

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

CRIMINAL WRIT PETITION NO.1816 OF 2017

Lalit Ramesh Patil,
Age 32 years, Occu. Doctor,
R/o 54/1/B, Flat No.14,
Near Akash Homes, Pokale Poultries,
Near Dhareshwar Mandir, Dhayari,
Tal. & Dist. Pune.

... **Petitioner**

Versus

1. Sau. Minakshi W/o Lalit Patil,
Age 28 years, Occu. Nurse,
2. Kum. Hridaya D/o Lalit Patil,
Age 3 years, Occu. Nil,

Both R/o C/o Murlidhar Ramdas Choudhari,
Civil Hospital Quarters, Opp. Eye Ward,
Jalgaon, Tq. & Dist. Jalgaon.

3. The State of Maharashtra,
Through its Secretary.

... **Respondents**

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Mr. Girish Nagori, Advocate for Petitioner.
Mr. H.A.Patankar, Advocate for Respondent Nos.1 & 2.
Mr. S.P.Deshmukh, APP for Respondent-State.

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CORAM : MANGESH S. PATIL, J.

RESERVED ON : 19.06.2018

PRONOUNCED ON : 20.07.2018

JUDGMENT :-

Rule. Rule is made returnable forthwith. With the consent of both the sides the matter is heard finally. This is a Writ Petition under Article 226 and 227 of the Constitution of India.

2. The petitioner who is the husband of Respondent No.1 and father of Respondent No.2 is impugning the judgment and order passed by the learned Additional Sessions Judge, Jalgaon in Criminal Revision Petition No.134 of 2017 dated 18.11.2017, whereby the learned Additional Sessions Judge rejected the revision and confirmed the order passed by the Judicial Magistrate First Class in Criminal Miscellaneous Application No.635 of 2014 dated 30.09.2016 granting Respondent Nos.1 and 2 interim maintenance under Section 125 of the Cr.P.C. @ Rs.8000/- and Rs.4000/- per month respectively.

3. The learned advocate for the petitioner vehemently submitted that the order passed by the Magistrate fixing the interim maintenance is purely based on surmises of

conjectures. There was no material before him to quantify the interim maintenance which is glaringly on the higher side. The learned Additional Sessions Judge has failed to consider these vital aspects and has dismissed the Revision. The order is not sustainable in law. He would submit that the petitioner has been staying in Pune in a rented premises when Respondent No.1 drove him out of the house and was jobless. He would submit that there was sufficient material before the Magistrate as well as the learned Additional Sessions Judge demonstrating that in fact Respondent No.1 had deserted the petitioner. The salary slips produced by him which were for the period from August 2015 to February 2017 were overlooked whereas the salary slips filed by Respondent No.1 were wrongly relied upon. The income received by him which was highest in one of the months has been taken into account ignoring the variables. He would further submit that the Lower Courts have also ignored the liability of the petitioner to maintain his age old parents who were dependent on him. Thus according to the learned advocate the

interim maintenance fixed by the Lower Courts is glaringly on the higher side.

4. The learned advocate for the petitioner also submitted that the Lower Courts below have also ignored the material aspect in the form of income being received by Respondent No.1 by serving in a Primary Health Center at Bhadali, Taluka Jalgaon as a Nurse. She was earning Rs.4,000/- per month and that has not been factored in while fixing the interim maintenance.

5. The learned advocate would further point out that apart from the present proceeding, even the respondents have been awarded maintenance @ Rs.6,000/- per month in PWDVA Miscellaneous Application No.70 of 2014 under Section 23 of the Protection of Women from Domestic Violence Act, 2005 and even that order has not been taken into account while fixing the quantum of the maintenance by the impugned orders. The order in that PWDVA Miscellaneous Application No.70 of 2014 was passed on 16.03.2015 whereas in the matter in hand the learned Magistrate has fixed the quantum of interim

maintenance by the order dated 30.09.2016. Therefore while fixing the quantum of interim maintenance earlier order should have been taken into account and failure to do so has resulted in miscarriage of justice.

6. The learned advocate for Respondent Nos.1 and 2 strongly opposed the petition. He would submit that there is no error or perversity in the orders passed by the Courts below. While fixing the quantum of maintenance the Courts have taken into consideration the qualification of the petitioner who is a Doctor by profession. There were strong reasons for Respondent No.1 to stay separate and claim maintenance because of his behaviour. The maintenance awarded is only interim and is befitting the income of the petitioner and the need of the respondents, which may not be interfered with.

7. He would further point out that apart from the merits even the conduct of the petitioner dis-entitles him from seeking any relief from this Court as he is already in arrears and has defaulted in making payment of interim maintenance to the Respondents which is

upto Rs.4,80,000/-. Though there was a variation in his monthly income, his potential to earn has to be taken into account. Even if he chooses to remain idle, he cannot avoid his liability to provide maintenance. He avoided to disclose his exact income even when the burden was on him under Section 106 of the Indian Evidence Act to prove his income. The respondents had to take pains in collecting his salary slips and based on the income disclosed by such slips that the quantum has been fixed. The orders passed by the Courts below are well reasoned and cannot be said to be perverse so as to enable this Court to intervene. The petition may be dismissed.

