

# Sanjay Kholia vs State Of Uttarakhand And Another on 23 June, 2022

**Author: Ravindra Maithani**

**Bench: Ravindra Maithani**

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Revision No. 740 of 2019

Sanjay Kholia

...Revisionist

Versus

State of Uttarakhand and another

...Respondents

Present:-

Mr. Pawan Mishra, Advocate for the revisionist.

Mr. Atul Kumar Sah, D.A.G. for the State.

Mr. Pankaj Miglani, Advocate for the respondent no.2.

With

Criminal Revision No.6 of 2020

Pammi Kholia

...Revisionist

Versus

State of Uttarakhand and another

...Respondents

Present:-

Mr. Pankaj Miglani, Advocate for the revisionist.

Mr. Atul Kumar Sah, D.A.G. for the State.

Mr. Pawan Mishra, Advocate for the respondent no.2.

## JUDGMENT

Hon'ble Ravindra Maithani, J. (Oral) Both these revisions arise from common judgment and order, hence these have been decided by this common judgment. In this judgment revisionist in Criminal Revision No. 6 of 2020, Pammi Kholia shall be referred to as revisionist and respondent no.2 in that revision Sanjay Kholia shall be referred as respondent.

2. Facts necessary to appreciate the controversy, briefly stated, are as follows. The revisionist filed an application under Section 125 of the Code of Criminal Procedure, 1973 ("the Code") seeking

maintenance from the respondent. Based on it, the proceeding of Misc. Criminal Case No. 39 of 2017, Smt. Pammi Kholia Vs. Sanjay Kholia was instituted in the court of Judge, Family Court, Nainital ("the case"). According to the revisionist, after marriage with the respondent, on 03.12.2016, she was subjected to cruelty for and in connection with the demand of dowry. The respondent also once made her obscene video, threatened her to bring more money from her father's house. There was a lot of dispute, but finally the revisionist was expelled from her matrimonial house. According to the revisionist, she is not able to maintain herself. Whereas, the respondent is working in a company and earning Rs.10,000/- per month.

3. The respondent filed objections. According to the respondent, he did not commit any cruelty or harassment. It is the revisionist, who denied conjugal relations on one pretext or other; the revisionist would tell that she never wanted to marry the respondent, but under the pressure of her family she agreed for it. With regard to his income, the respondent would state that he is earning Rs.7,500/- per month, as a labourer, in some khaste ka thela. According to the respondent, the revisionist also earns Rs.10,000/- to Rs.15,000/- per month.

4. Heard learned counsel for the parties and perused the record.

5. The parties adduced evidence. The revisionist examined herself as PW1 and PW2 Sunil Ghildiyal was also examined on her behalf. The respondent appeared as a witness, as DW1 and also filed certain documents alongwith list 28B. After hearing the parties, by impugned judgment and order dated 26.11.2019, the application under Section 125 of the Code has been allowed and the respondent has been directed to pay Rs.6000/- per month to the revisionist. The revisionist has challenged the impugned judgment and order, seeking enhancement of the maintenance from Rs.6000/- per month to Rs. 10,000/- per month. Whereas, the respondent has challenged the impugned judgment and order on the ground that it is not legally justified.

6. During the course of hearing, the Court invited the attention of learned counsel for the parties to the list of documents 28B filed by the respondent on 27.02.2018. Along with it, eleven documents were filed by the respondent. The respondent, when appeared as DW1, in the case, has extensively been cross examined on the document as filed alongwith the list 28B. In his affidavit filed in his examination in chief, the respondent has stated about the documents, which he had filed along with the list. It is recording of calls between the parties.

7. The Court wanted to know from the learned counsel for the parties as to whether documents have been even discussed in the impugned judgment and order.

8. Learned counsel for the revisionist would submit that electronic record could not have been read in evidence for the want of certificate, as required under Section 65 B of the Indian Evidence Act, 1872 ("the Act"). Learned counsel for the revisionist also referred to the statement of DW1 Sanjay Kholia in his cross examination, when he replied that he does not know as to what contains in the Compact Disc ("CD"). He has also admitted that the printout of the chats, which he had filed as 28B/13 and 28B/22 do not bear any signature or seal. But, the fact also reveals that in para 11 of his affidavit filed alongwith his examination in chief, the respondent has categorically stated that

certain things were admitted by the revisionist in his telephonic conversation with the respondent, of which, the CD is produced. So, reading of para 11 makes it clear that what was there in the CD. The written arguments were also filed by the respondent.

9. Learned counsel for the respondent would submit that he may be provided an opportunity to submit a certificate under Section 65B of the Act.

