IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL REVISION APPLICATION (FOR MAINTENANCE) NO. 911 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J. C. DOSHI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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PRAFULKUMAR DATTARAM SALVI
Versus
VARSHA PRAFULKUMAR DATTARAM SALVI & ORS.

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Appearance:
MR DHARMESH R PATEL(5592) for the Applicant(s) No. 1
MR YASH K DAVE(10269) for the Respondent(s) No. 1,2
MR SOHAM JOSHI, ADDL. PUBLIC PROSECUTOR for the Respondent(s) No. 3
VISHAL K ANANDJIWALA(7798) for the Respondent(s) No. 1,2

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CORAM:**HONOURABLE MR. JUSTICE J. C. DOSHI**

Date : 05/03/2024

CAV ORDER

1. With the consent of learned advocates for the parties, the matter is taken up for final hearing today.

2. By way of this petition filed u/s 397 r/w section 401 of the Code of Criminal Procedure, 1973, the petitioner has prayed to quash and set aside or suitably modify order dated 12.1.2022 passed in Criminal Misc. Application No.371 of 2018 passed by the learned Principal Family Court, Anand.

3. The brief facts of the case are as under:-

3.1 The marriage of respondent no.1 and present petitioner has been solemnized in the year 2005 and from 2005 onwards both have started residing with the family members of petitioner and out of wedlock of one baby boy Pruthvi was born.

3.2 That soon after the marriage petitioner subjected the respondent no.1 to ill-treatment and started torturing physically as well as mentally as the respondent no.1 having relations with one Dhavalkumar Ghyanshyambhai Patel.

3.3 That the dispute between present petitioner and respondent no. 1 increased, and therefore, both decided to separate with each other by giving divorce to each other, and therefore, one registered divorce deed has been executed on 12/02/2013. Thereafter the present petitioner and respondent no.1 started residing separately having custody of respondent No.2 with respondent No.1.

3.4 Then thereafter, respondent no.1 had a dispute with said Dhavalkumar Ghyanshyambhai Patel, issue reached up to police

station wherein the present respondent no.1 has agreed to not to contact in any manner Patel Dhavalkumar Ghyanshyambhai by executing one settlement deed dated 24/3/2017.

3.5 That due to above stated dispute between respondent no.1 and Dhavalkumar Ghanshyambhai Patel both have separated, and thereafter to grab huge amount from petitioner, application under 125 of the Code of Criminal Procedure has been filed after waiving every right to claim maintenance as stated in registered divorce deed.

3.6 That the respondent with malafide intention file application for maintenance after 5 years from execution of registered divorce deed wherein Hon'ble trial court has passed impugned order without considering the evidence produced on record, and therefore, present petition is filed.

4. Heard learned advocate, Mr Dharmesh, Patel for the petitioner and learned advocate Mr Yash Dave for the respondent and learned APP.

5. Learned advocate for the petitioner while assailing the judgment would submit that the learned Family Court has committed serious error in reading Exh.20. He would further submit that the learned Family Court has believed execution of Exh.20 i.e. divorce deed and also believed that the divorce is also taken place between both the parties and yet has not considered the waiver clause of Exh.20, by which the respondent wife has

waived her right of maintenance in favour of the petitioner. He would further submit that serious error is committed by the learned Family Court, having granted maintenance under section 125 of the Code of Criminal Procedure, 1973 (in short "Code"). He would further submit that though Exh.20 was executed somewhere in 2013, the petitioner continued to financially help the respondent wife as well as child by paying the medical expenses etc. He would further submit that the respondent wife is living in adultery which can be revealed from Annexure D, which is a Samadhan karar between the respondent wife and one Mr Dhaval Patel indicating that there was some unusual relationship between both of them. He would further submit that the respondent wife since living in adultery, would not be entitled to get maintenance under section 125 of the code.

