

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

919 CRIMINAL WRIT PETITION NO.833 OF 2020

**FARZHANA PARVIN W/O AKHLAQKHAN
VERSUS
AKHLAQKHAN S/O KHALILKHAN AND ANOTHER**

...
Advocate for Petitioner : Mrs. Rashmi S. Kulkarni
Advocate for Respondent No.1 : Mr. Naseem R. Shaikh
APP for Respondent No.2/State : Mr. R.B. Bagul
...

CORAM : N.R. BORKAR, J.

DATE : 18TH NOVEMBER, 2021

PER COURT :

This petition takes an exception to the judgment and order dated 1st June, 2020, passed by the learned Addl. Sessions Judge, Jalgaon in Criminal Revision Application No.170 of 2016. By the order impugned, the learned Addl. Sessions Judge had confirmed the order passed by the learned Magistrate, dated 3rd August, 2016, in Criminal Misc. Application No.385 of 2013, by which the learned Magistrate rejected the application filed by the petitioner under Section 125 of the Criminal Procedure Code for maintenance.

2. The petitioner and respondent No.1 were married on 19th May, 2012 and it was second marriage of respondent No.1 after the death of his first wife. According to the petitioner, during her stay at the matrimonial house, she was ill-treated mentally and physically. It is alleged that on 24th February, 2013 she was sent to her parents house even though at that time she was seven months pregnant. According to the petitioner, on 1st May, 2013, she gave birth to a still-born girl child. It is alleged that respondent No.1 came to the hospital and instead of giving her moral support, abused her and refused to take her back for cohabitation to his house.

3. On the other hand, according to respondent No.1, the petitioner was not happy with her marriage and she always used to say to him that she wanted to marry with unmarried person. According to respondent No.1, petitioner thus on her own, left his house and went to her parents' house. According to respondent No.1, though he tried to bring her back to his house, she refused to come.

4. The learned Magistrate, after recording the evidence and hearing the parties, rejected the application filed by the petitioner. The learned Magistrate has held that there is no neglect or refusal on the part of respondent No.1.

5. The Revision Petition was filed against the order of learned Magistrate rejecting the application for maintenance. The Revisional Court dismissed the Revision petition by the order impugned.

6. I have heard the learned counsel for the petitioner and the learned counsel for respondent No.1.

7. Learned counsel for the petitioner submits that the learned Magistrate has failed to appreciate the facts and circumstances of the case in its correct perspective and erred in rejecting the application for maintenance. It is submitted that admittedly the marriage of respondent No.1 with the petitioner was a second marriage. It is submitted that according to respondent No.1, the petitioner was not happy with her marriage as she wanted to marry unmarried person. It is submitted that in that case the petitioner would not have accepted the marriage proposal of respondent No.1 nor she would have stayed with respondent No.1 for nine months. It is submitted that, according to respondent No.1, he gave *Talaq* to the petitioner on 1st August, 2013. It is submitted that this conduct of the petitioner is against his claim that he tried to bring back the petitioner to his house. It is submitted that respondent No.1 thereafter immediately even married to one Shahistabi for third time.

8. It is further submitted that if according to respondent No.1, the petitioner was refusing to come with him for cohabitation and he was genuinely wishing to bring her back then he ought to have filed proceeding for restitution of conjugal rights instead of giving the alleged Talaq. It is submitted that in the aforesaid circumstances, the learned Magistrate was not justified in rejecting the application filed by the petitioner, and the learned Revisional Court was not justified in dismissing the Revision Petition. It is accordingly submitted that the orders impugned need to be set aside.

9. On the other hand, the learned counsel for respondent No.1 submits that the learned Magistrate after appreciating the evidence on record, recorded finding that there was no neglect or refusal on the part of respondent No.1. It is submitted that learned Revisional Court has confirmed the said finding and dismissed the Revision Petition. It is submitted that in absence of any jurisdictional error this petition under Article 227 of the Constitution of India may not be entertained against the orders impugned. In support of submission, learned counsel for respondent No.1 has relied upon a decision of Hon'ble Supreme Court in the case of **Gulshera Khanam v. Aftab Ahmad**, reported in **AIR 2016 Supreme Court 4810**.

10. Learned counsel for respondent No.1 further submitted that the petitioner has admitted in her evidence that she had not lodged the report in respect of alleged harassment nor she had sent notice through Lawyer. It is submitted that the petitioner has further admitted that she has not filed any proceeding for restitution of conjugal rights. It is submitted that considering this evidence, no interference is called for in the impugned orders. In support of the submission, the learned counsel for respondent No.1 has relied upon the decision of this Court in the case of ***Sayyed Jabbar Ali v. Mst. Saheba Fatima***, reported in ***2002 Cri.L.J. 1332***.

