

**Criminal Revision**  
**PRESENT: THE HON'BLE MR. JUSTICE RAGHUNATH RAY**

Judgment on: 04.02.2010

**C.R.R. No. 776 of 2008**

**Sarat Bouri**

**Vs**

**State & anr.**

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**Point:**

**Evidentiary value:** Relationship of the witness whether affect credibility of a witness- Evidence Act, 1872- S.134.

**Fact:** In this Criminal Revision the Petitioner / husband has challenged the Judgment and Order passed by the Ld. Judicial Magistrate in a case under Section 125 of the Code of Criminal Procedure whereby the Ld. Magistrate, without taking into consideration the corroborative evidence of the teen-aged son and daughter of the couple on the ground that they are interested witnesses, held that the petitioner wife is entitled to monthly maintenance from her husband.

**Held:** Evidentiary value of a witness is to be judged on the basis of its intrinsic worth and relationship with the party at whose instance he has deposed cannot be the sole ground to discard such testimony in toto. (Paragraph – 14)

Relationship per se does not affect credibility of a witness and merely because a witness happens to be a relative of a party, he / she can not be characterized as an interested witness. (Paragraph – 16)

**Cases cited:**

1. AIR 1977 SC (472) (Mst. Dalbir Kaur & Ors. – appellants – Vs. – State of Punjab – respondent)
2. AIR 1991 SC 318 (Brathi @ Sukdev Singh Vs. State of Punjab)
3. AIR 1971 SC 1949 (Biswanath Rai – Vs – Sachhidanand Singh & Ors.)
4. AIR 1988 SC 2154 (State of UP – VS – Krishna Gopal & Anr.)
5. (2008) 2 SCC 316 (Chatruvuj – appellant – Vs – Sitabai – respondent)
6. AIR (2008) SC 2436 (Ashoke Kr. Chowdhury Vs. State of Bihar)
7. AIR (2009) SC 152 (State Rep by Inspector of Police Vs. Sarvaman another)
8. 2007 (4) CHN 1032 (Partha Pratim Basak Vs. Arundhuti Basak)

9. 1984 Cri.L.J. (Bom) 1524 (Sangita Arun Mhasvade Vs Arun Aba Mhasvade and Another).

For the Petitioner: Mr. Ajoy Debnath, Mr. Sujit Saha  
For the State Opposite Party No. 1: Mr. S. K. Mallick  
For the Opposite Party No. 2: Mr. Swapan Banerjee

**The Court:**

1. In this Criminal Revision the Petitioner / husband has sought to challenge the Judgment and Order dated 05.1.2008 passed by the learned Judicial Magistrate, 2nd Court, Asansol in Misc. Case no.33/2002 under Section 125 of the Code of Criminal Procedure.

2. The Petitioner / husband has contended inter alia in this Revisional Application that their marriage was solemnized in accordance with the Hindu religious rites and customs in the year 1985 and both of them led their conjugal lives for a considerable period of time and out of the said wedlock one daughter and two sons were born. According to the Revisionist, his wife being a lady of aggressive nature and of promiscuous habits left her matrimonial home leaving behind her sons and daughter in the year 1996 and started living with another person. Despite several attempts to bring her back to his house, the wife refused to return to her matrimonial home and also to look after their children. She even threatened to implicate him in a criminal case. Because of his wife's willful absence their children could not even properly be taken care of during their childhood. All of them are still being deprived of motherly affection in their upbringing. She also did not care to take information about her children even during their serious illness.

3. She, however, subsequently filed the Misc. Case no.33 of 2002 under section 125 Cr. P.C. claiming maintenance for her on the allegation of illtreatment, torture and assault.

4. The Petitioner husband contested the said proceeding by filing a written objection wherein he controverted all these material allegations and contended inter alia that she left the matrimonial home out of her own volition leaving behind her minor children.

5. On consideration of evidence, so adduced by both sides together with

relevant materials and circumstances on record, learned Judicial Magistrate, 2nd Court, Asansol came to a finding that the Opposite Party no.2 is entitled to get monthly maintenance at the rate of rupees one thousand from the Revisionist from the date of filing of the said proceeding vide his order dated 5.1.2008. He was also directed to liquidate the arrear amount of maintenance in installment of Rs.3,000/- per month together with current monthly maintenance within 10th of every succeeding month and first of such installment shall have to be paid along with current maintenance for the month of January, 2008 and to go on paying month by month until the entire arrear amount is liquidated.

6. Feeling aggrieved thereby, the Petitioner husband has preferred this Revisional Application.

7. The moot point for consideration in the instant revision is whether the learned Magistrate is justified in holding that the petitioner wife is entitled to monthly maintenance from her husband OP on appreciation of evidence and circumstances on record in its proper perspective.