6. Learned advocate for the petitioner would further submit that the learned Family Court has completely overlooked above aspect and without assigning cogent reason, passed order of maintenance which is bad in law. He would further submit that the petitioner has no independent income. He would further submit that the learned Family Court has also erred in assessing income of the petitioner by ignoring income tax return on the record and other relevant evidence. He would further submit that granting of maintenance at the rate of ₹15,000/- and ₹10,000/-, in total ₹25,000/- only on the assumption and guesswork by the Family Court is totally unjustified and illegal, and therefore he submits to interfere with the impugned order by allowing this petition.

7. On the other hand, learned advocate Mr. Yash Dave, for the respondent wife, while supporting the impugned judgment, would submit that, as of now, the respondent is not earning any amount, she is not married to any third-party and even if she is divorcee of the petitioner, the petitioner is duty bound to pay maintenance to respondent wife. He would further submit that the learned Family Court has discussed all the issues elaborately and reached to the conclusion that respondents are entitled to maintenance at the rate of ₹15,000/- and ₹10,000/-, in all ₹25,000/-. He would further submit that the Coordinate Bench of this Court vide order dated 29.9.2022 observed that though the petitioner husband was ready and willing to pay Rs.3,50,000/- within a period of two months before the learned Family Court, till date, the petitioner husband has not paid any amount towards maintenance.

8. To meet with the submission of income tax return produced by the petitioner and not considered by the learned Family Court, learned advocate for the respondent would submit that the petitioner has not produced any income tax return except for the year 2021 and therefore, the income tax return of singular year cannot be relied upon to assess the income of the petitioner, which is rightly believed by the learned Family Court. Upon such submission, he submits to dismiss this petition.

9. Having heard a learned advocates, for both the parties, it is to be noted that the very object of the revisional jurisdiction upon the superior criminal court is to correct miscarriage of

justice arising from misconception of law or irregularity of the procedure. The discretion of the revisional jurisdiction should be exercised within four corners of section 397 of the code whenever there has been miscarriage of justice. The revisional jurisdiction should not be lightly exercised as it cannot be invoked as of right. Section 397 of the code confers power on the High Court or Session Court as the case may be "for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceeding of such inferior court". While considering the legality, propriety or the correctness of a finding or a conclusion, normally, the revising court does not dwell at length upon the facts and evidence of the case. The court in revision considers the materials only to satisfy itself about the correctness, legality and propriety of the findings, sentence or order and refrains from substituting its own conclusion on an elaborate consideration of evidence.

10. In **State of Maharashtra v Jagmohan Singh (2004)7 SCC 659**, it was held that the High Court in exercise of its revisional jurisdiction cannot embark upon an in-depth re-examination of the oral and medical evidence and come to a conclusion contrary to the consistent one reached by the two courts below.

11. The submissions of learned advocate Mr. Patel for the petitioner is on two aspects. Firstly, he submitted that the learned Family Court has not interpreted Exh.20 in context with the evidence of the witness – deserted lady. On going through Exh.20, what appears that it was a registered agreement

between a divorcee lady i.e. the respondent wife and one Mr. Dhaval Patel and it is registered with the Sub Registrar office. In the deposition before the learned Family Court, the respondent wife has accepted that she has taken divorce from the petitioner husband. Learned advocate for the petitioner press into service the clause, by which it is stated that the divorcee lady has relinquished her right of maintenance. The maintenance right is statutory right given under section 125 of the Code or other law for the time being in force. It cannot be effected by surrendering clause in such agreement. It is to be adjudged by the competent court. Learned advocate for the petitioner, who pressed into service clause surrendering the right of maintenance, did not notice another clause of the agreement, which indicates that portions were also agreed to file proceedings before the competent court for obtaining divorce, however, such proceedings were never filed before the competent court to decide divorce issue between the parties. If such proceedings are filed before the competent court, the right of maintenance could have been taken proper care by the concerned competent court, but it was never filed and got adjudged by the competent court. In that facts and circumstances, it is incorrect to submit that the respondent has waived her right of maintenance under section 125 of the code or other law for the time being in force, by agreeing in Exh.20.

