to state that such a discretion must be exercised judiciously and must be supported by sound reasons. The learned Judge while restricting the increase only from the date of the order has not assigned cogent and relevant reasons. As is mentioned herein above the learned Judge merely mentioned that the applicants were already receiving the maintenance. When it can be easily demonstrated from the observations herein above, last increase in maintenance was awarded to the applicants in the year 2010 when the respondent was under suspension and was not getting the full pay. Subsequently he was re-insisted in the year 2014 and since thereafter he started getting full pay. It would certainly cause serious prejudice to the applicants if they are not allowed to reap benefit of such increase in the salary of the respondent from the date of the application. As is observed above, the learned Judge has not assigned cogent and relevant reasons for not making the increase effective from the date of the application and therefore even this part of the impugned order is perverse, arbitrary and capricious.

19. The upshot of the above discussion is that the observations and

the conclusions of the learned Judge of the Family Court restricting the increase to Rs. 2,700/- per month only and its operation to the date of the order is clearly perverse, arbitrary and capricious which has resulted in miscarriage of justice and needs to be corrected under the revisional jurisdiction of this Court.

20. The Revision is allowed. The impugned order to the extent mentioned herein-above is quashed and set aside. The applicants shall be entitled to increase in the maintenance at the rate of Rs.5,900/- to the applicant no. 1 and Rs.6,200/- to each of the applicant nos. 2 and 3, thereby they would be entitled to claim maintenance at the rate of Rs.7,000/- per month each from the date of the application i.e. 20.08.2014.

[MANGESH S. PATIL, J.]

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