

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

916 CRIM.WRIT PETITION NO. 606 OF 2018

Girish Vijaysingh Pardeshi

Age : 36 Yrs., Occ. Computer

repairing, R/o : Galli No. 3,

Welcome Nagar, Garkheda,

Aurangabad.

.... PETITIONER/

[ORI. OPPONENT]

V E R S U S

1. Sau.Harshada Girish Pardeshi

Age : 30 Yrs., Occ. Household,

R/o : C/o Motilal Rupchand Rajput,

Mhasavad (Shiv Colony),

Jalgaon, Tq. and Dist. Jalgaon.

2. Kum. Parnika Girish Pardeshi

[under guardianship of Resp.No.1]

Age : 4 ½ Yrs., Occ. Nil,

R/o : C/o Motilal Rupchand Rajput,

Mhasavad (Shiv Colony),

Jalgaon, Tq. & Dist. Jalgaon.

.... RESPONDENTS/

[ORI. COMPLAINANT]

.....

Mr. C.V.Dharurkar, Advocate for Petitioner.

Mr. V.P.Patil, Advocate for R – 1.

.....

CORAM : V.L.ACHLIYA, J.

DATE OF JUDGMENT : 28/06/2019

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JUDGMENT :

1. Rule. Rule made returnable forthwith. By consent heard finally at the stage of admission.

2. By this petition filed under Articles 226 and 227 of Constitution of India, the petitioner/original opponent has challenged the order dated 31/03/2018 passed in PWDV No. 147/2015 by learned J.M.F.C., Court No. 7, Jalgaon. By the impugned order the learned Magistrate has ordered to strike out the defence of petitioner-opponent.

3. Heard learned counsel for petitioner and respondents. Perused the impugned order.

4. Before advertizing to deal with the submissions advanced, it is useful to refer few facts leading to filing of this petition. The respondents herein have filed petition/complaint u/s 12, 18,19,20 and 22 of the Protection of Women from Domestic Violence Act, 2005 [hereinafter referred to as 'D.V.Act'] as against the petitioner/original opponent. Pending hearing and

decision of petition/complaint, the respondents have filed application seeking interim maintenance. By order dated 22/02/2017, the learned Magistrate has directed the petitioner-opponent to pay interim maintenance @ Rs. 2,000/- per month to respondent No. 1 and Rs. 1,000/- per month to respondent No. 2 from the date of filing of application i.e. 21/11/2015 till decision of main proceeding. While the proceeding pending for hearing, the respondents moved application vide Exh.30 alleging therein that the petitioner/opponent has not complied the order dated 22/02/2017 and urged to direct the petitioner to comply the order and failure to pay the outstanding dues to strike out the defence of petitioner.

5. The petitioner has opposed the application. He has pleaded that the respondents have suppressed the fact regarding deposit of Rs. 10,000/- in Court. It is contended that the application has been filed with malafide intention to protract the hearing of the case. The petitioner has specifically contended that though the case was repeatedly adjourned for recording

evidence, the respondents have avoided to appear and lead evidence. By order dated 31/03/2018 the learned Magistrate has allowed the application and strike out the defence of the petitioner. Being aggrieved, the petitioner/opponent has preferred this Petition.

6. Learned counsel for petitioner assailed the impugned order with contention that the order is per-se illegal, arbitrary and without any authority vested in law to pass such order. It is contended that the application filed to strike out the defence itself not maintainable in a proceeding filed under D.V.Act. It is pointed that section 28 (1) of the D.V. Act provides that provisions of Code of Criminal Procedure to be followed in conduct of proceedings filed u/s 12, 18 to 23 of D.V.Act. So also Section 29 provides the remedy by way of appeal to Sessions Court against the order passed by Magistrate under said Act. It is submitted that the procedure prescribed under Code of Civil Procedure have no application to proceedings filed under the provisions of D.V.Act. In this back-

ground it is contended that the impugned order passed by learned Magistrate to strike out the defence of petitioner is per-se illegal, arbitrary and without jurisdiction.

