

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

CRIMINAL WRIT PETITION NO.1661 OF 2017

1. Vaseem Fatema Hashmi w/o
Sayyad Akil, Age 37 years,
Occu: Physiotherapist,
R/o MHADA Colony,
Champa Chowk, Aurangabad
2. Sayyad Ibrahim s/o Sayyad Akil, .. **Petitioners**
Age 07 years, **(Original**
Minor (Through Guardian mother, **Applicants)**
Petitioner No.1)

VERSUS

1. Sayyad Akil s/o Rauf
Age 39 years, Occu: Business
in M/s ASCS, B-115, Prerna
Arcade, Near Tarakpur S.T.Stand,
Ahmednagar
2. Sayyad Abdul Rauf s/o Zainuddin
Age 76 years, Occu: Retired
R/o 30-A, Mukundnagar,
Ahmednagar
3. Sayyad Shakil s/o Abdul Rauf, .. **Respondents 1**
Age 42 years, Occu: Service, **to 3 (Original**
R/o Ritz Apartment, **respondents)**
Near Bitco High Shool, Nashik
4. State of Maharashtra .. **Respondent No.4**

Mrs. Ranjana D.Reddy, Advocate for the petitioners

Mr. Shaikh Mazhar A. Jahagirdar, Advocate for
respondent Nos. 1 to 3

Mr. A. P. Basarkar, APP for respondent No.4 State

WITH

CRIMINAL REVISION APPLICATION NO. 288 OF 2017

1. Sayyad Akil s/o Rauf
Age 40 years, Occu: Service
in M/s ASCS, 30-A,
Mukundnagar,Ahmednagar
2. Sayyad Abdul Rauf s/o Zainuddin
Age 75 years, Occu: Retired
R/o 30-A, Mukundnagar,
Ahmednagar
3. Sayyad Shakil s/o Abdul Rauf, .. **Applicants**
Age 50 years, Occu: Retired, **(Original**
R/o 30-A, Mukundnagar, **respondents)**
Ahmednagar

VERSUS

1. Vaseem Fatema Hashmi w/o .. **Respondents**
Sayyad Akil, Age 35 years, **(Original**
Occu: Medical Practitioner, **applicants)**
R/o MHADA Colony,
Champa Chowk, Aurangabad
2. Sayyad Ibrahim s/o Sayyad Akil,
Age 07 years, Occu: Education
Minor (Through Guardian mother,
Respondent No.2)

Mr. Shaikh Mazhar A. Jahagirdar, Advocate for
Applicants

Mrs. Ranjana D.Reddy, Advocate for the respondents

CORAM : K. L. WADANE, J.

RESERVED ON : 28th February, 2018

PRONOUNCED ON : 6th March, 2018

JUDGMENT:

1. Heard learned counsel for the respective
parties.

2. Rule. Rule made returnable forthwith. With consent of parties, both the matters are taken up for final disposal.

3. The aforesaid criminal writ petition and criminal revision are filed against the common judgment and order dated 13.10.2017 passed by the learned Additional Sessions Judge, Aurangabad in PWDVA Cri. Appeal No.95/2013 and PWDVA Cri. Appeal No.102/2013 which were filed by the respective parties challenging the order passed by the learned Judicial Magistrate, First Class, Aurangabad in Cri. M.A. No.1640/2011.

4. Brief facts of the case may be stated as follows:

(1) The petitioners/original applicants had filed Cri. M.A.No.1640/2011 under the provisions of section 12 of Protection of Women from Domestic Violence Act, 2015 (for short, 'D.V. Act') seeking reliefs under sections 18, 19, 20 and 22 of the D.V. Act against the respondent Nos. 1 to 3/ original respondents. The parties herein are referred to by their original status in Cri. M.A. No. 1640/2011. Applicant No.1 is wife

and applicant No.2 is minor son of applicant No.1 and respondent No.1/husband. Respondent Nos.2 and 3 appears to be in-laws of applicant No.1.

(2) On 27th April, 2008, applicant No.1 married with respondent No.1 as per Muslim religious customs and ceremonies. After the marriage, applicant No.1 and respondent No.1 resided at Ahmednagar, Pune and Aurangabad during the period from 2008 to 2011. Meanwhile, respondent No.1 husband started giving ill-treatment to applicant-wife by abusing her physically, mentally and economically. Respondent No.1 caused mental harassment to applicant no.1 by sending messages on her mobile. Ultimately, the parties issued notices to each other and in one of the notices, respondent No.1 husband said that he has given "Talaq" by issuing legal notice through advocate. Applicant No.1 did not admit the same nor she accepted the amount of amount towards Mehar or Iddat.

