

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

WRIT PETITION NO.3528 OF 2013

Sou. Pratibha Narendra
Kulkarni

And Another

... Petitioners

Versus

Narendra Ramkrishna Kulkarni

And Another

... Respondents

.....

Mr. Abhijeet B. Kadam a/w Hamid D. Mulla for the Petitioners.

Mr. P.R. Arjunwadkar for Respondent No.1.

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CORAM : M.S. SONAK, J.

DATE : 22 DECEMBER 2018

Oral Judgment :

. Heard Mr. Kadam, learned Counsel for the Petitioners and Mr. Arjunwadkar for Respondent No.1.

2 The challenge in this petition is to the judgment and order dated 25 September 2012 made by learned Sessions Judge, Pandharpur allowing Criminal Revision Application No.14 of 2009 instituted by Respondent No.1-husband and setting aside the judgment and order dated 15 January 2009 made by learned Judicial Magistrate First Class, Mangalwedha in Criminal Misc. Application No.115 of 2007, by which, the learned Judicial Magistrate First Class, had awarded maintenance of Rs.1,500/- per month to Petitioner No.1 (Rs.1,000/- per month to Petitioner No.2 - a minor son Santosh).

3 Mr. Kadam, learned Counsel for the Petitioners submits that the learned Sessions Judge failed to appreciate that he was exercising revisional jurisdiction and not appellate jurisdiction. He submits that even otherwise, there was ample evidence on record to indicate that Respondent No.1 was mistreating the Petitioners and therefore, the Petitioners had valid reasons to stay away from the matrimonial home. He submits that the maintenance amount awarded by the learned Judicial Magistrate First Class was itself quite meager. In any case, the learned Sessions Judge clearly exceeded jurisdiction interfering with the same. He submits that the learned Sessions Judge has reassessed the evidence and misconstrued the answers given by Petitioner No.1 in the course of her cross examination. He submits that Respondent No.1-husband failed to even step into witness box and therefore an adverse inference was required to be drawn against him. For all these reasons, he submits that the impugned judgment and order made by the Sessions Judge warrants interference.

4 Mr. Arjunwadkar, learned Counsel for Respondent No.1 submits that there is absolutely no error in the impugned judgment and order made by the learned Sessions Judge. He submits that the learned Judicial Magistrate First Class had completely misread the deposition of Petitioner No.1 and on such basis, recorded findings of facts which were in fact perverse. He submits that the learned Sessions Judge has correctly appreciated evidence on record and there is no infirmity in the findings recorded by the learned Sessions Judge. Mr. Arjunwadkar submits that Petitioner No.1 has failed to produce any evidence to suggest that she was beaten or ill-treated by Respondent No.1. He submits that Petitioner No.1 in the course of her cross examination admitted that she is ready to stay

with Respondent No.1, provided, Respondent No.1 ready to stay in a separate accommodation. He points out that the parents of Respondent No.1 were in their 90's and therefore, this suggestion was not acceptable to Respondent No.1. He submits that since, it is apparent that Petitioner No.1 is not willing to stay with Respondent No.1, this is clearly not a case of neglect or failure to maintain. He submits that in fact the Petitioners are staying away from matrimonial home without any valid reasons, therefore, their claim for maintenance is not at all justifiable.

5 Mr. Arjunwadkar points out that Respondent No.1 had already filed an application at Exhibit 16, in which he had made clear that the Petitioners are welcome to return to the matrimonial home. He submits that his application was not even considered by the learned Judicial Magistrate First Class, therefore, the order of learned Judicial Magistrate First Class was rightly set aside by the learned Sessions Judge.

6 Mr. Arjunwadkar produced for the perusal of this court, the deposition (oral evidence) lead before the learned Judicial Magistrate First Class. This comprises deposition of Petitioner No.1 and her cross examination. Mr. Arjunwadkar submits that Petitioner No.1 has herself admitted that she had hearing defect and despite the same, Respondent No.1 had married her. For all these reasons, Mr. Arjunwadkar submits that this petition is liable to be dismissed.