7. On the other hand, learned counsel for respondents supported the impugned order. By referring to sub section (2) of section 28 of D.V.Act, it is contended that the order passed by learned Magistrate suffers from no illegality, irregularity or jurisdictional error so as to call for interference in exercise of writ jurisdiction of this Court. It is contended that petition filed is devoid of merit.

8. I have carefully considered the submissions advanced in the light of order passed by the learned Magistrate. If we consider the application [Exh.30] filed by the respondent/original applicant, then basically the application has been filed for enforcement of order to pay interim maintenance passed in favour of respondents and as against the

petitioner/opponent. In the application filed, the respondents/original applicants have made grievance in respect of non compliance of order to pay interim maintenance and urged to direct the petitioner/opponent to comply the order and on failure to comply such order strike out the defence of petitioner/opponent. The application [Exh. 30] nowhere discloses the provision under which the respondents have filed said application. It appears from the order passed by learned Magistrate that the learned Magistrate has acted in most casual manner in dealing and deciding the application [Exh.30]. The impugned order reads as under.

" I perused both of the citation on record. I am of considered opinion that the non applicant has in default of the maintenance amount and the amount of Rs. 74,000/- is pending towards him, execution of the maintenance order as per order passed by this Court on Exh. 5 on dated 22/02/2017 is necessary. Even though the order is passed on dated 22/02/2017 that non applicant should pay the maintenance amount from the date of the application i.e. 21/11/2015. Now a day from dated 22/02/2017 to till today there is a sufficient time to pay the maintenance amount. But non applicant has failed to availed it and not paid the maintenance

amount. Hence, I came to the conclusion that it will be proper to struck out the defence of the non applicant.

ORDER

01) The application is allowed.

02) The defence of the non applicant is hereby struck out for the non payment of the maintenance amount."

9. The perusal of the order itself spell out that the learned Magistrate has made no efforts to find out whether such application can be entertained and order to strike defence can be passed in such proceeding. The serious consequences of such order also not considered while passing the impugned order.

10. At the out-set, the impugned order passed by learned Magistrate is without any authority vested in law to pass such order. In terms of section 28 (1) of D.V. Act, the proceedings filed u/s 12, 18 to 23 as well as offence to be dealt u/s 31 of D.V. Act are to be governed by Code of Criminal Procedure, 1973. Section 29 of D.V.Act provides for remedy of appeal

before the Court of Sessions against the order passed by the Magistrate. Thus, there is express provision made in D.V.Act providing for procedure for conduct of proceeding as well as filing of appeal by the aggrieved person. Sub section (2) of section 28 of D.V.Act provides exception to sub section (1) of section 28 of D.V.Act and provide discretion to Court to lay down its own procedure for disposal of application filed u/s 12 or under sub section (2) of section 23 of D.V.Act. Thus, except the judicial discretion vested u/s 28 (2) of D.V.Act, the Magistrate dealing with a proceeding filed u/s 12, 18 to 23 of D.V.Act required to follow the procedure prescribed under Code of Criminal Procedure in conduct of such proceedings. There is no provision under D.V.Act applying the provisions of Code of Civil Procedure to the proceedings filed under D.V. Act.

11. The impugned order passed by learned Magistrate not refers the provision under which the order to strike out the defence of petitioner has been passed by the learned Magistrate. There is nothing to

infer that the impugned order has been passed in exercise of powers vested under sub section (2) of section 28 of D.V.Act. In absence of any provision contained under Code of Criminal Procedure as well as D.V.Act to entertain such application and pass order to strike out defence, the order passed by learned Magistrate to strike out defence is not sustainable in law. The impugned order passed by learned Magistrate is without authority of law. In that view the impugned order deserves to be set aside as learned Magistrate exceeded the jurisdiction vested in law.

