

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL REVISION APPLICATION NO. 91 OF 2018

APPLICANT : Gajanan S/o. Manikrao Mandekar,
(Ori. Non-applicant) Aged about 49 years, Occ. Service,
R/o. Akshar Chhaya, Hari Om Colony,
Bhojapur, Kuhi, Tq. Kuhi, District
Nagpur.

//VERSUS//

NON-APPLICANTS : 1. Sau. Deepashree W/o. Gajanan
(Ori. Applicants) Mandekar, Aged about 38 years.

2. Abhinav S/o. Gajanan Mandekar,
Aged about 16 years, Minor, through
Natural Guardian Mother Sau.
Deepashree Mandekar.

Both R/o. C/o. Shri Sharad Kashinath
Bule, Near Shrikrishna Temple,
adjacent to V.H.B. Ground, Kedia
Plot, Akola, Tq. and District Akola

Mr. S.B. Mohta, Advocate h/f. Mr. B.N. Mohta, Advocate for the
Applicant.

Mr. P.J. Mehta, Advocate for the Non-applicants.

CORAM : G. A. SANAP, J.
DATED : 12th APRIL, 2023.

ORAL JUDGMENT

Heard.

02] **Admit.** The application is heard finally with the consent of the learned advocates for the parties at the admission stage.

03] In this criminal revision application, challenge is to the judgment and order dated 23rd May, 2016 passed by the learned Judge of the Family Court, Akola, whereby the learned Judge has partly allowed the application for enhancement of the maintenance made under Section 127 of the Code of Criminal Procedure, 1973 (for short “Cr.PC) by the non-applicants.

04] The facts relevant for deciding this revision application are as follows:

The parties would be referred in this judgment by their nomenclature in the application made under Section 127 of the Cr.PC before the Family Court. The applicant in this revision is the non-applicant. The non-applicants in this revision are the applicant Nos.1 and 2. The applicant No.1 and the non-applicant got married on 19th May, 1997. Applicant No.2 is the son of the applicant No.1 and the non-applicant. At the time of the marriage, the applicant No.1 has passed 12th Standard Examination. The non-applicant is serving as a Professor at Rani Indirabai Bhosale

Mahavidyalaya, Kuhi. As per the case of the applicant No.1, after marriage, the non-applicant made a demand of Rs.1,00,000/- from her father. Her father partly satisfied his demand. It is stated that the non-applicant and his other family members started ill-treating the applicant No.1. On 25th May, 2008, the non-applicant drove out the applicant No.1 together with the applicant No.2 from his house. The applicant No.1, with the applicant No.2, started residing with her father.

05] The non-applicant did not make any provision for the maintenance of the applicant Nos.1 and 2. They, therefore, filed an application under Section 125 of the Cr.PC in the Court of Judicial Magistrate First Class, Akola. After establishment of the Family Court at Akola, the said application was transferred to the Family Court. The matter was settled before the Marriage Counsellor of the Family Court, Akola on 13th June, 2011. In terms of the settlement, the non-applicant agreed to pay a sum of Rs.4,000/- each to the applicant Nos.1 and 2 from 13th June, 2011. The applicants in the year 2015 filed an application under Section 127 of the Cr.PC and prayed for the enhancement in the maintenance. According to the applicants, the monthly maintenance awarded in the year 2011 is not sufficient to satisfy their bare minimum needs.

There has been considerable rise in the inflation. It is their case that since the cost of living has skyrocketed on account of the inflation, the said amount of maintenance was not sufficient to satisfy their day-to-day requirements. The applicant No.2 has been taking education. The applicant No.1 is required to spend huge amount for the education of the applicant No.2. It is stated that they have no source of income. They are unable to maintain themselves. The non-applicant is Professor. His monthly salary is Rs.75,000/- to Rs.80,000/-. He owns with other family members near about 30 acres of agricultural land. The annual income from the agricultural land is near about Rs.10,00,000/-. The applicants, therefore, prayed for the enhanced maintenance at the rate of Rs.20,000/- per month each.

