

Judge, Bhusawal in Criminal Revision Application No.101/2014, by which the revision is dismissed and the order 07.07.2012 passed by the learned Judicial Magistrate, First Class, Yawal rejecting Misc. Application No.136/2006 filed by the present petitioner under section 125(5) and section 127 of the Code of Criminal Procedure Code, is confirmed.

3. The facts leading to the present writ petition, in brief, are as under:

i. The respondent No.1-wife had filed Criminal Misc. Application No. 65/1983 before the learned Judicial Magistrate, First Class Yawal for maintenance under section 125 Cr.P.C. That application was decided on 11.08.1992 and maintenance @ Rs.100/- per month was granted in favour of respondent wife. In revision i.e. Cri. Revision No. 227/1992, the learned District Judge, Jalgaon enhanced the amount of maintenance to Rs.200/-.

ii. The petitioner-husband had filed Hindu Marriage Petition No. 298/1997 for dissolution of marriage. It was decided on 24th April, 2006 and the divorce is granted. The petitioner, then filed Misc. Application No. 136/2006, under section 125(5) and section 127 of

the Code of Criminal Procedure Code for cancellation of the maintenance order on the ground that divorce decree is passed against the respondent wife on the ground of adultery and the marriage is dissolved. The learned Judicial Magistrate, F.C. Yawal rejected the application. The petitioner preferred Criminal Revision Application No. 101/2014. The learned Additional Sessions Judge, dismissed the revision and confirmed the order passed by the learned Judicial magistrate, F.C. Yawal. Hence this criminal writ petition.

4. Heard Mr. B. R. Kedar, learned counsel for the petitioner, Mr. P. P. Kothari learned counsel appearing for respondent No.1, and Mr. A. P. Basarkar, APP for respondent No.2 State.

5. Mr. Kedar, the learned counsel for the petitioner submits that the petition for dissolution was allowed on three grounds i.e. (i) desertion, (ii) cruelty at the hands of respondent wife and (iii) the wife was living in adultery. So, according to the learned counsel for the petitioner, the order of maintenance needs to be cancelled in view of Section 125(4) and (5) and section 127(2) Cr.P.C. Mr. Kedar further submits that the decree of divorce passed in Hindu Marriage

Petition No. 298/1997 was challenged by the respondent wife in the District Court by filing Regular Civil Appeal No. 187/2006. The District Court, by order dated 26.03.2012, confirmed the decree of Divorce.

6. Mr. Kedar further submits that the respondent wife has assailed the said order in Second Appeal No.647/2012 before this Court. The second appeal was also dismissed by this Court by order dated 24th July, 2017. According, to Mr. Kedar, the learned counsel for the petitioner, the petitioner husband has, by the cogent evidence, established that the respondent was living in adultery, therefore, she is not entitled for maintenance from the petitioner. However, the learned Magistrate has wrongly the dismissed the application for cancellation of maintenance and the said finding was wrongly confirmed by the Revisional Court.

7. Mr. Kothari, the learned counsel appearing for the respondent No.1 wife submits that single instance of sexual intercourse is not sufficient to constitute adultery. It is for the petitioner to establish that the respondent wife was continuously living adulterous life. According to the learned counsel, no independent evidence is produced before the learned Judicial

Magistrate, F.C. Yawal for cancellation of the maintenance on the ground of adultery. It is for the petitioner husband to prove the alleged adultery of the respondent in the proceeding before the Magistrate by leading evidence to that effect. So, according to the learned counsel for the respondent wife, the petitioner has failed to establish that the respondent was living in adultery continuously and that aspect has not been independently proved in the proceeding before the trial court i.e. Magistrate. Therefore, the learned Magistrate has rightly rejected the application so also the learned Additional Sessions Judge has rightly rejected the revision presented by the petitioner husband.

8. Mr. Kothari, learned counsel appearing for the respondent, in support of his contentions, relied upon the observation in case of **Vanmala Vs. H.M.Rangnatha Bhatta, reported in (1995) 5 Supreme Court Cases 299**, in which it is observed that divorced wife, who has not remarried, is entitled for maintenance. The observation of the above cited case is not applicable to the facts of the present case. In this case, it is the contention of the petitioner that the divorce was

granted by the Civil Court on the ground of adultery and therefore, in view of provisions of Section 125 (4) and (5) the respondent wife is not entitled for maintenance.

9. Section 125(4) and (5) Cr.P.C. reads as follows:

"125.Order for maintenance of wives, children and parents. (1) If any person having sufficient means neglects or refuses to maintain-

(a)

(2) ..

(3) ...

