

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

CRIMINAL WRIT PETITION NO. 149 OF 2020

Gopal s/o Radhu Dahibhate
Age 66 years, Occupation : Pensioner
R/o. Shrimani Bhadra Estate
Flat No.701. 7th Floor,
Wakad Centre Building, Opp. Hotel Janjir
Pune.

.. PETITIONER
[Original opponent]

VERSUS

Sushila w/o Gopal Dahibhate
Age 61 years, Occupation : Household,
R/o Shrikrushna Nagar, Bolhegaon,
Ahmednagar

.. RESPONDENT
[Original Complainant]

...

Adv. Mr. Sushant V. Dixit for petitioner.
Adv. N.B. Narwade, for respondent.

....

CORAM : MANGESH S. PATIL, J.
DATE : 14/09/2020

ORAL JUDGMENT :-

Heard both the sides.

2] Rule. The Rule is made returnable forthwith and with the consent of both the sides the matter is heard finally at the stage of admission.

3] The petitioner is impugning the order passed by the learned Judicial Magistrate, First Class on the application for interim reliefs (Exh.5), in a

proceeding initiated by the respondent who happens to be his wife under various provisions of Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as D.V. Act for short) bearing Criminal Application No.409/2015. The Magistrate granted interim reliefs in respect of preventing the petitioner from entering into the house where she has been residing, restraining him from alienating agriculture lands and further directing him to pay to her Rs.10,000/- per month as interim maintenance. He is also impugning the judgment and order passed by the learned Additional Sessions Judge under Criminal Appeal No.189/2016 dated 18/11/2019 whereby the learned Judge allowed the appeal partly and only modified the order passed by the Magistrate to the extent of awarding interim maintenance which he reduced to Rs.5000/- p.m.

4] The learned advocate for the petitioner vehemently submits that both the Courts below have grossly erred in fixing the maintenance purely based on surmises and conjectures. There was no evidence before them to reach a conclusion as regards petitioner's income and financial condition. He is a person aged more than 66 years who has retired from a private employment. In fact he himself is claiming maintenance from his two sons and has filed a proceeding under Section 125 of the Cr.P.C. against them. Both the Courts below have grossly erred in jumping to a conclusion that he is capable of providing and the respondent is in need of maintenance to the extent fixed by them.

5] The learned advocate for the petitioner further submits that in fact the petitioner had preferred the appeal under Section 29 of the D.V. Act before the Sessions Court. Since 3 different interim reliefs were granted by the

Magistrate, the appellate Court ought to have decided the appeal comprehensively particularly when no concession was given by the learned advocate for the petitioner. He would point out that simply on the basis of the statement made by the learned advocate for the respondent herein that the learned Additional Sessions Judge chose to decide the appeal by limiting its scope to the quantum of interim maintenance and ignoring the challenge to the order of two injunctions granted by the Magistrate. The learned Additional Sessions Judge has grossly erred in adopting such a procedure. The learned advocate therefore submits that the order refusing to entertain the appeal to this extent is grossly erroneous and may be set aside.

6] The learned advocate for the respondent submits that the proceeding under the D.V. Act has been instituted way back in the year 2015. At no point of time the petitioner provided anything for the maintenance of the respondent though she is also aged more than 60 years. In fact the applicant having deserted her and having started residing with another lady since the year 1980, no discretion be exercised in his favour. The learned advocate would submit that what was being solicited by the respondent was interim reliefs which were to operate till decision of the main proceeding under Section 12 of the D.V. Act. At this stage, one cannot expect the lower Courts to have insisted for any evidence to be led. It was imperative for them to decide the quantum of maintenance by resorting to conjectures. He would further point out that the burden to prove his income was on the petitioner but his replies in the written statement filed before the Magistrate are evasive. Many lands stand in his name and even he admits that he was in the employment of a reputed company like Larson and Tubro. However he has omitted to state specifically as to how much has he been earning from these various sources.

The learned advocate therefore would submit that the quantum of maintenance fixed by the Magistrate has been reconsidered by the learned Additional Sessions Judge and the petitioner has merely been asked to pay Rs.5000/- per month from the date of the application. The learned advocate further submits that even the petitioner has not deposited the arrears of interim maintenance till date and therefore, he may not be given any concession in that respect and may be called upon to deposit all the arrears immediately.

7] The learned advocate for the petitioner submits that the petitioner has deposited Rs.48,000/- towards the arrears in the Court of the Magistrate.

8] I have carefully considered the papers and the rival submissions. Admittedly, there is no dispute about the matrimonial relations between the parties or even their age. There is no dispute about the fact that they are not residing together for years, for whatever reason. Obviously the parties are at two poles and coming with rival stands as regards the alleged violence. Needless to state that all these matters and disputes can be gone into and decided in the main proceeding at an appropriate stage.

9] Suffice for the purpose to observe that by the impugned order only some interim reliefs are being claimed by the respondent to protect her interest and to enable her to maintain herself. As far as quantum of maintenance is concerned, at no place in his written statement the petitioner has come with any stand about having provided anything for the maintenance of the respondent since the two have become separate.

10] Again conspicuously he has admitted that he was in the employment of Larson and Tubro company limited and has also not disputed existence of number of agriculture lands but has omitted to come out with a candid disclosure about his exact income from various sources, post retirement benefits and the agriculture income. Needless to state that these are the facts which are within his exclusive knowledge and by virtue of Section 106 of the Indian Evidence Act, the burden to prove these facts is on him. Looked at from this angle, absence of specific stand in the written statement about his income must have necessitated the two Courts below to resort to conjectures and surmises while determining the quantum of interim maintenance. For that matter, even now, this Court will have to resort to inevitable guess work. Considering all the aforementioned facts and circumstances in my considered view the petitioner is capable of providing and the respondent is in need to maintain herself with an amount of Rs.4,000/- p.m. from the date of the application till decision of the main proceeding.

11] So far as the grievance of the petitioner about the lower appellate Courts having not decided the appeal comprehensively, it is apparent that the learned Judge for the reasons which cannot be made out from the impugned judgment has avoided to consider the appeal to the extent it challenged the order passed by the Magistrate issuing firstly injunction of not entering into the house of the respondent and secondly restraining the petitioner from alienating and creating encumbrance upon the agriculture lands. Only one sentence can be found in paragraph no.2 of the judgment of the Additional Sessions Judge which reads thus :

"Under this appeal appellant is only contentive for reduction of maintenance amount."

12] Taking into account the fact that the petitioner had preferred the appeal against the order passed by the Magistrate, one cannot comprehend as to how the learned Additional Sessions Judge could have restricted the scope of the appeal. For that matter the impugned judgment and order passed by him does not make it clear as to why the scope of the appeal was so restricted. It is therefore quite clear that the learned Additional Sessions Judge has committed an error in not deciding the appeal comprehensively.

13] In view of above, the Writ Petition is partly allowed. The judgment and order dated 18/11/2019, passed by the Additional Sessions Judge, Ahmednagar in Criminal Appeal No.189/2016, is quashed and set aside.

14] The petitioner is directed to pay maintenance to the respondent at the rate of Rs.4,000/- per month from the date of application (Exh.5) till final decision of the proceeding.

15] The petitioner shall deposit all the arrears of maintenance, in the trial Court within a period of three months from today, failing which the trial Court may consider striking of the defence of the petitioner.

16] The appeal is remanded back to the Court of Sessions, Ahmednagar for decision afresh except in respect of interim maintenance. Parties to appear before that Court on 05/10/2020 and there shall be no need to issue notice to them.

17] The Rule is accordingly made absolute.

[MANGESH S. PATIL, J.]

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