12. The submission advanced that order has been passed in purported exercise of authority vested under sub section (2) of section 28 of D.V.Act can not be accepted. No doubt, the remedies provided under the D.V.Act are pre-dominantly civil in nature. But by way of specific legislative enactment, the legislatures have provided the applicability of provisions of Code of Criminal Procedure for conduct of proceedings filed u/s 12, 18 to 23 as well as the offence u/s 31 of

D.V.Act except the judicial discretion vested under sub section (2) of section 28 of D.V.Act. In the case of *Nandkishor Pralhad Vyawahare Vs. Mangala w/o Pratap Bansar reported in 2018 (3) Mh.L.J. 913*, the Full Bench of this Court has examined the scheme of D.V.Act while deciding the reference on the point of nature of proceeding under the D.V.Act and applicability of section 482 of Code of Criminal Procedure to such proceedings and observed as under.

" 42. We have seen that the nature of proceeding initiated under the [D.V. Act](#) is predominantly of civil nature. But, can we say, only because the proceedings have a dominant civil flavour, the applicability of the provisions of [Cr.P.C.](#) to the proceedings under the [D.V. Act](#), is excluded or to be precise inherent power of the High Court under [Section 482](#) of [Cr.P.C.](#) is not available to deal appropriately with these proceedings, in spite of express application of the provisions of [Cr.P.C.](#) by the Parliament as provided under [Section 28](#) of the [D.V. Act](#) ? In other words - Would the nature of the proceedings decide the fate of [Section 28](#) or the intention of the Parliament as expressed in [Section 28](#) of the [D.V. Act](#) would ? To find out an answer, as a first step, we must look into the express language of the provision of [Section 28](#) of the [D.V. Act](#) and then if required, we may look for

external aids, if any, as dictated to us by the settled principles of statutory interpretation.

48. Sub-section (1) of [Section 28](#) clearly lays down that all proceedings taken under Sections from 12 to 23 and in respect of offence under [Section 31](#) shall be governed by the provisions of [Cr.P.C.](#) except as otherwise provided in the [D.V. Act](#). It means that only such of the provisions of the Act as would lay down a particular procedure to be followed by the Magistrate, which would have prevalence over the provisions of the [Cr.P.C.](#) to the extent of their inconsistency with the specific provisions of the [D.V. Act](#). To give examples, these specific provisions are seen embedded in [Section 12\(3\)](#) of the D.V. Act requiring filing of the application in the prescribed form; Rules 6(1) and 6(5) of the Rules, 2006, prescribing form of application under [Section 12](#) and following of procedure governing proceedings filed under [Section 125](#) Cr.P.C., while dealing with an application under [Section 12](#) and enforcing the orders passed on it; [Section 12\(4\)](#) mandating fixing of the first date of hearing ordinarily not beyond three days from the date of receipt of the application; [Section 13\(1\)](#) directing the service of notice through the Protection Officer and so on and so forth. Barring such specific procedural requirements, however, the provisions of the [Cr.P.C.](#) have been made applicable under [Section 28\(1\)](#) of the D.V. Act. This applicability, it is seen from the plain and clear language of this provision, is general and omnibus. It unequivocally speaks of the intention

of the Parliament to generally apply provisions of the [Cr.P.C.](#) to the proceedings under or arising from the [D.V. Act](#), subject to exceptions specifically indicated in [Section 28](#). It appears that such criminal procedure is generally applied with the avowed purpose of giving teeth to the remedies provided under the civil law.

53. This would mean that generally the provisions of [Cr.P.C.](#) would be applicable, to all proceedings taken under [Sections 12](#) to [23](#) and also in respect of the offence under [Section 31](#) of the [D.V. Act](#), subject to the exceptions provided for in the Act including the one under sub-section (2) of [Section 28](#). It would then follow that it is not the nature of the proceeding that would be determinative of the general applicability of [Cr.P.C.](#) to the proceedings referred to in [Section 28\(1\)](#) of the [D.V. Act](#), but the intention of the Parliament as expressed by plain and clear language of the Section, which would have it's last word. We have already held that [Section 28](#) of the [D.V. Act](#) announces clearly and without any ambiguity the intention of the Parliament to apply the criminal procedure generally subject to the exceptions given under the Act. So, the inherent power of the High Court under [Section 482](#) of [Cr.P.C.](#), subject to the self-imposed restrictions including the factor of availability of equally efficacious alternate remedy under [Section 29](#) of the [D.V. Act](#), would be available for redressal of the grievances of the party arising from the orders passed in proceedings