06] The non-applicant filed the reply and opposed the application. According to the non-applicant, the applicant No.1 is doing service. She has source of income. She has done beauty parlour course. The parents of the applicant No.1 are financially sound. The applicant No.1 is taking beauty parlour classes. She is getting near about Rs.10,000/- per month from the said business. She is doing tailoring work. From the said work, she is also getting income.

07] According to the non-applicant, he has been spending money for the education of his son. His son has passed 10th Standard with 86% marks. He has been regularly paying visit to his son and making provision for his education. It is contended that there is no change in the circumstances. He has not disputed his salary. However, it is his contention that his old age mother and his mentally retarded sister are dependent on him. He has to spend huge money for their maintenance and medical treatment. According to him, the maintenance, which has already been granted, is more than sufficient.

08] The parties adduced their evidence before the Family Court. The learned Judge of the Family Court, on consideration of the evidence, found that there has been change in the circumstances and as such there is need for enhancement in the maintenance. The learned Judge, accordingly, quantified the enhanced maintenance at the rate of Rs.10,000/- per month to the applicant No.1 and Rs.12,000/- per month to the applicant No.2. Being aggrieved by this order, the non-applicant is before this Court.

09] I have heard Mr. S.B. Mohta, learned advocate for the non-applicant and Mr. P.J. Mehta, learned advocate for the

applicants. Perused the record and proceedings.

10] The learned advocate for the non-applicant submitted that the entire proceeding has been vitiated, because as per the provisions of Section 10 of the Family Courts Act, 1984, the examination-in-chief of the witness on affidavit, is not permissible. It is submitted that in this case the evidence has been adduced by the applicants on affidavit. It is submitted that because of this, the entire proceeding has been vitiated. In order to substantiate this submission, the learned advocate has placed heavy reliance on a decision in the case of *Mr. Anil Ambashankar Joshi Vs. Mrs. Reena Anil Joshi & Anr. [2017 ALL MR (Cri.) 338]*.

11] Besides, the learned advocate for the non-applicant submitted that the applicants have failed to establish that there is change in the circumstances, warranting the enhancement in the quantum of maintenance already awarded in the year 2011. The learned advocate submitted that as far as the applicant No.2-son is concerned, the non-applicant has no objection to grant the enhanced maintenance quantified by the learned Judge of the Family Court. The learned advocate, however, submitted that the applicant No.1 is not at all entitled to get the enhanced

maintenance, as quantified by the learned Judge of the Family Court. The learned advocate submitted that there is ample evidence to show that in the year 1997, the applicant No.1 was doing service as Clerk in the school, which is run by her mother. Learned advocate further submitted that there is ample evidence to show that she has been running a beauty parlour and earning near about Rs.10,000/- per month. The learned advocate submitted that from the salary of the non-applicant, the monthly deduction is around Rs.30,000/-. It is submitted that after deductions, the salary left in the hands of the non-applicant is not sufficient to satisfy his basic needs. The learned advocate, therefore, submitted that the learned Judge of the Family Court was not right in granting the enhancement in the maintenance.

12] The learned advocate for the applicants submitted that the amount of Rs.4,000/- each towards the maintenance awarded in the year 2011, was not sufficient to satisfy their bare minimum needs. The learned advocate pointed out that there has been manifold increase in the salary of the non-applicant from 2011 till the date of the impugned order. The learned advocate submitted that apart from the salary, the non-applicant is having income from the agricultural land. The learned advocate submitted that the case

put-forth by the non-applicant about the dependency of his mother and his mentally retarded sister, is not supported by any evidence. The learned advocate further submitted that the non-applicant has sufficient income from the agricultural land and the non-applicant and his other family members are together responsible to take care of the mother and sister. The learned advocate further submitted that the deductions from the salary, as sought to be placed on record, are non-compulsory and, therefore, the learned Judge of the Family Court has not given a primacy to the same.

