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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1143 OF 2018

Ganesh Devram Kotwal

..Petitioner.

V/s.

Mrs. Sujata Ganesh Kotwal & Ors.

..Respondents.

Mr.Rajiv Chavan, Senior Advocate with Ms.Priyanka Chavan and Mr.Prashant Relekar i/b. Parth P.Shah for the petitioner.

Mr.P.G.Sarda for respondent No.1.

Mr.S.S.Pednekar, APP for the respondent-State.

CORAM: NITIN W.SAMBRE, J.

DATE : MARCH 9, 2018

PC.:-

Heard respective parties.

2. Out of a matrimonial discord of the parties to the present proceedings, an application under section 23 of the Protection of Women from Domestic Violence Act, 2005 ('the D.V. Act' for short) in Criminal M.A. No.5257/2014 came to be moved before the learned Magistrate for grant of maintenance at the rate

of Rs.50,000/- per month to each of the respondents *viz.* wife and two children with certain ancillary reliefs such as restraining the respondent from entering into the house and restraining the petitioner from creating any third party rights in the said property under section 18A of the D.V. Act, etc.

3. The present petitioner-husband filed reply to the same resisting the claim and the learned Magistrate vide his order passed below Exhibit-5 on October 1, 2015 and allowed the application in part, thereby directing the present petitioner to pay maintenance at the rate of Rs.25,000/- per month to each of the children. A further restraint order is passed against the petitioner from entering into the house and clinic which are occupied by the respondent-wife.

4. It is not in dispute that both the husband and wife are in medical profession.

5. The petitioner-husband feeling aggrieved preferred an appeal being Criminal Appeal No.558/2015 under section 29 of the D.V. Act, which came to be dismissed vide order dated February 15, 2018. As such, this petition.

6. Mr.Chavan, the learned senior counsel would urge that since both the husband and wife are earning, the responsibility to pay maintenance can't be individually saddled on the petitioner-husband. So as to substantiate his contention, he would invite the attention of this Court to the case of *N. Ramadua V/s. N.Lahari*¹ particularly paragraphs 10 and 11 and *Padmaja Sharma V/s. Ratan Lal Sharma*². In addition, Mr.Chavan would urge that the petitioner has demonstrated before the Court below that he is already maintaining children, by depositing the tuition fees of applicant Nos.2 and 3 in their respective schools. He submits that the maintenance awarded by the impugned order is contrary to the income reflected in tax returns which is produced before the learned Courts below. In addition, the learned counsel would urge that the order is contrary to the judgment in the case of *Vimlaben Ajitbhai Partwl V/s. Vatslaben Ashokbhai Patel and Ors*³ particularly paragraphs 20 and 21. He would try to rely upon the factual matrix of the present case so as to claim that the property in regard to which restraint order is passed is not acquired by the

1 2004 4 ALD 722

2 2000(2) Supreme 653

3 (2008) 4 Supreme Court Cases 649

petitioner individually but is the property of his brother.

7. *Per contra*, the learned counsel for respondent-wife would urge that the qualification and the fact that she is practicing on medical side is not a fact in dispute. He would invite attention of this Court to the observations made by the lower Appellate Court in paragraph 13 so as to demonstrate the holding of immovable properties, interests in practicing medical profession at various places. He submits that there is no maintenance awarded to the wife as she has an independent source of income. According to him, the award of maintenance at the rate of Rs.25,000/- p.m. to each child is justified and sought dismissal of the petition.

8. Considered rival submissions.

9. The learned senior counsel was right in inviting the attention of this Court to the judgment of the Apex Court in the matter of *Padmaja Sharma* (cited supra) that if both spouses are earning, it would be equal liability of each of them to share the liability and maintenance of their children. In the aforesaid

backdrop, if the legal position and the factual situation is appreciated and even if it is presumed that the petitioner-father is regularly paying the tuition fees of the children, still the respondent-wife is maintaining the children for their daily school needs and other expenses in the school, etc. As such, at this stage it is sufficient to infer that both the spouses are sharing the responsibility and financial liability, particularly in the backdrop of the order impugned in this Court, from maintaining the children.

10. Apart from the above, the fact remains that other holdings of the petitioner which is brought on record and reflected in paragraph 13 is taken into account by the Courts below so as to order Rs.25,000/- per month to each of the child, which in my opinion, having regard to the profession which is practiced by the petitioner and the holdings of immovable properties, shall be termed to be justified and is a possible view.

11. So far as the grievance of petitioner to the effect that he is not permitted to enter the house and that he is not permitted to used clinic, it is worth to observe here that the Courts below, having regard to the provisions of D.V. Act *prima facie* found that

the circumstances exists to pass a restraint order against the petitioner.

12. So far as the claim put forth by the petition *qua* he be permitted to use part of the clinic, it is always open for the petitioner to move the learned trial Court for modification of the order to that extent. The petitioner is at liberty to approach the learned trial Court for modification of the order to that extent.

13. In the aforesaid backdrop having regard to the facts, the view taken by the Courts below is a possible view and no interference is warranted in the petition. The petition, as such, is dismissed.

14. It is made clear that if the petitioner moves an application seeking for modification of the order to the extent of use of the premises for clinic, the same be dealt with by the learned trial Court, independent of the observations made hereinabove.

(NITIN W.SAMBRE, J.)