under [Sections 12, 18, 19, 20 21, 22 and 23](#) and also in respect of the offence under [Section 31](#) of the D.V. Act. 54] We are also fortified in our view by the opinion expressed by the Division Bench of the Gujarat High Court in the case of Ushaben (supra), wherein it is observed that a proposition that because the proceedings are of civil nature, the [Cr.P.C.](#) may not apply, is too general a proposition to be supported in a case where the Parliament, by express provision, has applied the provisions of [Cr.P.C.](#) to the proceedings under the Act (Paragraph 16). It also held that the remedy under [Section 482](#) of Cr.P.C. would be available to an aggrieved person, of course, subject to self-imposed restrictions on the power of the High Court in this regard. Relevant observations of the Division Bench appearing in paragraph 19 of the judgment are reproduced as under :

"19. In view of the discussion and the observations made by us herein above, once the provision [of the Code](#) has been made applicable, it cannot be said that remedy under [Section 482](#) of the Code would be unavailable to the aggrieved person. But the said aspect is again subject to self-imposed restriction of power of the High Court that when there is express remedy of appeal available under [Section 29](#) before the court of Session or revision under [Section 397](#), the Court may decline entertainment of the petition under [Section 482](#) of the Code. But such in any case would not limit or affect the inherent power of the High Court under [Section 482](#) of the Code."

13. In the case of ***Kunapareddy @ Nookala Shanka Balaji Vs. Kunapareddy Swarna Kumari and another reported in (2016) 11 SCC 774***, the Hon'ble Apex Court while dealing with issue as to maintainability of application seeking amendment to the petition/complaint filed under the provisions of D.V.Act has examined the scope and ambit of exercise of powers under sub section (2) of section 28 of D.V.Act observed and held as under.

" 18. In this context, provisions of Sub-Section(2) of Section 28 of the DV Act gain significance. Whereas proceedings under certain sections of the DV Act as specified in sub-Section (1) of Section 28 are to be governed by the Code, the Legislature at the same time incorporated the provisions like sub - Section (2) as well which empowers the Court to lay down its own procedure for disposal of the application under Section 12 or Section 23(2) of the DV Act. This provision has been incorporated by the Legislature keeping a definite purpose in mind. Under Section 12, an application can be made to a Magistrate by an aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person to claim one or more reliefs under the said Act. Section 23 deals with the power of the Magistrate to grant interim and ex-parte orders and sub-Section (2) of Section 23 is a special provision carved out in this behalf which is as follows:

" 23.(2).If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

19. The reliefs that can be granted by the final order or an by interim order, have already been pointed out above wherein it is noticed that most of these reliefs are of civil nature. If the power to amend the complaint/application etc. is not read into the aforesaid provision, the very purpose which the Act attempts to sub-serve itself may be defeated in many cases. "

14. The application [Exh.30] was presented seeking enforcement of order to pay interim maintenance. In that view, learned Magistrate was not remediless to pass appropriate order for enforcement of interim order. The remedy as provided u/s 125 (3) of Code of Criminal Procedure was available for the respondents to seek enforcement of order. In this context it is useful to refer the decision in the case of *Sachin Vs. Sushma reported in 2015 All MR (Cri.)*

3128, wherein this Court [**CORAM : M.L.TAHALIYANI, J.**] in a case based upon identical issue held as under.

" 6. In my considered opinion, the procedure laid down under Section 125(3) of the Code of Criminal Procedure for getting compliance of the orders passed by the Magistrate under Section 125(1) of the Code will have to be followed for executing the orders passed by the Magistrate under Section 20 (Monetary Reliefs) of the Protection of Women from Domestic Violence Act, 2005. The reliefs available under Section 125(1) (a) of the Code of Criminal Procedure are analogous to the reliefs available under Section 20 of the Protection of Women from Domestic Violence Act, 2005. The procedure for getting compliance of the order passed under Section 125(1) of the Code of Criminal Procedure is available under Section 125(3) of the Code of Criminal Procedure, which runs as under :-

"125(3). If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,) remaining unpaid after the

execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this Section notwithstanding such offer, if he is satisfied that there is just ground for so doing."

