

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.1520 OF 2018

Smt.Poonam Manish Lath @
Poonam Jamunadas Khandelwal

.. Petitioner

Vs.

Manish Kashiprasad Lath

.. Respondent

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Mr.Amrut Joshi a/w. Mr.K.I. Khandelwal I/b. M/s.Khandelwal
Assoicates, Advocate for the Petitioner.
Mr.Ganesh K. Gole, Advocate for Respondent No.1.
Mr.P.H. Gaikwad, APP for the Respondent - State.

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CORAM : PRAKASH D. NAIK, J.

DATED : AUGUST 16, 2018.

P.C. :

Heard both sides for final disposal.

2 The petitioner has preferred this petition under Article 227 of the Constitution of India, challenging the order dated 28th February, 2018, passed by the learned Additional Sessions Judge, Thane in PWDVA Appeal No.124 of 2016, setting aside the order passed by the Court of learned Judicial Magistrate First Class, Thane dated 6th February, 2016.

3 The petitioner is wife of respondent. The marriage between them was solemnized on 13th May, 2013. Petitioner is residing with her parents at the address mentioned in the cause title. On account of the alleged harassment, torture and assault, the petitioner had lodged First Information Report (“FIR”, for short) bearing No.I-00 of 2014, dated 3rd September, 2014 with Bhyander Police Station, for the offences punishable under Section 498-A, 504 read with 34 of IP. On completing investigation, charge-sheet was filed before the competent Court and the proceedings are pending vide RCC No.597 of 2014.

4 The petitioner is aggrieved person as defined under the Protection of Women from Domestic Violence Act, 2005 (“DV Act”, for short), she filed an application under Section 12 of the said Act in the Court of 6th Judicial Magistrate First Class, Thane, for protection and several other reliefs under the provisions of the said Act. She also sought relief of maintenance. The respondent and other opponents filed their say to the main application preferred by the petitioner.

5 Learned trial Court vide order dated 6th February, 2016, allowed the application directing the payment of

maintenance and the other reliefs. Trial Court after analyzing the material on record directed respondent no.1 to pay maintenance of Rs.10,000/-, per month to the petitioner.

6 The respondents preferred an Appeal before the Sessions Court. Since there was a delay in preferring an Appeal, an application for condonation of delay was also preferred. The said application was allowed and the delay was condoned. Learned Sessions Judge vide order dated 28th February, 2018, set aside the order of the trial Court for the time being and remanded the matter back to the trial Judge with direction to the Court to grant an opportunity to the parties to adduce the evidence on its own merits and after extending the opportunity, parties to adduce their respective evidence, to decide the matter a fresh.

7 Petitioner is aggrieved by the said order and has preferred this petition.

8 It is submitted that there was no reason for the Appellate Court to set aside the order of the trial Court. Respondents had not made out any case for remanding the

matter back to the trial Court. There was no pleading to warrant such an order. Trial Court had offered sufficient opportunity to the respondents to contest the matter, but inspite of several opportunities, respondents remained absent and the trial Court was, thus, constrained to proceed with the matter. The order dated 6th February, 2016, passed by the trial Court did not require any interference, as the court has taken into consideration relevant aspects of the matter and granted maintenance to the petitioner. Respondents, through advocate sought time to file reply on 15th July, 2015. Reply was filed on 30th July, 2015 to the main application as well as to the interim application. Thereafter, the advocate for the opponents including the respondent continuously remained absent on 10th August, 2015, 26th August, 2015, 5th September, 2015, 22nd September, 2015, 13th October, 2015, 29th October, 2015, 19th November, 2015, 1st December, 2015, 22nd December, 2015, 8th January, 2016, 22nd January, 2016, 6th February, 2016. Thus, the respondent and others were absent on 13 dates, listed across 7 months from August 2015 to February 2016. Petitioner has relied upon Roznama of the trial Court. Petitioner and the trial Court had no other option but to proceed with the matter.

