

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

CRIMINAL REVISION APPLICATION NO.61 OF 2022

Prakash S/o Eknath Dheple,
Age 46 years, Occ. Labour,
R/o. Hanuman Chowk, Chilkalthana,
Aurangabad.

...Applicant

Versus

1. Vithabai W/o Prakash Dheple,
Age : 40 years, Occu: Service,
R/o. In front of Balaji High School,
Dahihande Lane, Chikalthana,
Aurangabad.

2. Kailas S/o Prakash Dheple,
Age : 18 years,
R/o. As above.

...Respondents

...

Mr. Prakash Eknath Dheple, Party in person.
Ms Shital E. Waghmare, Advocate for the respondents.

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CORAM : S.G. MEHARE, J.

RESERVED ON : 14th JULY, 2022

PRONOUNCED ON : 18th AUGUST, 2022

JUDGMENT:-

1. The petitioner/husband has impugned the common orders under Section 397 and 401 of the Code of Criminal Procedure, passed by the learned Judge Family Court, Aurangabad, in Miscellaneous Criminal Applications Nos. 47/2021 and 01/2021 dated 14.01.2022.

2. The brief facts of the case are that the Family Court,

Aurangabad, had granted the maintenance of Rs.1,500/- per month to respondent no.1 and Rs. 2,000/- per month to respondent no.2 by its order passed in case no.E-285/2012 dated 03.03.2017. The petitioner revealed that respondent no.1 had made a false statement before the Court that she did not work and had no source of income at the time of the petition. On the contrary, she was working and getting a monthly salary of Rs. 12,000/- to 15,000/-. He also alleged that respondent no.1 was working by changing her name to Shalini. She has obtained the maintenance orders suppressing the facts and playing fraud with the Court; hence, the order dated 03.03.2017 may kindly be cancelled.

3. The respondents denied the allegations of playing fraud and having the income to respondent no.1. The respondents have filed an application under section 127 of the Code of Criminal Procedure for the enhancement of maintenance. They have a case that the earlier maintenance was granted three years and ten months before. Due to inflation, the prices of daily needs have risen. The education expenses of respondent no.2 have also been increased. Her expenses have also been increased. The petitioner/husband is an Engineer. He runs two photo studios and has income from rent. He has agricultural land also. He has an income of Rs. 20,000/- to 25,000/- per month from studios, Rs.16,000/- per month from rent and Rs. One lac p.a from agriculture. He can pay them monthly

maintenance of Rs 20,000/- per month.

4. The petitioner/husband denied the income as pleaded. He came with a case that he earns his livelihood by doing wage labour. He has to maintain his old parents, and his financial condition is poor. Hence, their application may be dismissed.

5. The learned Judge of the Family Court has rejected the application of the petitioner/husband, holding that he has not proved any of the circumstances provided in Section 127 of the Code of Criminal Procedure. The Court has no jurisdiction to cancel the maintenance for the reason of suppressing the income by the wife while claiming the maintenance in the earlier proceeding under section 125 of the Code of Criminal Procedure, and he did not produce cogent evidence that a lady Vithabai and Shalini is the same person. It has also been observed that the Court is not sitting in appeal against the maintenance orders. The learned Judge has also observed that though the wife is earning, taking her income into account, maintenance may be granted to her. Accordingly, he allowed the application of the respondents and enhanced the maintenance from Rs. 3,500/- per month to Rs 6,500/- per month.

6. The petitioner/husband argued in person and submitted the notes of written arguments. He has aggressively argued that the learned Judge ignored the material evidence that the respondent was

working with the company and had received a provident fund. She was working under a fake name. The learned Judge has also not discussed the various documents placed on record. The Court has not taken action under section 340 of the Code of Criminal Procedure against the wife. He also relied on the case laws. He prayed to allow the revision application.

7. The learned counsel for the respondents has vehemently argued that the Applicant did not establish the allegations of using a fake name. He was very irregular in paying the maintenance. Still, a huge amount is due to the Applicant. He has not to maintain anybody, but he has come up with a false case that he has to maintain his parents. He has a handsome income from business, rent and field. The evidence laid before the learned Judge has been correctly appreciated. The expenses of the son have been increased. The wife has no sufficient means and income to cope with the essential daily expenses. The son is a college-going boy. A good amount is required for his education, food and medicine. She has supported the impugned orders and prayed to dismiss the revision.

8. Before adverting to the facts, it would be appropriate to answer on the jurisdiction of the Court under section 127 of the Code of Criminal Procedure.

9. The petitioner/husband sought the cancellation of the

maintenance order primarily on the ground that the wife had the source of income, but she had suppressed it from the Court and obtained the maintenance order. The learned Judge discarded his prayer by observing that the Court entertaining an application under section 127 Code of Criminal Procedure has no jurisdiction to consider such application on the ground of obtaining the order by suppressing the facts that the wife had a source of income and is not sitting in appeal.