7. The procedure for levying of fines is available under Section 421 of the Code of Criminal Procedure as under :-

"421. Warrant for levy of fine - When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may -

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both of the

defaulter:"

8. Thus there is absolutely clear provision under the Code of Criminal Procedure, which lays down as to how the amount of maintenance, final or interim, is to be recovered. The Magistrate, in my opinion, could not have issued non bailable warrant directly. He should have followed the procedure laid down in sub-section (3) of Section 125 and Section 421 of the Code of Criminal Procedure. In the scheme of Code of Criminal Procedure, in the first place, the Magistrate was under obligation to issue a warrant for levy of the amount by attachment and sale of any movable property. The other remedy available was to issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both of the defaulter. The Magistrate could have sentenced the petitioner for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which might extend to one month or until payment if sooner made.

15. In the case of *Vinod Vs. Chhaya* reported in *2002 (4) Mh.L.J. 937*, this Court [CORAM :

R.S.MOHITE, J.] has held that on failure to pay interim maintenance in a proceeding filed before Family Court, the defence of a person can not be strike out as the provisions of Civil Procedure Code not applicable to such proceedings.

16. Thus, in absence of any specific provision contained in the Code of Criminal Procedure to entertain the application to strike out defence of any party to such proceeding, the impugned order passed by learned Magistrate is unsustainable in law and deserves to be set aside on the ground of jurisdictional error committed in passing the order. In view of remedy provided under the Code of Criminal Procedure to recover the amount due and payable in terms of interim order of maintenance by either taking recourse to section 125 (3) of Cr.P.C. or by issuing warrant of recovery to recover amount as a levy of fine, the respondents were not entitled to invoke unusual and exceptional powers vested under sub section (2) of section 28 of D.V.Act.

17. The powers to strike out the defence having serious consequences and penal in nature, the powers under sub section (2) of section 28 of D.V.Act to pass such order. The said provision applied to matters of procedural in nature. The powers under sub section (2) of section 28 of D.V.Act conferred upon Court to lay down its own procedure for disposal of an application u/s 12 or under sub section (2) of section 23 can not be resorted to entertain the application seeking order to strike out defence of the party. More over the powers u/s 28 (2) of D.V.Act are procedural in nature and can not be invoked for grant of remedies having penal consequences. Thus, in absence of any provision to strike out the defence of any party provided under the D.V.Act or Code of Criminal Procedure, the learned Magistrate erred in passing the impugned order.

18. It is well settled position in law that the powers to strike out defence can not be resorted and exercised in a casual manner. In the case of *Raman Kumar Vs. Smt. Uma Kiran reported in AIR 2006*

Himachal Pradesh 63, while considering the purport of Order VI Rule 16 of Code of Civil Procedure, the Court has discussed the scope and ambit of powers to strike out defence and observed as under.

" 9. Even If the husband had not obeyed the orders of the Court and had not deposited the arrears of interim alimony, then also before taking a drastic measure of striking off the evidence, he should have been given a reasonable opportunity to pay the arrears of pendente lite. The proper courses would have been to permit the wife to lead her evidence and Court could have directed the husband to pay some portion of the arrears of maintenance and on payment of such amount he could have been permitted him to cross-examine the witnesses produced by his wife and the husband should have further been directed that only in case he deposits the total arrears of maintenance pendente lite he would be permitted to lead his own evidence. Striking off evidence is a very serious matter. It renders the party defenceless. This action is to be taken only as last resort when all other means fail. It cannot be used as short cut to divest any party of its valuable right to cross-examine the witnesses of the opposite side and to lead evidence in support of its case. In case where the offending party has willfully disobeyed the orders of the Court, the Court can strike off the defence. However, before taking such action, the offending spouse must be given an opportunity to make amends and pay the arrears. There may be cases where even though interim

alimony has been awarded, the husband for various reasons, beyond his control, is unable to pay any amount to the wife. In such cases the defence cannot be struck off merely because he has not paid the arrears of maintenance pendente lite. However, the Court has the power, where the offending spouse despite having sufficient income is trying to avoid its liability to pay the maintenance pendente lite to strike off his defence but this action should only be taken after affording reasonable opportunity to the offending spouse to pay all the arrears. The Court must come to the conclusion that the offending spouse is willfully disobeying the orders before taking such action. "

