

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL REVISION APPLICATION (FOR MAINTENANCE) NO. 238 of 2014**

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SAKARBEN SHAMBHUBHAI RABARI & 1....Applicant(s)

Versus

SHAMBHUBHAI MASHARUBHAI RABARI KALOTARA & 1....Respondent(s)

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Appearance:

MR ANVESH V VYAS, ADVOCATE for the Applicant(s) No. 1 - 2

MS JIRGA JHAVERI, APP for the Respondent(s) No. 2

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CORAM: **HONOURABLE MR.JUSTICE S.G.SHAH**

Date : 07/04/2014

ORAL ORDER

1. Heard learned advocate Mr. A.V. Vyas for the applicants.

2. The applicants have challenged the order dated 06/03/2014 passed by the Sessions Court, Patan in Criminal Revision Application No.78 of 2010 under Section 397 of Cr.P.C. Therefore, basically this is the second Revision Application against the judgment and order dated 31/08/2010 by the 4th Additional Civil Judge (S.D.) and Additional Chief Judicial Magistrate at Patan in

Criminal Misc. Application No. 127 of 2002.

3. The applicants have filed such Criminal Misc. Application No. 127 of 2002 under Section 125 of Criminal Procedure Code, claiming maintenance from the respondent no.1. Applicant no.1 is wife of respondent no.1, whereas, applicant no.2 is minor son of both of them. By order dated 31/08/2010 practically application of the applicants herein is partly allowed and thereby the first trial Court has awarded the amount of maintenance of Rs.7000/- wherein Rs.4500/- is towards maintenance of the applicant no.1 being wife and Rs.2500/- is for applicant no.2 being son. The copy of such order confirms that application was filed on 12/06/2002 and decided on 31/08/2010 i.e. after eight years and amount of maintenance has been awarded from the date of application thereby the enhanced amount of maintenance is already awarded for more than eight years.

4. However, it seems that applicants herein are not satisfied with such enhancement and therefore preferred Criminal Revision Application No.78 of 2010 before the Sessions Court, Patan which was decided by impugned judgment and order dated 06/03/2014 i.e. after almost three and half years but the Sessions Court did not think it proper to increase the amount of maintenance already granted by the first trial Court as above.

5. Now at present Revision Application is again for seeking enhancement in the amount of maintenance to the tune of Rs.25,000/-. It would be appropriate to reproduce the prayer clause which reads as under :-

"(A) Be pleased to grant this revision application.

(B) Be pleased to quashed and set aside the order dated 06/03/2014 passed by Ld. Dist. & Sessions Court at Patan in Criminal Revision Application No. 78/2010 confirming the order passed by the addn. Sr. Civil Judge at Patan.

(C) Further be pleased to enhance the amount of maintenance of Rs.25,000/- **considering the change of social circumstances.**

(D) PENDING ADMISSION AND HEARING of the present Revision Application be pleased to **direct the**

respondent to pay the outstanding amount which is due from the date of an order."

6. Therefore, on perusal and plain reading of prayer clauses, it becomes clear that though the order of Sessions Court is not disturbing the order of maintenance in favour of applicants, the advocate of applicant has prayed to quash and set aside such order, whereas enhancement in amount of maintenance is claimed "considering the change of social circumstances". It is also further prayed for direction against the respondent to pay the outstanding amount. Thereby applicants want to execute the order of the Magistrate through this Revision Application and enhancement due to change in circumstances.

7. In view of such prayer, before discussing factual details and merits of the case, reference of section 127(1) of Cr.P.C. would be necessary, which reads as under:-

"127.Alteration in allowance. - (1) On proof of a change in the circumstances of any person,

receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be."

8. The bare reading of Section 127 makes it clear that in case of change in circumstances, both applicants are entitled to apply for alteration of an order of maintenance before the Trial Court. Whereas sub Section (1) of Section 127 of the code, which is reproduced hereinabove, specifically empowers the Magistrate to make such alteration as he thinks fit and prove in fact in the circumstances. Therefore, prima-facie when applicant is claiming enhancement because of the change in circumstances, it would be appropriate for the applicant to file an application before the Magistrate Court, where they have to submit the proof of change in circumstances which ultimately require to be proved so as to enable the Magistrate to alter the amount of maintenance. Whereby because of change in

circumstances, if amount of maintenance is to be altered, it can be altered by submitting the proof by the applicants. Therefore, considering the contentions in the Revision Application, when alternative efficient remedy is available to the applicants, there is no reason to entertain such Revision Application, more particularly when the Revision Application is already entertained by the Sessions Court and decided on merits after giving full opportunity to both the sides to submit their case. It is also settled legal position that in such second Revision, the evidence which is already scrutinized and appreciated by two Courts, cannot be re-appreciated only because of the reason that there may be possibility of different view for the same evidence.

