

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

CRIMINAL WRIT PETITION NO.2070 OF 2016

Noor Alam Khan	]	
Aged - 50 years, Occupation - Service,	]	
R/at.CGS Quarter, Building No.202/2453,	]	
Kane Nagar, Antop Hill, Wadala	]	
Mumbai - 400 030.	]	.. Petitioner

Vs.

(1)	Hasina Bano Noor Alam	]	
	Age - 36 years,	]	
	Occupation - Beutician,	]	
	R/at. 323/324, Qaim Ali Peer	]	
	Bhai Chawl, Room No.4,	]	
	S.V. Road, Andheri (W),	]	
	Mumbai 400 058;	]	
(2)	State of Maharashtra.	]	.. Respondents

.....

Mr.Ahmed N. Shaikh, Advocate for the Petitioner.
 Ms.Flavia Agnes a/w. Mr.Pramod Shenoy, Advocate for
 Respondent No.1.
 Mrs.M.R. Tidke, APP for Respondent No.2 - State.

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CORAM : PRAKASH D. NAIK, J.

DATED : JULY 11, 2018.

JUDGMENT :

Heard both side for final disposal.

2 The proceedings under the provisions of the Domestic
 Violence Act were initiated by respondent no.1 vide CC

No.46/DV/2012. The said proceedings are pending before the Court of Metropolitan Magistrate 10th Court at Andheri Mumbai. The petitioner has challenged order dated 21st July, 2015, passed by the trial Court granting maintenance in the sum of Rs.10,000/- to respondent no.1 and order dated 15th February, 2016, passed by the Sessions Court in an Appeal preferred by the petitioner by modifying the same and directing the petitioner to pay the maintenance in the sum of Rs.6,000/- per month to respondent no.1.

3 According to petitioner, respondent no.1 has filed a false proceedings in order to harass and extort money from the petitioner. In the proceedings initiated by respondent no.1 false and baseless allegations are made against the petitioner. It is contended that respondent no.1 has suppressed that the petitioner had pronounced three times oral Talaq "Islamic Permissible Divorce" against respondent no.1. and thereby the marital ties between the petitioner and respondent no.1 has come to an end by virtue of oral Talaq pronounced by the petitioner on 16th May, 2012. The application initiated by respondent no.1 is based on false and concocted averments. It is also contended that the mandatory requirement of report submitted by protection

officer contradicts the allegations of domestic violence made by respondent no.1, before the trial Court in the said proceedings.

4 The Protection Officer had submitted the domestic incident report to the Court of Metropolitan Magistrate 10th Court, Mumbai, on 24th July, 2012. Alongwith the said report, the copy of the non-cognizable complaint made by respondent no.1 and registered with the concerned police station was also forwarded to the Court. Respondent no.1 filed an affidavit before the trial Court on 17th October, 2012, giving instances of purported the domestic violence committed by the petitioner against her. It was also stated that the details provided in the application for grant of relief under Section 12 of the Protection of Women from Domestic Violence Act, 2005, have been entered into on her instructions. It was further stated that the relief claimed in the applications are urgent. The petitioner filed his reply opposing the relief sought by respondent no.1. Learned Magistrate by order dated 21st July, 2015, directed the petitioner to pay maintenance of Rs.10,000/- to respondent no.1, until further orders from the date of application. The petitioner preferred an Appeal before the Sessions Court challenging the order of maintenance. The learned Sessions Judge, by order

dated 15th February, 2016, confirmed the findings of the trial Court. However, the maintenance amount was reduced from Rs.10,000/- to Rs.6,000/-, per month from the date of the Domestic Violence Petition.

