

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

CRIMINAL WRIT PETITION NO.692 OF 2018

Swapnil s/o Sudhakar Vispute
Age: 38 years, Occu.: Labour,
R/o: Yeshoda Nagar, Peth Road,
Mehardham, Sarthak Bunglow,
Behind Ganpati Temple, Nashik,
Tq. & Dist. Nashik.

...PETITIONER

Versus

1. Sau. Dipali (Pushpa) Swapnil Vispute
Age: 26 years, Occu.: Nil,
2. Ku. Dhanishta @ Shipra Swapnil Vispute,
Age: 05 years, Occu.: Education,
(Respondent no.2 is minor hence
notice to be served on the guardian mother)
Both R/o: Plot No.19, Transport Nagar,
Bhusawal Road, Jalgaon,
Tq. & Dist. Jalgaon.

... RESPONDENTS

Mr. M.R. Wagh, Advocate for the Petitioner.

Mr. K.B. Jadhavar h/f Mr. S.B. Bhapkar, Advocate for Respondent nos.1 & 2.

**CORAM : MANGESH S. PATIL, J.
RESERVED ON: 30.08.2019
PRONOUNCED ON: 25.09.2019**

JUDGMENT:

Heard. Rule. The Rule is made returnable forthwith. Learned advocate Mr. K.B. Jadhavar h/f Mr. S.B. Bhapkar waives service. On the request of both the sides the matter is heard finally at the stage of admission.

2. The petitioner is the husband of respondent no.1 and father of the respondent no.2. He is impugning the order passed by the learned Magistrate on his application (Exhibit-10) filed in Criminal Misc. Application No.979 of 2016 preferred by the respondents for recovery of maintenance awarded to them in Criminal Misc. Application No.455 of 2015 under Section 125 of the Code of Criminal Procedure. In addition he has prayed for quashing and setting the judgment and order dated 28.09.2016 passed in Criminal Misc. Application No.455 of 2015 and to remand it to the Magistrate to enable him to file his written statement and to contest it since it was decided ex parte.

3. The learned advocate for the petitioner submits that the respondents have been simultaneously claiming maintenance under two different proceedings for the same period. They had filed a proceeding under Section 12 of the Protection of Women from Domestic Violence Act, 2005 bearing Criminal Misc. Application No.225 of 2013 and by the judgment and order dated 29.03.2016 the learned Magistrate had allowed that application and the petitioner was directed to pay to the respondents Rs.4000/- and Rs.2000/- per month respectively as maintenance. This proceeding was initiated on 26.04.2013. Simultaneously, the respondents also filed Criminal Misc. Application No.455 of 2015 claiming maintenance under Section 125 of

the Code of Criminal Procedure which was filed on 09.06.2015 when the earlier proceeding was pending under the Domestic Violence Act. Without disclosing the decision in the Domestic Violence Act proceeding dated 29.03.2016 the respondents obtained the impugned judgment and order in a proceeding under Section 125 of the Code of Criminal Proceeding on 28.09.2016 whereby they were granted maintenance at the rate of Rs.2,500/- and Rs.1,000/- per month respectively. It is a settled law that a wife and children cannot be allowed to get maintenance in such separate proceedings thereby getting twice the amount to which they are otherwise entitled to. Their need would remain constant. At least the maintenance awarded to them in an earlier proceeding should be factored in while deciding the quantum of maintenance in a subsequent proceeding.

4. Since the respondents sought to execute the order passed under Section 125 of the Code of Criminal Procedure he had preferred the application (Exhibit-10) pointing out all the above facts and sought adjustment of the deposits made by him in execution of both these orders. However by the impugned order the learned Magistrate refused to take cognizance in spite of having pointed out several judgments of the Supreme Court and the High Court.

5. The learned advocate further submitted that the proceeding under Section 125 of the Code of Criminal Procedure was decided ex parte. He could not get any opportunity to contest it. Even the respondents did not bring it to the notice of the learned Magistrate the earlier decision in their favour in a proceeding under Section 12 of the Domestic Violence Act and now even the learned Magistrate has refused to intervene and calibrate the amount of maintenance. Therefore it would be just and proper to quash and set aside the judgment and order in the proceeding under Section 125 of the Code of Criminal Procedure and it may be remanded to enable him to contest it and to enable the learned Magistrate to calibrate the quantum of maintenance which would also enable the respondents to lead further evidence if they so choose to.

6. The learned advocate for the respondents submitted that in fact the Writ Petition is not maintainable particularly as far as the request for remand of the proceeding under Section 125 of the Code of Criminal Procedure is concerned. The petitioner ought to have preferred a revision under Section 397 of the Code of Criminal Procedure against that order before the Sessions Court. He having failed to do so, this Court under the writ jurisdiction cannot intervene.

7. The learned advocate for the respondents would further submit that, the petitioner in spite of having been served with notices in both the proceedings i.e. one under Domestic Violence Act and the other under Section 125 of the Code of Criminal Procedure failed to contest the matters which has resulted in decision of these proceedings. In spite of having an opportunity he had not availed it and has suffered both the orders which have become final. Therefore no such calibration as is sought to be done by the petitioner can be made. It is only in the execution proceeding that he filed the application (Exhibit-10) which has been rightly rejected by the learned Magistrate under the impugned order.

