

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL REVISION No.1289 of 2018

In
Miscellaneous Appeal No.350 of 2018

Arising Out of PS. Case No.- Year-1111 Thana- District-

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Anup Kumar Pandit, son of Sri Basudev Pandit, Resident of Village-Bisari Bigha, P.S.-Ekangarsarai, District-Nalanda at present Sampatchak, P.O. Sona Gopalpur, P.S. Gopalpur, District-Patna.

... .. Petitioner

Versus

1. Sunita Devi, daughter of Sidheshwar Pandit, resident of Village Karah Bazar, P.S. Silao, District-Nalanda.
2. Beauti Kumari, daughter of Sunita Devi (claims to be the daughter of Anup Kumar Pandit), resident of Village-Karah Bazar, P.S.-Silao, District-Nalanda.

... .. Opposite Parties

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Appearance :

For the Petitioner	:	Mr. Anjani Kumar, Sr. Advocate
		Mr. Sanjay Kumar, Advocate
For the Opposite Parties :		Mr. Suraj Narayan, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT

Date : 18-12-2023

This revision application has been preferred for setting aside the judgment and order dated 02.01.2018 passed by learned Principal Judge, Family Court, Nalanda at Biharshariff in Matrimonial Case No. 25 (M) of 2010. By the impugned judgment, the learned Family Court has been pleased to direct the husband-petitioner to pay a maintenance amount of Rs.5,000/- to the applicant no. 1-O.P. No. 1 and Rs.2,000/- to the applicant no. 2-O.P. No. 2 w.e.f the date of application i.e. 01.04.2010. The applicants in the Family Court are the wife and daughter respectively of the present petitioner.



Brief Facts of the Case

2. The applicants-opposite parties in the Family Court claimed that this petitioner was married to applicant no. 1 in the year 1990 in the month of *Baisakh* and she went to her matrimonial home where she gave birth to a child who is applicant no. 2-O.P. No. 2. It was alleged that the husband of the applicant no. 1 was demanding a motorcycle and cash, since the demands could not be fulfilled, therefore, the applicant no. 1 along with her minor daughter was thrown out of the matrimonial home. She filed a complaint case bearing No. 260 (C) of 1995 in the court of learned Chief Judicial Magistrate, Nalanda at Biharshariff. The applicant no. 1 claimed that since her ouster from the matrimonial house, she was residing at Karah Bazar (Naihar) and was facing a lot of trouble in leading her life with the minor daughter.

3. It was further the case of the applicants that the present petitioner was having an income of Rs.40,000/- per month but he was neglecting his wife and minor daughter.

4. Per contra, the case of the husband-petitioner in written statement was that he was never married with applicant no. 1, the applicant no. 1 never came to stay with him in his native place, therefore, there was no question of giving birth to a child out of the wedlock. He further claims that in the Complaint Case



No. 260 (C) of 1995, an order of acquittal has been passed on 29.05.2004.

5. The husband-petitioner further denied his income and claimed that applicant no. 1 earns sufficiently from stitching and teaching from private tuition. He also claimed that he was mentally ill since 1998 and was under treatment by Dr. K.M. Das for mental disease.

6. The father of applicant no. 1 had stated in his deposition that applicant no. 1 was matriculate and he had married his eldest daughter in the year 1990, therefore, the question of marriage of second daughter in the same year does not arise. The petitioner claimed that he hardly earns Rs.10,000/- per month.

Evidences Adduced by the Parties.

7. On behalf of the applicants, four witnesses deposed and some documents were also exhibited. Mother of applicant no. 1 deposed as A.W. 1 who has stated that the applicant no. 1 was married to this petitioner in the year 1990 and '*Ruksadi*' had taken place in the year 1992. She further deposed that in the year 1994 applicant no. 1 had given birth to applicant no. 2. According to this witness, applicant no. 1 was thrown out of the matrimonial home because the demand of motorcycle and cash could not be fulfilled. She has stated that the applicant no. 1 has little educational



background whereas her husband (petitioner) is an MBBS Doctor and he is running his own clinic from which he earns Rs.40,000/- per month. In her cross-examination, this witness has stated that applicant no. 1 was married to the petitioner in the year 1990 and after her '*Ruksadi*' in the year 1992, she had stayed in her *Sasural* for 2-2 and ½ months. She further alleged that the petitioner has already performed second marriage with one Sarita Devi who hails from Begusarai.

