

ISM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****WRIT PETITION NO. 1999 OF 2009**

Mr. Nasir Maqbool Khatri
residing at A/2/410, Green Park,
Co-op. Hsg. Society, Opp. Sane
Guruji School, Santacruz (West)
Mumbai – 400 054.

.....Petitioner

V/s.

1. Kausar Ayub Querishi
residing at Flalt 504, A-4, "I"
Plot, Chunabhatti, Santacruz (West),
Mumbai 400 054.

2. The State of Maharashtra

....Respondents

Mr. S. G. Kudle for the petitioner.
Mrs. S. S. Kaushik APP for the State.

CORAM : NITIN W. SAMBRE, J.

RESERVED ON : MARCH 13, 2018.

PRONOUNCED ON : JUNE 4, 2018

ORDER

This petition is by husband questioning the order of

maintenance passed in proceedings in C.C. No. 151/M/2008 by the 32nd Court of Metropolitan Magistrate, Bandra on 17/04/2009 confirmed in Criminal Revision Application no. 761 of 2009 by the learned Sessions Judge on 15/06/2009.

2 The facts necessary for deciding the present petition are as under:

It is the case of the respondent no. 1 that provisions of section 12 of the Protection of Women from Domestic Violence Act, 2005 were invoked in view of discord between the respondent and the petitioner, who were married on 19/01/2007. Out of the said wedlock, a son was born. It is claimed that petitioner is a mason. It is further alleged that there was assault on the respondent. As the petitioner neglected to maintain her, the proceedings in question were set in motion under the provisions of D.V. Act. It is further claimed that source of income of the present petitioner is earning from contractorship with MHADA which is alleged to be around Rs. 1,50,000/- per month. It is also claimed that the maintenance of Rs. 10,000/- will be sufficient for the respondent and her daughter.

Considering the pleadings, amount of Rs. 10,000/- was awarded by the impugned order of the Magistrate passed on 17/04/2009. The learned Sessions Court in a revision dismissed the same. It is worth to note that though appeal under section 29 was maintainable, revision came to be filed. The learned Sessions Court re-appreciated the entire pleadings and noted that marriage in question is a second marriage of both the parties i.e. petitioner and respondent. It is also not in dispute that the respondent has delivered a male child out of the wedlock. It is also not in dispute that respondent-wife is not residing with the petitioner since January 2008.

3 In the aforesaid background, the learned counsel for the petitioner while questioning the order of the Magistrate and the learned Sessions Judge would urge that both orders viz. of the Magistrate's Court and the Revisional Court are not sustainable as the amount ordered is disproportionate to the known source of income. According to him, even if it is presumed that the petitioner

is a mason, still it is difficult for him to pay the maintenance of Rs. 5,000/- each i.e. total Rs. 10,000/- to the respondents. The petitioner would draw support from the copies of the income tax return. The plea of non availability of the provisions of the Protection of Women from Domestic Violence Act, 2005 to the respondent is also sought to be raised as according to petitioner, parties are governed by Muslim law. The learned counsel then would urge that as there is already a divorce on 07/08/2008 between the petitioner and respondent, proceedings are not maintainable. He sought quashing of the orders impugned.

4 *Per contra* the learned APP supports the order and would urge that both the courts below have properly considered the factual matrix and documentary evidence and proceeded to pass an order in the matter.

5 Considered rival submissions.

6 This court while referring the matter for mediation, observed that maintenance at the rate of Rs. 5,000/- be paid. The orders

dated 24/09/2009, 14/10/2009 & 20/09/2010 speak sufficient about accommodation granted to the parties *qua* settling the matter. However, no settlement is arrived at in spite of repeated adjournments.

7 The petitioner, pursuant to the orders of this Court has deposited an amount of Rs. 1,55,000/- in addition to Rs. 45,000/- towards arrears of maintenance.

8 This Court since 2009 has continued the interim relief in favour of the petitioner. None appears for the respondent.

9 The fact remains that neither Magistrate's Court nor the Sessions Judge has considered the issue of source of income of the petitioner-husband, his income tax returns and proceeded to pass an order of payment of maintenance. It is then to be noted that source of income of the petitioner being a contractor working with MHADA is not supported by any of the individual documents in the form of evidence.

10 Considering the fact that since 2009 till date, i.e. for last more

than 9 years, the petitioner is paying maintenance at the rate of Rs. 5,000/- to the respondent, it will not be appropriate to disturb the said position. As such, order of the Magistrate awarding maintenance of Rs. 10,000/- i.e. Rs. 5,000/- each to the respondents confirmed in revision by the learned Sessions Judge which is also impugned in the present petition, stood modified. The petitioner shall continue to pay amount of Rs 5,000/- towards maintenance to both respondents instead of Rs. 10,000/- till the disposal of the main complaint i.e. C.C. No. 151/M/2008 pending on the file of 32nd Court of Metropolitan Magistrate, Bandra. The learned Magistrate shall make every endeavour to decide the said complaint, keeping in view the litigation policy, as expeditiously as possible.

11 With above observations, petition stands disposed as partly allowed.

[NITIN W. SAMBRE, J.]