5 Learned advocate for the petitioner made following submissions:

- (i) The petitioner had pronounced three times oral Talaq and thereby the martial ties between the petitioner and respondent no.1 has come to an end. Reliance was placed on the Fatwa dated 16th May, 2012. It is submitted that the Talaq was pronounced on 16th May, 2012;
- (ii) The report of the Protection Officer is contradictory to the allegations made by respondent no.1, in her application;
- (ii) The marriage between the petitioner and respondent no.1 was not consummated. Respondent no.1 is not having any menstruation period. Hence, the petitioner was constrained to pronounce oral Talaq, which is supported by the Fatwa obtained from Mufti/Qazi Aziz-ur-Rehman;

- (iv) The trial Court without appreciating the reply filed the petitioner to the interim application had come to the conclusion of granting the maintenance in the sum of Rs.10,000/-, per month to respondent no.1, until further order from the date of application;
- (v) The petitioner was working in ASTT Garrison Engineer as Mate (Labour) (FGM) in the year 2011 and his net pay salary of Rs.5,180/-, after deducting all deductions which are reflected in the salary of May 2011. The petitioner after loosing his job again approached the employer and started working as mate (FGM) at the same company and his net pay is Rs.6,397/-, after deducting all deduction, as per salary slip of the month of July 2015. The petitioner is having net pay of Rs.6,124/-, after necessary deduction as seen from the salary slip for the month of March 2016, which is annexed to this petition;
- (vi) The petitioner had borrowed friendly loan to clear the arrears for the maintenance of his first wife Zarina Khatun in respect of the proceedings which are pending in the Court of Metropolitan Magistrate Kurla and had deposited

Rs.85,000/-, towards the arrears of the interim maintenance granted by the Sessions Court in Criminal Appeal No.706 of 2015, at the time of admission while granting stay to the implementation of the order dated 21st July, 2015, passed by the trial Court in the present proceedings. The petitioner was required to repay the borrowed sum of Rs.85,000/- from MSE Co-operative Credit Society Colaba. The statement of loan obtained by the petitioner has been annexed to the petition. The aged parents of the petitioner are dependent on him. The first wife Zarina Khatun had filed an application under the Domestic Violence Act, in which the Court had granted interim maintenance at the rate of Rs.1,200/- per month to Zarina Khatun and Rs.1,000/- for minor son from the date of application. The petitioner has to pay a monthly interim maintenance of Rs.2,200/-, per month to his first wife and child;

- (vii) The petitioner is diabetic and suffering from several health issues. He is also required to spend amount towards his daily basic needs;

- (viii) The application filed by respondent no.1 does not disclose any domestic violence. She is not entitled for the relief claimed in her application. The Appellate Court has not considered the income of the petitioner while passing the impugned order. The quantum of maintenance is very high and it will be difficult for the petitioner to pay the said amount of maintenance to respondent no.1;
- (ix) The petitioner had produced his salary slip for the month of July 2015 which reveals that there are deduction of Rs.14,518/-, comprising of subscription towards GPF at the rate of 14,000/-, per month. The Courts below have committed an error for not considering such deductions while calculating the income capacity. The net pay/salary of the petitioner as per the salary slip is of Rs.6,397/-. The Appellate Court has committed an error while deciding the quantum of net gross pay of Rs.20,915/-, but did not consider the net salary received by the petitioner;
- (x) While awarding maintenance from the date of application, expressed order is necessary, however, in the present case there was no express order giving reasons as to why the maintenance is to be paid from the date of the application;

(xi) The respondent no.1 has filed the application in the year 2012, and from time to time she sought adjournments for hearing interim application which had caused delay. The Courts below have failed to take into consideration the said aspect while awarding interim maintenance without giving reasons for granting maintenance from the date of the proceedings. Reliance is placed on the following decisions:

- (1) *Kalyan Dey Choudhari Vs. Rita Dey Choudhari, decided by Supreme Court*¹;**
- (2) *Decision of the Supreme Court delivered in the case of Shail Kumari Devi & Anr. Vs. Krishan Bhagwan Pathak @ Kishun B. Patha*²**

6 The submissions of Ms.Flavia Agnes, learned counsel appearing for respondent no.1 can be summarised as under::

(a) There is no infirmity in the order passed by the Courts below. The trial Court had analyzed the evidence on record and had come to the conclusion that there is Domestic Violence, and, thereafter, the maintenance was granted. It is submitted that the Appellate Court has modified the order of the trial Court and has reduced the maintenance

1 Civil Appeal No.5369 of 2017

2 AIR 2008 SC 3006

from Rs.10,000/- to Rs.6,000/- per month. It is submitted that while reducing the maintenance, the Appellate Court has confirmed the findings of the trial Court *qua* the existence of Domestic Violence and after taking into consideration all the aspects of the matter including the earnings of the petitioner had passed the order directing maintenance in the sum of Rs.6,000/-, per month;

