

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

CRIMINAL REVISION APPLICATION NO. 236 2013

- | | |
|---|-------------------|
| 1. Amir Jainul Hajari, |) |
| Age 33 years, Occupation : Agriculturist |) |
| |) |
| 2. Shabbir Jainul Hajari, |) |
| Age 44 years, Occupation : Agri. & Service, |) |
| |) |
| 3. Sou. Hasina Shabbir Hajari, |) |
| Age 39 years, Occupation : Household, |) |
| |) |
| 4. Smt. Maimunbi Jainul Hajari, |) |
| Age 64 years, Occupation : Household, |) |
| Nos. 1 to 4 R/o. Mauje Vadgaon, |) |
| Taluka : Hatkanangale, |) |
| District : Kolhapur. |)... Applicants. |
| Vs. | |
| 1. The State of Maharashtra, |) |
| (Notice to be served on the A.P.P., |) |
| High Court, Mumbai.) |) |
| |) |
| 2. Sou. Shabana Amir Hajari, |) |
| Age 29 years, Occupation : Household & |) |
| Service, R/o. C/o. Mehboob Madarsha |) |
| Makandar, 2454, D, Shukrawar Peth, |) |
| Kolhapur. |)... Respondents. |

Mr. Prasanna Shahane h/f Mr. Milind Deshmukh, for the Applicants.
Ms. S. S. Kaushik, APP for the Respondent No.1/State.
Mr. Abhijit M. Adagule for Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : OCTOBER 30, 2018.

JUDGMENT :

1. By the present Criminal Revision Application, the applicants have challenged judgment and order dated 12th April, 2013 in Criminal Appeal No. 92 of 2011 passed by the learned Additional District Judge-1, Kolhapur. By the impugned order the learned Judge had dismissed the Appeal preferred by the applicants against the judgment and order dated 10th March, 2011 passed by the Judicial Magistrate First Class No.5, Kolhapur in Misc. Criminal Case No. 5 of 2010. Against the same judgment and order of the learned JMFC the Respondent No. 2 herein had preferred Criminal Appeal No. 98 of 2011 which was partly allowed. By the clause 3 of the operative part of the order, the learned Ad-hoc Sessions Judge-1 directed the applicant No.1 to reside separately with Respondent No.2 and to desist from committing domestic violence. In the alternative if the residence arrangement were not made, applicant No.1 was directed to pay Rs.3,500/- per month.

2. The facts, according to the Respondent No.2, in brief, are as follows;

The Respondent No.2 had filed complaint under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as D.V. Act), in the Court of JMFC Court No.5, Kolhapur against the applicants. The applicant No.1 is the husband of

Respondent No.2. The applicant No.2 is the brother of applicant No. 1. Applicant No.3 is wife of the applicant No.2. Applicant No.4 is mother of applicant Nos. 1 and 2 and applicant No. 5 is the sister of the applicant Nos. 1 and 2.

3. The Respondent No.2 had filed a complaint for relief under Section 18 and 20 of the D. V. Act. The Respondent No.2 had prayed for maintenance amount of Rs.10,000/- from the applicant No. 1.

4. Respondent No.2 in her complaint, has stated that, after her marriage, she started residing with the applicant. From the very beginning, the applicant No.2 had immoral intentions and he desired to establish physical relationship with the Respondent No.2. According to her, the applicant No.1 was afraid of the applicant No.2 and though she informed the applicant No.1 about applicant No.2's misbehaviour, he ignored her and asked her to keep quiet. It is further her case that the applicants tried to set her on fire on 07/06/2009. She has also alleged that when she was pregnant, the applicant Nos.1 and 2 gave her medicines forcibly for abortion. The applicants forcibly admitted her to the dispensary of Dr. Chougule and tried to give the electric shock treatment. The applicants tried to prove that she was mentally ill. Because of all these incidents she started residing with her parents from 27th July, 2009. Thereafter, the applicants used to make telephonic calls and used to tell her to agree for divorce from applicant No.1. The