9 Learned counsel for the petitioner further pointed out the interim application for maintenance and the application for production of documents preferred by the respondents remained undecided. Trial Court had kept the matter for evidence of the petitioner. On 29th October, 2015, the petitioner filed her affidavit of evidence vide Exhibit-11 and her evidence was closed vide pursis dated 1st December, 2015. Even thereafter the trial Court waited for the respondent and the other opponents to proceed with the cross-examination of the petitioner on 29th October, 2015, 19th November, 2015 and 1st December, 2015. However, respondents did not appear. In the circumstances, the Court passed an order of “No Cross”, against the respondent and other opponents on 1st December, 2015. Trial Court, then kept the matter for evidence of respondent and other opponents on 15th December, 2015, 22nd December, 2015 and 8th January, 2016. But the respondents failed to appear and lead evidence, as a result the trial Court closed the evidence vide order dated 8th January, 2016. Petitioner through her advocate filed written arguments on 8th January, 2016, and, thereafter, the matter was kept for judgment on 22nd January, 2016, which was finally pronounced on 6th February, 2016, partly allowing the application by directing the petitioner to pay Rs.10,000/-, per month to the petitioner from

the date of the application i.e. 19th March, 2015, without any other protection, compensation or accommodation order etc.

10 Petitioner filed Execution Application No.14 of 2016, for execution of order dated 6th February, 2016, before the trial Court. Show-cause notice was issued to the respondents. It is submitted that respondent no.1 never paid any amount out of his own accord in the execution proceedings. Subsequently, appeal was preferred before the Sessions Court along with application for condonation of delay. It is submitted that in the absence of the petitioner, the respondent pressed for stay application and the Appellate Court was pleased to hear the said application allowing the interim stay till the next date of hearing, vide order dated 3rd August, 2016, and the same was extended from time to time till final decision on 23rd November, 2016. It is submitted that the petitioner has lodged the protest vide affidavit stating that she urgently needs maintenance amount. The delay was condoned on 23rd November, 2016, subject to costs of Rs.25,000/-, to be deposited by the respondents. Learned Sessions Judge, thereafter, passed the impugned order regarding the matter back to the trial Court for fresh consideration and for giving an opportunity to adduce evidence before the said Court. It is

submitted that the Appellate Court has failed to consider the nature and circumstances of the DV proceedings. The Appellate Court erroneously invoked inherent powers of this Court, which is not available to the said Court granting ex parte stay to the operation of the judgment of the trial Court. Appellate Court ignoring the evidence on record and observations of the trial Court, granted maintenance to the petitioner and the fact that the respondent and the other opponents had not appeared before the Court repeatedly, no cross order passed by the trial Court was never challenged by the respondent and the other opponents. There was no reason for the Sessions Court to remand the matter back to the trial Court. It was not pleaded by the respondent and the other opponents in the prayer clause as well as the averments that matter be remanded back to the trial Court for fresh consideration. The order passed by the Sessions Court, thus, causes grave prejudice to the petitioner and it was uncalled for. The impugned order is against the spirit of the DV Act. Learned counsel for the petitioner has placed on record several decisions in support of his arguments. It is submitted that the Sessions Court has remanded the matter back to the trial Court without giving any finding as to the maintainability of the orders passed by the trial Court. It is submitted that the nature of the

proceedings was civil and no cause was shown for fresh evidence being recorded by the trial Court by respondents and the Appellate Court has committed a gross error in passing the impugned order. To substantiate the submission with regard to the nature of the proceedings initiated by the petitioner, the learned advocate has placed reliance upon several decisions which are part of compilation referred to herein above.

11 Learned counsel for the respondent submitted that there is no error in the order passed by the Sessions Court. It is submitted that no prejudice would be caused to the petitioner by the said order. Appellate Court has tried to strike balance between the right of hearing of the respondents and also for claim towards maintenance. Learned Sessions Judge has directed that the amount of Rs.60,000/-, deposited by the appellant be paid to the petitioner, if not already paid and the said amount be adjusted towards the interim maintenance of Rs.5,000/-. It is submitted that during the pendency of the Appeal, respondent no.1 was directed to pay an amount of Rs.5,000/-, as interim arrangement, which was continued by the Sessions Court while disposing of the Appeal and the trial Court was directed to report compliance of the order. It is submitted that the Sessions Court

had adopted a practical view in order to give an opportunity to the respondent and other opponents to defend themselves in the proceedings initiated by the petitioner. It is submitted that the respondents had not cross-examined the petitioner nor they could adduce any evidence in their defence, which is being permitted by the Appellate Court, and, in the circumstances, the said order does not warrant any interference.