8. The petitioner is impugning the order passed by the Magistrate awarding maintenance to respondent Nos.1 and 2 under Section 125 of the Cr.P.C. which has been confirmed in the revision preferred by him, thereby fixing the maintenance to them @ Rs.8,000/- per month and Rs.4,000/- per month respectively from the date of the application that is 19.11.2014. There is also no dispute about the fact that respondent Nos.1 and 2 were

simultaneously awarded interim maintenance under Section 23 of the D.V.Act in PWDVA Miscellaneous Application No.70 of 2014 @ Rs.6,000/- per month from the date of that application that is 17.06.2014. Conspicuously the order granting interim maintenance in PWDVA Miscellaneous Application No.70 of 2014 was passed on 16.03.2015 whereas the impugned order passed by the Magistrate on 30.09.2016 that is more than one and half year of passing of the earlier order. However though the fact of such a claim by respondent Nos.1 and 2 was cursorily referred to by the learned Magistrate while passing the impugned order under Section 125 of the Cr.P.C., neither the petitioner nor respondent Nos.1 and 2 seem to have brought to the notice of the learned Magistrate that already interim maintenance @ Rs.6,000/- was awarded under the proceeding under D.V.Act. Obviously this has resulted in passing of two separate orders in a gap of one and half year awarding maintenance to respondent Nos.1 and 2.

9. Needless to state that since the law permits the

aggrieved person under the D.V.Act and a wife and a child under Section 125 of the Cr.P.C. to claim maintenance, no fault can be found even if both the remedies are invoked. However, one cannot lose sight of the fact that since both these provisions enable a destitute to claim maintenance, it is expected that the courts awarding the maintenance would be guided by the trite principles. Apart from the alleged refusal and neglect, the quantum of maintenance is to be determined under both these provisions by ascertaining the income of the husband, need of the wife and the child, number of persons dependent on the husband etc. Since these are the broad principles which govern the decision as regards quantum of maintenance, no sooner a maintenance is fixed in one of the proceedings which is decided first in point of time, such an order and the quantum of maintenance has to be taken into account while deciding the quantum in the subsequent proceeding. In other words, it cannot be comprehended that the legislature by providing different rights and remedies for claiming maintenance was intending to

unjustly benefit the aggrieved person or the wife and child. Though both the remedies and orders can stand simultaneously and could be enforced, unless the quantum is amalgamated, it is certain to result in allowing the person entitled to claim maintenance something more than what she is entitled to.

10. This is what has happened in the matter in hand. In addition to Rs.6,000/- per month awarded to Respondent Nos.1 and 2 under Section 23 of the D.V.Act, without the fact being brought to the notice of the learned Magistrate by either of the parties, by the impugned order they have been additionally awarded Rs.8,000/- per month and Rs.4,000/- per month that is Rs.12,000/- per month in aggregate. So in total the respondents would be able to claim Rs.18,000/- per month even when there is no specific reason for awarding such additional maintenance.

11. Theoretically respondent Nos.1 and 2 might claim enhanced maintenance by resorting to appropriate proceeding and that may well be decided accordingly. However since respondent Nos.1 and 2 have been

awarded maintenance in both the proceedings it would be just and proper to rationalize their right by giving necessary clarification, so that they would at their discretion be able to resort to the execution of both the orders but still would not be able to recover more than to what they are entitled to.

12. Unfortunately, the mistake seems to have perpetuated even while deciding the revision preferred by the petitioner. The fact of award of interim maintenance under Section 23 of the D.V.Act does not seem to have been brought to the notice of the learned Additional Sessions Judge. Had it been brought to his notice certainly the learned Judge would have been able to factor in such interim maintenance awarded earlier while confirming the maintenance awarded by the learned Magistrate by the impugned order.

13. Taking into account all the afore mentioned facts and circumstances, instead of relegating the parties to the decision afresh by the Magistrate just to fix the quantum by referring to the order of interim maintenance awarded to respondent Nos.1 and 2 under

Section 23 of the D.V.Act, clarification at this stage would avoid further litigation and delay.

14. The Writ Petition is partly allowed. It is clarified that respondent Nos.1 and 2 would be entitled to execute the order passed under Section 23 of the D.V.Act and / or the order passed under Section 125 of the Cr.P.C. However they shall be entitled to recover only an amount of Rs.8,000/- per month and Rs.4,000/- per month only. If they choose to execute the order under Section 23 of the D.V.Act, while executing the order under Section 125 of the Cr.P.C. they shall be entitled to claim only the balance viz. Rs.4,000/- per month and Rs.2,000/- per month. With this clarification the Writ Petition is disposed of.

15. The rule is made absolute with these terms.

(MANGESH S. PATIL, J.)

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