- (b) The contention of the petitioner that the order passed by the Courts does not consider the deductions with respect to General Provident Fund while calculating the income of the petitioner is devoid of merits. The contention is erroneous, as the subscription to General Provident Fund is a voluntary deduction that is not to be considered while calculating income for the purposes of deciding maintenance;
- (c) The Allahabad High Court in the case of ***Veena Panda @ Seema Panda Vs. Devendra Kumar Panda***³, has observed that the contributions towards General Provident Funds and payment towards installments loan etc., shall not

be permitted to be deducted to work out the carry home salary;

- (d) In the case of ***Savita Aggarwal Vs. R.C. Aggarwal***⁴, the High Court of Punjab and Haryana had rejected the deductions of General Provident Fund and other deductions from calculations of income;
- (e) The High Court of ***Punjab and Harayan in the case of Mukesh Kumar Vs. Rekha Rane and Ors.***⁵, had observed that deductions that are made from the gross salary towards long term savings, which a person would get back at the end of his service and such as deductions towards General Provident Fund, General Group Insurance Scheme, L.I.C. Premium, State Life Insurance Loan can be deemed to be asset that he is creating for himself. In arriving at the income of the party only involuntary deductions like income tax, provident fund contributions etc. are to be excluded. Therefore, such deductions cannot be deducted or excluded from his salary while computing his means to pay maintenance;

4 I (1991) DMC 18

5 MANU/PH/0277/2018

- (f) Respondent no.1 has fully made out case of Domestic Violence, a separate application for interim maintenance under D.V. Act is not required.
- (g) There is no infirmity in the orders passed by the Courts below in granting maintenance from the date of application. Reliance was placed on the Roznama of the proceedings before the trial Court to show that the applicant had not delayed the said proceedings.
- (h) Apart from the decisions referred to herein above, learned counsel for respondent no.1 also relied upon the following decisions:
- (1) Annurita Vohra Vs. Sandeep Vohra⁶, decided by Delhi High Court;**
 - (2) Harinder Kaur Vs. Sukhwinder Singh⁷, Decided by Delhi High Court;**
 - (3) Anup Varadpande Vs. Anisha Anup Varadpande⁸;;**
 - (4) Sukumar Pawanlal Gandhi Vs. Bhakti Sushil Gandhi⁹;**
 - (5) Bharat Hegde Vs. Saroj Hegde¹⁰;**
 - (6) Vishal Damodar Patil Vs. Vishakha Patil¹¹;**

6 2004(74) DRJ 99

7 2002(62) DRJ 742

8 2010(3) MH.L.J. 777

9 2016 SCC OnLine Bom 12942

10 2007 DMC 815

11 2009 Cri.L.J. 107

(7) *Jaiminiben H. Vyas Vs. Hirenbhai R. Vyas*¹²;

(8) *Shamima Farooqui Vs. Shahid Khan*¹³

7 The proceedings under the Domestic Violence Act were initiated on 24th July, 2012. The Domestic incident report was submitted by the Protection Officer. The respondent no.1 filed affidavit dated 17th October, 2012. In the report submitted to the trial Court, it was mentioned that the petitioner claims maintenance in the sum of Rs.10,000/-. In the affidavit dated 17th October, 2012, respondent no.1 had contended that the details provided in the application for grant of relief under Section 12 of the said Act have been entered into on her instructions. It was also stated that the relief claimed in the application are urgent, as respondent no.1 would face great financial hardship and will be forced to live under the threat of repetition/escalation of acts of domestic violence, if the said reliefs are not granted. It was also stated that the respondent in this proceedings (petitioner) has threatened her of dire consequences and threatened to kill her if she initiates any legal proceedings to restraining him from his evil tactics. He has abused and assaulted her on several occasions, however, she remain silent. The affidavit also gives instances of incidents which according to her amounts to