9. It is also certain that the applicants are claiming enhancement of maintenance on change in circumstances, that too after the gap of four years from the order of the Magistrate which is

dated 31/08/2010. In absence of proof of change in circumstances such order cannot be interfered only because applicants want some more maintenance, more particularly when alternative remedy of claiming alteration by way of enhancement of maintenance is available as provided under Section 127(1) of the Code.

10. Similarly, so far as prayer to execute the impugned order is concerned, Section 128 of the Code specifically deals with enforcement of order of maintenance, whereby Magistrate is empowered to execute the order and, therefore, such prayer in Revision Application is unwarranted and cannot be entertained when alternative efficient remedy is available under the statute.

11. The Revision Application deserves to be dismissed on such preliminary ground alone, with an observation that the applicants may initiate appropriate proceedings before the Magistrate Court under Sections 127 and 128 of the Code with

an observation that as and when such applications are preferred by the applicants, the Court shall decide it on its own merits without being influenced by the present judgment and observations made herein.

12. However, the litigation regarding maintenance of deserted wife and children are arising out of social problem. Though, it cannot be dealt with strict procedural law, at the cost of precious Court hours, the available record is scrutinized, but even on merits, I do not find any substance in the application so as to call upon the other side for enhancement of amount of maintenance. Though, strict proof of evidence is not required in such proceedings, it cannot be said that even in absence of basic and prima-facie evidence, the Court shall allow the prayer of the wife and children only because they opted to file such litigation. It cannot be ignored that provisions of maintenance under the Code is for speedy relief of reasonable amount of maintenance for

basic livelihood of the deserted wife and minor children, but if at all they want a handsome amount of maintenance, considering the social status and properties of the opponent, then it would be appropriate for such deserted wife and persons who are eligible to maintenance, to initiate appropriate proceedings under appropriate law viz. Hindu Adoption and Maintenance Act.

13. Even in such proceedings for maintenance under the Code, prima-facie evidence regarding income of the responsible person is necessary and based on such prima-facie evidence, if amount of maintenance is awarded on some presumptions here and there, then, unless there is proper evidence regarding income and properties of the opponent i.e. person who is liable to maintain the applicants, such amount of maintenance cannot be enhanced based upon different presumptions, more particularly in second Revision Application when two Courts have concurrently confirmed the amount

of maintenance. Therefore also now for enhancement of maintenance, the applicants have to choose the alternate remedy either under Section 127(1) of Cr.P.C. or Hindu Adoption and Maintenance Act and to prove the income of the husband-opponent.

14. In any case, in the present Revision Application the Court has to determine the amount of maintenance that can be awarded from the date of application, which is 12/06/2002 i.e. before twelve years. Therefore, if, applicants are claiming more maintenance because of change in circumstances after twelve years, then also it is now new cause of action for which they should avail the provision of Section 127(1) of the Code.

15. On perusal of available record it transpires that:-

(a) Marriage of applicant no.1 and opponent no.1 was solemnized somewhere in the year 1994 and out

of such wedlock they have one son being applicant no.2 namely Chirag who is now aged about 17 years and therefore, liability of respondent no.1 will come to an end when he becomes major.

(b) Both applicants are residing in Patan in a separate house. Applicant no.2 is studying in science stream.

(c) In the year 1999 Hindu Marriage Petition No.32 of 1999 was filed by the applicants, wherein interim amount of maintenance granted by the Civil Court was Rs.3000/- to applicant no.1 and Rs.1500/- to applicant no.2 by an order dated 26/07/2000, which amount is not enhanced by the High Court in C.R.A. No. 1195 of 2000.

(d) Applicant has also filed a complaint under Section 498(A) of Indian Penal Code, against which respondent has filed a Quashing Petition, which is pending till date.

(e) Applicants have admitted that amount of maintenance as per order in Hindu Marriage Petition was paid till the year 2005 i.e. even after filing of the application for maintenance under Section 125 of the Code which has been dragged till then.