(3) Looking to the averments of the applicant in the application, it appears that due to mental and physical harassment, applicant Nos. 1 and 2 were constrained to reside separately from respondent No.1. Therefore, in view of the provisions of the D. V. Act, as referred

above, the applicants have claimed maintenance, rent as well as compensation.

(4) To establish her claim, applicant No.1 relied upon her oral evidence filed by way affidavit at Exh. 19, oral evidence of her father Sayyad Shamsham at Exh. 36 in the form of affidavit and also examined one Sayyed Afak Ahmed Hashmi at Exh.41 to prove that rented house was arranged for residence of the applicants, however, the respondent husband did not pay the rent amount. As against this, respondent No.1 husband had filed affidavit of oral evidence at Exh.52 and affidavit of his father-respondent No.2 at Exh.63. Besides the oral evidence, the parties have relied upon the copies of notices and replies at Exh. 55 to 58.

(5) The learned Judicial Magistrate, F.C., after scrutiny of documentary as well as oral evidence on record, came to the conclusion that the applicants are entitled to maintenance of Rs. 3000/- each per month and in addition to that, applicant No.1 is entitled to rent amount to the extent of Rs.3000/- per month and compensation of Rs.2,00,000/- from respondent No.1 and accordingly disposed of Criminal M.A. No.1640/2011.

(6) The order passed by the learned Magistrate was challenged before the learned Additional Sessions Judge, Aurangabad by both the parties in appeals. PWDVA Cri. Appeal No.95/2013 was presented by the respondents whereas, PWDVA Cri. Appeal No.102/2013 was presented by the applicants. Learned Additional Sessions Judge partly allowed the appeal filed by the respondents and the order of rent awarded to the applicants was set aside, whereas, the appeal presented by the applicants was dismissed in toto. Being aggrieved by the same, the applicants have preferred present criminal writ petition No.1661/2017 and the respondents have preferred Criminal Revision Application No. 288/2017.

5. I have heard Mrs. Ranjana D.Reddy, Advocate for the petitioners/applicants and Mr. Shaikh Mazhar A. Jahagirdar, Advocate for the respondents.

6. With the help of learned counsel for the parties, I have gone through the evidence on record. On perusal of the same, it appears that applicant No.1 reiterated almost all the contents in the application by way of filing affidavit. Father of the applicant No.1 also supported the case of the applicants. On

perusal of oral evidence of applicant No.1, it appears that she deposed about the instances took place between her and respondent No.1 husband since the date of marriage and how she was subjected to ill-treatment by respondent No.1. Therefore the fact of ill-treatment given by respondent no.1 to the applicant wife is very much clear. It appears that respondent No.1 has harassed the applicant wife mentally as well as physically. Even considering certain admissions given by applicant no.1 during her cross examination, it is does not mean that that respondent No.1 did not ill-treat applicant no.1. Furthermore, the oral evidence of father of applicant no.1 also supported the case of the applicant. As against this, respondent No.1 has filed affidavit and reiterated the contents of his say so also the father of respondent No1. i.e. respondent no.2 herein has also supported the case of respondents. So, looking to the oral evidence of parties, it appears that there are words against words on oath. However, one cannot ignore the basic concept that a married woman cannot willingly live separately from his husband in normal circumstance, unless there are compelling circumstances for her to reside separately. In the present case, the circumstances

brought on record and the oral evidence indicate that due to domestic violence, applicant No.1 started residing with her parents.

7. Learned counsel appearing for the respondents argued that initially, respondent No.1 was serving at Pune, but he left the job and it is alleged that due to circumstances created by applicant no.1, respondent no.1 was constrained to leave the said job. However, from the cross examination of respondent no.1, it appears that presently he is in service and earning Rs.25,000/- per month by way of salary. Therefore, looking to the amount of maintenance awarded by the learned Magistrate i.e. Rs.3,000/- each per month to the applicants, I do not think that it is inadequate or disproportionate to the earning of respondent No.1.

8. The learned Magistrate has granted Rs.3000/- per month to the applicants towards rent. However, it is brought on record by the respondents that the applicants have not taken house on rent, they are residing in the house of parents of applicant No.1 and therefore they are not required to pay rent. Therefore, the order of rent amount granted by the learned Magistrate has been rightly cancelled in the

appeal by the learned Additional Sessions Judge.

