

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Writ Petition NO. 3056 OF 2018

Vijay Mukesh Sawardekar

...Petitioner

Versus

Dipali Vijay Sawardekar

And others.

...Respondents

....

Mr. Shailesh Pathak, Advocate for the Petitioner.

Mr. Manohar N. Kandalkar, Advocate a/w. Chaitanya Kotnis, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 25th OCTOBER, 2018

P.C.

1. Heard Mr. Shailesh Pathak, learned counsel for the petitioner and Mr. Manohar Kandalkar, learned counsel for respondent No.1, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner-husband has challenged the order dated 12.6.2018 passed by the learned Additional Sessions Judge, Greater Bombay in Criminal Appeal No.768/2017. By that order, the learned Sessions Judge allowed the appeal preferred by the first respondent-wife and set aside the order dated 17.11.2017 passed by the learned Metropolitan Magistrate, 13th Court, Dadar, Mumbai below Exhibit-8 in Criminal Case

No.72/DV/2017. The petitioner is directed to pay monthly interim maintenance of Rs.10,000/- from 25.5.2017 i.e. the date of filing of application Exhibit-8. He is directed to clear the arrears of maintenance in three equal monthly installments from the date of the order and go on paying monthly interim maintenance on or before 10th day of that month. In default, at the end of that particular month, the respondent-wife would be at liberty to execute the order in accordance with law. The petitioner is also directed to pay Rs.10,000/- towards the costs to the first respondent and bear his own costs.

3. In support of this Petition, Mr. Pathak has invited my attention to the findings recorded by the learned Magistrate while rejecting application Exhibit-8 filed by the first respondent. In paragraph-18, the learned Magistrate observed thus :

“18. The above facts and circumstances on record suggested that there are serious differences between the parties. They are levelling allegations against each other. Prior to filing of this proceeding the respondents took assistance of Mahila Manch and Office of Police Commissioner and ultimately instituted divorce proceeding against the applicant. Further, since the month of August, 2015 applicant is staying at her parental house. No case of applicant that since then any of the respondents indirectly or by coming to her parental house committed any act of violence. Regarding stridhan also there is serious dispute. In such circumstances, according to me, the material available on record is not sufficient to infer that the

applicant has, prima-facie, sustained domestic violence at the hands of respondents. That fact can be adjudicated after giving opportunity of adducing evidence to both the parties. As such the applicant failed to establish the fact of domestic violence on the part of respondents at this stage of the proceeding. Hence, I answer the point No.1 in the negative.”

4. Mr. Pathak invited my attention to paragraph-13 onwards of the Sessions Court's judgment. He submitted that after the learned Magistrate held that there is no domestic violence, the learned Sessions Judge was not justified in reversing that finding in the absence of any evidence. The Appellate Court had limited jurisdiction and in exercise of that jurisdiction, it cannot upset the finding recorded by the Court of first instance. He submitted that the petitioner is a jobless person and he has no source of income. He submitted that only on the basis of affidavits, the learned Sessions Judge has passed the impugned order. He invited my attention to Section 10 of the Protection of Women from Domestic Violence Act, 2005 (for short, 'D.V. Act') as also Rule 10 of the Protection of Women from Domestic Violence Rules, 2006 (for short, 'D.V. Rules') to contend that before recording finding as regards commission of domestic violence, the learned Sessions Judge ought to have appointed Service Provider. It is only upon receipt of Domestic Incident Report, the learned Sessions Judge could have recorded finding as regards commission of domestic violence. In the absence of

appointment of the Service Provider as also in the absence of Domestic Incident Report in the prescribed form, the learned Sessions Judge was not justified in holding that the petitioner is guilty of commission of domestic violence.

5. Mr. Pathak submitted that the petitioner has instituted Petition seeking divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955 against the first respondent some time in March, 2017. It is only thereafter in May, 2017, respondent No.1 has filed the proceedings under the D.V. Act. He submitted that since 2015, respondent No.1 is residing with her parents. As the first respondent is not residing with the petitioner, the learned Sessions Judge was not justified in holding that the petitioner is guilty of committing domestic violence. In support of this proposition, he relied upon the decision of this Court (Coram: Mrs.Roshan Dalvi, J.) dated 7.3.2013 in Criminal Application No.160/2011 [**Sejal Dharmesh Ved Vs. The State of Maharashtra and others**].