8. The A.W. 2 has deposed that he had got printed the marriage card of applicant no.1 in the year 1990 at the instance of her father and he has proved the marriage card saying that it is original. A. W. 3 is a person acquainted with both the parties who has deposed that this petitioner was married with applicant no.1 about 20-22 years back. He also deposed that the petitioner is running his clinic. This witness is related to the petitioner. A.W. 4 is another person who knows both the parties. He also supported the factum of marriage.

9. On behalf of the opposite party-petitioner, three witnesses were examined. This petitioner deposed as O.P.W. 3. He claimed that he has been married with one Sarita Devi in the month of February, 1995 and has got one daughter and two sons from the said marriage. He denied his marriage with applicant no.1



and deposed that applicant no. 2 is not his daughter. He also denied being involved in running any nursing home and he claimed that he does not work as medical practitioner. The O.P.W. 1 and O.P.W. 2 are the co-villagers and brother of O.P.W. 3 who have supported the case of the opposite party.

Findings of the Family Court

10. The learned Principal Judge of the Family Court has, upon analysis of the evidences and the materials in form of oral evidences and marriage card (Exhibit-2) indicated that the applicant no.1 was married to the opposite party. The witnesses on behalf of the applicant had stated that the applicant no. 1 was ill-treated because of non-fulfillment of demand of dowry and after giving birth to her daughter, she had been living in her *naihar*. According to learned Principal Judge, Family Court filing of the complaint case itself provides sufficient reasons to say as to why applicant no.1 was residing at her *naihar*. It has further been held that the applicant no.1 is not well educated and she does not have any work, therefore, she was fully dependent on her father who is also ill and in a weak condition to support the applicants. The opposite party had failed to produce any evidence to show that the applicant no.1 is engaged in any work and is able to earn sufficiently to maintain herself and her daughter. The Family Court



finally concluded that the opposite party runs his clinic at Sampatchak from which he earns Rs. 40,000/- per month.

Submissions on behalf of the Parties

11. While assailing the impugned judgment, it has been brought to the notice of this Court that the applicant no.1 died during pendency of this application on 28.02.2023 and the opposite party no.2 has become major and she has been married at present. Thus, at this stage, Mr. Anjani Kumar, learned Senior counsel for the petitioner has taken a plea that the order passed by learned Principal Judge, Family Court is not a decree, therefore, the same cannot be executed by the applicant no. 2-O.P. No.2 who is the legal heir of the deceased-O.P. No.1. It has further been contended that once the O.P. No.2 is married, she would also not be entitled for maintenance. In fact, the submissions advanced on behalf of both the parties have been elaborately taken note of by this Court in its order dated 08.12.2023 while reserving the judgment in this case. This Court deems it just and proper to reproduce the entire order dated 08.12.2023 hereinbelow:-

Order Dated 08.12.2023

“Heard Mr. Anjani Kumar, learned senior counsel assisted by Mr. Sanjay Kumar, learned counsel for the petitioner and Mr. Suraj Narayan Yadav, learned counsel for the opposite parties.

2. At the outset, Mr. Anjani Kumar, learned senior counsel has submitted that in this case, opposite party no. 1 died during pendency of this application on 23.02.2023, therefore, a question would arise as to



whether in case the impugned order sustains, the maintenance allowance may still be recovered by her legal heir who is O.P. No. 2.

3. Learned senior counsel has relied upon a judgment of the Hon'ble Bombay High Court in **Civil Application No. 8775 of 2023 in Family Court Appeal No. 35 of 2021 (Jayshree @ Pushpa and Anr. versus Satyendra)**. It is submitted that in the said case, the Hon'ble Division Bench of Bombay High Court, Aurangabad Bench held that right to maintenance is a right in *personam* and not in *rem*, therefore, right to sue does not survive in favour of the legal heir who is married daughter of the deceased.

