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

**CRIMINAL WRIT PETITION NO. 666 OF 2016
WITH
CRIMINAL APPLICATION NO.4551 OF 2016**

Sumit Arvind Deshmukh,
Age: 31 years, Occu: Nil,
Residing at : A-601,
Kishor Park, Parsiknagar,
Kharegaon, Kalva,
District Thane

..PETITIONER

VERSUS

1. Swati Sumit Deshmukh,
Age: 26 years, Occu: Service,
N-11, LB-27, Yadavnagar,
Cidco, Aurangabad

2. The State of Maharashtra

..RESPONDENTS

Mr Tapan Thatte, Advocate holding for Mr H. P. Randhir, Advocate for petitioner;
Mrs Shilpa L. Awchar, Advocate for respondent No. 1;
Mr R. V. Dasalkar, Addl. Public Prosecutor for respondent No. 2

CORAM : N.W. SAMBRE, J.

DATE : 1st September, 2016

ORAL ORDER :

The petitioner, in compliance with the the order dated 16th June, 2016, has deposited an amount of Rs.50,000/-. A prayer is made by learned Counsel appearing on behalf of respondent no.1 – wife for withdrawal of the said amount. The prayer stands allowed. Respondent no.1 – wife is permitted to withdraw the amount of Rs.50,000/- deposited in this Court.

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2. In the present petition, the petitioner has come out with a prayer that the order dated 9th May, 2016, passed below Exh.142 by the learned Magistrate, in Criminal Misc. Application No.1355 of 2012, thereby issuing non-bailable warrant against him for recovery of amount of maintenance, be quashed and set aside.

3. While questioning the legality and sustainability of the said order, learned Counsel appearing on behalf of the petitioner has invited my attention to the provisions of sections 12, 20 (6) and 20 (8) of the Protection of Women from Domestic Violence Act, 2005 (for short "DV Act"). He would also rely upon the provisions of sub-rule (5) of rule 6 of the Protection of Women from Domestic Violence Rules, 2006 (for short "the Rules"), so as to canvass that without attaching the movables of the petitioner, there cannot be an order of detention/arrest against the petitioner.

4. The aforesaid submissions are opposed by the learned Counsel appearing on behalf of respondent no.1 – wife, on the ground that the amount of Rs.2,33,000/- is noticed to be outstanding and efforts to recover the said amount, through attachment and auction of the movables pursuant to the scheme provided under section 125 of the Code of Criminal Procedure has not resulted into taking the order of the Court to its logical end. She would then submit that the order of detention was the last resort as is provided under the statute and as such, rightly taken recourse to by

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the learned Magistrate and prayed for rejection of the petition.

5. Prima facie, it is required to be noted that pursuant to the provisions of sub-section (6) of section 20 of the DV Act, the consequence of failure to make payment in terms of the order under sub-section 6 passed by the Magistrate is provided. Furthermore, rule 6 (5) provides that in case if the application under section 12 of the DV Act is preferred, the same is required to be dealt with and the order thereunder can be enforced in a manner laid down under section 125 of the Code of Criminal Procedure. Sub-section (3) of section 125 of the Code of Criminal Procedure reads thus :-

“If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

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Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him."

6. What is contemplated under sub-section (3) of section 125 of the Code is that the Magistrate has every power to order issuance of warrant for levying the amount due in the manner provided for levying fine and also provides for sentencing such person for the whole or any part of each month's allowance for the maintenance payable. First proviso to the main section states that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due. It is required to be noted in the present case, that the court has issued a warrant for the purpose of recovery of the amount of maintenance. However, such warrant, pursuant to the provision of sub-section (3) of section 125 read with section 421 of the Code of Criminal Procedure is not taken to its logical end and straight away warrant of arrest came to be issued, which is contrary to the above referred observations. As such, warrant of arrest as ordered on 9th May, 2016, is not sustainable. I, therefore, pass following order :-

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The order dated 9th May, 2016, passed by Judicial Magistrate First Class, Aurangabad, below Exh.142, in Criminal Misc. Application No.1355 of 2012 is quashed and set aside.

Learned Magistrate is directed to take recourse to the attachment and recovery of maintenance from the disposal of such attachment, including that of movable and immovable property and then to take extreme step of ordering arrest of the petitioner as contemplated under sub-section (3) of section 125 of the Code of Criminal Procedure.

Criminal Writ Petition as also Criminal Application No.4551 of 2016 stand allowed in above terms.

(N.W. SAMBRE, J.)

amj