13] In order to appreciate the rival submissions, I have gone through the record and proceedings. The question that needs to be primarily addressed is, whether there is change in the circumstances as pleaded by the applicants, to justify the enhancement in the maintenance. It is true that in the year 2011, the maintenance application filed by the applicants against the non-applicant was compromised. As per the settlement, the amount of Rs.4,000/- each to the applicant Nos.1 and 2 was awarded as a maintenance. It is not the case of the non-applicant that as per the settlement, the lumpsome maintenance was decided as one time measure. It, therefore, goes without saying that the

applicants have right to make an application for enhancement in the maintenance, if there is change in the circumstances. As far as the entitlement of the maintenance is concerned, the said issue has already been crystalised when the order of maintenance was passed in the year 2011 pursuant to the settlement between the parties. The said order, in my view, would take care of 2-3 important aspects, namely the failure and neglect on the part of the non-applicant to maintain the applicants, inability of the applicants to maintain themselves for want of sufficient means and their entitlement to get the maintenance from the non-applicant. It is to be noted that on these aspects, no dilation is required. The only question that needs to be addressed is, whether there is change in the circumstances qua the applicants as well the non-applicant. If there is change in the circumstances qua the parties, as alleged by the applicants, then they would be held entitled to get the enhancement in the maintenance.

14] It is the case of the applicants that the applicant No.1 has no source of income. She is unable to maintain herself. It is their case that the applicant No.2 is pursuing his higher studies and as such he is required to spend huge money. It is further their case that due to rise in the inflation, the cost of living has skyrocketed

and, therefore, the paltry sum of Rs.4,000/- each awarded as a maintenance, is not sufficient to satisfy their bare minimum needs. It is their case that apart from the income from the agricultural land, there has been manifold increase in the salary of the non-applicant. According to them, in the year 2011, his salary was near about Rs.42,922/- per month but, which has increased to Rs.80,000/- per month at present. According to them, therefore, on all the above counts, there has been change in the circumstances and in the changed circumstances, which are mostly against them, they are entitled to get the enhancement in the maintenance.

15] In order to rebut this contention, the non-applicant has contended that there is no change in the circumstances. As far as applicant No.2 is concerned, the learned advocate has fairly conceded that the non-applicant may not seriously dispute the maintenance enhanced qua applicant No.2. According to the non-applicant, though his salary is around Rs.80,000/- per month, after deductions, his take home salary is less than Rs.50,000/- per month. In his evidence, he has placed on record the deductions from his salary under various heads. The calculation of the same would show that it is around Rs.30,000/- per month. It is seen that some of the deductions are non-compulsory. In my view, as far as

the non-compulsory deductions are concerned, the non-applicant cannot set up the same as a defence, to deny the enhancement in the maintenance.

16] As agreed between the parties, the monthly maintenance was quantified at the rate of Rs.4,000/- per month each for the applicant Nos.1 and 2 in the year 2011. The applicants have made the application for enhancement in the year 2015. In their application, they have averred the changed circumstances and forcefully prayed for enhancement. The monthly salary of the non-applicant has been proved. The salary slips are on record. Perusal of the salary slips would show that his monthly salary is around Rs.80,000/-. It is seen that the deductions from the salary are around Rs.30,000/- per month. It is seen that some of the deductions are non-compulsory. In my view, in case of non-compulsory deductions, the non-applicant cannot be justified in setting up the same as a defence. Even if it is assumed for the sake of argument that the deductions are around Rs.30,000/- per month, then his take home salary would not be less than Rs.50,000/- per month. The learned Judge, on the basis of the material on record, quantified the enhanced maintenance at the rate of Rs.10,000/- per month to the applicant No.1 and

Rs.12,000/- per month to the applicant No.2. In terms of this order, the non-applicant would be required to pay a total sum of Rs.22,000/- per month by way of maintenance. Even if it is assumed that his take on salary is Rs.50,000/-, the amount of the enhanced maintenance qua the applicant No.1 and the applicant No.2 together would be around 40% of his take home salary. After deducting 40% of his salary towards the maintenance, 60% of the salary would be at his disposal. Therefore, the non-compulsory deductions even if taken into consideration, would not be of any help, to substantiate the claim of the non-applicant put-forth to deny the enhancement.

