

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 220 OF 2019

Mr.Hamza Yusuf Shaikh

...Petitioner

Versus

Mrs. Zainab w/o. Hamza Shaikh & Anr.

...Respondents

Mr.Nilesh Tribhuvan a/w. Ms.Aarti Deodhar and Ms.Nidhi Chheda i/b.
Ms.Ashna Patel for the Petitioner.

Mr.A.N.Shaikh for Respondent No.1.

Mr.Vinod Chate, APP for Respondent No.2-State.

CORAM : S.S.SHINDE J.

DATE : 31.07.2019

ORAL ORDER

1. This petition takes an exception to the judgment and order dated 26.10.2018 passed by learned Addl. Sessions Judge, Sessions Court, Gr. Mumbai in Criminal Appeal No. 333 of 2018 arising out of the order dated 12.04.2018 passed by learned Metropolitan Magistrate, 69th Court, Mazgaon, Mumbai in C.C. No. 93/DV/2016.

2. Heard learned Counsel appearing for both the parties.

3. Learned Counsel appearing for the petitioner-husband invites attention of this Court to the pleadings and grounds taken in the petition, and submits that the trial Court contrary to the document placed on record, has directed the petitioner -husband to pay Rs. 15,000/- p.m. towards interim maintenance to respondent No.1-wife. In Criminal Appeal filed by the petitioner-husband, the Appellate Court mechanically endorsed the findings/reasons given by the trial Court. In fact, the petitioner-husband was out of employment at the relevant time and, therefore, he had no source of income. Both the Courts below have failed to appreciate the contentions of the petitioner-husband.

4. Upon appreciating the rival contentions and material placed on record, and the findings recorded by both the Courts below, it appears that salary certificate showing income of the petitioner -husband was placed on record by respondent No.1 -wife, and after appreciating the said document, the trial Court has directed the petitioner -husband to pay Rs. 15,000/- p.m. towards maintenance to respondent No.1-wife. It would be gainful to reproduce paragraph No. 11 from the judgment of the Appellate Court, which reads as under :

"11. Wife in order to show income of the husband produced salary certificate showing income of the husband as Rs.52,942/- issued by the Johnson Control India Pvt. Ltd. Amount awarded by the Trial Court is Rs. 15,000/-. Parties are resident of Mumbai. In the city like Mumbai, amount of Rs. 15,000/- cannot be said to be on higher side. Wife though she may be qualified, but being qualified is different thing from actual getting income. Whether she is intentionally avoiding earning money or she is not getting any job is a question of evidence. Further, wife is entitled for more money as claimed by her requires detailed evidence on the point of income of the husband, need of the wife. Matter at this stage is on interim maintenance. I also go through the judgment delivered by our Hon'ble High Court in the matter of **Abhijit Bhikaseeth Auti V/s State of Maharashtra and Another reported in 2008 SCC OnLine Bom 1388**. In this matter, Hon'ble High Court observe and summarise the conclusion to the question arise in that matter as under :

"1.) Following questions arise for consideration in this petition:-

(i) Whether an order passed on an application made under Section 23 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the said Act') is appealable under Section 2d of the said Act ?

(ii) Whether an appeal will lie under Section 29 of the said Act against every order passed by the learned Magistrate in proceedings initiated on the basis of an application made under Section 12 of the said Act?

(iii) What is the scope of an appeal under Section 29 of the said Act?

24) Thus, the conclusions which can be summarized are as under :

(i) An appeal will lie under Section 29 of the said Act against the final order passed by the learned Magistrate under sub-section (1) of Section 12 of the said Act;

(ii) Under sub-section (2) of Section 23 of the said Act, the learned Magistrate is empowered to grant an ex parte ad interim relief in terms of Sections 18 to 22 of the said Act. The power under sub-section (1) is of granting interim relief in terms of Sections 18 to 22 of the said Act. Before granting an interim relief under sub-section (1), an opportunity of being heard is required to be granted to the respondent.

(iii) An appeal will also lie against orders passed under sub-section (1) and sub-section (2) of the Section 23 of the said Act which are passed by the learned Magistrate. However, while dealing with an appeal against the order passed under Section 23 of the said Act, the Appellate Court will usually not interfere with the exercise of discretion by the learned Magistrate. The appellate Court will interfere only if it is found that the discretion has been exercised arbitrarily, capriciously, perversely or if it is found that the Court has ignored settled principles of law regulating grant or refusal of interim relief.

(iv) An appeal under Section 29 will not be maintainable against purely procedural orders which do not decide or determine the rights and liabilities of the parties".

5. In that view of the matter, since both the Courts below on appreciation of factual aspects and the document placed on record, have arrived at a conclusion that respondent No.1-wife is entitled for interim maintenance of Rs.15,000/- p.m. The conclusions reached by the Courts below appears to be in consonance with the material placed on record and, therefore, no interference is required in the impugned judgment passed by the Appellate Court. Hence, this Court is not inclined to entertain this petition and the same stands rejected.

6. In the peculiar facts of this case, the learned Metropolitan Magistrate, 69th Court at Mazgaon, (Sewree), Mumbai is directed to decide Case No. 93/DV/2016 as expeditiously as possible, however, within a period of three months from today. Parties shall extend full co-operation for early disposal of the said proceedings. The learned Magistrate shall not entertain the prayer for adjournments unless there is compelling reason for granting such adjournments.

(S.S.SHINDE, J.)