

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.1191 OF 2016

- 1) Shaikh Sadeq s/o Shaikh Taj
Mohammed Patel, Age 34 years,
Occupation : Labour,
R/o Jahagirdar Colony,
Near RTO Office, Railway Station Road,
Aurangabad.
- [2) Shaikh Taj s/o Mohammed Patel,
Age 52 years, Occ. Nil, - **Deleted**
R/o Jahagirdar Colony,
Near RTO Office, Railway Station Road,
Aurangabad.
- 3) Fatemabee w/o Shaikh Taj Mohammed
Patel, Age 67 years, Occ. Household, - **Deleted**
R/o Jahagirdar Colony,
Near RTO Office, Railway Station Road,
Aurangabad.
- 4) Shaikh Haroon Patel Shaikh
Taj Mohammed Patel, Age 42 years,
Occ. Labour, - **Deleted**
R/o Jahagirdar Colony,
Near RTO Office, Railway Station Road,
Aurangabad.]

**(Nos.2 to 4 deleted as per
order of Hon'ble Court dated 20.4.2016)**

... **APPLICANTS**
(Orig. Respondents in
J.M.F.C. Court)

VERSUS

- 1) Shakerabegum w/o Shaikh Sadeq Patel,
Age 29 years, Occ. Household,
R/o C/o Shri Shaikh Sattar,
Galli No.4, Hussain Colony,
Garkheda Parisar, Aurangabad

- 2) Madiha d/o Shaikh Sadeq Patel,
Age 6 years, under guardianship
of real mother, respondent No.1
- 3) Hadiya d/o Shaikh Sadeq Patel,
Age 4 years, under guardianship
of real mother, respondent No.1

... **RESPONDENTS**
(Original Applicants in
J.M.F.C. Court)

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Mr. R.R. Shaikh, Advocate for applicants
Mr. Khizer Patel, Advocate for respondent No.1
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CORAM: A.I.S. CHEEMA, J.

DATED: 2nd August, 2016.

Date of reserving judgment : 18th July, 2016.

Date of pronouncing judgment : 2nd August, 2016

JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with the consent of learned counsel for the parties.

2. This application was filed by 4 applicants. Applicant No.1 (hereinafter referred as - applicant) is husband of respondent No.1 Shakerabegum. His parents and brother earlier joined the application, but have been subsequently deleted. Respondent Nos.2 and 3 are children of the applicant and respondent No.1. The respondent No.1 filed Misc. Criminal

Application No.1180/2012 in the Court of 11th Judicial Magistrate, First Class, Aurangabad under the provisions of Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Domestic Violence Act for short). Various reliefs were claimed. The matter proceeded and after hearing the parties, the Judicial Magistrate, First Class, approved the application partly and directed payment of per month maintenance of Rs.5000/- to respondent No.1 wife and another Rs.5000/- jointly for respondent Nos.2 and 3, the minor children. The amount was directed to be paid from the date of the Domestic Violence Act application which had been filed on 13.7.2012. During the pendency of that petition, by an order, the Judicial Magistrate, First Class had transferred the custody of the two minor children, respondent Nos.2 and 3, to the respondent No.1 mother. The order was repeated in the final disposal of the petition also, with visiting rights to the applicant. Being aggrieved, the applicant filed Criminal Appeal No.279/2013 to the Court of Sessions, Aurangabad. The same came up before Additional Sessions Judge. The respondents also filed Criminal Appeal No.114/2015 regarding rejection of part of the application which had been filed. The Sessions Judge has decided the said appeals by common judgment dated 13.1.2016. Both the

appeals came to be dismissed and the order of the Judicial Magistrate, First Class has been confirmed by the Additional Sessions Judge, Aurangabad. Thus this present application has been filed by the applicant - husband.

3. Looking to the above, the present application remains limited to the question of deciding whether or not the order of maintenance passed by the Judicial Magistrate, First Class needs to be maintained.