(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order. "

10. Learned counsel for the respondent relied upon the observation of this court in case **Chandrakant Gangaram Gawade Vs. Sulochana Chandrakant Gawade and others, reported in 1996 Cri.L.J.520**, in which, it is observed that mere stray or single lapse on part of wife is not sufficient to bring her conduct within meaning of 'living in adultery' as provided under section 125(4) Cr.P.C. It should be continuous course of adulterous conduct. Learned counsel also relied on the observation of this Court in the case **Chanda Preetam Wadate Vs. Preetam Ganpatrao Wadate and anr., reported in 2002 Cri.L.J. 397** to contend that stray instance of departure from virtue would not be sufficient to deny maintenance. Learned counsel for the respondent further relied on the decision of this Court in the case of **Nirmaldas s/o Ratan Alhat Vs. Sunita w/o Nirmaldas Alhat and ors., reported in 2006 Cri.L.J. 2635**, in which it is observed that respondent was unable to establish that petitioner was living in adultery through evidences. The learned counsel further placed reliance on the decision of Gauhati High Court in the case of **Abdul Sattar Vs. State of Assam, reported in Lex (Gau) 2008 6 63**, in which, in

para 5, it is observed that-

"5. Even if, for a moment, it is assumed that what the present petitioner contends is true that the opposite party had sworn an affidavit dissolving her marriage with the present petitioner, the fact of the matter remains that a Muslim marriage cannot be dissolved by a wife by swearing an affidavit. This position of law is, in fact, not in dispute. Notwithstanding, therefore, the accusations made against the opposite party that she had been, once, living with her paramour, the fact of the matter remains that the marriage-tie between the present petitioner and the opposite party having not been snapped according to the law, applicable to the parties, their marriage-tie still survives irrespective of fact as to whether the opposite party had voluntarily gone with her paramour and lived with her paramour or not. Thus, the crucial facts, which are relevant and necessary for determination of the case, were these: Whether the parties to the maintenance proceedings were husband and wife and whether the present petitioner, as husband, refused to maintain the opposite party and whether such refusal is legally sustainable?"

11. I have gone through the observations in the above

cited case. Those are not applicable to the peculiar facts of the present case. Here, in the present case, admittedly divorce in favour of the petitioner husband was granted on the ground that respondent wife was living in adultery. It is also undisputed that the order of the civil court granting divorce on the ground of adultery has attained finality. Therefore, in such circumstance, the question is whether it is required for the petitioner to prove this fact again before the criminal court. Obviously, the answer is 'No' for the reason that the question of adultery was finally determined by the Civil Court and that finding is confirmed by the first appellate Court as well as by this Court in Second Appeal. Therefore, such finding is binding upon the parties in the criminal proceedings also.

12. Relevant finding of the Civil Judge in HMP No. 298/1997 reads as under:

"6. The petitioner in his evidence at Exh. 68 deposed same things as in the petition. He again disclosed names of two persons, Chudaman Nathu Borse and Narayan Tukaram Mahajan. He received a letter written by his wife to narayan Tukaram Mahajan from the same

person which was brought to him by Shamrao Supadu Mali. that letter is at Exh.81. He got his letter examined through the Handwriting Expert at Aurangabad. He seen his wife when terminated her pregnancy in the year 1980 in the field of Chudaman Nathu Borse. He further deposed that he was having personal knowledge about illicit relations of the wife with narayan Tukaram Mahajan. He suffered a set back to his reputation due to it. In his cross examination, he admitted that he is acquainted with the handwriting of wife, when this letter was written her father was serving as Talathi and it was written on Inward-Outward registers page. Article A is report of Handwriting Expert. He denied that Exh.89 is not in the handwriting of his wife and he fabricated this letter in her name. Thus, evidence about the fact that in the year 1980 he seen his wife lying in the field of Chudaman Nathu Borse and she aborted her fetus remained unchallenged. His personal knowledge about illicit relations of his wife with Narayan Tukaram mahajan also remained unchallenged in his cross examination. He examined Shaligram Bhavrao Patil to support his contentions. But his case is supported by the evidence of Handwriting Expert."

13. The above finding was assailed by the

respondent wife before the District Judge, Jalgaon by filing Regular Civil Appeal No. 187/2006. The learned District Judge, Jalgaon has also confirmed the finding of the Civil Court by observing as follows:

"17. In the light of above observations and discussions, I am of the view that, the evidence, led by the respondent-husband, is sufficient to prove that the appellant-wife has deserted him for more than two years and it is also established that the appellant-wife was leading adulterous life. Learned Judge has taken into consideration all these facts and he correctly came to the conclusion that there was desertion and cruelty on the part of the appellant-wife and she was also leading adulterous life. The finding, given by the learned Judge, in my opinion, does not require interference. Learned Judge has correctly granted the decree for divorce. The appeal is, therefore, liable to be dismissed with costs."