12 (2015) 2 SCC 385

13 (2015) 5 SCC 705

domestic violence. Whereas, it is contention of the petitioner herein that false and frivolous allegations are made at the instance of respondent no.1, which are not supported by any evidence. It is further contended that the report of the protection officer and the claim of respondent no.1 are contradictory to each other. The primary contention of the petitioner is that there is no existence of any relationship between the petitioner and respondent no.1. The marital ties between them has come to an end on account of oral Talaq pronounced thrice by the petitioner on 16th May, 2012. The petitioner has placed reliance on the Fatwa issued by Mufti/Qazi. The other contentions which are emanating from the submissions advanced by the counsel for the petitioner is that no case was made out for grant of maintenance. The Courts have not taken into consideration the deduction while awarding the maintenance. The petitioner has no earning capacity to pay maintenance awarded by the trial Court and the Appellate Court and that the order directing payment of maintenance from the date of application, is contrary to law.

8 On perusal of the order dated 21st July, 2015, passed by the trial Court, it appears that prior to filing application for maintenance, the respondents therein (petitioner) had filed an

application objecting the maintainability of the proceedings. The said application was rejected by order dated 14th November, 2014. The contention of the petitioner on the ground of Talaq was rejected and that order had attained finality. It is further observed that the contention of the petitioner that the respondent no.1 is not legally wedded wife is devoid of any substance and that he was liable to pay the maintenance to respondent no.1. the learned Magistrate took into consideration the contents of the application, the documents on record, the reply filed by the petitioner opposing the reliefs and has come to the conclusion that the respondent no.1 is entitled to maintenance in the sum of Rs.10,000/- per month from the date of the application. It was also observed that the contention of the applicant therein that the respondent has suppressed the fact of his three marriages itself amounts to mental cruelty to any women. The respondent therein is neglecting the applicant by denying the fact of their marriage. The respondent had not filed any documents to show that he had provided any kind of maintenance to the applicant therein. The Court referred to NC complaint which shows that the wife was subjected to ill treatment. It was further observed that the husband being a government servant has sufficient means to maintain his wife. The petitioner had also contended that he is

required to pay maintenance to his first wife as per the directions of the Court. It was submitted that the salary of the petitioner and the expenditure which is required to be incurred towards the maintenance to be paid to his first wife and towards his parents and himself, has to be considered and thus, the quantum of maintenance as awarded by the Courts below was contrary to law. The Appellate Court has reduced the maintenance from 10,000/- to Rs.6,000/-. The said order had not been challenged by the respondent no.1.

9 Learned Sessions Judge while deciding the Appeal after analyzing the documents on record, observed that the respondent was entitled to maintenance, however, the so far as the quantum is concerned, *prima facie*, dependency on the appellant and his income capacity is required to be considered. After analysing the aspects relating to quantum of maintenance, the Court was pleased to reduce the maintenance amount to Rs.6,000/-, per month from the date of the D.V. Petition. The Court has observed that though the petitioner is bound to subscribe some amount towards GPF, it cannot be huge amount of Rs.14,000/- per month, which reveals the intention of evading maintenance amount. Though the pay slip reveals Rs.6397/-, net

gross pay of the petitioner is Rs.20,915/- and the interim maintenance is required to be provided considering the maintenance of Rs.2,200/-, to be provided to the earlier wife, and after considering the compulsory reductions/deductions. The Court noted that the maintenance of Rs.10,000/- was exorbitant in the light of the factual aspects in the present matter. The appellate Court has also dealt with the contention of the petitioner that the D.V. Petition was filed in the year 2012, whereas, the impugned interim order came to be passed in the year 2015 and, as such there was no urgency for the respondents to have any interim monetary relief. The Court observed that no material was produced by the appellant to ascertain as to who has caused delay in hearing of interim relief. It was further observed that the copy of Fatwa is in Urdu language and its translation was annexed thereto. The appellant has not filed affidavit of the translator to *prima facie* make out the sanctity of the contents thereof. The respondent had not submitted that she has been divorced by the appellant at any time. Under such circumstances, the communication of pronouncement of Talaq was required to be *prima facie* made out. Apart from such factual proof of pronouncement of Talaq it is necessary to consider that the status of the aggrieved person under the D.V. Act in relation

to her marriage and divorce is not relevant. The Court relied upon the decision of the Supreme Court in the case of ***Zuveri Abdul Majid Patni Vs. Atif Iqbal Mansoori***. It was further observed that in the present case, the respondent have made allegations of harassment by the appellant and the pronouncement of Talaq which was allegedly done on 16th May, 2012, is after the wife was driven from matrimonial home on 13th May, 2012. *Prima facie* the act of the appellant who had pronounced Talaq after causing harassment amounts to domestic violence. I do not find any reason to deviate from the findings given by the Appellate Court