4. It would be appropriate to refer to some necessary facts to decide the present petition. It appears from record that, the respondent No.1 wife and applicant - husband got married on 25.5.2008. In her petition, the wife claimed that, at the time of marriage, Rs.50,000/- and other household articles had been given by her father. She went to reside with the husband. The children are born from the wedlock. She was treated well for about one and half year. Then the present applicant started demanding Rs.50,000/- so as to fill goods in the Mobile Shop of the husband. Her father works as Coolie and could not pay. She was being subjected to illtreatment. When she was pregnant for second time, she was driven away from the house on the count

of money. The respondent No.3 was born at the place of her parents and four months after birth of the child, her parents reached her to the place of her husband. There was no change in the behaviour. She was subjected to illtreatment with demand of money. Ultimately, she was driven away and the children were kept back by the husband. As she wanted to live with the husband, she did not file complaint in the police station. On 30.6.2012, she went to the matrimonial home, but the husband and his family quarreled and poured kerosene on her and attempt was made to burn her. She somehow managed to run away. She filed complaint, but police did not record it and only offence under Section 498-A of the Indian Penal Code was registered. She claimed that, she has no source of income and the husband has not provided anything. The husband was running a Mobile Shop and has three storeyed residential house with 30 rooms, out of which some are let out. He also owns agricultural land and has an earning of Rs.50,000-60,000/- per month. The husband and his family subjected her to physical and mental harassment. Thus, she claimed Rs.10,000/- as maintenance per month for herself and Rs.5000/- for each of the two children. She sought compensation of Rs.10,00,000/- and separate residence.

5. The applicant appeared as non applicant in the Court of Judicial Magistrate, First Class and resisted the application denying the allegations, except the relationship. The husband claimed that the wife did not like him staying with other family members and wanted to be separate. She resided well only for six months and then was going away to the place of her parents. He tried to convince her, but she was not listening. In view of her demand, he started residing separate but there was no change in behaviour. When second child was born, he went to the place of parents of the wife and spent money at the hospital, but she did not come to the matrimonial home. After much efforts she came. Still she kept going to her parent's place frequently. She was not subjected to illtreatment. She left the matrimonial home on her own, leaving both the daughters, and filed proceedings to pressurize the husband. She gave false statement to Kranti Chowk Police Station on 1.7.2012 and false complaint under Section 498-A of the Indian Penal Code was filed. The husband claimed that, on 13.6.2010, he gave divorce to the respondent No.1 wife as per Muslim law by pronouncing triple talaq. The husband claimed that, he was only a worker in the

shop of his brother and was getting only Rs.3000/- and could not provide separate house to the wife and children. Agricultural land is not on his name. The wife has deserted him without any reason. She does tailoring work and earns Rs.3000-4000/- per month and can maintain herself. She is not entitled to separate maintenance.

6. The parties brought on record necessary evidence they wanted and the Judicial Magistrate, First Class, after hearing the matter, held that there was domestic violence. He found that, the wife was entitled to claim maintenance from the husband. The claim for separate residence, protection order, compensation did not find favour with the Judicial Magistrate, First Class. The custody orders were, however, passed.

7. The Sessions Court has confirmed the order of the Judicial Magistrate, First Class. The learned counsel for the applicant has argued that, although the trial Court found that the wife failed to prove physical and mental ill-treatment and although it was found that, domestic violence was not proved, still the maintenance orders had been passed. It has been

argued that, the order passed of Rs.10,000/- is also excessive. The applicant only works as worker in the shop of his brother, which is a mobile shop and he gets only Rs.3000/-. According to the counsel, the oral evidence on this count of the applicant should have been held as sufficient. It is submitted by the counsel that, there was sale of the agricultural field and in the sale, the applicant was only one of the vendor, who got just Rs.1,13,000/-. It is further argued that, the wife had filed yet another petition for maintenance under Section 125 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short). Although in the petition under the Domestic Violence Act it was claimed that the wife was driven away three months back, same assertion was made in the application filed under Section 125 of the Cr.P.C., which was of different dates and still, it was claimed that three months earlier she had been driven away. Thus, according to the counsel, her case that she was driven away should not have been accepted. The counsel stated that, the applicant was ready to pay the maintenance to the children, but the claim of the wife was required to be dismissed. It has been argued that, the maintenance application under Section 125 of the Cr.P.C. has been rejected by the concerned Court. It is stated

that, because the wife wanted to reside separate, the husband had taken separate room. It is stated that, the criminal case filed by the wife under Section 498-A has been dismissed, copy of which judgment has been filed.