(f) Applicants have also filed Criminal Misc. Application No. 533 of 2013, Criminal Misc. Application No.537 of 2011, and Criminal Misc. Application No.407 of 2010 under Section 125(3) of Cr.P.C. to recover the amount of maintenance till date.

(g) Thereby applicants are aware and vigilant to execute the order of maintenance, hence such prayer cannot be entertained at this stage. Opponent no.1 has also challenged the impugned order before the Sessions Court in Criminal Revision Application No.76 of 2010, which is dismissed on 06/03/2014 with the impugned order.

(h) Pursuant to order of maintenance under Hindu Marriage Petition, applicants have preferred some proceedings under Contempt of Courts Act, wherein, because of the consent and agreement between the parties some directions were issued by this High Court in Misc. Civil Application No.2142 of 2004 in Civil Revision Application No.1195 of 2000 on 05/04/2005, though, the Civil Application No.5595 and Civil Application No.823 of 2000 were dismissed on 28/07/2003.

16. The development and history of proceedings narrated hereinabove, makes it clear that applicants are capable to take care of their rights by filing different applications and, therefore, it would be appropriate for them to avail alternative remedy under Section 127(1) instead of dragging the matter to the High Court at every stage.

17. Even on merits of the quantum of maintenance, if we peruse the record further, it becomes clear

that neither before the Civil Court nor before the Court of Magistrate in Criminal Misc. Application for maintenance, applicants have bothered to prove at least probable income of the respondent husband, if not the correct or perfect income. Since respondent husband is an agriculturist, what is produced by the applicants as evidence to confirm the income of the respondent husband is only extract of 7-12 report of the revenue record regarding land owned and held by respondent husband. Though, some income can be presumed from such record, it is certain that agriculture income is uncertain and, therefore, specific income of the husband cannot be determined and thereby the award of amount of maintenance would always by way of some presumption. However, if we peruse the affidavit of respondent, which is filed in Misc. Civil Application in Contempt No.2142 of 2004 on 22/02/2005, copy of which is produce on record, it becomes clear that respondent-husband has disclosed all the relevant information in clear

terms regarding his properties and income. Therefore, while deciding such revision application this High Court has categorically observed that the learned Judge has given cogent and convincing reasons in awarding interim alimony after looking to the income of the husband and, therefore, this Court did not see any reason to interfere with the order of the maintenance awarded by the Civil Court in the proceedings under Hindu Marriage Act. Though both proceedings are different, when the appreciation of some evidence by four Courts (Magistrates, Sessions Court, Civil Judge and High Court) may be in different proceedings, now it cannot be said that such appreciation is improper and hence it cannot be altered only because applicants have preferred Revision Application before this Court.

18. The perusal of evidence of the respondent also makes it clear that there is some fault on the part of the applicants in staying separately, though it cannot be the reason for refusing the

maintenance, it cannot be ignored that respondent has offered half of land to be transferred in the name of applicant no.2, if, applicants resides with him and agrees to live separately from his joint family, only with the applicants and to compromise everything to lead a peaceful life with the applicants. It is also disclosed by the respondent in such affidavit that his yearly income was only Rs.70,000/- out of which he has to spend for electricity, labour, fertilizer insecticide etc. and having effective income of only Rs.26,000/- per year i.e. almost Rs.2000/- per month. Thereafter, the High Court has reduced the amount of maintenance Rs.4500/- in such Civil Revision to Rs.1500/- whereas at present the Magistrate's Court has awarded total amount of Rs.7000/- in favour of applicants, therefore there is no reason to interfere with such award.

19. The applicants have also placed on record copy of the deposition of Nagjibhai Chelabhai Rabari at exhibit 104 before the Magistrate's

Court in Criminal Misc. Application No.127 of 2002 from which this Revision Application arises. The perusal of such deposition also makes it clear that in fact applicants are blowing both hot and cold when they alleged against the witness in so many words about his capacity to depose and thereafter while claiming more maintenance they are relying upon the same witness that when such witness is earning a lot, the respondent husband must have handsome income. However no such presumption can be made at this stage so as to enhance the amount of maintenance as prayed for i.e. to the tune of Rs.25,000/- per month.

20. The relevant revenue record produced in this matter also simply proves the holding of the land and not the correct earning capacity or earnings of respondent. At the most, there may be some presumption about the income of the respondent based upon such holdings.