10 Section 23 of D.V. Act provides for interim relief to be granted by the Court if satisfied that *prima facie* case of domestic violence being caused to the applicant is made out in the application. In the present case, D.V. Petition is presented to Protection Officer in prescribed form and it reveals the instances of domestic violence. Such instances, are further substantiated by the affidavit filed by the respondent under Section 23(2) of the D.V. Act. It is revealed from the submissions that the respondent is married to the petitioner on 21st November, 2010, and she was assaulted and abused by the petitioner. However, she remained

silent to keep peace in the matrimonial relations. It is also revealed that the petitioner had suppressed the fact that he is already married to other woman. The Appellate Court had observed that the appellant in the reply did not specifically disclose his monthly income and merely denied the claim of the original applicant. The salary slip was produced before the trial Court for the month of May 2011 and July 2015. The pay slip for the month of July 2015, shows that the gross salary of the petitioner was Rs.20,915/- with total deduction of Rs.14,518/-. The modified order passed by the Sessions Court do not require any interference. The advocate for the petitioner had tendered document relating to loan, LIC premium, GPF subscription. Whereas advocate for respondent tendered written submission along with decisions of Court.

11 In the case of ***Shailkumari Devi (Supra)***, which is relied on by the petitioner the Court dealt with issue whether while deciding an application under Section 125 of the Code, the Magistrate is required to record reasons for granting maintenance from the date of application. It is observed that for awarding maintenance from the date of application, express order is necessary, however, no special reasons are required to be

recorded by the Court. It was also held that while deciding an application under Section 125 of the Code, a Magistrate is required to record reasons for granting or refusing maintenance to wife, children or parents. Another decision relied upon by advocate for petitioner in the case of ***Kalyan Dey (Supra)*** was relating to order of maintenance passed by High Court in Review Petition. It was observed that maintenance is always depending on the factual situation of the case and Court would be justified in moulding the claim on various factors. Learned counsel for the respondent placed reliance on the decision of the Delhi High Court in the case of ***Annurita Vohra Vs. Sandeep Vohra (Supra)***, wherein it was observed that the Court must first arrive at the net disposable income of the husband or the dominant earning spouse. If the other spouse is also working, these earnings must be kept in mind. This would constitute the Family Resource Cake which would then be cut up and distributed amongst the members of the family. The apportionment of the cake must be in consonance with the financial requirements of the family members, which is exactly what happens when the spouses are one homogeneous unit. The satisfactory approach would be to divide the Family Resource Cake in two portions to the husband since he has to incur extra expenses in the course of

making his earning, and one share each to other members. In another decision of Allahabad High Court relied upon by the counsel for the respondents delivered in the case of ***Veena Panda @ Seema Panda Vs. Devendra Kumar Panda (Supra)***, it was observed by the Court that as long as matrimonial ties subsists between the parties, the wife is entitled to live in the matrimonial house or in a separate building. The wife should not be relegated to a lower standard of living than that the husband enjoys. She should be given maintenance according to status of her husband. While considering the question of '*maintenance pendente lite*' under Section 24 of the Hindu Marriage Act its definition as given in Hindu Adoption and Maintenance Act should be adopted and some significant points should necessarily be taken into account such as position and status of the parties, reasonable wants of the claimant, towards food, clothing, shelter and medical attendance, income of the respondent, income, if any, of the claimant, number of persons the respondent is obliged to maintain. In another decision of the Delhi High Court in the case of ***Harminder Kaur Vs. Sukhwinder Singh (Supra)***, it was observed that One could not be oblivious to the fact that equal status has been given to Indian women under Articles 14 and 16 of the Constitution. Wife has to live according to the status of her

husband. In the decision of **Anup Varadpande Vs. Anisha Anup Varadpande (Supra)**, this Court has observed that what is contemplated to be income in any provision for grant of interim maintenance, be that under Section 24 of the Hindu Marriage Act, Section 18 of the Hindu Adoptions and Maintenance Act, Section 20(1)(d) of the Protection of Women from Domestic Violence Act, 2005, under Section 125 of the Criminal Procedure Code, or any other similar legislation is that the wife, of her own volition, and upon her educational or professional qualifications, pursues a settled career either by way of service or profession or business in which she derives her own independent, separate income or otherwise earns income by way of investments, rents, profits or the like from any settled source of income. The sufficiency or otherwise of such income is required to be seen and calculated to grant or reject her claim of maintenance.