17] The non-applicant owns, albeit, with other family members near about 30 acres agricultural land. The 7/12 extracts of the agricultural land have been placed on record. From the 7/12 extracts, it is seen that the seasonal crops are grown. According to the applicants, his annual income from the agricultural land is around Rs.10,00,000/-. The learned Judge, on analysis of the oral and documentary evidence, assumed his income from the agricultural land to be approximately Rs.60,000/- per year. The same has been taken into consideration, while quantifying the enhancement. The applicants have not challenged this finding.

However, it goes without saying that the income from the agricultural land would not be so meager in any situation. The fact, therefore, remains that while quantifying the maintenance apart from the salary, the income from the agricultural land will have to be taken into consideration. If the income from the agricultural land and the salary are considered together, then it would show that the non-applicant has sufficient means to pay the enhanced maintenance to the applicants.

18] The question is whether the evidence on record adduced by the applicants is sufficient to establish the change in the circumstances. The order of maintenance was passed in the year 2011. They applied for enhancement of the maintenance in the year 2015. Their application for enhancement was decided on 23rd May, 2016. It is their contention that from 2011, there has been manifold increase in the salary of the non-applicant. According to them, the Government has implemented 6th Pay Commission. After implementation of the 6th Pay Commission, considering the rise in the inflation, the salary of the government servant was increased. According to them, with the rise in inflation, the prices of the essential commodities have skyrocketed.

19] In my view, in order to prove this fact with regard to the rise in the inflation and resultantly the rise in the prices of the essential commodities, no evidence is required. It has to be held in the facts and circumstances that from 2011 to 2015, there was manifold rise in the essential commodities. The amount of maintenance was quantified keeping in mind the price index in the year 2011. The maintenance awarded remained static. It is to be noted that with the rise in inflation, the value of money gets decreased. The rise in inflation causes manifold increase in the prices of the essential commodities. The cost of living, therefore, naturally increases. In this case, as far as the non-applicant is concerned with the rise in inflation, there has been manifold increase in his salary.

20] The second important ground put-forth to assert the change in the circumstances is higher education of the applicant No.2 and the amount required to be spent for the education, namely tuition fee, purchase of books etc. It is seen on perusal of the evidence that the applicants have established that there has been change in the circumstances on both the counts.

21] The applicants have been staying with the father of the applicant No.1. The applicants are at the mercy of the parents of

the applicant No.1. Since the applicants have been staying with the father of the applicant No.1, the applicants are not required to spend money for their residence. The applicants, however, cannot expect the father of the applicant No.1 to take care of their day-to-day needs in all respect. In order to satisfy their day-to-day needs, they would need money. The non-applicant is the Professor. Both the parties are from a well to do family. They are from the higher strata of the society. Both the parties are accustomed to descent standard of living. The non-applicant is Professor in a reputed college. The applicants are, therefore, entitled to contend that they have to lead a descent life, which they have been accustomed to, being the family members of the Professor. Their contention that they are entitled to lead a standard life and that too befitting the status and position of the non-applicant, cannot be rejected. The non-applicant-Professor cannot expect his wife and son to lead an indigent life. It is pertinent to note that whatever be his expectation, in this matter, the choice is not with him. The choice would absolutely be of the applicants. They have a right to lead a decent life and that too befitting the status and position of the non-applicant. The non-applicant, therefore, cannot expect them to lead an indigent life. On this count, therefore, the contention of the applicants cannot be rejected.