7 Rival contentions fall for determination.

8 There is distinction between the revisional jurisdiction and appellate jurisdiction. In exercise of revisional jurisdiction, the revisional court is not expected to re-appreciate or reassess evidence on record, as if it were a court of the first instance. On perusal of the impugned judgment and order made by the learned Sessions Judge, it appears that this distinction between the revisional jurisdiction and appellate jurisdiction was lost sight of. This is the basic infirmity in the impugned judgment and order of the learned Sessions Judge, which warrants interference.

9 The learned Sessions Judge, in present case proceeded to re-appreciate and reassess evidence on record. This is despite the fact that the learned Sessions Judge did not have opportunity to witness the demeanor of Petitioner No.1, who chose to examine herself. The learned Sessions Judge, it appears, has made selective reference to the deposition of Petitioner No.1. The entire examination in chief has been almost completely lost sight of. From out of statements in cross examination, mainly, some statements were averted to, out of context. On such basis, the learned Sessions Judge was not justified to interfere with the order made by the learned Judicial Magistrate First Class, awarding maintenance of Rs.1,500/- per month to Petitioner No.1 and Rs.1,000/- to the minor son Santosh.

10 In this case, now Respondent No.1-husband failed to even step into witness box. This means that there was no evidence to back his evidence. Some adverse inference was required to be drawn against Respondent No.1, for choosing not even step into witness box. Learned Sessions Judge, however, has not even adverted to this aspect.

11 From the deposition of Petitioner No.1, it is clear that she has deposed to the incidents of ill treatment meted out to her by Respondent No.1-husband. Even to the question as to whether she is willing to return to the matrimonial home, her immediate answer was that she was not willing, since Respondent No.1 used to beat her with kicks and blows. She also stated that she was also not given proper information of her son Hemant, who was staying with Respondent No.1. Thereafter, she did say that she would stay with Respondent No.1, provided Respondent No.1 is ready to reside separately. The Learned Sessions Judge has only emphasized on this statement and on such basis, held that it is Petitioner No.1, who was acting unreasonably in not returning to the matrimonial home. The learned Sessions Judge failed to appreciate social context of the matter or the setting in which such statement was made. The learned Sessions Judge also failed to appreciate social status of the parties before him.

12 At several places in the examination-in-chief as well as in the cross examination, Petitioner No.1 has deposed to that maltreatment she had to suffer at the hand of Respondent No.1. The learned Sessions Judge has faulted Petitioner No.1 to not examining any independent witness. However, same yardstick was not applied when Respondent No.1, who was the main party to the proceedings, failed even to step into witness box and examine himself.

13 Mr. Arjunwadkar, learned Counsel contended that Petitioner No.1 owns property and has also applied for partition. In her evidence,

Petitioner No.1 had made some reference to an agricultural property. However, such undivided property was, by no means, sufficient to maintain herself and her son-Santosh. The evidence on record as regards occupation of Respondent No.1, gives an indication of his earnings. In any case, the learned Judicial Magistrate First Class had awarded maintenance of only Rs.1,500/- per month to Petitioner No.1 and Rs.1,000/- to Petitioner No.2, the minor son-Santosh. This amount is neither excessive nor disproportionate to the income of Respondent No.1.

14 There is hardly any discussion, as to why the maintenance amount of the minor son-Santosh has been reduced from Rs.1,000/- per month to Rs.700/- per month. Mr. Arjunwadkar, learned Counsel for Respondent No.1, however, quite correctly and quite graciously agreed that amount of maintenance of Rs.1,000/- per month awarded by Judicial Magistrate First Class to minor son-Santosh, may be restored.

15 For all aforesaid reasons, this petition is required to be allowed. Accordingly, the impugned judgment and order dated 25 September 2012 made by the learned Sessions Judge at Pandharpur is set aside and the judgment and order dated 15 January 2009 made by learned Judicial Magistrate First Class at Mangalwedha is restored.

16 Rule is made absolute in the aforesaid terms with costs, which is quantified at Rs.5,000/-.

17 The arrears of maintenance, which will have now accumulated on account of restoration of the order made by the learned Judicial Magistrate

First Class to be paid by Respondent No.1 to the Petitioners within three months from today. Respondent No.1, however, to start paying the maintenance amount in terms of the order of the Judicial Magistrate First Class forthwith.

18 All concerned to act on basis of authenticated copy of this order.

(M.S. SONAK, J.)