11 The Apex Court in the case of **Shamima Farooqui Vs. Shahid Khan¹⁴**, has observed that the obligation of the husband is on the higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is

14 (2015) 5 SCC 705

deprived of many comfort. Some time her faith in life reduces. Sometime she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance. Grant of maintenance to wife has been perceived as a measure of social justice.

12 In the case of ***Sukumar Pawanlal Gandhi Vs. Bhakti Sushil Gandhi (Supra)***, this Court has laid down the requisite procedure for a claim of interim relief. It was observed that Sub-section (1) of Section 12 of D.V. Act, is a salutary provision which enables not only the aggrieved person but a Protection Officer or any other person on behalf of the aggrieved person to present an application to the Magistrate seeking one or more reliefs under the D.V.Act. Sub-section (3) of Section 12 contemplates that every application under Sub-section (1) shall be in such form and contain such particulars as may be prescribed. Accordingly, Rule 6 of the Protection of Women From Domestic Violence Rules, 2006, prescribes a form of application

under Sub-section (1) of Section 12 and a form of affidavit under Sub-section (2) of Section 23. Factual detailed averments are not at all required to be made. Thus, Clause 1 provides only for information as to whether the applicant is an aggrieved person or a Protection Officer or any other person acting on behalf of the aggrieved person. Clause 2 contains a list of prayers and Clause 3 of the prescribed form only gives a list of orders which are required to be passed. Clause 4 of the form requires details of previous litigations, if any. When an interim relief is claimed, an affidavit in prescribed form is required to be filed. Clause 9 of Form III requires the Applicant to specify the threat given by the Respondent. Even going by the said form, it is not necessary to make detailed averments therein. Therefore, if an application is made under Sub-section (1) of Section 12 in Form II under the D.V. Rules, or any affidavit in support is filed in Form III of the D.V. Rules, the same need not contain detailed averments on facts. It is not necessary to incorporate factual averments therein making out a case that a particular act or omission or conduct of the respondent constitutes a domestic violence within the meaning of Section 3 of the D.V. Act. It is a matter of inquiry to be made by the concerned Court before which reliefs under the D.V. Act are sought. In the case of ***Vishal Damodar Patil Vs.***

Vishakha Vishal Patil (Supra), the respondent therein had filed an application under the Domestic Violence Act and the trial Court had passed an order directing the husband to pay interim maintenance. It was contended by the husband that in the absence of any interim application being made by the first respondent, there was no occasion for the Magistrate to consider prayer for grant of interim relief. However, the said contention was rejected by this Court and it was observed that there need not be any separate application for interim relief made by the aggrieved person. In the case of ***Saroj Hegde (Supra)***, it was held by Delhi High Court that, while considering the claim of interim maintenance, the Court has to keep in mind status of parties, reasonable wants of applicant, income and property of both parties. The Supreme Court in the case of ***Jaiminiben H. Vyas Vs. Hirenbai R. Vyas (Supra)***, has observed that there was no evidence of having an independent income during the period the parties lived as husband and wife. Thus, the order of the High Court was reversed and the husband was directed to pay maintenance from the date of application.

13 In the light of the principles enunciated in several decisions and considering the factual aspects involved in

this matter, and, for the reasons stated above, there is no reason to interfere in the impugned orders. The Court is also justified in granting maintenance to the respondent from the date of the petition under the Domestic Violence Act. Hence, the petition fails and the same is required to be dismissed.

14 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Writ Petition No.2070 of 2016, stands dismissed;
- (ii) Criminal Writ Petition, stands disposed of.

(PRAKASH D. NAIK, J.)