12 Having heard both the sides and going through the documents on record, it is clear that the proceedings were initiated by the petitioner under the DV Act in 2015, the trial Court had passed the order on 6th February, 2016, only to the extent of grant of maintenance to the petitioner. There is no plausible explanation from the respondents for not appearing before the trial Court and leading evidence or conducting cross-examination of the petitioner, before the trial Court. From the Roznama brought on record, it is apparent that on several occasion the matter was adjourned by the trial Court, with a view to offer an opportunity to the respondent and other opponents to appear before the trial Court. In the absence of the respondent and other opponents, the Court was constrained to pass the order of "No Cross". Respondents did not deem fit and proper to

challenge the order of “No Cross”. Petitioner adduced evidence by tendering affidavit-in-evidence. In spite of opportunity, she was not cross-examined. Trial Court, therefore, proceeded to pass the order dated 6th February, 2016. Even thereafter the petitioner was required to prefer an application for execution of the order of the trial Court as the directions of the maintenance were not complied by the respondents. It is thereafter the Appeal was preferred by the respondents, wherein there was delay, which was condoned by the Sessions Court. While passing the impugned order, the Sessions Court, has observed that the Appellant’s advocate has pointed out that due to communication gap between their advocate and the respondents, there was absence before the trial Court. Trial Court has proceeded in the absence of the appellant. It is also observed that sufficient opportunities were apparently granted to the appellant by the trial Court, which is evident from the findings recorded by the Court. However, the fact remain on record that the appellant was absent and for whatsoever reason he could not get proper opportunity for placing his defence on record. It is also observed that the appellant had placed reliance on certain documents, which he wishes to rely in support of his defence, and, trial Court could have passed a different order, if the appellant have appeared

before the Court, and, thus, the opportunity should be granted to the appellant to put forth those documents before the Court. The Court, however, further observed that without formal evidence of the parties, the documents cannot be relied upon. The documents tried to be relied upon by the respondents, cannot be considered. The Court, therefore, proceeded to pass the impugned order. In the light of the fact that sufficient opportunity has been granted to the respondents, which is evident from the Roznama on record, there was no reason for the Appellate Court to set aside the order of the trial Court. The trial Court has passed order on 6th February, 2016, which was challenged by the respondents subsequently by preferring an Appeal. It was open to the Appellate Court to decide the Appeal on merits, but, accepting the statements made by the respondents' advocate, the Appellate Court has set aside the order of the trial Court purportedly for the time being and directed parties to adduce evidence. In the light of several decisions, and, the scope of the proceedings under the DV Act, and, the factual aspects involved in the matter, the order passed by the Sessions Court deserves to be set aside. For the reasons stated hereinabove, there is no necessity to refer and analyse various decisions relied upon by the counsel for the petitioner by filing compilation. However, it is

seen that the Appellate Court has not decided the Appeal of the respondents on merits, and, it is open to the Appellate Court to consider the Appeal preferred by the respondents in accordance with law on merits.

13 In the circumstances, I pass the following order:

:: ORDER ::

- (i) Criminal Writ Petition No.1520 of 2018, is allowed;
- (ii) The impugned order dated 28th February, 2018, passed by the Additional Sessions Judge, Thane, in Criminal Appeal No.PWDVA Appeal No.124 of 2016, is set aside;
- (iii) The Appellate Court is directed to decide the Appeal preferred by the respondents on merits and in accordance with law;
- (iv) Criminal Writ Petition No.1520 of 2018, stands disposed of;

- (v) Respondent is directed to comply the order of maintenance passed by the trial Court, expeditiously.

(PRAKASH D. NAIK, J.)