4. Learned senior counsel further submits that in this case, the present petitioner had taken a stand in the learned court below that the O.P. No. 1 was not his wife and O.P. No. 2 was not his daughter. His case was that the O.P. No. 2 had lodged a complaint case bearing No. 260 (C) of 1995 with false allegations and the said complaint case was dismissed by the learned Magistrate after O.P. No. 1 being complainant failed to prove her marriage with the petitioner.

5. Learned senior counsel has assailed the impugned order on the ground that the learned Principal Judge, Family Court has wrongly recorded a finding that the marriage between the petitioner and O.P. No. 1 was solemnised in the month of *Baisakh* in the year 1990 in accordance with Hindu Rites and Customs and then O.P. No. 2 was born in the year 1994 out of the said wedlock. He has relied upon a judgment of the Hon'ble Supreme Court in the case of **Yamunabai Anantrao Adhav versus Anantrao Shivram Adhav and Anr.** reported in **AIR 1988 SC 644** (in paragraph '6') to submit that to succeed in a case under Section 125 Cr.P.C., it is incumbent upon the applicant to prove that she is a wife of the opposite party. In this case, since the O.P. No. 1 could not prove her marriage with the petitioner, the impugned order would stand vitiated.

6. On the other hand, Mr. Suraj Narayan Yadav, learned counsel for the O.P. No. 2 submits that after the death of O.P. No. 1, he has brought on record the information regarding her death and it is his submission that O.P. No. 2 being the Class-I legal heir of O.P. No. 1 shall be entitled to realise the amount of maintenance



which had become due to the deceased O.P. No. 1 prior to her death.

7. Learned counsel has submitted that in the case of **Jayshree @ Pushpa** (supra), the Hon'ble Bombay High Court was dealing with a case in which an application under Section 127 Cr.P.C. was filed by the mother of the applicant daughter who was married but the said application was still pending and the enhancement in the maintenance amount had not taken place. Since no right had been determined and crystalised under Section 127 Cr.P.C., the Hon'ble Bombay High Court took a view that right to maintenance was a right in *personam* and not in *rem*.

8. It is submitted that so far as the present case is concerned, the application under Section 125 Cr.P.C. had already been decided and the amount having been determined and crystalised, if the criminal revision fails, the said amount shall be realised and the order may be executed at the instance of the daughter of the deceased-wife. Learned counsel has relied upon Section 128 of the Code of Criminal Procedure to submit that the order of maintenance is enforceable in accordance with law.

9. Learned counsel further submits that so far as the dismissal of the complaint case is concerned, the said dismissal was challenged by the complainant in Cr. Appeal (SJ) No. 9 of 2005 which has been disposed of vide order dated 04.07.2013. This Hon'ble Court has, while dismissing the criminal appeal, observed and made it clear that in case the appellant chooses to get her grievance redressed in the Family Court, any findings and observations made in the instant case shall not come in her way. Thus, it is submitted that dismissal of the complaint cannot be cited to prejudice the case of the opposite parties.

10. Learned counsel further submits that O.P. No. 2 was married in the month of May 2018, therefore, on the date of the impugned judgment i.e. 02.01.2018, she was still entitled for maintenance. He has relied upon the judgment of the Hon'ble Supreme Court in the case of **Jagdish Jugtawat versus Manju Lata and Others** reported in (2002) 5 SCC 422 and on a judgment of this Court in the case of **Subhash Roy Choudhary versus The State of Bihar and Others** reported in 2003 (3) BLJR 2310. It is submitted that the daughter would be entitled to get maintenance till the date of her marriage.



11. Learned counsel further submits that in this case earlier this Court had stayed the execution of distress warrant issued against the petitioner, though the impugned judgment was not stayed but because the execution of distress warrant was stayed, the petitioner did not pay any amount and not a single farthing was paid to the deceased-O.P. No. 1 during her lifetime or to O.P. No. 2. Thus, they have lived in penury condition awaiting the result of the case.

