

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
WRIT PETITION NO. 942 OF 2017**

Naseem Rouaz Khalifa	]	Petitioner
Vs.		
Mariyam Naseem Khalifa and Ors.	]	Respondents

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Ms. Farhana Khan i/b Rushikesh Patil, for Petitioner.
Ms. Nasreen Sajid Khalique, for Respondents.

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CORAM : R.G. KETKAR, J.

DATE : 1st NOVEMBER, 2018.

P.C.

Heard Ms. Khan, learned Counsel for the petitioner and Ms. Khalique, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 19th October, 2015 passed by the learned Judicial Magistrate First Class, Thane in O.M.A. No.132 of 2013 as also judgment and order dated 29th December, 2016 passed by the learned additional sessions Judge, Thane in PWDVA Criminal Appeal No.57 of 2016. By these orders, the Courts below partly allowed the application made by respondent No.1 under section 23 of the Protection of Women from Domestic Violence Act, 2005 (for short 'D.V. Act') and issued injunction restraining the petitioner herein and respondents therein from committing any act of domestic violence to respondents No.1 and 2. The petitioner was directed to pay Rs. 5,000/- per month each to respondents No.1 and 2 from the

date of application till final disposal of the case. The petitioner is also directed to pay Rs.10,000/- per month to respondent No.1 towards accommodation charges from the date of the application till final disposal of the case.

3. The matter was heard by this Court on 5th April, 2017. This Court issued notice to respondent No.1 returnable on 5th May, 2017. It was made clear that pendency of this Petition shall not be construed as a stay to the operation and execution of the order dated 19th October, 2015 passed by the JMFC, Thane in M.A. No. 132 of 2013 which was confirmed by the Additional Session Judge, Thane vide judgment and order dated 29th December, 2016. The Petition was thereafter heard on 30th October, 2017. After hearing the learned Counsel for the parties, the learned Single Judge noted that as on today, the petitioner is in arrears of more than Rs. 7,20,000/-. Reference was made to the observations made by the learned Magistrate in paragraph 8 of the order dated 19th October, 2015 that the petitioner runs business and owns a property at Shahapur Taluka. In view thereof, the petitioner was directed to deposit Rs. 4,00,000/- as pre-condition before entertaining his prayer to stay the operation of the impugned order. At the request of the petitioner's Advocate, the matter was adjourned so as to enable to take instructions within what manner and within what period, the petitioner will deposit Rs. 4,00,000/-.

4. It is common ground between the parties that the petitioner has not complied the order dated 30th October, 2017 till date by depositing Rs. 4,00,000/-.

5. In support of this Petition, Ms. Khan strenuously contended that the petitioner is unable to comply the impugned orders because of his medical condition. He is unable to carry on his business of barber shop. Even his son is

unable to carry on the business. She invited my attention to the order passed by the learned Magistrate to contend that the learned Magistrate decided the application on merits without hearing petitioner's Advocate. Ms. Khan submitted by order dated 30th October, 2017, this Court gave liberty to the petitioner to produce documents to substantiate that his income is not sufficient to pay the amount of maintenance as directed. Ms. Khan has also tendered medical certificate dated 31st October, 2018 showing medical condition of the petitioner. Doctor has advised the petitioner strict bed rest. She, therefore, submitted that the impugned orders may be set aside and the matter may be remitted so as to give opportunity to the petitioner to contest the application.

6. On the other hand, Ms. Khalique supported the impugned orders. She submitted that in paragraph 2 of the order of the learned Magistrate, it is observed that the petitioner and his Advocate though called repeatedly were absent for arguments. On previous occasions also, they were absent. Thus, though opportunity was given to the petitioner, he did not avail those opportunities. She submitted that in paragraph 8, the learned Magistrate has considered the material on record and on that basis directed the petitioner to pay Rs. 5,000/- per month each to respondent No.1 and their son from the date of the application.

7. In so far as learned Sessions Judge is concerned, she invited my attention to paragraphs 9 and 10 and submitted that no case is made out for interfering with the impugned orders.

8. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. A perusal of the order passed by the learned Magistrate shows that in paragraph 2, the learned

Magistrate observed thus;

“Perused record. Heard Ld. Advocate for the applicant at length. The respondents and their Advocate though called repeatedly are absent for argument today, as well as, on previous date. Hence, the present application is decided on merits on perusal of say given by the respondents at Exhibit 6”.

9. Thus, perusal of paragraph 2 extracted hereinabove shows that despite affording several opportunities, the petitioner and his Advocate have failed to avail those opportunities. The learned Magistrate, therefore, proceeded with the matter on merits. I do not find that approach of the learned Magistrate was erroneous or perverse. In paragraph 8, the learned Magistrate noted that the petitioner is estate agent and earning Rs.60,000/- to 80,000/- per month. Respondent No.1 produced certified copy of Special Civil Suit No.312 of 2009 filed by the petitioner before Civil Judge, Senior Division, Kalyan wherein the petitioner has stated his occupation as “business”. Respondent No.1 filed document at Exhibit 19 showing that petitioner's father is having Hair Cutting Saloon. The learned Magistrate also considered income tax returns filed at Exhibit 23 and noted that the petitioner is having landed property at Taluka Shahapur. After considering these documents, the learned Magistrate observed that the petitioner has sufficient source of income and accordingly passed order directing the petitioner to pay maintenance as noted earlier.

10. In so far as order of the Sessions Court is concerned, in paragraph 9, the learned Sessions Judge noted that the petitioner and his Advocate were absent before the learned Magistrate though repeatedly called when the matter was fixed for arguments. Even on the previous date also they were absent. While deciding application, the learned Magistrate considered say filed by the

petitioner at Exhibit 6. The learned Sessions Judge, therefore, did not find any fault with the approach of the learned Magistrate for proceeding with the matter on merits. In paragraph 10, the learned Sessions Judge considered financial condition of the petitioner and observed that the learned Magistrate did not fix maintenance excessively and exorbitantly.

11. For the reasons recorded in the impugned orders, I do not find that any case is made out for interfering with the impugned orders by invoking powers under Article 227 of the Constitution of India.

12. Ms. Khan relied on medical certificate dated 31st October, 2018 and income tax returns. In so far as income tax returns relied on by the petitioner are concerned, in case of **Vinod Dulerai Mehta Vs. Kanak Vinod Mehta**, AIR 1990 BOMBAY 120, Division Bench of this Court in paragraph 5 has observed thus;

“....

As is common knowledge, income-tax returns do not reflect the true position of the income of a party for several reasons, and cannot be taken as the sole guide for determining it in proceedings such as the present one”.

13. In view thereof, reliance placed on income tax returns does not advance case of the petitioner. In so far as medical certificate dated 30th October, 2018 is concerned, it is material to note that Petition was heard initially on 5th April, 2017 and this Court clarified that it has not stayed the impugned orders. Subsequently, by order dated 30th October, 2017, the petitioner was directed to deposit Rs. 4,00,000/- in this Court having regard to the fact that arrears as on that date was more than Rs.7,00,000/-. It is not in dispute that the learned Magistrate had passed order as far as on 19th October, 2015 and till date not a single penny is paid by the petitioner. In view thereof

also, no case is made out for interfering with the impugned orders. Hence, Petition fails and the same is dismissed.

[R.G. KETKAR, J.]