

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

CRIMINAL WRIT PETITION 1761 OF 2018

Naziyabee Chanpasha Mulla
Age 28 years, Occu : Household
R/o Dalimb Tq. Omerga
Presently R/o : C/o Bashid Usman Shaikh
Sastur,Tq.Lohara, Dist.Osmanabad. .. PETITIONER
[Orig.Applicant]

VERSUS

- 1] Chandpasha Yakub Mulla
Age 31 years, Occu : Agril & Wireman,
- 2] Yakub Chandpasha Mulla
Age 65 years, Occu : Agri,
- 3] Madarma W/o Yakub Mulla
Age 58 years, Occu : Household
- 4] Ismail Gafur Bhadbhade
Age Major, Occu : Agri,
- 5] Kalimuddin Gulab Mujawar
Age : Major, Occu : Agri,
All respondents R/o : Dalimb
Tq.Omerga, Dist.Osmanabad. .. RESPONDENTS
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Mr.P.V.Barde h/f P.D.Sangvikar, Advocate for petitioners.
Mr.S.B.Choudhari, Advocate for respondents no.1 to 5.

CORAM : MANGESH S. PATIL, J.

DATE : 16/09/2019

ORAL JUDGMENT :

Heard. Rule in both Writ Petitions. The Rule is made returnable forthwith. The learned Advocate Mr.Choudhari waives service for respondents in both the Writ Petitions. With the consent of the parties, Petitions are heard finally at the stage of admission.

- 2] The petitioner has filed a proceeding under Section 12 of the

Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the D.V.Act) in the Court of Judicial Magistrate, First Class, Omerga against the respondents who are her husband and his relatives. In that proceeding she filed an application (Exh.14) under Section 21 of the D.V. Act and sought interim custody of her two minor sons. By another application (Exh.5), she prayed for interim maintenance under Section 23 of the D.V. Act. The respondents contested both these applications. The learned Magistrate allowed both these applications by the orders dated 21/8/2018 and 6/2/2018. The learned Magistrate directed respondents to hand over the custody of minor children to her and also directed them to pay her interim maintenance at the rate of Rs.4500/- per month.

3] The respondents challenged both these orders by preferring Criminal (PWDV) Appeal Nos.12/2018 and 11/2018 respectively under Section 29 of the D.V. Act. The learned Additional Sessions Judge by the impugned and order allowed both the appeals but directed the main proceeding to be expedited and decided within six months. Hence these two separate Writ Petitions impugning the orders passed in the Criminal Appeals.

4] The learned advocate for the petitioner submits that taking advantage of her precarious condition, the respondents have indulged in creation of some forged record just to deprive her of her right to claim maintenance and seek custody of her minor children. The alleged statement of her purportedly recorded by the police in fact does not bear her signature or the signature of her parents and brother. Similarly she has been forced to execute Khulanama. Serious imputations are being levelled against her about her chastity.

Her children are aged 7 and 5 years and being minor and she being mother the custody ought to have been given to her. She is unable to earn her livelihood and has been exclusively dependant on her parents. In spite of direction, main proceeding has not yet been decided finally. Ignoring all these facts and circumstances, the appellate Court has without sufficient basis overturned both the orders which were passed by the Magistrate assigning sufficient and cogent reasons. The appellate Court ought not to have indulged in scrutinizing record when the main proceeding was still not ripe even for hearing and only interlocutory orders were passed. The appellate Court having indulged in such scrutiny of the material has committed gross error which has resulted in miscarriage of justice. The petitioner cannot be expected to defend herself without being provided with some alimony. Even the children need her protection being a mother. Therefore, both the Writ Petitions be allowed and the impugned judgments and orders passed in Appeals may be quashed and set aside and the orders passed by the learned Magistrate be confirmed.

5] The learned advocate for the respondent submits that though the petitioner is disputing her statement recorded by the police, it would not be proper to jump to any conclusion as regards its veracity by comparing her signature and the one appearing on the statement. Similarly he points out that it is not the case that her statement bears only her signature. It also apparently bears signature of her father, thumb impression of her mother and signature of her brother. Her such statement recorded on 21/6/2017, after she had come back from Mumbai and after missing report was lodged by her husband, clearly reads that she had on her own left the matrimonial home alongwith her two sons and had gone to her paramour. It is only after

learning about filing of the complaint that he had sent her back to Omerga and on the next day i.e. on 21 June 2017, her statement was recorded in presence of her parents and brother wherein she made all these disclosures. At this stage this much of material was sufficient for the appellate Court to decide both the appeals. Veracity or otherwise of such record can only be judged during the course of the hearing of the main proceeding. However, this much of material was sufficient for the appellate Court to come to a conclusion that the petitioner had left her matrimonial home at her own will and was not a right person to claim custody of the minor children when she has been having an affair.

6] I have carefully gone through impugned judgments in both the appeals as well as the orders passed by the Magistrate.

7] Since admittedly the Magistrate had passed the orders at an interlocutory stage, it is only on the basis of the material available at that juncture that he could have arrived at some *prima facie* conclusion. Obviously no threadbare scrutiny was expected at that stage.

8] There was record to point out that the petitioner's husband had filed a missing report on 19/6/2017. It was recorded by the police as Missing Case No.7/2017. It is thereafter that apparently police recorded petitioner's statement on 21/6/2017 which not only bears signature of the petitioner but bears signature of her father and brother and thumb impression of her mother. In her such statement she admitted to have left the matrimonial home and to have gone to the person with whom she had an affair, who thereafter had sent her

back with her children. Obviously this is not the right stage to compare admitted signatures of the petitioner and the signature appearing on this statement. Similarly it would not be appropriate to comment upon veracity or otherwise of the statements made therein at this stage. Since it has been recorded by a Police Officer during the course of inquiry in respect of missing report registered with the police station, no fault can be found with the appellate Court in referring to this document which ought to have been referred to and commented upon by the Magistrate.

9] Be that as it may, without indulging into any further scrutiny of such record which may have some effect on the decision of the main proceeding, I find no sufficient and cogent reason to set aside the decision atleast to the extent of setting aside order passed by the Magistrate on the application (Exh.14) directing custody of the children to be handed over to the petitioner. The children though are minor, since the year 2017 they are in the custody of the respondents. There is apparently no material that the children are not being looked after properly. Therefore, to that extent I find no justifiable and cogent reason to interfere in the decision in the appeal.

10] As far as the interim maintenance is concerned, obviously petitioner does not have any source of income. In spite of direction by the appellate Court, the Magistrate has not decided the main proceeding within the stipulated time. It would therefore, be in the fitness of things to make some provision for her maintenance interregnum. Whether she would be entitled to claim any permanent alimony under the provisions of the D.V.Act is a matter which is better left for decision by the Magistrate after fulfilled trial.

However, not providing anything to the petitioner at all would not be just and proper.

11] Therefore, to this extent, in my considered view the impugned judgment and order in Criminal Appeal refusing to grant any maintenance to the petitioner is liable to be interfered with.

12] Criminal Writ Petition No.1762/2018 is dismissed.

13] Criminal Writ Petition No.1761/2018 is allowed partly. Respondent no.1 shall pay to the petitioner Rs.2000/- per month from the date of this Writ Petition i.e. 24/12/2018 till final decision in the proceeding before the Magistrate under Section 12 of the D.V.Act.

14] The Rule is accordingly made absolute.

15] The learned Magistrate shall decide the main proceeding on merits within four months. The parties shall cooperate the Magistrate.

(MANGESH S. PATIL,J.)

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