

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

CRIMINAL WRIT PETITION NO. 938 OF 2018

Sau. Deepa w/o Ajay Jaiswal
Age : 33 years, Occu:Household,
R/o Plot No.1, J-3, N-7, CIDCO,
New Vinayak Krupa Housing Society,
Aurangabad

.. PETITIONER
(Orig.Applicant)

VERSUS

Ajay s/o Laxminarayan Jaiswal
Age : 42 years, Occu : Business
R/o : Ward No.2, A/P Virur Station,
Tahsil Rajura, Chandrapur
VRM Maharashtra

.. RESPONDENT

.....

Mr. I.G.Durrani, Advocate for the petitioner
Mr. Amit S. Savale, for respondent State .

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CORAM : MANGESH S. PATIL, J.
DATE : 16/10/2019

ORAL JUDGMENT :-

Heard both the sides. Rule. The Rule is made returnable forthwith.
With the consent of both sides, the matter is heard finally at the stage of
admission.

2] The petitioner is aggrieved by the judgment and order passed by the
learned Additional Sessions Judge in an Appeal preferred by the respondent

under Section 29 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the D.V.Act) thereby quashing and setting aside the order passed by the Magistrate in a proceeding initiated by her under Section 12 of the D.V.Act and awarding her and her children from the respondent interim maintenance at the rate of Rs.5000/- per month each under Section 23 of that Act.

3] The learned advocate for the petitioner vehemently submits that for the elaborate reasons assigned by the Magistrate he had found her and her children to be entitled to Rs.5000/- per month each under Section 23 of the D.V.Act. The learned Magistrate had taken into consideration the rival pleadings and had reached a plausible conclusion about the income of the respondent and need of the petitioner and her children. It is only after such objective assessment that by way of interim relief the maintenance was awarded. The order by no stretch of imagination was either perverse or arbitrary which could have enabled the appellate Court to intervene and reverse it.

4] The learned advocate for the petitioner further submits that the learned Additional Sessions Judge without assigning sufficient and cogent reasons, has allowed the appeal thereby replacing his opinion in place of the discretion exercised by the Magistrate. The learned Additional Sessions Judge has also failed to assign cogent and convincing reasons to refuse any maintenance to the petitioners. The impugned order therefore, is illegal and may be quashed and set aside.

5] The learned advocate for the respondent submits that the Magistrate

had failed to reach any conclusion regarding his income and based on surmises and conjectures arrived at some random figure of interim maintenance. There is absolutely no material before the Magistrate to come to any conclusion as to the exact income of the respondent and need of the petitioner and her children. Noticing all these facts, the learned Additional Sessions Judge has rightly interfered with and reversed the order passed by the Magistrate. There is no error in the impugned judgment and the Writ Petition may be dismissed.

6] The learned advocate would then submit that in fact there was no report under Section 11 of the D.V.Act before the Magistrate and in the absence of which no inference could have been drawn by him legally regarding there being any domestic violence in the absence of which no interim relief under Section 23 of the D.V.Act could have been granted. The learned advocate also placed reliance in the decision of this Court in Mr.Gurudas Sanvalo Naik s/o late Sanvalo Naik & Ors. Versus Mrs. Saanvi Gurudas Naik w/o Mr. Gurudas Naik; (2017) 11 L.J.Soft51 and Kaviraj Dattatray Muslonkar Versus Rachana Kaviraj Muslonkar; (2017) 4 Mh.L.J. (Cri) 356.

7] I have carefully gone through the judgments of both the Courts below and the papers. One need not resort to explain and understand the aims and objects of bringing the D.V.Act into effect. Admittedly for whatever reason the petitioner and the respondent who are wife and husband have been residing separately the couple has begotten 3 children out of the wedlock and all of whom are minors aged around 14 years, 12 years and 7 years. Obviously, since the children are in the custody of the petitioner, she must have been

required to spend for their education and daily needs. Needless to state that the proceeding initiated by the petitioner under Section 12 of the D.V. Act would reach finality in due course of time. However, the fact remains that though it has been filed way back in the year 2017 and by the impugned order passed on 2/7/2018, the learned Additional Sessions Judge having expedited hearing of the main proceeding, it has not even taken up for hearing for last more than 2 years. If such is the state of affairs, the very purpose of legislature providing some succor to the destitute wife under Section 23 of the D.V. Act would be lost, which could not have been the intent of the legislature.

8] It is not the case of the respondent about having made any provision for maintenance of the petitioner or their 3 children, since the day couple has separated. His only version is about he having paid around Rs.37000/- which is his version in the Written statement filed before the Magistrate. If such is the state of affairs, one can easily comprehend what hardships the petitioner and particularly the children must have been facing.

9] The submission of the learned advocate for the respondent and the contention of the respondent is that the father of the petitioner is well off. She has been running a beauty parlour. But it seems that his such stand is apparently a convenient excuse. He himself is not coming forward with any proposal to provide something to the petitioner and the children. This attempt of the respondent itself is eloquent enough and can be regarded as mental and physical abuse within the meaning of Section 3 of the D.V. Act.

10] The Magistrate had exercised the powers under Section 23 of the

D.V. Act as an interim measure. He had to resort to inevitable guess work based on whatever material was placed before him. Bearing in mind these aspects, the Magistrate has certainly considered that there is no dispute as to the relation between the parties and the fact that the couple has 3 children and she has been residing at her paternal home alongwith 3 children who have to take education.

11] True it is that the Magistrate has not precisely reached any conclusion as to the exact income of the respondent. However, one cannot lose sight of the fact that his Written Statement is equally vague and evasive. He has taken care to deny the averments in the application of the petitioner about his occupation and income but has conveniently omitted to come out with his own version. He is prompt in contending that the petitioner is running business and earning more than Rs.25,000/- to 30,000/- per month but has not come out with such disclosure about his own income. In one hand he has stated to have lend huge amount of Rs.9 lakh to the father of the petitioner but has conveniently omitted to state as to how could he lend them such a huge amount when he had no occupation or income. Though the learned Magistrate has not undertaken such scanning of the averments in the Written Statement but one cannot ignore those. It is only after taking into consideration all these aspects that adverse inference was available to be drawn against respondent about his occupation and income albeit the Magistrate has not resorted to guess work and has been reached at a random figure regarding interim maintenance. Needless to state that in view of such peculiar state of affairs some guess work was inevitable. The Magistrate seems to have found that the respondent had the capacity and the petitioner and their children needed Rs.5000/- per month each by way of interim

maintenance under Section 23 of the D.V.Act.

12] If such was the state of affairs when the matter was before the Magistrate one can but hold that the conclusion by the Magistrate demonstrates that he had exercised the discretion judiciously. If that was the case, the learned Additional Sessions Judge ought not to have interfered and replaced his own view in place of that of the Magistrate. Considering all the aforementioned facts and circumstances, the impugned order of the learned Additional Sessions Judge is quite perverse, arbitrary and capricious and deserves to be quashed and set aside.

13] The Writ Petition is allowed. The impugned order is quashed and set aside and the one passed by the Magistrate is restored. Rule is made absolute.

[MANGESH S. PATIL, J.]

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