

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.695 OF 2019

- 1) Abhay Marutrao Jadhav
Age 40 years, Occu- Service,
R/o Shriram Apartment, First Floor,
Padma Nagar, In front of Basketball
Ground, Karnik Nagar,
Solapur, Dist. Solapur.
- 2) Maruti Devram Jadhav,
Age- 70, Occu- Pensioner and agri
- 3) Smt. Savitri Maruti Jadhav
Age-67, Occu- Nil
2 &3 R/o Khanapur, Tal. Shrirampur,
Dist. Ahmednagar.

... **PETITIONERS**

Versus

- 1) Vaishali Abhay Jadhav
Age-40, Occu-Beauty Parlour and
Fashion Designing
R/o Ward No.1, Behind Batra Hospital,
Dashmeshnagar, Shrirampur,
Taluka Shrirampur, District Ahmednagar.
- 2) The State of Maharashtra
Through Shrirampur Police Station

... **RESPONDENTS**

...
Advocate for Petitioner : Mr. Pathan Zafar M.
A.P.P. for Respondent-State : Mr. S.B. Joshi
Advocate for Respondent No.1 : Mr.V.P. Narwade
...

CORAM : MANGESH S. PATIL, J.
DATE : 24.09.2019

ORAL JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. The learned advocate Mr. V.P. Narwade waives service for the respondent no.1 and the learned A.P.P. waives service for the respondent-state. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The petitioners are the husband and his relations and the respondent is his wife. She initiated a proceeding under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter the 'D.V.' Act) and simultaneously submitted application (Exhibit-12) seeking ad interim maintenance under Section 23 of the D.V. Act. By the order dated 07.12.2018 the learned Magistrate rejected that application by observing that though the learned advocate for the respondent herein was present and was heard and in spite of having extended several opportunities the applicant therein i.e. respondent no.1 herein was not interested to argue the matter. She thereafter submitted the application (Exhibit-43) on 12.02.2019 and prayed to set aside the order of disposal of the application (Exhibit-12) and to issue witness summons for obtaining the salary certificate of the petitioner no.1. By the impugned order, the learned Magistrate allowed that application (Exhibit-43), directed restoration of the application (Exhibit-12) and also directed the

respondent no.1 to lead further evidence for deciding that application (Exhibit-12). The petitioners are challenging this order.

3. The learned advocate for the petitioner submits that the Magistrate had no power to set aside his own order passed on the earlier occasion dismissing the application (Exhibit-12). The learned advocate also adverted my attention to the fact that in spite of dismissal of this application (Exhibit-12), the respondent no.1 went ahead and examined a witness on 31.12.2018. The petitioner filed application (Exhibit-41) raising an objection on the ground that the application (Exhibit-12) was already dismissed and the order has reached finality and that the witness ought not to have been examined. It was requested that at least his cross-examination on behalf of the present petitioners be deferred till the respondent no.1 stepped in the witness box. After obtaining say of the respondent no.1 the learned Magistrate allowed that application. It is thereafter that the present application (Exhibit-43) was filed as an afterthought and even the learned Magistrate has illegally allowed it by the impugned order and therefore it may be quashed and set aside.

4. The learned advocate for the respondent no.1 submits that the application (Exhibit-12) was not decided on merits. Reasons were quoted in

the application (Exhibit-43) for recalling the order and for issuing witness summons to prove the salary of the petitioner no.1 so as to enable the Court to fix the ad interim maintenance being claimed by her. There was no apparent error or illegality in the impugned order.

5. As is apparent on the face of the record that, in spite of having dismissed the application (Exhibit-12), the Magistrate had allowed the respondent no.1 to go ahead with the recording of evidence apparently to bring on record the income of the petitioner no.1 obviously to enable it to fix the quantum of maintenance. Interestingly, even the witness was examined on 31.12.2018, even when the order rejecting the application (Exhibit-12) was in force. The petitioners by submitting the application (Exhibit-41) had brought it to the notice of the learned Magistrate that the application (Exhibit-12) stood dismissed and the order had reached finality since it was not challenged by the respondent no.1. A request was made to defer the cross-examination of the witness on behalf of the petitioners till the respondent no.1 stepped in the witness box. The Magistrate allowed this application and the learned advocate for the respondent no.1 had consented for such arrangement.

6. It is thereafter that the respondent no.1 filed the application

(Exhibit-43) on 12.02.2019. It was strongly objected to on behalf of the petitioners by their detailed say quoting all the aforementioned happenings. In spite of that, by the impugned order the learned Magistrate set aside the order passed by him on 07.12.2018 dismissing the application (Exhibit-12) and directed the respondent no.1 to lead further evidence.

7. There is no provision of review in the Criminal Procedure Code. The order dismissing the application (Exhibit-12) was also not challenged by the respondent no.1 independently. It had reached finality. In spite of such state of affairs, the Magistrate has allowed the respondent no.1 to examine the witness and it is thereafter that perhaps realising the mistake, the respondent no.1 filed the application (Exhibit-43) and even the Magistrate apparently made an attempt to correct the irregularity by the impugned order. The Magistrate has no such power to set aside the order which had reached finality. For this reason alone the impugned order is liable to be quashed and set aside.

8. Even on merits, the order dismissing the application (Exhibit-12) was passed after hearing the arguments of the learned advocate for the petitioners herein. Though the respondent no.1 was not present, it was specifically observed that in spite of opportunity the matter was not being

argued on her behalf.

9. The impugned order suffers from gross illegality and needs to be quashed and set aside.

10. The Writ Petition is allowed. The impugned order is quashed and set aside. The rule is made absolute.

[MANGESH S. PATIL, J.]