

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRI.WRIT PETITION NO. 952 OF 2011

Mrs. Varsha Uttam Kokitkar
Vs
Mr. Uttam Maruti Kokitkar & Anr.

Petitioner
.. Respondents

WITH

CRI.WRIT PETITION NO.280 OF 2011

Mr. Uttam Maruti Kokitkar
Vs
Mrs. Varsha Uttam Kokitkar and
Anr.

Petitioner
.. Respondents

Mr.Vinit A.Kulkarni, Advocate for the Petitioner in WP/952/2011
& Respondent no.1 in WP/280/2011.

Mr. B.G.Vaidya. Advocate for Respondent no.1 in WP/952/2011
& for Petitioner in WP/280/2011.

Mr. A.R.Patil, A.P.P. for respondent no.2-State in both Petitions.

CORAM : R.G.KETKAR,J.
RESERVED ON: 05.3.2015.
DELIVERED ON: 12.3.2015

PC:

1. Heard Mr. Vinit A. Kulkarni, learned counsel for the petitioner in Writ Petition No.952 of 2011 & for Respondent no.1 in Writ Petition No.280 of 2011, Mr. B. G. Vaidya, learned counsel for respondent no.1 in Writ Petition No.952 of 2011 and for Petitioner in Writ Petition No.280 of 2011 and Mr A.R.Patil, learned A.P.P. for State in both the Petitions at length.

2. Writ Petition No.952 of 2011 is instituted under Article 227 of the Constitution of India by the wife against respondent no.1-husband challenging the Judgment and order dated 21.9.2010 passed by the learned Addl. Sessions Judge, Court Room no.15, Sewree, Mumbai, in Criminal Appeal No.53 of 2010. By that order, the learned Sessions Judge partly allowed the Appeal preferred by respondent no.1 and set aside the direction issued by the learned Magistrate, 29th Court, Dadar Mumbai, contained in the order dated 16.2.2010 in Application C.C.No.33/Misc/2009, to pay Rs.1000/- per month to her towards rent in lieu of residence. The learned Sessions Judge confirmed the order of the learned Magistrate so far as the order of maintenance is concerned.

3. Writ Petition No.280 of 2011 is instituted under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1860 (for short, "Cr.P.C.") challenging the Judgment and order dated 16.2.2010 passed by the learned Metropolitan Magistrate, 29th Court Dadar, Mumbai in Misc. Application No.33 of 2009 as also the Judgment and order dated 21.9.2010 passed by the learned Sessions Judge in Criminal Appeal No.53 of 2010. The relevant and material facts that are necessary for disposal of these Petitions, briefly stated, are as under:-

4. The marriage between the petitioner and the first

respondent was solemnized on 23.5.1991 as per Hindu Vedic Rites and Customs. The wife started residing with the husband at matrimonial home at village and post Umberwadi, Taluka Gadhinglaj, District Kolhapur. The parties, thereafter, came to Mumbai and initially stayed at her parents house. It is the case of the wife that her father paid Rs.5000/- to the husband to refund the security deposit of the room. Somewhere in the month of December, 1991, the wife started residing with the husband at matrimonial home at Dharavi, Mumbai-400 019. On 1.11.1992, a female child Dhanshree was born. In September, 1993 she went to reside with the husband along with minor child and stayed there for six months. On 29.11.1993 she was mercilessly assaulted by her husband. She, therefore, had lodged complaint at Dharavi Police Station. Again, on 27.3.1994 she was assaulted and, therefore, she had lodged complaint at Dharavi Police Station. On the same day, she was driven away from the matrimonial home along with minor child and since then she is residing at her parents house along with her parents, her two brothers and other family members.

5. It is her case that on 1.8.1994 she had lodged a written complaint at Dharavi Police Station and C.R. No.641 of 1994 was registered under section 498-A, 506(ii) Indian Penal Code, 1860. She had instituted M.J.Petition No.A/1565 of 1994 for restitution of conjugal rights under section 9 of the Hindu Marriage Act,

1955. During the pendency of that petition, on 10.2.1998 the parties filed Consent Terms. The wife agreed to stay in a room near Dharavi Depot from 16.2.1998 so long as the husband arranges a room near the shop. The petition for restitution of conjugal rights was dismissed on 16.11.1998 after recording that both the parties admitted that they are staying together for the last eight months.