9. Learned counsel appearing for the respondents has submitted that applicant No.1 herself abandoned the society of respondent no.1 and willingly started residing with her parents. Therefore, she is not entitled for maintenance. However, such submissions of the learned counsel for the respondents are not acceptable because, there is sufficient evidence on record to prove that the applicant was subjected to domestic violence i.e. physically as well mentally. From the evidence on record, it appears that respondent no.1 was sending messages to applicant no.1 wife through his mobile and on perusal of the texts of those messages, they are sufficient to establish that there was verbal and emotional abuse as defined under section 3(iii) of the D.V. Act.

10. Further, it is material to note that the learned counsel for the respondents has argued that respondent No.1 was ever ready to cohabit with the applicant No.1. However, such argument of the learned counsel for respondents is not acceptable because, from the record, it appears that respondent No.1 had tried to give customary divorce i.e. Talaq by sending notice

alongwith cheque of Mehar or Iddat, however, the same was not accepted by applicant no.1. Further, it appears from the record that respondent no.1 had filed petition for divorce, which indicates that say of respondent no.1 that he is willing to reside with applicants appears to be false, otherwise there was no necessity for respondent no.1 to file such divorce petition.

11. Learned counsel appearing for the respondents has relied upon the decision in the case of **E. Shanthi Vs. Vasudeo H.K. reported in AIR 2005 Karnataka 417**, in which, it is observed that:

"3. Admittedly, petitioner is residing with her parents at Chennai and whose brother is also a Doctor. When the petitioner was practicing prior to marriage, when her name continues on the board of the clinic, the trial court is justified in rejecting the application of the petitioner. There is no difficulty for the petitioner to work as a Doctor. Even if the petitioner is not working as a Doctor in the clinic of her brother, since there are no impediments for her to work alongwith her brother as a Doctor and when she is capable of earning, this Court is of the opinion that the trial Court is justified in rejecting the application of the petitioner. When the

petitioner is capable of earning and having required qualification and that when she was working as a Doctor prior to marriage, there cannot be any difficulty for her to continue the same profession. Therefore, Section 24 of the Hindu Marriage Act cannot come to the aid of such persons. Accordingly, this petition has to be rejected. "

Observations of the above cited authority are inapplicable to the facts of the present case, because, in the present case, the respondents have not established that there was independent earning of applicant no.1. No doubt, somewhere it is brought on record that applicant No.1 is a Doctor and somewhere it is stated that she is physiotherapist, even then there is no material/evidence on record to show that presently the applicant is a practicing doctor or physiotherapist or earning salary. In the absence of concrete proof, it is not desirable to say that applicant no.1 is earning money.

12. Learned counsel for the respondents also relied on the observations in the case of **Sanjay Bhardwaj & ors. Vs. State and Anr, reported in 2010(5) CRJ 446 (Del)**, in which it is observed that the Court cannot tell the husband that he should beg, borrow or steal

but give maintenance to the wife, more so when the husband and wife are almost equally qualified and almost equally capable of earning and both of them claimed to be gainfully employed before the marriage.

Again, the aforesaid observations are inapplicable to the facts of the present case, because, in the present case, respondent No.1 himself has admitted in his cross examination that he is earning salary of Rs.25,000/- per month, however, as discussed above, there is no evidence on record to show the earning of applicant no.1.

13. Looking to the nature of the present case, it is not desirable to enter into the disputed facts of the case between the parties. On perusal of the order passed by the learned Additional Sessions Judge in the the appeals before him, it appears that after re-appreciation of evidence on record, the learned Additional Sessions Judge has confirmed the order of maintenance and compensation and has rightly set aside the order of granting rent. Therefore, it is not necessary to interfere with the order passed by the learned Additional Sessions Judge more so, when the learned Additional Sessions Judge, after re-appreciation

of evidence on record, arrived at correct conclusion.

14. Learned counsel for the respondents has failed to point out perversity or illegality in the order passed by the learned Additional Sessions Judge. Furthermore, the learned counsel for the respondents also failed to show how the amount of maintenance awarded to the applicants is disproportionate compared to the earning of respondent no.1. Consequently, there is no substance in both the matters and therefore they are liable to be dismissed. Accordingly the criminal writ petition and criminal revision application are dismissed with no order as to costs.

15. Rule is accordingly discharged.

16. Pending criminal applications also stand disposed of.

(K. L. WADANE, J.)

JPC