

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition (ST) NO. 6324 OF 2018

Dheeraj Bhojraj Malukani

...Petitioner

Versus

Seema Dheeraj Malukani

...Respondent

....

Mr. Uday Warunjikar i/b. Ashish Dubey, Advocate for the Petitioner.

Mr. Amrut Patil i/b. Birendra Kumar, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

RESERVED ON : 12th JULY, 2018

PRONOUNCED ON : 24th JULY, 2018

ORDER :

1. Heard Mr. Uday Warunjikar, learned Counsel for the petitioner and Mr. Amrut Patil, learned Counsel for the respondent, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner-husband has challenged the judgment and order dated 17.1.2018 passed by the learned Judge, Family Court No.7, Mumbai in Interim Application No./2016 (Exhibit-18) in Petition No.A.1142/2014. By that order, the learned trial Judge partly allowed the application filed by the respondent-wife under Section 24 of the Hindu Marriage Act, 1955 (for short, 'Act') and directed the petitioner-husband to pay

interim maintenance @ Rs.25,000/- per month to the respondent-wife from the date of the application i.e. from 9.5.2016 till disposal of the main Petition. The learned trial Judge further observed that the respondent-wife is entitled to recover maintenance amount in one proceeding i.e. in this petition or in D.V. Petition. The learned trial Judge was of the view that the respondent cannot claim maintenance in both the Petitions at a time. The amount granted in this Petition is inclusive of maintenance to be granted to her in D.V. proceedings.

3. Rule. Mr. Patil waives service on behalf of the respondent. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

4. The Petition was heard on 21.6.2018. In the order dated 21.6.2018, Clauses-2 to 4 of the operative part of the order were reproduced. In paragraph-3 of the order, it was observed that a perusal of clauses-3 and 4 of the operative part of the order showed that they are *prima facie* in the teeth of Sections 20(1)(d) and 26 of the Protection of Women from Domestic Violence Act, 2005 (for short, 'D.V. Act'). In view thereof, it was indicated to the learned Counsel for the parties that the Court is inclined to exercise *suo moto* powers for considering the correctness of the directions contained in clauses-3 and

4 of the operative part of the order, in the light of the judgment of Apex Court in the case of **Surya Dev Rai vs. Ram Chander Rai, (2003) 6 SCC 675**. The parties were directed to address the Court on this aspect on the next date of hearing. The petition was accordingly adjourned to 28.6.2018. On 28.6.2018, the petition was adjourned to 12.7.2018. On 12.7.2018, the learned Counsel for the parties advanced detailed submissions. Accordingly, the arguments were concluded and the order was reserved.

5. In support of this Petition, Mr. Warunjikar submitted that the respondent-wife is highly educated and has been working with First Gulf Bank for more than six years. The respondent-wife has obtained B.Com degree from H.R. College of Commerce, Mumbai. She has completed her M.B.A. in the year 2007-09 from the institute of Management and Technology in Dubai, U.A.E. She has been working in Dubai as Credit Analyst in First Gulf Bank. After marriage, she had left India and went to Dubai and since January, 2013 she has been working with United Arab Bank. Now she has also opened her own business of boutique in Dubai and earns huge amount. In other words, she does not require any maintenance from the petitioner.

6. Mr. Warunjikar further submitted that by order dated 21.7.2017, the learned Metropolitan Magistrate has directed the

petitioner-husband to pay maintenance @ Rs.25,000/- per month to the respondent-wife. Even otherwise, she is not entitled to claim maintenance by filing application under Section 24 of the Act. Mr.Warunjikar relied upon following decisions :

- (i) **In Re: Taralakshmi Manuprasad, AIR 1938 Bom 499**, to contend that if a decree for maintenance is passed by a Civil Court, maintenance cannot be awarded in a criminal proceedings.
- (ii) **Ramesh Chander Kaushal v. Veena Kaushal and others, AIR 1978 SC 1807** to contend that a final determination of a civil right by a Civil Court must prevail against a like decision by a criminal court.
- (iii) **G. Ramanathan v. Revathy, 1989 Cri.L.J.2037 [Madras High Court]** to contend that when a civil proceeding is already pending between the parties under the Act, filing of proceedings under Section 125 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') is against the scheme of the Act and Chapter IX of Cr.P.C.
- (iv) **Vishwanath Pundlik Chavan v. Nirmala and others, 1992 Cri.L.J. 1262 [Bombay High Court]** to contend that the Court has to take into account the maintenance awarded to the wife

in civil proceedings. In this case, the order of the learned Magistrate was confirmed with modification that the amount of maintenance of Rs.250/- per month awarded to each of them, namely, wife and child, was subject to reduction of the sum of Rs.50/- and Rs.25/- per month respectively awarded by the Civil Court.