19. The only enabling provision to strike out the defence of party to the proceeding is provided by way of Order XXXIX Rule 11 of Code of Civil Procedure [Bombay amendment] which reads as under.

" Procedure on parties defying orders of Court and committing breach of undertaking to the Court – (1) Where the Court orders any to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding and such party commits any default in respect of or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or

contravention or breach is committed by the plaintiff or the applicant, or strike out the defences, if the default or contravention or breach is committed by the defendant or the opponent.

(2) The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court.

Provided that before passing any order under this sub-rule notice shall be given to the parties likely to be affected by the order so passed."

20. Plain reading of provision spell out that the Order XXXIX Rule 11 of Code of Civil Procedure is directory in nature. The relief to be granted is discretionary in nature. The Division Bench of this Court has examined the scope and ambit of Order XXXIX Rule 11 of Code of Civil Procedure in the case of ***Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi*** reported in ***AIR 2004 Bombay 212*** and ruled as under.

" Rule 11 of Order 39 as introduced by the Bombay amendment provides for a procedure on parties defying orders of the Court and/or committing breach of any undertaking to the Court. The provision in sub-rule (1) of Rule 11 merely vests power in the Court to dismiss the suit or proceeding where the default is by the plaintiff and strike off the defence of the defendant where the defaulter is the defendant. It does not obligate to do so in every case of default. This is further fortified by the provision contained in sub rule (2) which gives a discretion to the Court that even after the order contemplated under sub rule (1) of Rule 11 has been passed upon sufficient cause being shown by the party responsible for the default or contravention or breach and such party makes amended for the default or contravention or breach to the satisfaction of the Court, the Court may restore the suit or hear the defence on such terms and conditions it deems fit. If the Court has power to restore the party to the same position even after the adverse order has been passed under sub rule (1) of Rule 11 if the case is made out under sub rule (2), the provision of sub rule (1) has to be held to be directory and not imperative. The provision in the nature of sub rule (2) leaves no manner of doubt the intention of the rule making authority that the provision of sub rule (1) of Rule 11 is directory and that by such provision power has been vested in the Court to dismiss the suit or proceeding where the plaintiff is in default or striking off the defence of the defendant, where defendant is responsible for the

default. Hence, the provision contained in sub rule (1) of Rule 11 of Order 39 applicable in Maharashtra is directory. "

21. Similarly, in the case of ***Shaikh Samsul Hudda and others Vs. M/s Khayber Properties and Investment Pvt. Ltd. And others reported in AIR 2004 Bombay 126***, this Court has examined the scope of exercise of powers under Rule 11 of Order 39 of Code of Civil Procedure. It is held that the powers vested under Order XXXIX Rule 11 of Code of Civil Procedure are discretionary in nature and same to be exercised judiciously and in cases where the party deserves such harsh penalty and not merely because the other side feels aggrieved by the failure on the part of other side to comply with the order. It is further observed that in order to exercise powers under Order XXXIX Rule 11 of Code of Civil Procedure, the default or non compliance of order complained must be deliberate or intentional. While deciding such application, the Court is required to examine such issue and to record that the default is deliberate or intentional or willful so as to call for harsh action. In this context it is useful

to refer the observations made in para Nos. 4,5 and 6, which reads as under.

" 4. The Rule 11 of Order XXXIX of the Code, as is in force in the State of Maharashtra, empowers the Court to dismiss the suit, if the plaintiff defies or defaults in complying with the order. Certainly, such power can be exercised by the Appellate Court in relation to appeals also. But it is purely a discretionary power to be exercised judiciously and in cases where the party deserves such harsh penalty and not merely because the other side feels aggrieved by the failure on the part of the plaintiff to comply with the order. Besides, it has to be a deliberate or intentional action or inaction on the part of the plaintiff. Above all, it must be a case, to the satisfaction of the Court, fit and appropriate to invoke the powers under the provisions of the said Rule.