8. Assailing the Judgment and Order impugned passed by the learned Court below, it is submitted by Mr. Debnath, learned Counsel for the Petitioner / husband that the learned Court below has failed to take into consideration the corroborative evidence of Chayon Bauri (OPW 2), the teen-aged son of the couple and also Rita Bauri (OPW 3), their daughter on the ground that they are interested witnesses, although both of them successfully stood the test of cross – examination.

9. In this context it argued by him that the ld. Magistrate has thus committed a serious illegality by rejecting the corroborative testimony of their children on the ground of relationship. He, therefore, relies upon a ruling of the Hon'ble Apex Court reported in AIR 1977 SC (472) (Mst. Dalbir Kaur & Ors. – appellants – Vs. – State of Punjab – respondent) and argues that the mere fact that a witness is related to the petitioner is not sufficient to discard his testimony. He also refers to atleast three decisions of the Hon'ble Apex Court reported in AIR 1991 SC 318 (Brathi @ Sukdev Singh Vs. State of Punjab), AIR 1971 SC 1949 (Biswanath Rai – Vs – Sachhidanand Singh & Ors.) and AIR 1988 SC 2154 (State of UP – VS – Krishna Gopal & Anr.) and submits that the mechanical rejection of the evidence on the sole ground that it is interested would invariably lead to failure of justice.

10. It is, therefore, forcefully argued by him that the Id. Magistrate ought to have relied upon the best evidence adduced through their son & daughter of the OP. According to him, Id. Magistrate has arbitrarily rejected the corroborative testimony of these child witnesses who have deposed in one voice that they never found their father to inflict torture either mental or physical upon their mother. It is their further evidence that their mother left her matrimonial home without taking into consideration their plight. Therefore, in view of such cogent consistent and convincing evidence on record it is highly improper on the part of the Id. Magistrate to award maintenance in favour of the petitioner contravening the relevant provision under section 125 (4) Cr. P.C. It is clearly laid down therein that if the wife refuses to live with her husband without any sufficient cause, she is disentitled to have any allowance for her maintenance from her husband. In support of his contention he has referred to a ruling of the Hon'ble Apex Court reported in (2008) 2 SCC 316 (Chatruvuj – appellant – Vs – Sitabai – respondent).

11. Another facet of his argument is that the concocted story of torture is also not backed by materials on record since no criminal case under Section 498A of the Indian Penal Code has ever been filed against the Petitioner husband. He has also drawn my attention to the evidence of Opposite Party no.2 / wife (P.W.1) who herself has categorically asserted towards the concluding portion of her testimony that she wants to go to the place where her husband (Petitioner) works but not at the house at Mithapur. By referring to relevant portions of evidence of OP WS 2 and 3, it is, further, forcefully submitted by Mr. Debnath that her own children have emphatically stated before the Court that they never saw their father to inflict any torture upon their mother, and the wife herself is also unwilling to go back to her matrimonial home where her husband is residing with their children, it should, therefore, reasonably be inferred that she has refused to live with her husband without any sufficient cause and in view of that matter she is entitled to no maintenance allowance as per the provision of Section 125 (4) of the Code of Criminal Procedure.

12. Such submission is, however, strongly disputed by the learned Counsel for the Opposite Party no.2 / wife. According to him, Judgment and Order impugned does not suffer from any legal infirmity and as such, this Court in its revisional jurisdiction cannot interfere with the same. His further submission is that there is nothing on record to indicate that the wife had left her matrimonial home out of her own sweet-will. Rather, her oral testimony unequivocally suggests that she was tortured and driven out of her matrimonial home at the instance of her husband and because of such compelling circumstances she is now to earn her bread by working as a maid-servant in the house of the neighbouring people. It is also vehemently argued by him that she had to bear a

pang of separation from her children because of painful circumstances created by her husband. That apart, taking into consideration the question of social justice and also to prevent vagrancy the meagre amount of maintenance at the rate of rupees one thousand per month, awarded by the learned Court below, should be upheld to provide bare sustenance of life to her.

Mr. Mallick appearing on behalf of the State, however, supports the findings of Ld. Magistrate and submits that Ld. Court below is justified in granting maintenance in favour of the wife Opposite Party No. 2.

13. I have very carefully taken into consideration reasonings given by the Id. magistrate in the order impugned in the light of evidence on record and submission made at the Bar. It appears that the Id. Magistrate has expressed grave doubt about the evidentiary value of two children who were “at their very tender age when their mother was tortured allegedly” and as such according to him “there has been a chance that both PW 2 & 3 are being interested witnesses.” He has accordingly opined by rejecting corroborative testimony of child witnesses that “entitlement of the petitioner to get maintenance from the OP cannot be barred under the provisions u/s 125 (4) Cr. P.C.” He also did not attach much importance to the husband’s repeated attempts to bring his wife back to her matrimonial home since according to him it is “belated one and secondly there is no evidence available to cater that OP 2 tried to persuade the petitioner”.