21. On perusal of both the judgments i.e. judgment dated 31/08/2010 by Magistrate's Court in Criminal Misc. Application No. 127 of 2002 awarding total Rs. of 7000/- to maintain both the applicants and impugned judgment dated 06/03/2014 by the Sessions Judge in Criminal Revision Application No. 78 of 2010, it becomes clear that both the Courts below have scrutinized the evidence proper and arrived at appropriate suitable conclusion regarding income of the respondent no.1 and thereby amount of maintenance that can be awarded to the applicants. When both the Courts have concluded in similar terms I have no reason to interfere with such decision in second revision.

22. Thus, in such second Revision what is required to be verified at this stage is practically illegality, irregularity and perverseness, if any, in the impugned judgment. So far as entitlement of maintenance is concerned, now there is no scope for further

dispute since both courts – the trial Court and Sessions Court – have resolved this issue in favour of applicants, more particularly, because of the fact that present opponent is having his own agricultural land and he is earning, whereas, applicant no.2 being minor, he is unable to maintain himself and though there is allegation that applicant no.1 has her own earnings due to cattle breeding activities, that activity depends upon the owner of cattle, may be parents of applicant no.1. However, when applicants have not proved certain facts regarding specific income of the opponent before the trial Court, based upon pleadings only, which are not proved on record, at the stage of second Revision, order of maintenance cannot be altered or modified by enhancing the amount of maintenance from Rs. 7000/- to Rs. 25,000/- or to any other amount as claimed. If applicants want certain specific amount, they should prove specific income of the opponent; else, from prima facie evidence regarding earning capacity of opponent when two

courts have consider the amount after proper scrutiny and discussion of evidence adduced by applicants, there is no scope of re-appreciation of such evidence and to interfere with such concurrent decision of two courts in same proceedings. It is obvious that applicants have been unable to prove specific income of the opponent.

23. It cannot be ignored that issue of maintenance has been dragged till this Court in civil litigation between parties (Civil Revision against order of interim maintenance pending petition under the Hindu Marriage Act) and even in such civil litigation also this High Court has considered that an amount of Rs. 6000/- per month is on higher side and hence reduced it.

24. It cannot be ignored that we are dealing with the provision of code of Criminal Procedure, wherein the proceedings is to be conducted and thus evidence is to be dealt with in a summary

nature so as to see that beneficiaries may not die of starvation but in any case such proceedings should not be permitted to have luxury, more particularly in absence of at least some evidence on particular issue to arrive at definite conclusion, which is possible in salaried person where net income is fixed and constant.

25. In the case of between U.Shree vs. U. Shrinivas [AIR 2013 SC 415], wherein the Hon'ble Apex Court has already held that while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. It goes without saying that wife and children are entitled to good amount of maintenance but the Court has to certainly look into financial capacity of the husband and amount of maintenance should not be excessive or affect

the living condition of the other party.

26. Thus, while fixing the quantum of maintenance, the Court has to take into account not only the needs of person who claims maintenance but also the capacity, status, commitments and the obligations of person who has to pay it. If the husband has to maintain other persons like his parents, etc. reasonable allowance for their maintenance shall have to be made. It would be unjust to grant maintenance in an arbitrary manner. The party who has to pay maintenance is also not to be virtually rendered a destitute. A fair balancing of all the relevant factors is to be done by the Courts without making an emotional approach to the problem. The Court shall have to keep in mind that what is to be provided is the maintenance and it cannot have saving element in it nor is it the purpose of the legislature to put the claimant in a luxurious position. The definition of maintenance given by the Act makes this position amply clear.

[Kailashchandra Gupta versus Chamanlal Gupta, reported in 1985 (1) Hindu Law Reporter 411]. Similarly, if the claimant is residing in a village where the cost of living is comparatively cheaper than in the cities and towns, the Court shall have to take that factor also into account. [1984 Hindu Law Reporter 704]

27. The perusal of the impugned order makes it clear that the trial Court has taken into account the material and evidence available on record, which satisfied the learned trial Court to reach the conclusion for awarding appropriate amount towards maintenance. Having regard to the facts and circumstances of the case as well as material which are available on record, it cannot be said that the impugned order is unjustified or arbitrary or that the learned trial Court has committed any error of law of jurisdiction.

28. Therefore, it would be appropriate for the applicants to file appropriate application, if so

advised, before the trial Court and to produce and prove the relevant material on record so as to enable the trial Court to consider such fresh evidence and to take appropriate decision so far as quantum of maintenance is concerned. To that extent, the observations made in this judgment shall not come in the way of the applicants. However, there is no illegality or infirmity in the impugned order.