applicant No.2 used to call her and used to utter filthy words and used to threaten her. She has stated in her complaint that the applicant No.1 had committed murder of his first wife by giving electric shocks to her. She has further stated in her complaint that the applicant No.1 was a Doctor earning Rs.1,000/- per day. According to her, the applicants were financially well off and she herself was financially poor. In her complaint she has referred to meeting dated 11th December, 2009 wherein, the matter was tried to be settled with the help of common relatives but the efforts failed and the applicants again started harassing the Respondent No.2. She has further stated that she was willing to reside with the applicant No.1 but he had deserted her and had not made any provision for her and accordingly she had filed this complaint.

5. After the complaint was filed the learned JMFC called for report of the protection officer. After receipt of the report from protection officer, the learned JMFC held that there was sufficient evidence to proceed against the applicant and issued notice to the present applicants by his order dated 4th February, 2010 passed in Misc. Application No.5 of 2010. The learned JMFC by his order dated 4th August, 2010 referred the parties for mediation. However, the mediation failed. Therefore, the matter proceeded further before him. During the proceedings Respondent No.2 led her evidence by filing

affidavit in the form of examination in chief. In the said affidavit she has reiterated her statements and contentions made in her complaint. She was cross examined on behalf of the present applicants. She was mainly cross examined on the point that she was unwilling to help the other family members in the household work and work in respect of their cattle, agricultural land etc.. She has admitted in her cross examination that there was no criminal prosecution pending against the applicant No.1 in respect of death of his first wife. Respondent No.2 herself had not made any complaint in respect of the incident dated 7th June, 2006 wherein, according to her, she had suffered burn injuries and applicants had tried to set her on fire. She had also admitted that she had not made any complaint about the incident when she was forced to consume medicines for causing abortion. She had not made any complaint in respect of the misbehaviour of applicant No.2 with her and she had not made any complaint about the electric shock treatment given in dispensary of Dr. Chaugule. She has admitted that she was willing to reside with the applicant No.1 but only on the condition that the applicant No.2 should not reside with them. She was also cross examined on the earning capacity of the applicant.

6. On behalf of Respondent No.2, one more witness was examined. The witness No.2 one Kadar Malbari was the administrator of Mohamedan Education Society, Kolhapur. In his affidavit in the form

of examination in chief he has stated that they tried to settle the family matter between the parties, but their effort failed. This witness was a mediator of marriage between the Respondent No.2 and applicant No.1. He has stated that the Respondent No.2 had complained time and again about misbehaviour of applicant No.2. He has produced the certificate at Exh. 25. The said certificate is dated 11th December, 2009 wherein it is mentioned that the applicant No.1 was completely under thumb of his brother applicant No.2 and their sister. It was also mentioned in the said certificate that there was no substance in the allegations made by the applicant against the Respondent No.2. This certificate is dated 11th December, 2009. In his cross examination the witness has stated that the certificate was given after about two and half months from the last meeting for settlement.

There is some controversy about this date of the meeting and the date of the certificate. According to the complainant this meeting had taken place on 11th December, 2009 itself. Therefore, statement of this witness that the certificate was given after two and half months from the date of meeting does not appear to be correct.

7. The applicants, on their part, denied all the allegations made by Respondent No.2 in their reply. Each one of them filed an independent affidavit in the form of examination in chief. They were separately cross examined on behalf of the Respondent No.2. Their

consistent stand was that all the allegations made by Respondent No.2 in her complaint were false. None of the incidents mentioned in her complaint had ever taken place. According to them the Respondent No.2 herself was feigning illness and used to harass the other family members. She used to frequently go to her parental house on the ground of illness. The applicant alleged that the Respondent No.2 used to say that she was possessed by applicant No.1's first wife. The Respondent No.2 thus used to harass applicant No.1. All the applicants were cross examined. They denied that their contention was false. The applicant No.2 specifically denied about his immoral behaviour. They had also denied about the contention of the Respondent No.2 that they were in good financial condition. The applicant Maimunbi stated that she and other daughter in law were present in the house even during the day and neighbours used to regularly visit to watch television and therefore, it was not possible that the applicant No.2 could misbehave with the Respondent No.2. Same stand was taken by the applicant No. 1 and he had denied all the allegations against him and he specifically denied that the Respondent No.2 had complained to him about the behaviour of the applicant No.2. According to him, he was treating the patients by Naturopathy. He has denied the suggestion that he was financially well off.