5. It is to be noted that before imposing the penalty under Rule 11 of Order XXXIX of the Code, it is necessary for the Court to arrive at the finding about default and/or non-compliance of the order of the Court by the party, and such default being either deliberate or intentional or wilful. Mere filing of an application for contempt proceedings, by itself, therefore, would not justify the action under Order XXXIX, Rule 11 of the Code. Undoubtedly, the Rule does not use the words like deliberate or intentional or wilful. However, the action being of penal nature in as much as that the penalty would either be non-suiting or striking of the defence on account of

action under the said Rule, certainly the act for such penal action has to be deliberate or wilful and not merely an unintentional or mere failure to comply with the order. Any punishment or penalty should not be disproportionate to the nature and degree of offence or default. Therefore, the power under the Rule can be exercised only upon the finding by the Court that the default has been either deliberate or intentional or wilful.

6. It is well settled that an action for contempt of Court is always in the discretion of the Court. Merely because there is complaint of non-compliance of the order of the Court, the action for contempt of Court is not to be initiated as a matter of course. It is for the Court to decide about the same, based on the materials placed before it, and the complainant has no right of appeal if the Court decides not to take action against the person who is alleged to have committed default in compliance of the order of the Court. Likewise is the case in relation to exercise of powers under Order XXXIX, Rule 11 of the Code. The party cannot as a matter of right demand for striking of defence or dismissal of the suit for every violation or default of order at the hands of the opposite party. It is for the Court to take appropriate decision in its discretion, to be exercised judiciously, and depending upon the facts of each case."

22. Apart from the legal position discussed above,

the crucial question poses for consideration is whether the provisions of Order XXXIX Rule 11 of Code of Civil Procedure applies to the proceedings filed under the provision of D.V.Act. There is no provision under the D.V.Act making the provisions of Code of Civil Procedure applicable to the proceedings under the D.V.Act. On the contrary, there is express provision by way of section 28 (1) of D.V.Act laying down that the proceedings shall be governed by Code of Criminal Procedure. Sub rule (2) of Section 28 of D.V.Act has an exception to the general provisions contained in section 28 (1) of D.V.Act. It is quite settled that the recourse to sub section (2) of section 28 of D.V.Act can be resorted in exceptional circumstances. In absence of applicability of provisions of Code of Civil Procedure, the provisions under Order XXXIX Rule 11 of Code of Civil Procedure which is penal in nature can not be applied in a proceeding under the D.V.Act. In this context, it is useful to refer the decision of this Court in the case of *Murlidhar Datoba Nimanka and others Vs. Harish Balkrushna Latane and others reported in 2003 (4)*

Mh.L.J. 196, wherein this Court has held as under.

" The provisions of Civil Procedure Code are not applicable to the proceedings before the Co-operative Court while dealing with the disputes under the Maharashtra Co-operative Societies Act though in relation to such procedure wherever the provisions of law contained in the said Act and the said Rules are totally silent, the principles of the Civil Procedure Code can be made applicable but at the same time, it would not mean that the Co-operative Court will enjoy the powers specifically given to the Civil Court like those of inherent powers, review powers or the powers imposing penalty like striking off the defence under Order XXXIX Rule 11 of Civil Procedure Code."

23. Thus, in view of the conclusions arrived at the impugned order is per-se illegal, perverse and without any authority vested in law to pass such order, the impugned order deserves to be set aside. Hence, the following order.

ORDER

1. Petition is allowed in terms of prayer clause 'B'.
2. The impugned order dated 31/03/2018 passed below Exh. 30 is set aside. In consequence of setting aside the order of striking of defence of petitioner, the

trial Court is directed to allow the petitioner to participate in the proceeding and to defend the case.

3. Rule made absolute in above terms.

[V.L.ACHLIYA]
JUDGE

KNP.