- (v) **A. Joseph Fernando v. Maria Navis and others, 1987 LW(Cri) 267 [Madras High Court]** to contend that the decree passed by the Civil Court bars application under Section 125 of Cr.P.C.
- (vi) **Ravindra Haribhau Karmarkar v. Shaila Ravindra Karmarkar and others, 1992 Cri.L.J. 1845** to contend that the respondent-wife cannot be permitted to file two simultaneous proceedings in different Courts and the judgment of Civil Court prevails over the judgment of Criminal Court.
- (vii) **B. Prakash v Deepa and others, 2016 ALL MR (Cri) 168 (Madras High Court, Madurai Bench)** to contend that the respondent-wife having approached two different forums one under Section 125 of Cr.P.C. and other under Section 20 of the D.V. Act on same set of allegations and cause of action, such course of action was not legally permissible.

- (viii) **Gomaji v. Yashoda and others, 1996 (1) Mh.L.J. 423 [Bombay High Court]** to contend that the respondent-wife cannot be allowed to prosecute two remedies simultaneously in different Courts for maintenance.
- (ix) **Smt. Sonia v Om Prakash, 2010 SCC OnLine P & H 784 [Punjab and Haryana High Court]** to contend that when maintenance was awarded under Section 125 of Cr.P.C., maintenance *pendente lite* under Section 24 of D.V. Act cannot be granted.
- (x) Unreported judgment of Delhi High Court dated 30.8.2010 in the case of **Rachna Kathuria v. Ramesh Kathuria** to contend that D.V. Act does not create any additional right to claim maintenance on the part of the aggrieved person. In this case, the learned Single Judge of Delhi High Court held that if a woman living separate from her husband had already filed a suit claiming maintenance and after adjudication maintenance has been determined by a competent Court either in Civil Suit or by Court of Metropolitan Magistrate in an application under Section 125 of Cr.P.C., she does not have a right to claim additional maintenance under D.V. Act.
- (xi) Unreported judgment of this Court [Coram:Dr. Shalini

Phansalkar-Joshi, J.] dated 10.10.2017 in Criminal Writ Petition No.3791/2016 with Criminal Application No.296/2017 [**Prakash Babulal Dangi v. The State of Maharashtra & Another**] and in particular paragraph-7 thereof. Mr. Warunjikar submitted that by order dated 10.1.2018, the Apex Court while issuing notice has stayed the operation of this Court's order dated 10.10.2017.

7. On the other hand, Mr. Patil submitted that the learned trial Judge has not considered the effect of Section 20(1)(d) and 26 of the D.V. Act. He has invited my attention to the affidavit-in-reply filed by the respondent-wife and in particular paragraph-28(a), (b) & (c). He submitted that the learned trial Judge ought to have awarded maintenance in an application filed by the respondent-wife under Section 24 of the Act in addition to the maintenance awarded in a D.V. proceedings.

8. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. I have already referred to the impugned order passed by the learned trial Judge. In paragraph-14 of the impugned order, the learned trial Judge referred to the order dated 21.7.2017 passed by the

learned 65th Metropolitan Magistrate, Andheri, Mumbai in D.V. Petition bearing C.C. No.73/DV/2014. As per that order, the petitioner-husband has been directed to pay maintenance @ Rs.25,000/- per month to the respondent-wife.

9. In paragraph-16, the learned trial Judge observed that the amount of Rs.25,000/- per month towards the maintenance granted by the learned Metropolitan Magistrate is sufficient for the maintenance of the respondent. However, said maintenance was granted in D.V. matter cannot be the ground to deny the maintenance under Section 24 of the Act. Both the petitions are altogether different. The order passed in D.V. petition will subsist only during pendency of D.V. petition. However, this is a petition for dissolution of marriage, it will take its own time for final decision. Therefore, if the amount of Rs.25,000/- per month is granted to the respondent-wife in this Petition, it would be just and proper and will meet the ends of justice. Thus, the learned Judge was of the view that in the present proceeding it would be just and proper to direct the petitioner-husband to pay Rs.25,000/- per month to the respondent-wife towards maintenance which will meet the ends of justice.

10. In paragraph-17, the learned trial Judge observed that “It is well settled provision of law that the wife can ask maintenance in various proceedings but she can recover/claim the maintenance in any

one of the petition in which the higher maintenance is granted.” Consistent with this finding, the learned trial Judge held in clause-4 of the operative part of the order that the amount granted in this application is inclusive of maintenance granted to her in D.V. proceedings. Though the learned trial Judge has partly allowed the application filed under Section 24 of the Act, in effect the respondent is given nil maintenance.

11. Sections 20(1)(d), 26 and 36 of the D.V. Act read thus :

“20. Monetary reliefs.-- (1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to,-

(a) xxxxx;

(b) xxxxx;

(c) xxxxx

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 or any other law for the time being in force.

xxxxx

xxxxx”

“26. Relief in other suits and legal proceedings.-- (1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil Court, family court or a criminal Court, affecting the

aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.”

“36. Act not in derogation of any other law.--The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.”