10. The revisionist had filed an application under Section 125 of the Code, seeking maintenance. It is a summary procedure. The impugned judgment and order, does not take note of the list 28B, which was filed on 27.02.2018 by the respondent. The court did not discuss the documents filed along with the list 28B. DW1 Sanjay Kholia has been extensively cross examined on those aspects. But, the court did not take the note of it. Does it skip the court's attention? Or did the court had it in mind that CD does not contain any certificate under Section 65B of the Act, therefore, it cannot be read into evidence? But, it has not been revealed in the impugned judgment.

11. In para 4 of the impugned judgment, the court records as to what is the evidence adduced by the parties. The list of documents does not find mention in it.

12. It is true that system of law is adversary in this country. But, the court is not a moot spectator. It is not a referee to count faults of the parties. Section 165 of the Act empowers, in fact, enables the court to put questions to a witness that are necessary for the just decision of the case. DW1 Sanjay Kholia in his cross examination could not tell as to what is in the CD. A CD could have been run in the court. In fact, as stated, in para 11 of the affidavit filed in, examination in chief of DW1 Sanjay Kholia has deposed, as to what is in the CD.

13. In the case Ram Chander Vs. State of Haryana, (1981) 3 SCC 191, the Hon'ble Supreme Court discussed the role of courts qua Section 165 of the Act. In para 2 and 3 observed as hereunder:-

"2. The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past:

"Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or

irrelevant. Section 172(2) of the Code of Criminal Procedure enables the court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the Committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial. [Sessions Judge, Nellore v. Intha Ramana Reddy ILR 1972 AP 683 : 1972 Cri LJ 1485] "

3. With such wide powers, the court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must, of course, not assume the role of a prosecutor in putting questions. The functions of the Counsel, particularly those of the Public Prosecutor, are not to be usurped by the judge, by descending into the arena, as it were. Any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses. The danger inherent in a Judge adopting a much too stern an attitude towards witnesses has been explained by Lord Justice Birkett:

"People accustomed to the procedure of the court are likely to be overawed or frightened, or confused, or distressed when under the ordeal of prolonged questioning from the presiding judge. Moreover, when the questioning takes on a sarcastic or ironic tone as it is apt to do, or when it takes on a hostile note as is sometimes almost inevitable, the danger is not only that witnesses will be unable to present the evidence as they may wish, but the parties may begin to think, quite wrongly it may be, that the Judge is not holding the scales of justice quite eventually." Extracted by Lord Denning in *supra* f.n. 2.

In *Jones v. National Coal Board* *Jones v. National Coal Board*, (1957) 2 All ER 155 : (1957) 2 WLR 760 Lord Justice Denning observed:

The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the Judge and assumes the role of an advocate; and the change does not become him well."

We may go further than Lord Denning and say that it is the duty of a Judge to discover the truth and for that purpose he may "ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant" (Section 165 Evidence Act). But this he must do, without unduly trespassing upon the functions of the Public Prosecutor and the defence Counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The Judge, "like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and (sic the) old."

14. Not only this, the Court is also empowered to summon any witness whose evidence may be essential for the just decision of the case. Section 311 of the Code makes ample provisions on this aspect.

15. In the instant case, material averments were made by the respondent in his affidavit filed in examination in chief. He has stated about CD. He has stated about the WhatsApp chats allegedly made between the revisionist and Vijay Mehra, with whom, according to the respondent, the revisionist wanted to marry. It bears signature or does not bear signature? Has it been proved or not? The court had not taken note of it.

16. This Court at this stage may not call the witnesses or may not require any evidence to be adduced to decide the lis between the parties. The court at first instance should have done it. Since, the court has not taken into consideration the material, which was filed by the respondent as documentary evidence, on which, DW1 Sanjay Kholia has extensively been cross examined. This Court is of the view that impugned judgment and order deserves to be set aside and the matter needs to be remanded to the court below to consider the evidence and the statement of DW1 Sanjay Kholia in complete, particularly, with regard to the documents, as filed on 27.02.2018.

17. Learned counsel for the revisionist would submit that the Court may also direct the court below to decide the case within the time bound manner with he further direction that the respondent shall continue to pay the interim maintenance to the revisionist.

18. In view of what is stated hereinbefore, the revisions are allowed.

21. The impugned judgment and order is set aside.

22. The court below is directed to give an opportunity of hearing to the parties including opportunity to adduce any evidence that the parties may like to adduce and thereafter, decide the matter afresh.

23. The Court need not remind the learned court below that the provisions of Section 165 of the Act and Section 311 of the Code helps the court to unearth the truth and ensure justice. As and when there is occasion to invoke such provision, the court should not hesitate to exercise that jurisdiction.

24. The case be decided as expeditiously as possible, preferably within six months from today. Meanwhile, the respondent shall continue paying interim maintenance to the revisionist, as ordered in the case.

(Ravindra Maithani, J.) 23.06.2022 Jitendra