6. It is the case of the wife that during the pendency of that petition, she had applied for maintenance for herself and daughter and by order dated 20.9.1995 the husband was directed to pay Rs.500/- each to the wife and the daughter. It is the case of the wife that the husband did not pay the maintenance, and therefore she filed Regular Darkhast No.481 of 1999. By order dated 16.3.2002, the Family Court prohibited the husband from transferring or alienating the property, namely shop No.C-156/4/5 situate at Ambedkarnagar, M.L.Camp, Dharavi, Mumbai-19. She had thereafter instituted the proceedings under the Protection of Women from Domestic Violence Act, 2005 (for short, "Act"). The petitioner took out application under section 12 for relief of maintenance and for issuing protection order. By order dated 16.2.2010, the learned Magistrate partly allowed the application and directed the husband to pay monthly maintenance of Rs.1500/- to wife and Rs. 2000/- to the daughter from the date of the order. The

husband was also directed to pay Rs.1000/- to the wife towards rent in lieu of residence from the date of the order as also Rs.1000/- towards costs of the litigation.

7. Aggrieved by that order, the husband preferred Appeal before the Sessions Court. By order dated 21.9.2010 the learned Sessions Judge partly allowed the Appeal, as indicated herein above. Aggrieved by both the orders, the husband has instituted Writ Petition No.280 of 2011 and the wife has instituted Writ Petition No.952 of 2011 challenging the order of the Sessions Court.

8. Mr. Vaidya, learned counsel appearing for the husband submitted that basically the proceedings under the Act are not maintainable. He submitted that the wife filed the proceedings in the year 2009 and prayed for reliefs under sections 18.,19, 20, 22 of the Act. The parties are staying separately since 1998. After the gap of more than 11 years, she has filed the proceedings invoking the provisions of the Act. In the entire complaint, there are no allegations of domestic violence. He heavily relied upon the decision of this Court in the case of Kishor Shrirampant Kale Vs. Sou.Shalini Kishor Kale, 2010 Cri.L.J. 4049. He further submitted that for nonpayment of maintenance amount, the husband was also imprisoned.

9. On the other hand, Mr. Kulkarni submitted that after considering the material on record, the learned Magistrate

directed the husband to pay maintenance as also Rs.1000/- towards rent in lieu of residence. However, the learned Sessions Judge, without any justification, has set aside the direction of payment of Rs.1000/- towards the rent in lieu of residence. He submitted that the order of the learned Magistrate may be restored. He further submitted that the daughter Dhanshree is studying in Engineering College in Mumbai. The Courts below were, therefore, justified in ordering maintenance. He further submitted that though the marriage between the wife and the husband is subsisting, the husband remarried one Rajshree and out of that wedlock, son Chinmaye was born on 22.5.2004. He submitted that on facts, the decision of this Court in the case of Kishor Shrirampant Kale is not applicable. Mr. Kulkarni submitted that in Criminal Writ Petition No.952 of 2011 the wife has prayed for injunction restraining the husband from alienating shop and house No.156/4/5 Ambedkarnagar, M.L.Camp, Charavi and also has sought relief permitting them to reside. He states that for a period of eight weeks from today, injunction may be issued against the respondent in terms of prayer clause (c) thereof so as to enable the wife to take out appropriate proceedings before appropriate forum.

10. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the learned Magistrate

has directed the husband to pay monthly maintenance of Rs.1500/- to the wife and Rs.2000/- to the daughter from the date of the order. He has also directed the husband to pay Rs.1000/- per month to the wife towards the rent in lieu of residence from the date of the order. As against this, the learned Sessions Judge has confirmed the maintenance order and has set aside the order in so far as it directed the husband to pay Rs.1000/- per month towards rent in lieu of residence.

11. Mr. Vaidya submitted that the proceedings under the Act itself are wholly misconceived and are not maintainable. He submitted that from 1998 there is no contact/communication between the parties. In the entire complaint, there are no allegations of domestic violence. The proceedings under the Act are instituted almost after 11 years. In support of this submission, he relied upon the decision of this Court in the case of Kishor shrirampant Kale (supra). In that case, the marriage between the petitioner and respondent no.1 was solemnized on 8.5.1990. Respondent no.2-son was born on 24.2.1991. The petitioner deserted respondents 1 and 2 in the year 1992 and since then they were living separately with her father at his village. She had instituted proceedings for grant of maintenance which was decided on 30.11.1996 and both respondents were awarded maintenance amount under section 125 of Cr.P.C. The petitioner had instituted divorce proceedings

which were decreed and the Appeal preferred by the wife was pending and stay to the decree of divorce was granted. She thereafter instituted complaint under section 12 read with sections 19 and 20 of the Act in or about 2007. On facts, it was found that the parties admittedly were staying separately since 7.11.1992, that is almost 15 years before filing of the complaint. It was also found from material on record that they had neither any contact nor communication or any relationship whatsoever. After considering the provisions of the Act and in particular the definition of Domestic Violation under section 3 of the Act, this Court held that the complaint itself is not maintainable. The moot question is whether the said judgment is applicable in the facts and circumstances of the present case.