12. A perusal of Section 20(1)(d), extracted hereinabove, clearly shows that the Magistrate has power to direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include but is not limited to the maintenance for the aggrieved person as well as her children, if any, including an order under **or in addition to an order of maintenance under section 125 of Cr.P.C. or any other law for the time being in force.**

[Emphasis supplied]

13. Section 26(1) lays down that any relief available under Sections 18 to 22 may also be sought in any legal proceeding, before a civil Court,

family Court or a criminal Court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of the D.V. Act. Sub-section (2) thereof lays down that any relief referred to in sub-section (1) may be sought for in addition to and along with **any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.**

[Emphasis supplied]

14. Section 36 lays down that the provisions of D.V. Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.

15. Mr. Warunjikar relied upon the decisions referred in paragraph-6 above. The decisions in **Taralakshmi Manuprasad** (supra), **Ramesh Kaushal** (supra), **G. Ramanathan** (supra), **Vishwanath Chavan** (supra), **Ravindra Karmarkar** (supra) and **Gomaji** (supra) are prior to coming into force of D.V. Act and, therefore, are not applicable in the facts of the present case.

16. Mr. Warunjikar relied upon the decision of Madras High Court, Madurai Bench in **B. Prakash** (supra). In paragraph-18 of this decision, the learned Single Judge has held that it is manifestly clear that a previous order made under Section 125 of Cr.P.C. is not a bar for an aggrieved wife to approach a Magistrate under Section 20 of the D.V.

Act, for monetary relief as an additional relief of maintenance, provided subsequent to the passing of the earlier order under Section 125 of Cr.P.C., the husband has committed domestic violence resulting loss to the wife. In paragraph-19 reference was made to Section 36 of the D.V. Act and it was observed that Section 20 of the Act is not in derogation of Section 125 of Cr.P.C. The learned Single Judge clarified that as and when there is neglect or refusal on the part of the husband to maintain the wife, she has got option either to seek remedy under Section 125 of Cr.P.C. or under Section 20 of D.V. Act. If she elects to make a claim under Section 125 of Cr.P.C., on the same cause of action, she cannot, simultaneously, make a claim under Section 20 of D.V. Act and vice versa. In my opinion said finding, with utmost respect, is clearly contrary to the provisions of the D.V. Act and more particularly Sections 20(1)(d), 26 and 36 of the D.V. Act. I am, therefore, unable to subscribe to the view expressed in that decision.

17. Mr. Warunjikar also relied upon the decisions in **Sonia** (supra) of Punjab & Haryana High Court as also **Rachna Kathuria** (supra) of Delhi High Court. In the case of **Sonia** (supra), the learned Single Judge of Punjab and Haryana High Court held that when maintenance was awarded under Section 125 of Cr.P.C., maintenance *pendente lite* under Section 24 of D.V. Act cannot be granted. In

Rachna Kathuria (supra), the learned Single Judge of Delhi High Court held that if a woman living separate from her husband had already filed a suit claiming maintenance and after adjudication maintenance has been determined by a competent Court either in Civil Suit or by Court of Metropolitan Magistrate in an application under Section 125 of Cr.P.C., she does not have a right to claim additional maintenance under D.V. Act. A perusal of these decisions indicates that attention of the learned Single Judges of Punjab & Haryana High Court as also Delhi High Court, with utmost respect, was not invited to the provisions of D.V. Act at all. I am, therefore, unable to subscribe to the views expressed therein.

18. In the case of **Surya Dev Rai** (supra), the Apex Court has exhaustively dealt with the scope of Article 227 of the Constitution of India.

19. In paragraph-22, the Apex Court observed that “It is well-settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved **or may even be exercised suo motu**. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the

sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.”

(Emphasis supplied)

20. In paragraph-24, the Apex Court observed that “The power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate Courts and Tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the Court or Tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamounts to overstepping the limits of jurisdiction.”

21. In paragraph-25, the Apex Court observed that “In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior Court or Tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while

exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised *suo motu* as well.”

22. In paragraph-26, the Apex Court observed that there may be cases where but for invoking the supervisory jurisdiction, the jurisdictional error committed by the inferior court or tribunal would be incapable of being remedied once the proceedings have concluded. It was also held that where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.

23. In paragraph-38, the Apex Court summed up the conclusions. Clauses 4, 5, 7 and 9 read thus :

“38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

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XXXXX

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their

jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

- (5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.
- (6) xxxx
- (7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result

in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) xxxx

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.”

24. In the light of aforesaid discussion as also the finding recorded by the learned trial Judge that in the present proceeding it will be just and proper to direct the petitioner-husband to pay Rs.25,000/- to the respondent-wife towards maintenance which will meet the ends of justice, the impugned order is set aside. The petitioner-husband is directed to pay, as and by way of ad-interim relief to the respondent-wife, Rs.25,000/- per month as interim maintenance from the date of filing of the application i.e. 9.5.2016 till disposal of application Exhibit-

18 in addition to the maintenance awarded by the learned 65th Metropolitan Magistrate, Andheri, Mumbai in D.V. Petition bearing C.C. No.73/DV/2014. Application Exhibit-18 is restored to the file of the learned trial Judge. The learned trial Judge will permit the parties to file additional replies and proceed to decide the application Exhibit-18 afresh keeping in mind the provisions of Sections 20(1)(d), 26 and 36 of the D.V. Act.

25. Rule is partly made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)