10. Section 127 of the Code of Criminal Procedure provides for alteration of allowance and cancellation of the order granting maintenance. Under sub-section (1), where the change in the circumstances of the person has been proved, the Magistrate may alter the allowance granted to such person. Under sub-section (2), the Magistrate shall cancel or vary the maintenance order, where it appears to the Magistrate that in consequence of any decision of the competent Civil Court, the order should be cancelled or varied. Under sub-section (3), where after the divorce the woman is remarried, if she has received the whole of the sum under customary or personal law payable to such woman, the Magistrate, on the satisfaction of the conditions given above, shall cancel the order granting maintenance under section 125 of Code of Criminal Procedure.

11. The law is well settled that a decree or order obtained by playing fraud on the Court or misrepresentation of fact is a nullity and

non est in the eye of the law, and the fraud vitiates everything. The next question that arises for consideration is whether the Magistrate can recall the order obtained by playing a fraud on the Court on misrepresentation or suppression of fact ?

12. Section 362 of the Code of Criminal Procedure is relevant to deal with the powers of the Magistrate to alter or review the judgment or final order passed by him/her. For ready reference, it is reproduced thus;

“362. Save as otherwise provided by this Code or by any other law for the time being in force, no Court when, when it has signed its judgment or final order disposing of a case, shall alter or review the same, except to correct clerical or arithmetical error”.

13. The section opens with the words save as provided in this Code or any other law for the time being in force. That indicates that there is no absolute bar to alter or review the judgment or order signed by the Magistrate. Where the Code of criminal procedure or any other law for the time permitting, the Magistrate may review or alter its order. The said section applies to the cases where the case was finally disposed of. Section 127 of the Code of Criminal Procedure, as discussed above, confers the power upon the Magistrate to alter or cancel the order granting maintenance. The powers to review are the statutory powers. Unless the law confers such power, the Court cannot exercise the discretionary power. Section 362 of the

Code of Criminal Procedure applies to judgments as well as a final order. If the judgment or order is not final, then the Court may exercise the powers to review.

14. The Bombay High Court in the case of Ranjeeta Deepak Balsekar V Deepak Baburao Balsekar AIR 2009 NOC 1319 Bombay, has observed that it is well settled that the proceedings under section 125 of the Code of Criminal Procedure are of quasi-civil and quasi-criminal nature. The order passed in an application under section 125 of the Code of Criminal Procedure does not finally determine the rights and obligations of the parties.

15. The Hon'ble Supreme Court, in the case of Nandlal Misra v K.L. Misra, 1960, AIR 882, had an occasion to deal with sections 488 and 489 inserted in chapter XXXVI of the old Code of criminal procedure. The said chapter pertains to the maintenance of wives and children. The said chapters and sections 488 and 489 were identical to sections 125 and 127 provided in chapter IX of the *Code of Criminal Procedure 1973*. It has been observed in the said case that the relief given under chapter XXXVI is essentially of civil nature. It provides a summary procedure for compelling a man to maintain his wife or children. The findings of the Magistrate are not final, and the parties can legitimately agitate their rights in civil Court. This chapter is self-contained and prescribes the procedure to be followed, and provides for the enforcement of the decision of the Magistrate.

16. Chapter IX of the Code of Criminal Procedure 1973, the heading of the said chapter is “Order for maintenance of wives, children and parents”. It is an independent chapter dealing with the rights of wives, children and parents and the person unable to maintain herself/ himself, to claim the maintenance from the person responsible for maintaining such person. It also prescribes the alteration and cancellation of the maintenance order. It is settled law that the proceeding under chapter IX of the Code of Criminal Procedure, 1973 is essentially of civil nature.

17. The dictionary meaning of the term ‘review’ is to examine and study again. So the review of judgment and order is to examine or study the facts and judgment or order of the case again. The Discovery of new and important facts or evidence is one of the grounds to review the judgment or order. Where the Court has the power to review the judgment or order, the application for review would lie to the Court which passed the judgment or order. If a fact that vitiates the proceeding may be discovered subsequently, and if it is brought to notice of the Court, the Court has to examine such facts and take an appropriate decision. The law, as discussed above on order obtained by suppression of fact, is clearly a fraud, and fraud vitiates everything. The Court with whom the fraud has been played has very well the powers to examine and study the facts of the judgment obtained by playing fraud.

18. In the case of Nandalal Misra and Ranjeeta Deepak Balsekar (cited supra), it has been unequivocally laid down that the orders passed under section 125 are not final. Considering said law, this Court is of the view that the proceeding seeking cancellation of maintenance order does not fall under a bar under section 362 of the Code of Criminal Procedure 1973. Section 362 of the Code of Criminal Procedure does not bar reviewing the order passed under chapter IX of the Code of Criminal Procedure. Hence, the competent Court has powers to review its earlier orders if fraud has been played.

