

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1812 OF 2017

Mohd. Khaled S/o Mohd. Ikram Ansari
Age : 41 Years, Occu. Teacher,
R/o. Room No.12, F-8, Municipal Colony
Devnar, Govandi, Mumbai.

..PETITIONER
(Original Non Applicant)

Versus

1] Sameena Begum W/o Mohd Khaled Ansari
Age : 35 Years, Occ : Household,
R/o. Care of Nabbab Ansari, H. No. 8-11-386
Lane No.4, Maqsood Colony,
Aurangabad

2] Mohd. Daniyan S/o Mohd. Khaled Ansari
Age : 8 Years

3] Mohd. Nabil S/o Mohd. Khaled Ansari,
Age : 7 Years, Both U/G of Respondent No.1
R/o. As above.

..RESPONDENTS
(Original Applicants)

Mr. S. A. G. Qureshi , Advocate for the Petitioner.

Mr. C. V. Thombre Advocate for the Respondent Nos. 1 to 3.

CORAM : MANGESH S. PATIL, J.

Date of reserving the Judgment : 13.07.2018

Date of pronouncing the Judgment : 07.08.2018

JUDGMENT :-

Heard. Rule.

2] Rule is made returnable forthwith.

3] The learned Advocate for the respondents waive service. With the consent of both the sides the matter is heard finally at the stage of the admission.

4] Being aggrieved and dissatisfied by the Judgment and Order passed by the learned Additional Sessions Judge, Aurangabad in Criminal Appeal (PWDVA) No. 3/2015 dated 22.11.2017, thereby dismissing the appeal preferred by the petitioner husband under Section 29 of Protection of Women From Domestic Violence Act, 2005 (hereinafter referred to as "D.V. Act") and confirming the Judgment and order passed by the learned Judicial Magistrate First Class, Aurangabad in Misc. Cri. Application No. 1268 of 2011 dated 16.12.2014 preferred by the respondent no.1 wife under Section 12 of the D. V. Act and granting several reliefs in their favour of rent, maintenance and compensation, the husband has filed this Writ Petition under Article 227 read with Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure. In order to avoid confusion the parties are herein after referred to as the husband and the wife.

5] The learned Advocate for the petitioner submitted that the wife was admittedly residing separately from the husband since the year 2005 and there was not enough material before the Magistrate to establish that she was subjected to domestic violence within the

meaning of Section 3 of the D.V. Act. There was no evidence about the income of the husband. The rent, maintenance and even the compensation has been fixed by the Magistrate without there being sufficient and cogent evidence about the income of the husband and the need of the wife and their children. The observations and conclusions of the Magistrate, while determining these amounts is quite perverse and arbitrary. The learned Additional sessions Judge has clearly ignored such lack of evidence and has readily accepted the quantum fixed by the Magistrate. He would further point out that even the learned Additional Sessions Judge has not even whispered anything in respect of the huge compensation amount of Rs.1,00,000/- awarded by the Magistrate without any foundation. The order passed by the learned Magistrate is not tenable in law and even the impugned Judgment and Order of the learned Additional Sessions Judge suffers from same infirmity.

6] The learned Advocate for the wife submitted that as far as the domestic violence is concerned, there was enough evidence before the Magistrate to establish it. He has given detailed reasons and even the learned Additional Sessions Judge had an occasion to examine them and has confirmed the findings and the conclusions of the Magistrate. There are concurrent findings of the facts and there is no apparent defect in appreciating the evidence, so as to enable this court to intervene under the writ jurisdiction.

7] As far as quantum determined by the Magistrate is concerned, the burden was on the husband to have established his own income. Admittedly, he has been working as a teacher and still had not led any evidence to establish his exact income. Faced with the situation, the wife had no option but to make efforts and was fortunate to lay hands on his salary certificate which she could produce at the fag end of the trial. Though such salary slip cannot be said to be duly proved and still the Magistrate has referred to and relied upon it, he had no option and has specifically mentioned so in the Judgment, while referring to this salary certificate. Even otherwise, he could have drawn adverse inference against the husband since he had not discharged the burden cast upon him to prove his salary and therefore, no fault can be found with the Magistrate in arriving at a reasonably fair figure in respect of income of the husband.