12. Submission is that so far as the income of the petitioner is concerned, the same is not subject matter of any challenge as no submission has been made in dispute, therefore, the quantum of maintenance allowed by the learned Principal Judge, Family Court is in accordance with the ratio of the judgment of the Hon'ble Supreme Court in the case of **Rajnesh Versus Neha and Anr.** reported in (2021) 2 SCC 324.

13. Since the parties have concluded their arguments, let this case be listed for judgment on 18th December, 2023."

Consideration

12. From the submissions advanced on behalf of the parties as regards the filing of the complaint case by O.P. No. 1 and acquittal of the petitioner in the said case, this Court has noticed that after dismissal of the complaint case which resulted in acquittal of the petitioner, O.P. No. 1 had preferred a Cr. Appeal (SJ) No. 9 of 2005 which was disposed of vide order dated 04.07.2013 by dismissing the criminal appeal but at the same time, this Hon'ble Court had made it clear that to get her grievance redressed in the Family Court, any findings and observations made in the instant case shall not come in her way. In view of the observations of the Hon'ble Court in Cr. Appeal (SJ) No. 9 of



2005, this Court would agree with the submission of learned counsel for the opposite party that the findings and observations of the learned Family Court have to stand on their own footing. Dismissal of the complaint case and the appeal arising out of the same would not have any impact on the findings of the learned Family Court.

13. On perusal of the impugned judgment, this Court has noticed that the learned Principal Judge, Family Court has relied upon the evidences of the mother of applicant no. 1 and three independent persons whereas the opposite party-petitioner did not produce any independent person and he sought to support his case with the help of one of his gotiya and his own brother. The petitioner though took a plea that the applicant no. 1-O.P. No. 1 is not his wife but he never moved to a competent court of law to get a declaration to that effect. On the face of the materials which were brought before the learned Principal Judge, Family Court, Nalanda at Biharshariff, in the opinion of this Court, the findings of the Family Court that the applicant no. 1 happens to be the wife of the petitioner cannot be disturbed.

14. A bare glance over the provision of Section 125 CrPC would make it clear that this provision has been incorporated in Chapter IX of the CrPC to provide immediate succor to the wife



who is unable to maintain herself or the legitimate or illegitimate minor child including a daughter not being married daughter of a person who is having sufficient means who neglects his wife and minor children to maintain. The third proviso to Sub-Section (1) of Section 125 CrPC provides that an application for interim maintenance and expenses of the proceeding is to be disposed of within 60 days from the date of service of notice of the application to such person. It shows the urgency with which the application for maintenance/interim maintenance is to be considered. There are some exceptions to the Rule providing for maintenance/interim maintenance to a neglected woman. According to the exceptions, a wife would not be entitled to receive an allowance for maintenance or the interim maintenance and expenses of proceeding from her husband 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.

15. Apparently, in this case, the exceptions would not apply as it is not the case of the petitioner that his wife was living in adultery or had refused to live with him. His only stand was that he had not been married to applicant no. 1 and applicant no. 2 is not born of his marriage with applicant no. 1 but as observed



hereinabove, there is no declaration to this effect by a competent court of law.

16. As regards the income of the petitioner, he has explained in his affidavit before this Court that he had done MBBS which means Bachelors of Medicine in Biochemic System. He has denied his income of Rs.40,000/- per month and claims that he is earning only Rs.10,000/- per month. To this Court, it appears that the petitioner has disclosed his income half-heartedly and on the point of his income, he has not disclosed his all the sources of income. In the case of **Rajnish Versus Neha and Anr.** reported in **(2021) 2 SCC 324**, the Hon'ble Supreme Court has laid down some guidelines and thereunder both the parties are under obligation to file their respective affidavits declaring their income and other sources. However, this Court finds that at this stage, it would only be prudent to test the correctness of the impugned order on the basis of the materials which were before the Family Court at the relevant time. In the facts of this case where O.P. No. 1 has already died after contesting the case since the year 2010 and has not got a single farthing from the petitioner during her lifetime and the O.P. No. 2 has also attained majority and got married without any help from the petitioner, no purpose would be served by remitting the matter to determine the income of the opposite



party-petitioner. A reasonable view has to be taken and in the opinion of this Court, since the opposite party-petitioner did not disclose his all the sources of income and other assets and only vaguely denied the claim of the applicant that he was earning Rs.40,000/- per month, the opposite party-petitioner did not come out clean and he did not disclose his correct income. This Court is, therefore, of the considered opinion that the amount of maintenance awarded to the applicants by the learned Family Court are not unreasonable or excessive that it would require any interference of this Court.