12. To be noted that, though the respondent wife has accepted her divorce, she is not remarried and therefore her right to obtain maintenance survives, she is still a divorcee wife of the petitioner. Therefore, the clause made in Exh.20 surrendering

the maintenance right cannot be treated as an estoppel against the petitioner, since right of maintenance is not adjudged by the competent court. Upon such Exh.20, it cannot be said that the respondent has surrendered her right and now she is not in position to claim maintenance right. It is to be noted that the plea of estoppel even if read, it is not sustainable to decide the very provision of section 125 of the code. Thus, the first submission canvassed by the learned advocate for the petitioner is not sustained in the eye of law.

13. Another submission was canvassed by learned advocate for the petitioner that the respondent wife was living in adultery by referring to Exh.51 which is an agreement between the respondent wife and one Mr Dhaval, which has been put as a proof of living in adultery by the respondent to claim that the respondent wife is not entitled for the maintenance. The expression "living in adultery" in section 125 of the Code is purposefully used to indicate that an isolated act is not sufficient A consistent conduct and living in permanent and quasi-permanent adulterous relationship with the paramour has to be proved No such adulterous conduct or even element thereof is proved. If we go through Exh.51, it nowhere infer that the respondent is living in adultery.

14. Referring to income tax return on the record of the year 2021, learned advocate for the petitioner has also argued that the learned Family Court has not taken into consideration the income stated in the income tax return and only on assumption and presumption has granted maintenance. To be noted that the

petitioner has not produced income tax return of more than one year, but has only produced income of one year that is 2021. The maintenance petition was filed in 2018. So it is noted by the learned Family Court that in order to show his income less, the petitioner has filed the income tax written of the lesser amount, so it could become a reason for believing that the petitioner is earning much less. At this juncture, let refer judgment in case of **Kiran Tomar and others Vs. State of U.P. reported in 2022 LiveLaw (SC) 904**, para 10 is material, which reads as under:-

> *"10 On the first aspect, it is well-settled that income tax returns do not necessarily furnish an accurate guide of the real income. Particularly, when parties are engaged in a matrimonial conflict, there is a tendency to underestimate income. Hence, it is for the Family Court to determine on a holistic assessment of the evidence what would be the real income of the second respondent so as to enable the appellants to live in a condition commensurate with the status to which they were accustomed during the time when they were staying together. The two children are aged 17 and 15 years, respectively, and their needs have to be duly met."*

15. Considering the impugned order, what appears that the learned Family Court has taken holistic view and has discussed all facts about the income of the petitioner, including the fact that he is maintaining his second wife and is doing business and having two firms Sales and Service of I.T. product to reach to the conclusion that the petitioner is earning ₹1,00,000/- per month. To be noted that it is the duty of the petitioner being husband under section 106 of the Evidence Act to disclose the correct facts of his income before the court, but he has not done so.

16. At this juncture, let refer judgment of the Hon'ble Apex Court in case **Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke** and others reported in **(2015) 3 SCC 123**,

wherein the Hon'ble Apex Court has held in para 14 thus:-

> *"14. In the case before us, the learned Magistrate went through the entire records of the case, not limiting to the report filed by the police and has passed a reasoned order holding that it is not a fit case to take cognizance for the purpose of issuing process to the appellant. Unless the order passed by the Magistrate is perverse or the view taken by the court is wholly unreasonable or there is non-consideration of any relevant material or there is palpable misreading of records, the Revisional Court is not justified in setting aside the order, merely because another view is possible. The Revisional d Court is not meant to act as an appellate court. The whole purpose of the revisional jurisdiction is to preserve the power in the court to do justice in accordance with the principles of criminal jurisprudence. The revisional power of the court under Sections 397 to 401 CrPC is not to be equated with that of an appeal. Unless the finding of the court, whose decision is sought to be revised, is shown to be perverse or untenable in law or is grossly e erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where the judicial discretion is exercised arbitrarily or capriciously, the courts may not interfere with decision in exercise of their revisional jurisdiction."*

17. No reasons are made out to interfere with the impugned judgment and order under limited jurisdiction u/s 397 r/w section 401 of the Code of Criminal Procedure, 1973. For the forgoing reasons, present petition, fails and stands dismissed.

(J. C. DOSHI,J)

SHEKHAR P. BARVE