29. It cannot be ignored that the Hon'ble Supreme Court has in the cases of ***Kamla Devi V. Mool Raj, 1989 Supp.(2)SCC*** and ***Pyla Mutyalamma V. Pyla Suri Demudu, (2011) 12 SCC 189*** held that revisional court can interfere only if there is any illegality in order or there is any material irregularity in procedure or an error of jurisdiction and that interference by the High Court in revision not justified.

30. In the case of ***Deb Narayan Halder V. Anushree Halder*** reported in ***(2003) 11 SCC 303*** the hon'ble the Supreme Court has held, which confirming the rejection

of wife's claim for maintenance, that when the findings recorded by the learned Magistrate is justified based on the evidence on record and appears to be reasonable, it cannot be set aside by the High Court.

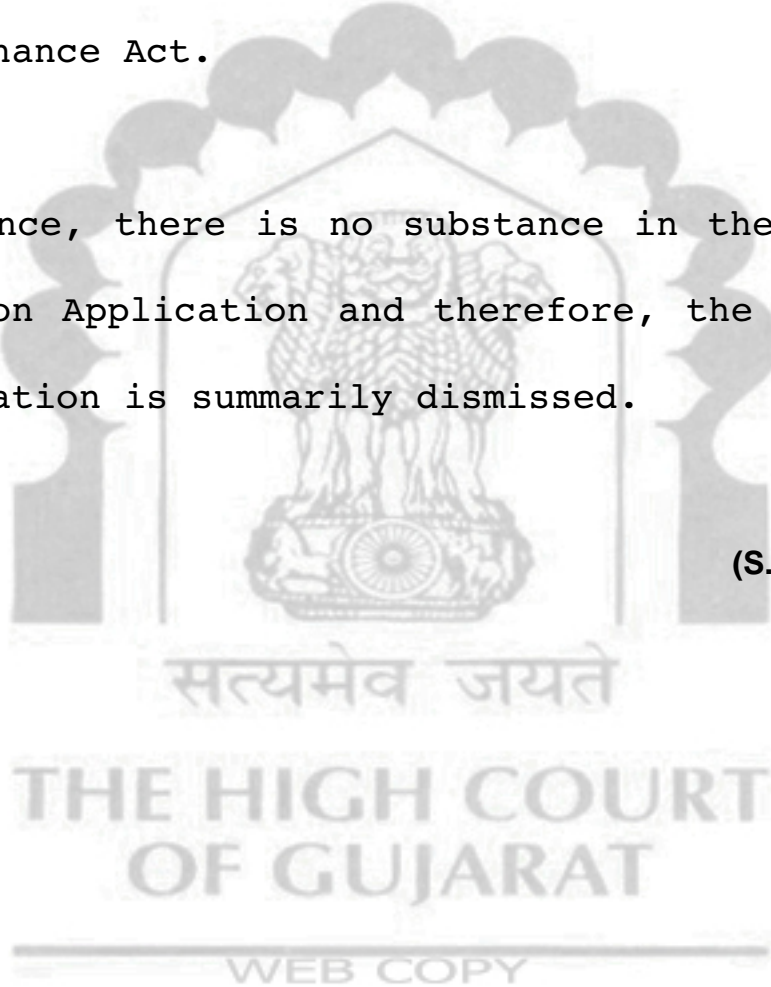
31. In the case of **Chaturbhuj V. Sita Bai** reported in **(2008) 2 SCC 316** the hon'ble the Supreme Court has held that the order of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support.

32. In the case of **Bhushan Kumar Meen V. Mansi Meen @ Harpreet Kaur**, reported in **(2010) 15 SCC 372** the hon'ble the Supreme Court has reduce the amount of maintenance from Rs.10,000/- to Rs.5000/- per month when husband was drawing Rs.34,900/- per month towards the salary, since there was total deduction of Rs.21,000/- and take away salary of the husband was only Rs.9000/-.

33. However, if at all applicants are entitled to more amount of maintenance than awarded by the impugned judgments, then, they may avail alternative remedy available to them under Section 127 of Cr.P.C. or in Hindu Adoption and Maintenance Act.

34. Hence, there is no substance in the present Revision Application and therefore, the Revision Application is summarily dismissed.

(S.G.SHAH, J.)



Manoj