19. The husband had come with a specific case that at the time when the wife had claimed the maintenance had a source of income. However, she had suppressed such material facts from the Court. She was working in a company under a different name. Therefore, the order granting maintenance in the first proceeding under section 125 Code of Criminal Procedure was obtained by playing fraud. The husband has filed the documents from the employer of the wife. The learned Judge has observed that the husband has filed many documents through witnesses. As per document Ex. 32, a lady, Shalini Prakash Dheple, has been doing a job in Amodi services since 2017. However, it has been further observed that the husband did not produce cogent evidence that a lady, Vithabai (the wife) and Shalini are the one women.

20. The law is settled that the earning women are also entitled to maintenance. In the case of Rajnesh Vs. Neha (2021) 2 SCC 324 the Hon'ble Supreme Court has laid down the law that the quantum of maintenance may be determined considering the income of the wife. The question that has been raised by the applicant/husband is that when Application No.E-285/2012 for maintenance was pending that time the wife had a source of income. However, she did not bring this fact to the notice of the Court and thereby played fraud with the Court and obtained the order of maintenance. Therefore, the earlier order is liable to be cancelled. Admittedly, the said proceeding was decided on 03.03.2017. The applicant/husband has produced the document from the employee that *prima facie* reveals that the provident fund account of the wife was settled in 2016-2017, and thereafter, she was in employment with Amodi Services Ltd. The applicant/husband has deposed that the wife has obtained the maintenance suppressing the material facts. He has also suggested to the wife in her cross-examination that the amount of the provident fund has been deposited in her account. She was working in Wadekar Industries Pvt Ltd and Amodi Services Aurangabad. She has denied the suggestion. Before her cross-examination, he brought the document by way of summoning like the EPF statement, the bank account statement, and wages detail of Amodi Services Ltd to prove the fact that she had a source of income;

however, she denied the case of the applicant/husband that she did service. These material documents are a vital bearing on the case; however, the learned Judge discarded the claim of the Applicant on the sole ground that the relief claimed by the applicant/husband does not fulfil the requirement of Section 127 of the Code of Criminal Procedure.

21. The dictionary meaning of the term "alteration" is a change to something that makes it different. It has been provided in section 127 of the Code of Criminal Procedure that 'on proof of a change in circumstances of any person.' That includes a change in the health of the person that makes him unable to earn, or a reduction in his income or the person in whose favour the order is in existence has got a source of income affecting the order of maintenance. Therefore, the suppression of facts from the Court also covers the case under section 127 of Cr.P.C. The factors determining the quantum of maintenance should be taken into account as directed in the case of Rajnesh cited supra. The life of the order under section 125 is up to alteration under section 127 of Cr.P.C. Women should be discouraged from suppressing the facts.

22. As far as the enhancement of the maintenance is concerned, the wife has sought the enhancement to the extent of Rs.20,000/- per month. She has come up with a case that the applicant/husband is an Engineer, Photographer and does the

shooting work. He earns Rs.50,000/- out of his job. However, she did not examine his employer nor produce a copy of the award of the acquisition of the alleged land owned by the applicant/husband.

23. Change in the pecuniary or other circumstances of the party paying or receiving the allowance would justify an increase or decrease of the allowance previously determined by the Court. The burden is on the applicant to prove the change in circumstances. The applicant/husband has come with a specific defence that nowadays, he is doing the labour work, his financial condition is very bad, he used to be ill, and he has to maintain his old aged mother. In his cross-examination, various suggestions have been given as regards his income from various sources; however, he has denied those suggestions.

24. The learned Judge, while determining the quantum of enhancement of the maintenance allowance, has recorded the finding that the applicant/husband has paid the arrears of the maintenance in instalment and the amount of Rs.20,100/-only remained to be recovered. Therefore, it appears that the applicant/husband can easily pay the maintenance to the wife, and he has a financial capacity. The learned Judge has enhanced the maintenance of Rs.3,500/- from Rs.1,500/- to the wife and Rs.3,000/- from Rs.2,000/- for his son. It appears that in the absence of any best possible evidence only on the basis of the clearance of the arrears of the amount, the learned Judge

has drawn the inference that the Applicant is able to pay the additional maintenance in the change in circumstances. The quantum of allowance cannot be determined on abstract and hypothetical things like the capacity to earn money. The applicant who is paying the arrears of maintenance may also not be a ground to believe that he is able to pay an enhanced allowance. There should be concrete evidence of change in circumstances.

25. Considering the material before the Court and the legal position, this Court is of the view that both the impugned orders warrant interference, and the matter needed to be remanded back to the learned Judge for decision afresh. Hence, the following order :

ORDER

- I) A revision petition is allowed.
- II) A common judgment passed in Criminal Miscellaneous Application No.47/19 and 1/2021 passed by learned Judge Family Court, Aurangabad dated 14.01.2022 are set aside.
- III) The case is remitted to the learned Judge Family Court, Aurangabad, for a decision afresh by granting an opportunity to both parties.
- IV) Both the parties are directed to appear before the learned Judge Family Court, Aurangabad, on 05.09.2022.

V) Record and proceedings be returned to the Family Court at Aurangabad.

(S.G. MEHARE, J.)

Mujaheed//