14. The order passed by the learned District Judge Jalgaon in RCA 187/2006 was assailed by the present respondent-wife by filing Second Appeal No. 647/2012 before this Court. This Court, by order dated 24th July, 2017, dismissed the second appeal. It is observed

by this Court in para 6 of the judgment that:

"06. There is concurrent findings of facts by the trial Court as well as first appellate Court in respect of the abovementioned three grounds of divorce. The letter Exh. 81 was examined by the handwriting expert namely Sanjay Badrinath Kachar (PW 3) and he opined that it is in the handwriting of the appellant. The said letter speaks for illicit relations of the appellant with one Chudaman Nathu Borse and Narayan Tukaram Mahajan. Admittedly, the appellant and the respondents are residing separate since 1970. The trial Court as well as first appellate Court recorded positive findings that the appellant and the respondents are neighbours. The trial Court specifically observed that the appellant is keeping illicit relations with some other persons on the face of the respondent and that itself amounts to mental cruelty. All these factual aspects have been properly considered by the trial Court as well as first appellate Court. The concurrent findings of the facts recorded by this Court

needs no reconsideration in the Second Appeal.

No substantial question of law involves in this appeal."

15. In view of the above, it is not necessary for the petitioner to lead evidence again in the proceeding before the learned Magistrate to prove the adultery on the part of respondent wife. Once the dispute between the parties in relation to a particular issue is already adjudicated by the competent courts, it is not necessary for the petitioner to prove the same thing again and again in different proceeding, particularly in criminal proceedings.

16. Mr. Kedar, the learned counsel for the petitioner has relied upon the observation in the case of **V. M. Shah Vs. State of Maharashtra and another, reported in (1995) 5 Supreme Court Cases 767, in which, in para No. 11**, wherein, the Apex Court has observed as follows:

"11. As seen that the civil court after full-dressed trial recorded the finding that the appellant had not come into possession through the Company but had independent tenancy rights from the principal landlord and, therefore the

decree for evictions was negatived. Until that finding is duly considered by the appellate court after weighing the evidence afresh and if it so warranted reversed, the findings bind the parties. The findings recorded by the criminal court, stand superseded by the findings recorded by the civil court. Thereby, the findings of the civil court get precedence over the findings recorded by the trial court., in particular, in summary trial for offences like section 630. The mere pendency of the appeal does not have the effect of suspending the operation of the decree of the trial court and neither the finding of the civil court gets nor the decree becomes inoperative. "

In the above case, the finding of the civil court was under challenge in the Appellate court. The Apex court observed that the findings recorded by the Civil Court prevails until it is reversed by the appellate Court after weighing the evidence afresh. Here, in the present case, in view of the above observation, the findings recorded by the Civil Court that the respondent wife was living adulterous life is upheld by the competent courts in first and second appeals and attained finality, therefore the same will definitely prevail.

17. Mr. Kedar, the learned counsel for the petitioner has relied upon the observation of this Court in the case of **Sangavva Gulappa Khandekar Vs. Gulappa Kariyappa Khandekar**, reported in **BLR 1942 44 514, LAWS (BOM)1942 4 4**, in which the amount of maintenance awarded to the wife who was living in adultery is cancelled. Mr. Kedar, further relied upon the observations in the case of **Satyawan Jagtap & ors. Vs. Smt. Vimal Satyawan Jagtap & ors.**, reported in **1999 ALL MR (Cri) 1781**. The facts in the above case are identical with the facts of the present case. The facts and observations in the above case reads as follow:

"2. The petitioner was married to the respondent No. 1 on 27-5-1975. The wife had initially filed Maintenance Application against the husband in the year 1980 which is numbered as Misc. Application No. 76 of 1980. In the said application order dated 10-8-1983 for maintenance was passed in favour of the wife whereby the petitioner was directed to pay maintenance at the rate of Rs. 125/- per month to the respondent No. 1-wife. Thereafter second application was filed being Misc. Application No. 182 of 1986. That application was allowed by the Ld. J.M.F.C. Daund by judgment and order dated 17th June 1991 and the respondent-wife was granted maintenance at