8. I have carefully gone through all the papers and the decisions cited on behalf of the petitioner. It is trite that a party may have a right under different statutes to claim a similar relief like the present one wherein the respondents have a right to claim maintenance under Section 12 of the Domestic Violence Act as well as under Section 125 of the Code of Criminal Procedure. However though such separate proceedings can be instituted, their need would remain constant. It is a matter of providing maintenance and therefore irrespective of the number of proceedings initiated under different statutes, the quantum of maintenance in aggregate should remain constant.

9. Obviously, when such decisions are rendered one after another awarding maintenance under different statutes, it is expected of the Court deciding the subsequent proceeding to take into account the quantum of maintenance awarded in the earlier proceeding. This would easily avoid any additional sum being paid to the person claiming maintenance which would be over and above his or her need.

10. Precisely this is what has happened in the matter in hand. Though the proceeding filed by the respondents under the Domestic Violence Act was decided on 29.03.2016, the fact of such decision was apparently not brought to the notice of the learned Magistrate who decided the proceeding under Section 125 of the Code of Criminal Procedure on 28.09.2016. There is absolutely no whisper in that judgment and order about such earlier decision and obviously the maintenance awarded to the respondents under the previous proceedings has not been referred to or factored in while directing the maintenance to be paid to them. In Domestic Violence Act proceeding they were directed to be paid Rs.4,000/- and Rs.2,000/- per month respectively w.e.f. 26.04.2013 and in proceeding under Section 125 of the Code of Criminal Procedure they have been directed to be paid Rs.2,500/- and Rs. 1,000/- per month respectively w.e.f. 09.06.2015. Thus in aggregate, they would be entitled to recover Rs.6,500/- and Rs. 3,000/- per month

respectively. This cannot be the intention of the legislature when under different statutes a provision of maintenance to the wife and children are made.

11. One can gainfully refer to several decisions which require such calibration to be made while deciding the quantum when successive proceedings under different statutes are decided. One can only refer to **Sudeep Chaudhary Vs. Radha Chaudhary; AIR 1999 Supreme Court 536** and the decision of this Court in Criminal Revision Application No.203 of 2017 (**Vishal Rajesaheb Gore Vs. Sow. Aparna Vishal Gore and Anr;**) (Aurangabad Bench) dated 13.06.2018. There are few other decisions as well but I do not feel it necessary to refer to them since they lay down a similar principle as has been laid down in the aforementioned two cases.

12. True it is that the petitioner has now been seeking to contest the proceeding under Section 125 of the Code of Criminal Procedure which has reached finality since he has not challenged the judgment and order by preferring any revision. In this Writ Petition now he is seeking a remand. In the normal course, this Court would be loath in entertaining any such request but for the peculiar facts and circumstances discussed herein-above. The petitioner had filed the application (Exhibit-10) in Criminal Misc. Application

No.979 of 2016 initiated by the respondents under Section 125 (3) of the Code of Criminal Procedure for recovery. He made a request to adjust the arrears deposited by him in the execution proceeding under the Domestic Violence Act bearing Criminal Misc. Application No.365 of 2016 but the learned Magistrate having refused the request he had to file this Writ Petition. It is during the pendency of this Writ Petition that by way of amendment he has sought to add the relief of seeking remand of a proceeding under Section 125 of the Code of Criminal Procedure.

13. In my considered view, when the law is well settled that the respondents cannot be allowed to simultaneously execute both the orders awarding them maintenance, when the proceeding under Section 125 of the Code of Criminal Procedure has been decided at latter point of time and they had not disclosed the earlier decision awarding them maintenance under the Domestic Violence Act proceeding, it would be just and proper and in the fitness of things to exercise the writ jurisdiction to quash and set aside the judgment and order in Criminal Misc. Application No.455 of 2015 and to remand it to the learned Magistrate for decision afresh by extending an opportunity to the petitioner to file his say and to decide it by taking into account maintenance awarded to the respondents under the Domestic Violence Act.

14. The Writ Petition is accordingly allowed. The judgment and order in Criminal Misc. Application No.455 of 2015 dated 28.09.2016 is quashed and set aside and the matter is remanded to the learned Magistrate for decision afresh by extending an opportunity to the petitioner to file his written statement. While deciding the proceeding the learned Magistrate shall take into account the quantum of maintenance decided in Criminal Misc. Application No.225 of 2013 under Section 12 of the Domestic Violence Act by the judgment and order dated 29.03.2016.

15. As a stop gap arrangement, the execution in both the proceedings, one under the Domestic Violence Act and the other under Section 125 of the Code of Criminal Procedure shall stand stayed subject to the Petitioner depositing an amount of Rs.50,000/- in Criminal Misc. Application No.455 of 2015 within a period of two months from today and continuing to pay to the respondents Rs.4,000/- per month and Rs.2,000/- per month respectively w.e.f. November, 2019 till decision of Criminal Misc. Application No.455 of 2015. The Rule is made absolute in these terms.

[MANGESH S. PATIL, J.]