17. The aforesaid discussions would lead this Court to conclude that in this case, the findings of the learned Family Court as regards the applicant no. 1 being wife of the opposite party-petitioner and the quantum of maintenance awarded to both the applicants need no interference. The opposite party no. 1 would be entitled for maintenance as per the order of the learned Family Court till the date of her death i.e. 28.02.2023 and the applicant no. 2-O.P. No. 2 would be entitled for maintenance till the date of her marriage.

18. Now, the question which remains to be considered is as to whether after death of opposite party no. 1, her daughter (O.P. No. 2) would be entitled to realise the outstanding amount?



19. Learned senior counsel has relied upon the judgment of the Hon'ble Bombay High Court in the case of **Jayshree @ Pushpa and Anr. versus Satyendra (Civil Application No. 8775 of 2023 in Family Court Appeal No. 35 of 2021)**. This Court has carefully gone through the judgment of the Hon'ble Bombay High Court. The facts of the case are totally distinguishable. In the said case, the wife had filed an application under Section 127 CrPC which was still pending for adjudication. During pendency of the application under Section 127 CrPC, the wife died. In such circumstances, the Hon'ble Bombay High Court held that since no right had been determined and crystallized under Section 127 CrPC, the application filed by the married daughter of the deceased under Order XXII Rule 1 and 2 of the Code of Civil Procedure seeking permission to bring her on record cannot be allowed. It is in that context, the Hon'ble High Court framed a legal issue as to whether the right to sue survives/lies with the legal heirs of the deceased appellant in the appeal for enhancement of maintenance in the personal law i.e. Hindu Adoption and Maintenance Act.

20. This Court is, therefore, of the considered opinion that the judgment of the Hon'ble Bombay High Court in the case of **Jayshree @ Pushpa (supra)**, would not help the petitioner.



Learned counsel for the O.P. No. 2 has rightly pointed out the two judgments which have been referred by the Hon'ble Bombay High Court in the case of **Jayshree @ Pushpa**. It is submitted that in the case of **Annadurai versus Jaya** reported in **2023 Online Mad 2604**, it has been held by the Hon'ble Madras High Court that the claim of arrears of maintenance of deceased wife is heritable right of legal heirs, however, the right of future is not transferable. The another judgment of Hon'ble Bombay High Court in the case of **Gangabai versus Bhagwn** reported in **(2007) Mh. LJ. 223** has been taken note of by the Hon'ble Bombay High Court wherein it has been held that object and social principles under Section 125 CrPC is not only against the husband but against the husband's property also.

21. This Court has no iota of doubt that the arrears of maintenance of the applicant no. 1-O.P. No. 1 would be heritable right of O.P. No. 2 and she would be within her rights to enforce the order of maintenance in the manner provided under Section 128 CrPC read with Section 18 of the Family Court Act, 1984.

22. In the light of the discussions made hereinabove, this revision application would fail.

23. Since the opposite party-petitioner has not paid a single farthing to O.P. No. 1 during her lifetime and O.P. No. 2 till



the date of her marriage and despite there being a judgment in their favour, they could not get any fruit of the judgment, this Court is of the considered opinion that the entire arrear amount shall be realised from the petitioner with interest at the rate of 6% per annum. The petitioner shall also pay a cost of litigation which is assessed at Rs.25,000/- (Rupees Twenty Five Thousand Only/-) to the opposite party no. 2.

24. This revision application is dismissed with cost.

(Rajeev Ranjan Prasad, J)

SUSHMA2/-

AFR/NAFR	
CAV DATE	08.12.2023
Uploading Date	18.12.2023
Transmission Date	