the rate of Rs. 200/- per month and each of the two children were granted maintenance at the rate of Rs. 100/- per month. That order was challenged before the Sessions Court in Criminal Revision Application which came to be dismissed and the order of maintenance was confirmed by the judgment of the Session Court on 26-4-95. In the mean time when the application for maintenance was pending before the trial Court, the petitioner-husband filed petition for divorce against the wife in the Court of Civil Judge, Senior Division, Thane bearing M. J. Petition No. 38 of 1990. That petition was filed on the ground of adultery, cruelty and desertion under section 13(1)(i) (i-a) and (i-b) respectively. The said petition was not contested by the wife who remained absent and, therefore, ex-parte decree came to be passed by the trial Court on 9-3-1992 for divorce under section 13 sub-section (1) Clause (i-a) and (i-b) i.e. on the grounds of cruelty and desertion. The wife in the mean time had applied for execution of the order of maintenance granted in her favour by the two courts below. The said execution proceedings were contested by the petitioner-husband on the ground that the decree of divorce was, in the meantime, granted against the wife and, therefore, he was not liable to pay any amount to the wife towards the maintenance including the arrears of

maintenance which had accumulated before the passing of the decree of divorce. That application was filed before the J.M.F.C. bearing M.A. No. 355 of 1991 on 26-6-92 purporting to be made under [section 125\(3\)](#) of the Cr.P.C. The Ld. J.M.F.C., Daund rejected the said application by his judgment and order dated 8th July 1992 which is under challenge in the present writ petition.

6. So far as the liability of the husband for the payment not only of the future maintenance but even with regard to the arrears of maintenance is concerned, the petitioner, in my opinion, would not be liable to pay the same in view of the ratio of the decision of the Division Bench of this Court in Sangavva's case (supra) . However, the contention of Mr. Shah with regard to the liability for the payment of maintenance to the children is, in my view, untenable. The perusal of the ex-parte decree for divorce passed by the Jt. Civil Judge Senior Division, Thane by order dated 9-3-1992 would show that the decree of divorce was passed under [section 13\(1\)\(i-a\)](#) and (i-b) i.e. on the ground of cruelty and desertion and not under [section 13\(1\)\(i\)](#) i.e. the ground of adultery Mr. Shah sought to rely on the observations of the trial Court, particularly in para 3 of the judgment, where the trial Court had observed that the husband had alleged, inter alia, that wife was living

immoral life and during that period she had given birth to two children out of the illicit relations with other person. What I find is that though those observations were made by the Civil Court, the decree of divorce was not granted on the ground of adultery and if the said Court had found that the wife was living in adultery, nothing prevented the Court to pass decree under [section 13\(1\)\(i\)](#) i.e. on the ground of adultery. In any event, there is no finding today by any competent Court that the respondent Nos. 2 and 3 children were born per alium. In the absence of any finding or decree of any competent Court that the children were born per alium, they are entitled to get maintenance as per the impugned order in execution proceedings.

8. In the result the petition is partially allowed and the order of the trial Court dated 8-7-1992 passed in Misc. Application No. 355 of 1991 is set aside only to the extent of execution of arrears of maintenance in favour of respondent No. 1 wife only. Rule is made absolute accordingly. In view of the above the order of stay granted by this Court on 9th June 1993 shall stand vacated as regards payment of maintenance to respondent Nos. 2 and 3.

18. In view of the above, I am of the opinion that once the petitioner husband has established that the

respondent wife was living in adultery and on that ground divorce has been granted to the petitioner, in such circumstance, it is not necessary for the present petitioner husband to prove the same thing again in different proceeding. In view of the concurrent findings, it is established that the respondent was leading adulterous life.

19. For the reasons stated above, I am of the opinion that learned Judicial Magistrate, First Class has wrongly rejected Misc. Application No. 136/2006, filed by the present petitioner under section 125(5) and section 127 of the Code of Criminal Procedure for cancellation of maintenance as well as the learned Additional Sessions Judge, Bhusawal has wrongly dismissed Criminal Revision Application No.101/2014. Therefore both the orders deserve to be set aside. Hence following order:

O R D E R

- i. Criminal writ petition is allowed.
- ii. Misc. Application No. 136/2006, filed by the present petitioner under section 125(5) and section 127 of the Code of Criminal Procedure for

cancellation of maintenance is hereby allowed.

- iii. Both the orders, i.e. Order 07.07.2012 passed by the learned Judicial Magistrate, First Class, Yawal rejecting Misc. Application No. 136/2006, filed by the present petitioner under section 125(5) and section 127 of the Code of Criminal Procedure and order dated 23.06.2015 passed by the learned Additional Sessions Judge, Bhusawal in Criminal Revision Application No.101/2014, are quashed and set aside.
- iv. Rule is made absolute in the above terms. No costs.

(K. L. WADANE, J.)

JPC