22] The next important aspect is with regard to the other dependents, as sought to be contended by the non-applicant. It is his case that his mother is dependent on him. It is also his contention that his widowed mentally retarded sister is dependent on him. The learned Judge, while appreciating this aspect, has found that no evidence has been placed on record to establish that the sister of the non-applicant is mentally retarded. The learned Judge also found that there is no material on record to show that the mother and his widowed sister are dependent on him. It is to be noted that the family owns near about 30 acres of agricultural land. The mother of the non-applicant would be having a share in the land. The non-applicant has one brother. He is an agriculturist. He has not placed on record an iota of evidence to show the income from the agricultural land. The evidence placed on record by him with regard to the income from the agricultural land would have been an answer to the contention of the applicants that his income from the agricultural land is hand to mouth. In my view, therefore, while quantifying the maintenance, the income from the agricultural land will have to be taken into consideration.

23] The learned Judge found that the applicant No.1 would be entitled to get the enhancement of the maintenance at the rate

of Rs.10,000/- per month and the applicant No.2 would be entitled to get the enhancement of the maintenance at the rate of Rs.12,000/- per month. The non-applicant has not seriously disputed the enhanced maintenance qua applicant No.2. The only challenge is to the enhancement awarded in the maintenance qua applicant No.1. The applicant No.1 was getting maintenance at the rate of Rs.4,000/- per month. The enhancement is, therefore, of Rs.6,000/- per month. In the totality of the facts and evidence, in my view, this enhancement is quite reasonable. It cannot be said to be excessive and exorbitant enhancement. It is seen that the enhancement in the maintenance is proportionate to the increase in the salary of the non-applicant.

24] As far as the preliminary objection is concerned, it needs to be stated that there is no substance in this objection. The reliance placed on the decision in the case of *Mr. Anil Ambashankar* (supra) has to be appreciated in view of the decision of the Division Bench of the Bombay High Court in the case of *Mr. K.V. More 3rd Joint Civil Judge (J.D.) and J.M.F.C., Baramati, District Pune Vs. The State of Maharashtra [Criminal Reference No.3/2007]*. This decision has been relied upon by the learned advocate for the applicants. The decision in the case of *Mr. Anil Ambashankar*

(supra) is dated 5th December, 2016. The decision rendered by the Division Bench in the case of *Mr. K.V. More 3rd Joint Civil Judge (J.D.) and J.M.F.C., Baramati, District Pune* (supra) is dated 23rd October, 2007.

25] In the case of *Mr. K.V. More 3rd Joint Civil Judge (J.D.) and J.M.F.C., Baramati, District Pune* (supra), the reference was made by the learned Judge to the High Court for its opinion on the specific question whether examination-in-chief of witness under Section 125 of the Cr.PC can be accepted by way of affidavit. The relevant observations while analysing this question can be found in paragraphs 34 to 38 of the decision. For the purpose of convenience, paragraphs 34 to 38 of the decision are extracted below:

“34. It may be mentioned that the object of the Family Courts is inter alia to secure speedy settlement of the disputes relating to marriage and family affairs and the object of Chapter IX of the Cr.P.C., as set out by the learned Magistrate in his opinion under reference, is the speedy remedy provided to women and children to obtain maintenance to prevent vagrancy and destitution. Therefore, the provisions of the Family Courts Act so far as they relate to the procedure set out in Chapter fV thereof must be followed by the Magistrates who try applications under Chapter IX which are essentially civil in nature and analogous to proceedings under the Family Court’s Act. Consequently in the matters which go to trial under Chapter IX of the Cr.P.C. the Magistrate shall take “all the evidence” by affidavit of examination-in-chief produced in support of

the application. He shall consider the admissibility of the documents, if any, filed along with such affidavit under Section 14 of F.C.A. whether or not, they are admissible under the Indian Evidence Act, 1872. He shall then either himself record the cross examination and re-examination or appoint a Court Commissioner to record such cross examination and re-examination. He need not take the evidence of only formal character on affidavit after the amendment to the C.P.C. on 1st July, 2002. This would be in keeping with the judgment of the Apex Court in the case of Salem Advocate Bar Association. Tamil Nadu Vs. Union of India 2005(5) ALL MR (SC) 876.