8. Apart from the applicants themselves they examined other

witnesses. Dr. Shakil Mohd. Mahabari was one of such witnesses. He had tried to bring about the settlement between applicant No.1 and Respondent No.2. In his affidavit in the form of examination in chief, he has stated that in the meeting, Shabana had become aggressive. She persistently declined to reside with the applicant No.1. In the cross examination conducted on behalf of the Respondent No.2, he has stated that he had treated the Respondent No.2 on couple of occasions when she was suffering from cold and cough, but he did not remember the dates.

9. Another witness Bhupal Magdum was a neighbour of the applicants. In his affidavit he has stated that Respondent No.2 used to go to her parental house on the pretext of illness. She used to unnecessarily shout and used to behave adamantly to avoid household work. According to him, he and others had tried to convince her that she should behave properly but she refused and started residing at her parental house. In his cross examination he has categorically admitted that when he had enquired with the applicant No.1 about Respondent No.2's illness at that time, applicant No.1 had informed that for medical treatment she used to go to her parental house. He has admitted that even when the Respondent No.2 had gone to her parental house, she has continued making allegations against the applicant No.2.

10. The next witness Kutubuddin Multani was another neighbour of the applicants. He has made the same statements as those made by the witness Bhupal Magdum. In his cross examination he has categorically admitted that when Shabana was residing with the applicants, she had suffered burn injuries. However, he denied the suggestion that the applicants had tried to set her on fire. According to this witness, she had suffered burn injuries accidentally. He has further deposed that he was not aware as to what treatment was given to her for the same.

11. After recording the cross examination of the witnesses and considering the material before him, the learned JMFC partly allowed the application of the Respondent No.2. The learned JMFC directed the applicant No.1 to pay Rs.1,500/- per month from the date of the filing of complaint. While discussing the contention of the parties, the learned JMFC observed that most of the allegations made by the Respondent No.2 were not proved. He has observed that in respect of forced abortion, the Respondent No.2 has not lodged any complaint neither has she examined any witness like her mother who could have established such facts. He further observed that in respect of all the other allegations of physical misbehaviour, no complaints were ever lodged by the Respondent No.2. He has further observed that it was also not believable that applicants attempted to give her electric shock

in the dispensary of Dr. Chougule and there was no evidence to that effect. The allegations against the applicant No.2 about his immoral behaviour were not believed by the learned JMFC. The evidence of the witnesses Bhupal Magdum, Kutubuddin Mulani was accepted. The Learned JMFC held that the evidence of Respondent No.2's witness Kadar Malbari and in particular the certificate at Exhibit 25 were not reliable. Having observed this, the learned JMFC still held that if the Respondent No.2 was residing at her parental house for whatever reason, still it was the legal duty of the applicant No.1 to make provision for her well being. The failure on his part in that behalf amounted to domestic violence and on this basis the learned JMFC held that the allegations of commission of domestic violence is proved. He has further held that the Respondent No.2 was not entitled for any protection order under Section 18 of the D.V. Act. Considering the financial capacity and the standard of living according to the learned JMFC the amount of Rs.1,500/- per month met the ends of justice. With these reasons, the learned JMFC passed his order.

12. This order was challenged by both the parties. The Respondent No.2 preferred Appeal No. 98 of 2011 and the applicants preferred Appeal No. 92 of 2011 in the Sessions Court at Kolhapur. The applicants' Appeal was dismissed and the Respondent No.2's Appeal was partly allowed. The applicant No.1 was directed to reside

separately with the Respondent No.2 and was restrained from committing any act amounting to domestic violence. In the alternative, he was directed to pay amount of Rs.3,500/- per month from the date of order of the Appeal.