11. Admittedly, the petitioner and respondent No.1 were married on 19th May, 2012 and it was the second marriage of respondent No.1 with the petitioner. According to the petitioner, during her stay at her matrimonial home, she was ill-treated mentally and physically and, on 24th February, 2013, she was sent to her parents house; whereas, according to respondent No.1, the petitioner was unhappy with her marriage with him as she wanted to marry an unmarried person and thus at her own left his house.

12. According to the respondent No.1 himself everything about his first marriage was disclosed to the petitioner. If this so, then the defence of

respondent No.1 that petitioner was unhappy with her marriage as she wanted to marry with unmarried person cannot be accepted. Apart from this, admittedly, on the date on which the petitioner was sent to her parents house, she was seven months pregnant. Assuming that the marriage of petitioner was performed against her wish, then she would not have stayed at the house of respondent No.1 for nine months nor she would have allowed to conceive the child from respondent No.1.

13. Admittedly on 1st May, 2013, the petitioner gave birth to a still born child. According to the petitioner, on that day, respondent No.1 came to the hospital and, instead of giving her moral support, abused her and refused to take her back to his house for cohabitation. Whereas, according to respondent No.1, many times he visited the house of parents of the petitioner alongwith respectable persons from his community including the Mediator of their marriage namely Jafarbhau Khatik to bring back the petitioner to his house for cohabitation. However, every time, they were insulted and the petitioner was not sent for cohabitation with him. However, neither Mediator Jafarbhau Khatik nor any respectable person came to be examined except one Nurulla Khan, who appears to be neighbour of respondent No.1. In the facts and circumstances, the Mediator was the best witness with regard to the alleged claim of respondent No.1 that he

visited the house of parents of the petitioner and tried to bring back the petitioner to his house for cohabitation. However, this witness has not been examined.

14. Apart from above, respondent No.1 instead of filing proceeding for Restitution of Conjugal Rights, according to him, on 1st September, 2013 he gave *Talaq* to the petitioner. This conduct of respondent No.1 of giving *Talaq* within a very short period of time after sending the petitioner to her parents home, belies his claim that he wanted to bring the petitioner at his house for cohabitation. It further appears that the petitioner thereafter even got married for third time, even though the suit filed by the petitioner challenging the *Talaq* is pending.

15. The learned Revisional Court instead of examining all these aspects dismissed the Revision Petition only on the ground that the petitioner is getting Rs.4,000/- per month as interim maintenance in the proceeding filed by her under the provisions of Protection of Women from Domestic Violence Act and no case is made out for additional amount. The learned Revisional Court however while doing so, lost sight of the admission of respondent No.1 in his evidence. The respondent No.1 in his evidence to show his inability to pay the maintenance to the petitioner at the rate

of Rs.12,000/- per month as claimed by the petitioner has stated that for maintaining his third wife, he is required to spend Rs.8,000/- to Rs.10,000/- per month. The petitioner is, thus entitled to at-least Rs.8,000/- per month. Admittedly, respondent No.1 is working as a Teacher and, in the year 2015, he was getting salary of Rs.20,000/- to Rs.25,000/- per month, and, thus, he has sufficient means to pay the said amount.

16. As regards the judgment relied upon on behalf of respondent No.1 in the case of **Gulshera Khanam** (cited *supra*), the Hon'ble Supreme Court has held that the High Court while exercising its power under Article 227 of the Constitution of India should have confined it's inquiry to examine as to whether any jurisdictional error was committed by the first Appellate Court by deciding the first appeal.

17. In the present matter, the findings of learned Magistrate are based on misreading of the evidence and are grossly erroneous. The Revisional Court thus failed to exercise the jurisdiction vested in it. Thus, the orders impugned cannot be allowed to stand.

18. As regards the judgment relied upon by respondent No.1 in the case of **Sayyed Jabbar Ali**

(cited *supra*), it would not apply to the facts of the present case, as in the said case, there was no sufficient evidence of refusal and neglect and, in addition to it, there was decree of restitution of conjugal rights against the wife. Thus, the following order is passed :-

O R D E R

- 1] The petition is allowed.
- 2] The impugned orders are quashed and set aside.
- 3] The respondent No.1 is directed to pay an amount of Rs.8,000/- [Rupees Eight Thousand] per month to the petitioner towards maintenance from the date of this order.

(**N.R. BORKAR, J.**)

Learned counsel for respondent No.1 submits that the present order be stayed for three months to enable respondent No.1 to approach the Hon'ble Supreme Court against this order. Considering the fact that this order is in relation to maintenance, request is rejected.

(**N.R. BORKAR, J.**)