

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 10 OF 2018**

Mrs. Maria Mercy Suzana Fernandes,
D/O late Egidio Fernandes,
Age 59 years, R/o Panorama Exclusive,
Near Microwave Station,
Monte Hill, Aquem Alto,
Margao, Salcete, Goa.

.... Petitioner

V e r s u s

1. Mr. Francisco Monte Piedade Cruz,
2. Mr. Vijay Monte Cruz,
Both are R/o H. No.37/A,
Gold Road, Pajifond, Margao,
Salcete, Goa.

..... Respondents

Adv. Prithvi Bandekar for the Petitioner.

Adv. Bhupesh M. Prabhu Dessai for Respondent no.1 & 2.

Coram:- C. V. BHADANG, J.

Date:- 20th February 2018.

ORAL JUDGEMENT:

Rule, made returnable forthwith. The learned counsel for the respondents waives service. Heard finally by consent of parties.

2. By this petition, the petitioner is seeking restoration of her application filed under Protection of Women from Domestic Violence Act, 2005 (Act for short) which have been dismissed for non prosecution.

3. It appears that the learned Magistrate by an order dated 23/4/2015 dismissed the application for default on account of the absence of the applicant and her counsel. The petitioner filed an application for restoration which was dismissed on 3/10/2015 in the following terms:

“Heard arguments. The applicant has failed to point out any provision whereby the court of JMFC has powers to restore a domestic violence case which is dismissed for default no such powers of restoration are found in Cr.P.C. Hence without going into the merits of the case application is dismissed.”

4. The petitioner challenged the said order before the learned Sessions Judge under section 29 of the Act being Criminal Appeal no.24/2016 which was dismissed on 7/9/2016 as not maintainable. This is how the petitioner is before this Court.

5. It is submitted that the learned counsel for the petitioner could not remain present on account of death of his father. It is submitted that the petitioner had already filed her affidavit in lieu of Chief examination of which a copy was furnished to the respondent. It is submitted that the learned magistrate was in error in dismissing the application for restoration as being not maintainable. It is further submitted that an appeal would lie against such

an order under section 29 of the Act and the learned Sessions Judge was also in error in refusing to entertain the appeal.

6. On the contrary it is submitted by the learned counsel for the respondent that the father of the counsel for the petitioner expired on 12/2/2015 i.e. prior to 27/3/2015 and as such, the same cannot be a cause for non appearance on 27/3/2015. The learned counsel has placed reliance on the decision of this Court in the case of **Mr. Abhijit Bhikaseth Auti Vs. State of Maharashtra and anr.** in Criminal Writ Petition No.2218 of 2007 dated 16/9/2008 in order to submit that an appeal would not lie against any such order it being an order purely of a procedural nature.

6. I have considered the rival circumstances and the submissions made.

7. Although the prayer clause in the petition is not happily worded, it shows that the petitioner is seeking restoration of the Case No.DV/02/13-D before the learned magistrate. Thus, apart from the order of the learned Sessions Judge, there is also a challenge to the order of the magistrate in the petition. The learned magistrate in my considered view was in error in holding that the magistrate had no jurisdiction to restore an application which has been dismissed in default. It is now well settled that power to dismiss a

case in default would include a power to restore. It will be highly unjust to assume that the court can dismiss a matter in default, however, has no jurisdiction to restore the same, even if sufficient cause is shown. Thus the order passed by the learned magistrate holding that he has no jurisdiction to restore a case which was dismissed in default in my considered view cannot be sustained.

8. Even so far as the maintainability of the appeal is concerned, again the learned Sessions Judge was in error in holding that the appeal was not maintainable. The reliance placed by the learned counsel for the respondent on the decision of this Court in the case of **Abhijit Bhikaseth (supra)** to mind is misplaced. In that case, this Court had summarized the conclusions in para 25 of the judgment which read thus:

Thus, the conclusions which can be summarized are as under:

- (i) An appeal will lie under section 29 of the said Act against the final order passed by the learned magistrate under sub-section 1 of section 12 of the said Act;
- (ii) Under sub-section 2 of section 23 of the said Act, the learned Magistrate is empowered to grant an ex-parte ad-interim relief in terms of sections 18 to 22 of the said Act. The power under sub-section 1 is of granting interim relief in terms of sections 18 to 22 of the said Act. Before granting an interim relief under sub-section 1, an opportunity of being heard is required to be granted to the

respondent.

(iii) An appeal will also lie against orders passed under sub-section 1 and sub-section 2 of the section 23 of the said Act which are passed by the learned Magistrate. However, while dealing with an appeal against the order passed under section 23 of the said Act, the Appellate Court will usually not interfere with the exercise of discretion by the learned Magistrate. The appellate Court will interfere only if it is found that the discretion has been exercised arbitrarily, capriciously, perversely or if it is found that the Court has ignored settled principles of law regulating grant of refusal of interim relief.

(iv) An appeal under section 29 will not be maintainable against purely procedural orders which do not decide or determine the rights and liabilities of the parties.

(Emphasis supplied)

9. On behalf of the respondent reliance is placed on para 25(4) of the judgment in which this court has held that an appeal u/s 29 will not be maintainable against purely procedural orders which do not decide or determine the rights and liabilities of the parties. An order in the nature of dismissal of the application in default and/or an order refusing to restore the matter cannot be said to be of a purely procedural in nature. Such an order certainly affects the rights and liabilities of the parties. What is envisaged in clause 24 (iv) are orders of incidental nature and/or in the nature of steps in aid such as granting or refusing adjournments etc.. It is difficult to accept

that an order dismissing an application in default or an order refusing to restore such an application, will not tend to decide or determinate rights and liability of the parties. Thus in my considered view, the learned Sessions Judge was also in error in holding that the order was not appealable. In the given circumstances, there is an option to send the matter back to the learned Sessions Judge. However, the circumstances in which the application was dismissed and the reasons on which the learned magistrate refused to restore the application are such that it would be appropriate for this Court in exercise its jurisdiction under Article 227 of the Constitution of India to restore the application filed before the magistrate. It may not be out of place to mention that under the provisions of the Act an application under section 12 are in the nature of summary proceedings which are to be decided within sixty days. Here is a case where such an application filed way back in the year 2013 is still pending at a preliminary stage. In such circumstances, the petition is allowed. D.V Case NO.02/PWDV/2013/D is restored back on the file of the learned Magistrate for disposal according to law. The parties to remain present before the learned Magistrate on 5/3/2018 at 10 a.m. Rule is made absolute in the aforesaid terms.

C. V. BHADANG, J.

ap/-