13. The Appellate Court held that the Respondent No.2 had proved that the applicant had committed domestic violence and she was entitled for an order under Section 18 of D.V. Act. The Appellate Judge observed in paragraph 13 of his judgment that the applicant No.1 had accepted in cross examination that the Respondent No.2 had complained to him about the misbehaviour of the applicant No.2. The learned Judge observed that since, the applicant No.1 did not pay heed to such complaint and since he appeared to be under thumb of applicant No. 2, this act amounted to domestic violence.

14. This observation in respect of acceptance by the applicant No.1 that the Respondent No.2 had made complaint to him is not factually correct. The cross examination of the applicant No.1 reveals that he has denied the suggestion that the Respondent No.2 had made any such grievance to him.

15. The appellate Judge however, held that even when Respondent No.2 was not keeping well, the applicants did not provide any medical help and she had to go to her parental house for medical treatment. The learned Judge observed that the applicants were

attempting to prove that the Respondent No.2 had lost her mental balance. The learned Judge believed the evidence of Respondent No.2's witness Kadar Malbari and accepted the certificate at Exhibit 25. Based on this reasoning, the learned Appellate Court held that the allegations made by Respondent No.2 were proved. The learned Judge thereafter considered the contention in respect of the financial condition of the parties. He held that the applicants had agricultural land, cattle and applicant Nos.1 and 2 were well off and therefore, considering the standard of living and the basic requirements, fixed the maintenance amount at Rs.3,500/- per month from the date of order of the Appeal. This order of Additional District and Sessions Judge, Kolhapur in Appeal No.98 of 2011 is challenged in the present Revision Application by the applicants.

16. I have heard Shri Shahane and Smt. Kaushik, the learned APP for the State. Shri Shahane submitted that the learned Sessions Judge erred in partly allowing the respondent No.2's Appeal. He submitted that the learned JMFC had held that all the allegations made against the applicants were false. The Appellate Court did not take into consideration this reasoning of learned JMFC and had not given any independent reasons to explain as to why the reasoning of the learned JMFC is not accepted. He further submitted that inspite of his own reasons the learned JMFC erred in granting maintenance to the

Respondent No.2 and the learned Additional Sessions Judge further erred in enhancing the same. He submitted that directing the applicant No.1 to reside together with Respondent No.2 in separate house away from his joint family including his old mother was beyond the scope of Section 18 of D. V. Act. He further submitted that none of the allegations against any of the applicants was proved and therefore, the Respondent No.2 was not entitled for any protection under the D. V. Act including the directions to pay maintenance. On the other hand, Mr. Adagule for the Respondent No.2 submitted that the reasoning given by the learned Additional Sessions Judge was proper and did not call for any interference. He submitted that, in the past, all the efforts of settlement and mediation failed because of the adamant approach of the applicants. He submitted that it was difficult to procure conclusive evidence in respect of incidents occurred in the applicants' house but that should not come in the way of the Respondent No.2 in seeking justice from the Court. He submitted that the order directing the payment of Rs.3,500/- was proper. He submitted that even today respondent No.2 is willing to reside with the applicant No.1 provided he stayed separately from applicant No.2. He has submitted that requirements of provisions of D.V. Act are sufficiently proved against the applicants and therefore, it was not necessary to interfere with the order of the learned Additional Sessions Judge.

17. With the help of the counsel for the parties, I have gone through the record record of the case and I have perused the judgment of both the Courts below.

18. In her complaint and in her evidence, the Respondent No.2 has made various allegations viz. immoral conduct of the applicant No.2, forceful abortion by giving medicines, setting on fire, not giving her proper medical treatment, trying to give her electric shocks in the medical dispensary etc. The learned JMFC was justified in observing that the Respondent No.2 could have substantiated these allegations by at least examining her near relatives.