8. Against this, the learned counsel for the respondent submitted that, the trial Court and Sessions Court both have held that the domestic violence has been proved. It is only while evaluating the question of compensation, observation has been made that case to that extent was not established. The proceeding under Section 125 was rejected because maintenance has been ordered in the present matter. The applicant husband is able bodied and is running mobile shop and is able to pay the maintenance as has been ordered. According to the counsel, where the wife and children have been deserted, the husband is bound to take care of them and maintain them. It is stated that, when the applicant husband filed say in the trial Court that he is willing to reside with the wife and the wife showed willingness, the husband amended the petition to claim that he had already given triple talaq. The counsel stated that, the applicant husband has in fact gone into second marriage. He states that, he has the

capacity and is liable to pay maintenance.

9. I have gone through the record of the trial Court as well as the judgment of the Judicial Magistrate, First Class and also the Sessions Court. There is no substance in the submissions made by the counsel for the applicant – husband that the lower Courts have found that there was no domestic violence and so no orders of maintenance could be passed. The counsel for applicant referred to first sentence of para 21 of the judgment of the Judicial Magistrate, First Class where the observation was that, the wife had failed to prove the specific mental and physical harassment. The learned counsel for the respondent wife referred to the further part of the same paragraph where the Judicial Magistrate, First Class continued to observe that even if specific physical and mental illtreatment was not established, still the act that the wife was required to pursue proceedings to get possession of the two minor children was also required to be considered and it could not be said that, she was not put to physical and mental torture. The learned counsel for the applicant husband referred to para 12 of the judgment of the Sessions Court, where it was observed that, it was not the case of the

applicants – wife and children that the wife sustained any loss due to domestic violence and that there was no sufficient and convincing evidence to show that the wife sustained any injury, either physical or mental, or any domestic violence committed by the non applicant. Against this, the learned counsel for the respondent wife submitted that, the Sessions Court itself in further part of para 12 of its judgment referred and concluded that the circumstances showed that the wife was not entitled to compensation and separate residence. It is argued that, the observations were in the context of claim for compensation and separate residence. It is apparent that, the applicant husband is trying to read the orders of the lower courts torn out of context and that cannot be accepted. Looking to the evidence which was brought in the trial Court and the judgment of the Judicial Magistrate, First Class as well as the Sessions Court, it is clear from record that the applicant husband has failed to maintain his wife and children. It appears from the record of trial Court that the husband subsequently added contents in his written say claiming that he has divorced his wife. The date claimed was of before filing of the said reply. It does not appear that he proved the said fact. The cross-examination of the applicant husband,

perused from the record of the trial Court shows him to be wavering and going back from his earlier statements. It was suggested to him that his claim that he had divorced the wife, was not proved. He denied the suggestion. He accepted that, if the wife comes to him he is not ready to cohabit with her. Desertion is apparent. The lower Courts have rightly granted maintenance in favour of the respondent. The judgment of the trial Court as well as Sessions Court further show that the capacity of the applicant was also considered. The evidence of the wife in this regard was taken into consideration. It was found that the husband did not bring any specific evidence regarding his income. The Sessions Court observed that, it was a fact within his knowledge. The lower Courts considered the cost of living and standard of living of the parties and fixed the amount. The counsel for applicant husband, at the time of submissions, stated that, the husband was ready to maintain the children, but not the wife. If the claim that the husband was earning Rs.3000/- per month only was true, even such concession would not have been shown by the husband that he is ready to pay maintenance to the children but not the wife, as the amount ordered for the children also is of Rs.5000/- jointly. It shows that, the applicant husband

is not coming before the Court with clean hands.

10. There is no reason to interfere in the orders passed by the Judicial Magistrate, First Class, maintained by the Sessions Court.

11. There is no reason for me to invoke inherent powers to interfere in the orders which have been passed.

12. The application is rejected with costs quantified at Rs.7500/- (Rupees seven thousand five hundred) payable to respondents. Rule discharged.

(A.I.S. CHEEMA, J.)