8] The learned Advocate for the wife would further submit that admittedly the wife along with children have not been staying with him and his second wife is cohabiting with him and obviously one could not have compelled the wife to share the household and in lieu there of the Magistrate has rightly awarded rent to her at the rate of Rs. 5,000/- per month. Similarly, the figures arrived at for awarding the maintenance to the wife and children are clearly within the accepted norms as compared to the income of the husband and that cannot be interfered

with.

9] As regards compensation the learned Advocate would admitted that there is no observation or conclusion in the order of the Magistrate for arriving at such a figure of rupees one lakh and even the learned Additional sessions Judge has not even touched this aspect. However, there was evidence to show that the husband is a teacher earning sumptuous salary and had subjected the wife to domestic violence. He had solemnized second marriage. Since inception he was not maintaining her properly and was insisting that he wanted to marry a woman having a specific educational qualification and his further conduct in solemnizing second marriage with a woman having such a qualification is sufficient to demonstrate that the wife was subjected to mental torture and emotional distress and directing him to pay rupees one lakh to her, in the circumstances, could not be interfered with.

10] As has been rightly submitted by the learned Advocate for the wife, there are concurrent findings of facts of the two Courts below. The findings are clearly borne out from correct appreciation of the evidence before the Magistrate and in the absence of any apparent perversity or arbitrariness in appreciating the evidence by the two courts below, this Court cannot re-appreciate the evidence and arrive at some independent conclusion. Still, I have carefully examined the evidence and the

reasoning part of the Judgments of the learned Magistrate and the Additional Sessions Judge and find no sufficient and cogent reason to interfere with in the conclusions as regards the facts.

11] As regards the income of the husband is concerned, needless to state that by virtue of Section 106 of the Indian Evidence Act, primarily the burden was on him to lead evidence about it and he having failed to do so, an adverse inference was liable to be drawn against him, particularly when admittedly, he has been working as a teacher. True it is that the wife had produced his salary certificate after closure of evidence and the document could not be duly proved within the four corners of the provisions of the Indian Evidence Act. However, as has been rightly noted by the learned Magistrate, since the burden was on the husband to prove his income and he had failed to do so, there was no impropriety or illegality if a recourse was taken to refer to and rely upon the salary certificate produced by the wife even if it was not duly proved. Even otherwise, ignoring such salary certificate, one could have drawn an adverse inference against the husband and no fault can be found in the conclusion of the learned Magistrate in holding that he was earning Rs. 30,000/- per month as a salary. Therefore, when his second wife is also a teacher and must have been earning salary independently, and there being no other evidence about anybody else being dependent upon the husband, when admittedly the wife along with children has

been residing separately, no fault can be found in the conclusion drawn by the learned Magistrate and upheld by the learned Additional Sessions Judge in awarding the wife Rs. 3,000/- per month as rent and Rs. 5,000/- per month as maintenance and also awarding Rs. 2500/- per month to the children as maintenance.

12] As regards the quantum of compensation awarded by the Magistrate, it is conspicuous that the learned Magistrate has not assigned any reason for awarding the compensation and even its quantum and for that matter even the learned Additional Sessions Judge in her impugned Judgment and order has not at all touched this aspect of the matter. Thus apparently the learned Magistrate and the learned Additional Sessions Judge have committed an error in ignoring this aspect of the matter. However in my considered view, it would not be appropriate at this stage to remand the matter to them just for the sake of determining the quantum of compensation afresh.

13] Independently, considering all the aforementioned aspects and the evidence about the domestic violence, in my considered view, the compensation awarded to the wife of Rupees one lakh under the provision of Section 22 of the Domestic Violence Act need not be interfered with. The husband is admittedly in permanent service as a teacher and there is no material about anybody else being dependent

upon him. On the contrary his second wife is also a teacher and earning salary.

14] Considering all these aspect, the writ petition does not hold merit and is liable to be dismissed.

15] The writ petition is dismissed.

The rule is discharged.

(MANGESH S. PATIL, J.)

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