35. We may further mention that the affidavit of examination-in-chief required to be taken as evidence may be the affidavits filed by the applicant as also the Respondents by way of the affidavit in support of the application or the application itself if it contains the solemn affirmation as to its truthfulness. In such case duplication by a further affidavit of examination-in-chief may be unnecessary and avoided. We may refer to the decision in the case of Bar Council of Maharashtra and Goa Vs. Shamrao Vishnu Kunjir, A.I.R. 2006 Bombay 167 by the Division Bench of this Court to which one of us (Roshan Dalvi, J.) was the party. In that cases after considering the object and purpose of the salutary provision in the amended Order XVII Rule 4 of the C.P.C. and after considering the aforesaid judgment in the case of Salem Bar Association supra, the Division Bench further considered the provision contained in Order VI Rule 15(4) r.w. Section 26(2) of the C.P.C. Hence, where any pleading is accompanied by an affidavit in support of the said pleadings, the pleading itself can be treated as an affidavit of examination-in-chief, and be received in evidence as examination-in-chief of that party. This would apply equally to the Applicants and Respondents in an application under Chapter IX of the Cr.P.C.

36. We may also refer to the provisions relating to the service under Section 126(2) of the Cr.P.C. It may be mentioned that the Respondent against whom the application is made is required to be served with a copy of the said application. Chapter IX is silent as to how the service is to be effected.

The service of such proceedings would not necessarily be required to be effected upon the Respondents as they are effected upon the accused in criminal trials. In view of the fact that the applications under Chapter IX of Cr.P.C. are of civil nature and analogous to proceedings in the Family Courts, service of such applications also need not be made as are made upon the accused in the criminal trials. The service of these proceedings are also required to be made as per the provisions contained in the C.P.C. Consequently as per the provision contained in Order V Rule 9 of the C.P.C. the Respondent to an application under Chapter IX of Cr.P.C. is required to be served as a Defendant in a Civil Suit by service of a summons either directly in person, by the Applicant or by an Officer of the Court or by registered post acknowledgment due or by speed post or such courier service as are approved by the High Court or the Court in which the application is filed, being the Magistrate's Court as also by a fax message or E-mail services provided by the Rules made by the High Court. The Magistrates may therefore, allow service upon the Respondent in any one of the aforesaid ways for all the applications filed under Chapter IX of the Cr.P.C. in their Courts.

37. Having considered at length the purpose, object and the separate provisions of Chapter IX to Cr.P.C. r.w. Chapter IV of the Family Courts Act and Order XVII Rule 4 as also Order VI Rule 15(4) and Section 26(2) of the C.P.C., we answer the question under Reference in the affirmative. We may mention that we have gone further than the said question and our answer shall be read accordingly.

38. We are gratified to note that the learned Civil Judge (J.D.), J.M.F.C. has himself rightly interpreted the provisions of law before made in the application, made under Chapter IX of Cr.P.C. We direct that henceforth all the applications before all the learned Magistrates trying applications under Chapter IX of the Cr.P.C. as also of the Family Courts in Maharashtra shall follow the aforesaid procedure, keeping in view the amended C.P.C.”

26] The Division Bench has answered the question in affirmative by holding that all the learned Magistrates trying applications under Chapter IX of the Cr.P.C. as well as of the Family Courts in Maharashtra shall follow the aforesaid procedure, keeping in view the amended C.P.C.

27] I am of the view that there is no substance in the application. The learned Judge has properly appreciated the material on record and came to the conclusion vis-a-vis the entitlement of the applicants for the enhancement in the maintenance. I am, therefore, of the view that no interference is warranted in the well reasoned order passed by the learned Judge of the Family Court. Therefore, the revision application is **dismissed.**

(G. A. SANAP, J.)

Vijay