12. As noted earlier, the wife had instituted proceedings under section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. During the pendency of that proceedings, on 20.2.1995 the Family Court had awarded maintenance of Rs.500/- per month each to the wife and daughter. It is evident from the record that during the pendency of the petition for restitution of conjugal rights, the parties filed Consent Terms on 10.2.1998 where under wife agreed that she will reside in a room near Dharavi Depot along with daughter so long as the husband arranges for a room near the shop. The husband agreed to secure a room for residence. He further agreed that

the shop will jointly stand in his name and in wife's name. On 16.11.1998 the petition was disposed of as the parties appeared before the Family Court and admitted that they are staying together since last eight months.

13. It is material to note that though the Family Court directed the husband to pay maintenance of Rs.500/- each per month by order dated 20.9.1996, he failed to comply that order. In view thereof, the wife instituted execution proceedings in the Family Court. By order dated 16.3.2002, the Family Court issued injunction restraining the husband from alienating shop No.156/4/5 Ambedkarnagar, Dharavi, Mumbai. It is the case of the wife that though the marriage between the parties is subsisting, the husband remarried one Rajeshree and out of that wedlock son Chinmaye was born on 22.5.2004. The present proceedings are instituted in the year 2009. Having regard to the fact that the husband failed and neglected to pay maintenance amount and the Family Court passed order in March 2002 as also having further regard to the fact that prima facie during the subsistence of the marriage, the husband remarried and out of that wedlock son was born on 22.5.2004, it cannot be said that the complaint instituted by the wife under the provisions of the Act, is not maintainable. In my opinion, there is live-link between the events set out herein above as also the complaint. I, therefore, do not find any merit in the

submission of Mr Vaidya that in view of the decision of this Court in the case of Kishor Shrirampant Kale (supra), the complaint was not maintainable.

14. Mr. Kulkarni submitted that the learned Sessions Judge committed error in setting aside the order in so far as directing the husband to pay Rs.1000/- towards rent in lieu of residence. I find merit in the submission. As noted earlier, on 10.2.1998 the parties filed Consent Terms in petition for restitution of conjugal rights. The wife agreed to stay in a room near Dharavi Depot from 16.2.1998 so as to enable the husband to arrange for a room near the shop. The husband agreed to do the needful. He further agreed that he will execute documents so that the shop will be in his name and in wife's name. From the material on record, it is evident that the husband has not complied the Consent Terms dated 10.2.1998. On the other hand, he failed and neglected to pay maintenance amount as per the order dated 20.9.1995 compelling the wife to file execution proceedings. The Family Court issued injunction restraining the husband from alienating the shop. It is the duty of the husband to provide for accommodation. Since he has not made any arrangement, the learned Magistrate held that the wife is entitled to rent in lieu of residence. I do not find that the learned Magistrate has committed any error in that regard particularly when the husband has prima facie committed breach of the

Consent Terms dated 10.2.1998 filed in the petition for restitution of conjugal rights. The learned Sessions Judge has not considered this aspect. Hence the order of the learned Sessions Judge in so far as setting aside the order of the learned Magistrate directing the husband to pay Rs.1000/- per month to the wife towards rent in lieu of residence, is required to be set aside thereby restoring the order of the learned Magistrate. Mr Kulkarni submitted that prayer (c) in the petition may be granted for a period of eight weeks from today so as to enable the wife to adopt suitable proceedings.

15. In the light of the aforesaid discussion, these petitions are disposed of in the following terms:

(i) The Judgment and order dated 21.9.2010 passed by the learned Sessions Judge in Civil Appeal No.53 of 2010 in so far as setting aside the direction of payment of Rs.1000/- per month to the wife towards rent in lieu of residence, is set aside.

(ii) The order of the learned Magistrate dated 16.2.2010 is restored. In other words, the husband will pay maintenance to the wife at the rate of Rs.1500/- per month and to daughter Dhanashree at the rate of Rs.2000/- per month from the date of the Magistrate's order dated 16.2.2010. The husband shall also pay Rs.1000/- per month to the wife the rent in lieu of residence from the date of the order, i.e. 16.2.2010.

(iii) For a period of eight weeks from today, there shall be

injunction retraining the husband from disposing of or alienating shop/house No.C-156/4/5/ Ambedkarnagar, M.L.Camp, Dharavi, Mumbai-400 019.

(iv) Criminal Writ Petition No.280 of 2011 is dismissed. Rule is discharged. Criminal Writ Petition no.952 of 2011 is allowed. Rule is made absolute in terms of prayer clause (a).

(v) It is made clear that by granting interim relief in terms of prayer clause (c) of Writ Petition No.952 of 2011, I have not expressed any opinion on merits of the case on either way. All the contentions of the parties in that regard are expressly kept open.

(R.G.KETKAR, J.)