

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APL) NO.375 OF 2017

(SWAPNIL SARVESHCHANDRA KATTIYAR & OTH...VS.. SAU. VIJAYA (POONAM) SWAPNIL KATTIYAR)

 Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

 Shri U.J.Deshpande, Advocate for Applicants.

CORAM : Z.A.HAQ, J.

DATED : FEBRUARY 22, 2019.

CRI.APPLN.NO.247 OF 2019.

Considering the facts of the case and for the reasons stated in the application praying for grant of early hearing by fixed date, the application is **allowed**.

CRI. APPLN.NO. 375/2017.

Heard.

The non-applicant had filed application under Sections 12, 18, 19, 20, 21, 22, 23 and 24 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as “the Act of 2005”). During the pendency of these proceedings, the parties were referred for mediation. Simultaneously, the matter was listed before the Court on the dates as shown in the roznama. On 2nd November 2016, the applicant had filed an application (Exh.15) before the trial Court stating that the matter was got adjourned on behalf of the present non-applicant (wife) on one count or the other and inspite of several opportunities, the wife had failed to adduce evidence. The present applicants prayed that the

proceedings be dismissed. The learned Magistrate dismissed the proceedings in default on 2nd November 2016. On 4th November 2016, the advocate for wife filed an application (Exh.17) praying that the application which was dismissed in default be restored. The applicants had opposed this application. By order dated 9th February 2017, the learned Magistrate allowed the application (Exh.17) and restored the proceedings filed by the wife under the provisions of the Act of 2005. This order passed by the learned Magistrate on 9th February 2017 was challenged by the applicant before the Sessions Court in revision application. By judgment dated 12th May 2017, the learned Sessions Judge dismissed the revision application observing that the revision under Section 397 of the Code of Criminal Procedure was not maintainable and the order passed by the Magistrate on 9th February 2017 is appealable under Section 29 of the Act of 2005. This judgment passed by the Sessions Court and the order passed by the learned Magistrate on 9th February 2017 are challenged by the applicants in this application under Section 482 of the Code of Criminal Procedure. According to the applicants, the proceedings under the Act of 2005 are governed by the Code of Criminal Procedure and it being so, the Magistrate has no power to restore the proceedings dismissed in default. To support the submission, the learned Advocate for the applicants has relied on the judgment given by the Full Bench of this Court in the case of *Nandkishor Vs. Mangala*, reported in **2018 (3) Mh.L.J. 913**.

Per contra, relying on the judgment given in the case of *Kunapareddy Vs. Kunapareddy Swarna Kumari*, reported in **(2016) 11 SCC 774**, the learned Advocate for the non-applicant (wife) has submitted that the proceedings

under the Act of 2005 are predominantly of civil nature and though the proceedings are governed by the provisions of the Code of Criminal Procedure, as per Section 28 of the Act of 2005, the Court can lay down its own procedure for disposal of the application under Section 12 or Section 23(2) of the Act of 2005 and therefore, the Magistrate has not committed any error by restoring the proceedings which were dismissed in default.

It is further pointed out that the mediation was going on and there was no need for the non-applicant / wife to adduce evidence at the stage when the proceedings came to be dismissed in default. It is further pointed out that the matter was fixed on 7th November 2016 and not on 2nd November 2016 and there is scoring of date on the roznama.

After considering the rival submissions and going through the judgments refereed by the learned advocates, I am of the view that the nature of the proceedings filed by the wife under the provisions of the Act of 2005 would be predominantly of civil nature and it cannot be said that the trial Court will not have power to restore the proceedings which were dismissed in default. Even on facts, the submission made on behalf of the non-applicant/ wife that the matter was not fixed for 2nd November 2016 and she was not required to adduce evidence on that date as mediation proceedings were underway has to be accepted. Hence, the order passed by the learned Magistrate on 9th February 2017 cannot be faulted with.

The Criminal Application is **dismissed**. In the circumstances, the parties to bear their own costs.

CRI.APPLN. NO. 921/2017.

In view disposal of Criminal Application No.375 of 2017, this application praying for grant of time to file certified copy of order does not survive, hence, it is **disposed**.

JUDGE*RRaut..*