19. In respect of incident of giving electric shocks in the medical dispensary of Dr. Chougule, it is difficult to believe she was forced to undergo such treatment and yet she did not lodge any complaint with any authority. The Respondent No.1 did not examine Dr. Chougule in whose dispensary this incident had occurred. She could have make complaint to the police who could have investigated such incident. It appears to be quite a serious allegation. However, this allegation is not successfully proved by the Respondent No.2.

20. In so far as the allegation against the applicant No.2 are concerned, the learned Additional Sessions Judge has observed that the applicant no.1 in his cross examination had admitted that the Respondent No.2 had made grievance to him about the applicant

No.2's behaviour. However, this observation is contrary to the record and the applicant No. 1 has not accepted any such suggestion. In fact he has denied the suggestion that the Respondent No.2 had made any such grievance. There is some substance in the arguments on behalf of the applicants that the mother in law and sister in law of the Respondent No.2 were always present in the house. It was rather difficult that such incident could have occurred. Importantly, the Respondent No.2 had not made any such complaint to the neighbours or even to her mother. She had not examined any family members to show that she used to make such grievances. Thus, even this circumstance is not established by her. However, the circumstance which the Respondent No.2 is able to prove is, about the burn injuries suffered by her and lack of efforts on the part of the applicants to provide medical help. None of the applicants has referred to any such incident. However, their witness Kutubuddin has stated in his affidavit that the Respondent No.2 had suffered burn injuries. From the record it is clear that the applicants never took Respondent No.2 for treatment of such burn injuries. Therefore, this omission on their part amounts to domestic violence.

Section 3(a) and (d) of the D.V. Act read thus :-

"3. Definition of domestic violence.-- For the purposes of this Act, any act, omission or commission of conduct of

the respondent shall constitute domestic violence in case it --

(a) harms or injures or endangers the health, safety, life, limb or wellbeing, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b)....

(c)....

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person. Explanation

(1) - for the purpose of this Section, -

(i) “physical abuse” means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) ...

(iii) ...

(iv) ...”

These relevant provisions would indicate that the act on the part of the applicants and in particular on the part of the applicant No.1 not taking the Respondent No.2 for medical treatment for burn injuries can be termed as domestic violence caused by omission to provide her proper treatment and his conduct has clearly endangered the health of Respondent No.2. For the purpose of proving whether domestic violence is caused or not, the overall facts and circumstances can be taken into consideration as provided in Explanation (II) under Section 3. Therefore, in the instant case this act clearly falls within the definition of domestic violence.

21. Learned counsel Shri Shahane submitted that the complaint was filed under Section 12 for grievance under Section 18 and 20 of DV Act. He submitted that the impugned order passed by learned Sessions Judge was out side the perview of Section 18 of the DV Act. In my opinion, such submissions has no force, particularly in the light of the Section 19 of the DV Act.

Section 20 Sub-section (1) reads thus :-

“(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 not

limited to,-

(a).....

(b).....

(c).....

(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 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require."

22. Similarly, the Court while disposing of the application has power to pass the residence order under Section 19 of the D.V. Act. Sub-section (2) of Section 19 provides that the Magistrate can impose any additional conditions or pass any other direction which may be reasonably necessary to protect or provide for the safety of the aggrieved person or any child or such aggrieved person. Thus, the learned Additional Sessions Judge was well within his power to pass the operative part of the order.

23. Though the Respondent No.2 has not conclusively established the misbehaviour of the applicant No.2, the evidence and record shows that she was uncomfortable in residing under the same roof with the applicant No.2. Therefore, the learned Sessions Judge was justified in directing the applicant No.1 to reside separately with Respondent No.2 or in the alternative to provide the amount of Rs.3,500/- per month from the date of the order of the Appeal.

24. In view of the above discussion, I do not find any infirmity in the order passed by the Ad-Hoc District Judge-1, Kolhaur. Hence the following order.

ORDER

- i) The Revision Application is dismissed.
- ii) The interim stay passed in the present Criminal Revision Application stands vacated.

[SARANG V. KOTWAL, J.]