14. The entire approach of the Id. Magistrate appears to be erroneous. It is well settled position of law that evidentiary value of a witness is to be judged on the basis of its intrinsic worth and relationship with the party at whose instance he has deposed cannot be the sole ground to discard such testimony in toto. In the present case OP Nos. 2 and 3 are the son and daughter respectively of both the parties and as such it is absolutely wrong to opine that both of them are interested only to take care of their father’s interest and would unnecessarily testify against their mother. In the present case a meticulous analysis of their evidence leads me to opine that both of them have respect for the truth only and a court of law should put an implicit trust on their innocence and simplicity.

15. That apart, it is settled position of law that the petitioner wife is required to prove that she was tortured by the OP. But the Id. Magistrate has negated established proposition of law and insisted that the OP husband is to establish that the petitioner was not tortured by the OP through independent witness. Such finding is neither plausible nor legally acceptable. More so, whenever the OP husband has clearly proved through the cogent and convincing evidence adduced by their son and daughter that the petitioner has been residing at her parental home leaving behind their minor children out of her own sweet will. As already discussed earlier Id. Magistrate’s finding that OPW 1 and 2 cannot be

relied upon is also contrary to settled position of law that evidence of relation should not be rejected mechanically because it is most unlikely that the children who are equally lovable to both their father and mother would deliberately tell a lie before the Court of law to protect their father's interest only.

16. It is well settled proposition of law that relationship per se does not affect credibility of a witness and merely because a witness happens to be a relative of a party, he / she can not be characterized as an interested witness. In this connection, I would like to refer to a ruling of the Hon'ble Supreme Court reported in AIR (2008) SC 2436 (Ashoke Kr. Chowdhury Vs. State of Bihar). It has been ruled therein as under :-

“In our opinion, even otherwise it will be erroneous to lay down as a rule of universal application that ..... the testimony of a relative of the victim which is otherwise creditworthy cannot be relied upon unless corroborated by the public witness. So far as, the question of creditworthiness of the evidence of relative of the victim is concerned, it is well settled that though the Court has to scrutinize such evidence with great care and caution but such evidence cannot be discarded on the sole ground of their interest in the prosecution.”

Reliance can also be placed upon a recent ruling of the Hon'ble Apex Court reported in AIR (2009) SC 152 (State Rep by Inspector of Police Vs. Sarvaman another) it has been ruled therein that the relationship of a witness with the deceased is no ground to affect its credibility.

17. Therefore, the evidence as led by OPWs 2 and 3 is required to be scrutinised with greater circumspection.

This Court would proceed to evaluate their testimony accordingly. During cross-examination

the son of the couple as OP W2 testifies as under :-

*“Nearly 10/12 years ago my mother left us. Since then my mother did not see us. When my mother left us, we used to reside at Mithepur house. At present I am 17 years old. Since before when my mother lastly left us she used to leave us occasionally. My mother never took me with her. I am her youngest son.”* It is also importantly important to note the next line of his cross-examination which runs as follows :-

*“ My mother whenever left us there was no quarrel or dispute with my father.”*

18. The afore-quoted revelation emanating during cross-examination of OPW2 is sufficient to indicate the stubborn attitude of the OP wife. In fact, the mother in her was never eager to meet her own children whom she abandoned almost a decade ago. Our common experiences tell us that normal conduct of a mother is that whenever she is driven out of her matrimonial home she would carry at least her youngest child with her. There is in no allegation that he was prevented from taking her children with her. On the contrary, alarming feature of

the present case is that the children were brought up in the most formative period of their lives with utmost care, love and affection by their father alone in the continued absence of their mother. Against the backdrop of such a fact situation this court is to hold that the petitioner husband had no role to play behind his wife's departure from her matrimonial home leaving their all minor children for the reason best known to her.

19. The daughter of the couple OPW3, Rita Bouri, also echoes the similar sentiment of her brother in her deposition which may be reproduced as under :-  
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*“When I was 11 years old my mother left us. At present I reside with my father and two brothers. When my father was living with us, we were very happy. My mother was treated by him with love. There was no dispute between them. My father has no habit of drinking liquor. I never saw my father to consume liquor.”*

20. She is also categorical in her assertion that her father and her brother went to get back her mother on many occasions but she refused to come back. The most poignant part of her testimony which touches the chord of every heart is quoted as under :-

*“My father has to leave at 6 AM in the morning to attend duty and returns at 6 PM after duty. Since my childhood I have to be taken to vellore for treatment once in every year. My father takes me to vellore every year. In the morning I cook food and at night father cooks for us.”*

21. The mother, however, remained adamant in such a distressing situation for all these long years and did not care to come back to her matrimonial home even to meet her daughter suffering from serious ailment. In fact, cogent and sincere persuasion from her husband and son in this regard failed to yield any result. The yearnings of children for mother's care and affection appears to be a mere cry in wilderness. In such a fact situation, allegations of torture and neglect against the petitioner husband appears to be not convincing. In fact, it is crystal clear from the materials on record that the father never neglected their children at any point of time. But the most unfortunate part of the case is that children are being neglected for more than a decade by their own mother because of her willful absence from her matrimonial home.