6. On the other hand, Mr. Kandalkar supported the impugned order and submitted that the learned Sessions Judge has observed that the learned Magistrate ought to have recorded a tentative finding about the instances of domestic violence. Merely because no oral evidence was adduced at the stage of considering the application for interim

maintenance, the application cannot be rejected. The application has to be decided on the basis of the pleadings of the parties supported by affidavits and other documents. Though no oral evidence is adduced, the statements on affidavit do not cease to be evidence for the purpose of determination of application of interim maintenance. He submitted that the learned Sessions Judge has observed in paragraph-17 that the petitioner has levelled serious allegations of illicit relations of the first respondent and in the absence of any proof, this is nothing but an act of domestic violence. He further submitted that in paragraph-18, the learned Sessions Judge has considered the financial position of the petitioner. The learned Sessions Judge also noted that though the petitioner-husband claims that he has no income still he is maintaining a bike and is also incurring medical expenses as also household expenses to the tune of Rs.12,000/- to Rs.15,000/- per month.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The matter was heard on 21.9.2018 and after hearing Mr. Pathak and upon making his statement that within two weeks the petitioner will deposit Rs.70,000/- in this Court, ad-interim relief in terms of prayer clause (C) of the Petition was granted. In pursuance thereof the petitioner has deposited Rs.70,000/- in this Court

vide D.D. No.665083 dated 27.9.2018. As mentioned earlier, the petitioner has instituted the petition for divorce under Section 13(1) (ia) of the Act. In paragraph-13, the petitioner has alleged that respondent No.1 has illicit relations with Mr. Sanket Sawardekar. A perusal of that Petition, however, shows that the petitioner has not even impleaded the person against whom serious allegations are made. Be that as it may. Insofar as the order passed by the learned Magistrate is concerned, in paragraph-18, extracted hereinabove, the learned trial Judge observed that from the material available on record it is not sufficient to infer that respondent No.1 has *prima facie* sustained domestic violence at the hands of the petitioner and his family members and the same is required to be tested only upon the evidence adduced by the parties during the trial.

8. As against this, the learned Sessions Judge has observed that the petitioner has made serious allegations of illicit relations against the first respondent. That itself constitutes domestic violence. Section 3 of the D.V. Act defines the expression "domestic violence". A perusal of that definition clearly shows that it is exhaustive. In view thereof, I do not find that the learned Sessions Judge has committed any error in recording a finding to the effect that *prima facie* the petitioner is guilty of commission of domestic violence.

9. While considering the question of interim maintenance, in paragraph-16, the learned Sessions Judge has noted that the petitioner's claim that he is jobless and he has no source of income still he is incurring of Rs.12,000/- to Rs.15,000/- per month towards his household expenses. In paragraph-18, the learned Sessions Judge noted the contention of the petitioner that respondent No.1 is working as a housemaid and earning Rs.7,000/- to Rs.8,000/- per month. After considering this contention, the learned Sessions Judge considered the amount spent by the petitioner on medical expenses, household expenses etc. After considering these expenses, the learned Sessions Judge estimated the monthly expenses of the petitioner as Rs.17,500/-. As against the claim of respondent No.1 of Rs.30,000/- per month, the learned Sessions Judge quantified the monthly maintenance at Rs.10,000/-. For the reasons recorded in paragraph-18, I do not find that the learned Sessions Judge has committed any error while quantifying the amount of interim maintenance.

10. Mr. Pathak contended that in (i) the absence of appointment of the 'Service Provider' under Section 10, (ii) in the absence of the report of domestic violence by the Service Provider, and (iii) only on the basis of the affidavit, the learned Sessions Judge was not justified in holding commission of domestic violence.

11. For the reasons recorded earlier, I do not find any merit in this submission. Mr. Pathak relied upon the decision of this Court in **Sejal Dharmesh Ved** (supra). A perusal of this decision shows that the facts obtaining in that case are materially different from the facts in the present case. In the present case, the petitioner has instituted the proceedings for divorce against the respondent and has made serious allegations against her. In view thereof, said decision is not applicable in the facts of the present case. Hence, Petition fails and the same is dismissed. Respondent No.1 is permitted to withdraw the amount deposited by the petitioner in this Court, unconditionally. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)