Taking all these facts and circumstances into account it can safely be inferred that there is no earthly reason for the OP husband not to maintain the wife whenever he has not shown even slightest neglect to his children.

22. That apart, it transpires from the cross –examination of PW 1 herself that her elder daughter is suffering from a disease of T.B. and she was taken to Vellore and Apollo for treatment. It is also available from her testimony that her one son is reading in class IX and another in Class VIII and a lot of money is required for

the purpose of education of her children. During her cross-examination she has also frankly stated that she would not go to her husband's house at Mithapur but she wants to go to the place where her husband works. Pausing for a moment it may be pointed out that all her children are staying at Mithepur house with their father and her father is attending his office after changing three buses from Mithapur. Such being the factual position, it is evident that he has not been provided with any residential accommodation in his work place. In such circumstances, her desire to reside with her husband at his workplace appears to be quite unreasonable and the same tantamounts to her refusal to reside at her matrimonial house at Mithapur with her husband and children. More so, whenever in her cross – examination she also unequivocally declares that she would not go to her matrimonial home at Mithapur. In this context it is pertinent to mention that PW 2 in his cross-examination has also clearly admitted that Sarat Bauri, OP resides at his own house at Mithapur alongwith his daughter and two sons who read in a school. Therefore, it is established and firmly established that the wife petitioner has refused to reside at her matrimonial home at Mithapur along with her husband and children without any sufficient cause. Against such factual backdrop as analysed with abundant care and caution in preceding paragraph it can safely be concluded that the petitioner wife is not entitled to maintenance because of her refusal to live with her husband without sufficient reasons.

23. It is ruled by this court in a decision reported in 2007 (4) CHN 1032 (Partha Pratim Basak Vs. Arundhuti Basak) that no wife shall be entitled to receive an allowance for the maintenance from her husband if she without any sufficient reason refuses to live with her husband. Reliance can also be placed upon a ruling of the Bombay High Court reported in 1984 Cri.L.J. (Bom) 1524 (Sangita Arun Mhasvade Vs Arun Aba Mhasvade and Another). It is held therein that requirements of Section 125(1) Cr. P.C. remains unfulfilled if the wife leaves the house of her husband on her own without having any proof of torture and neglect upon her.

24. As already discussed in sufficient details on dissection of evidence on record that the wife is living in her father's house without any sufficient cause although her husband and son made sincere endeavour to take her back on repeated occasions. It is also clear from evidence on record that in open court she has unequivocally declared that she would never go back to her husband's house at Mithapur. It is also available from evidence on record that she never felt any urge to meet any of her children not to speak of her husband within the span of all these 13/14 years after she left her husband's house leaving behind her seriously ailing daughter in the year 1995. Such abnormal behaviour of the wife speaks volume against her claim for maintenance on the ground of alleged torture and negligence.



That apart, evidence on record is quite insufficient to substantiate allegation of torture and neglect against her husband. Rather, it is obvious from materials on record that she has been residing at parental abode as per her own choice.

25. Viewed in the light of foregoing discussion it is held that, the wife is to satisfy the essential legal requirement that the husband must have neglected or refused to maintain his wife as envisaged u/s. 125 (1) Cr. P.C. On her failure to fulfil such requirement at the first instance, her staying away from her matrimonial home without any sufficient reason would disentitle her to maintenance as per section 125(4) Cr. P.C. In such circumstances, her claim for maintenance is not maintainable on the sole plea of vagrancy and destitution.

26. Therefore, on wholesome appreciation of evidence and circumstances on record I am to hold that the Id. Magistrate has committed illegality in not taking into consideration the entire evidence and circumstances on record in its proper perspective. The findings of the Id. court below that 'the petitioner wife is entitled to maintenance' is not sustainable either factually or legally. So, in my considered view it is a fit case where the High Court should interfere in its revisional jurisdiction to prevent the miscarriage of justice.

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27. Accordingly, the judgment and order impugned dated 05.01.08 passed by the Id. Judicial Magistrate, 2nd Court at Asansol in Misc. Case No. 33 of 2002 is set aside.

28. Consequently, Misc. Case No. 33 of 2002 filed by the petitioner wife before the Ld. Additional Chief Judicial Magistrate Asansol stands dismissed.

CRR No. 776 of 2008 thus stands **disposed of**.

**(Raghunath Ray J.)**