

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1273 OF 2018

Sameer S/o Ayyub Shaikh
Age : 42 Years, Occ.: Nil,
R/o. Baburao Nagar, Shirur,
Tal. Shirur, Dist. Pune

... PETITIONER

VERSUS

1. Asma Sameer Shaikh
Age: 32 years, Occu.: Household
R/o. J.J. Galli, Kotla,
Dist. Ahmednagar

2. Ayyub S/o Chotu Shaikh
Age: 73 years, Occu.: Agri.,
R/o Sutar Galli, Parner,
Tal. Parner, Dist. Ahmednagar

3. Sayida W/o Ayyub Shaikh
Age: 65 years, Occu.: Household
R/o Sutar Galli, Parner, Tal. Parner
Dist. Ahmednagar

(As per order dated 17-10-2019
respondent Nos.2 and 3 are deleted)

... RESPONDENTS

.....
Mr. Shaikh Mazar A. Jahagirdar, Advocate for petitioner.
Mr. A.D. Aghav, Advocate for respondent No.1.
.....

CORAM : SMT. VIBHA KANKANWADI, J.

JUDGMENT RESERVED ON : 27-01-2020.

JUDGMENT PRONOUNCED ON : 03-03-2020.

JUDGMENT :

. Present petition has been filed by original opponent No.1-husband challenging the order in Criminal Appeal No.206 of 2017 passed by learned Additional Sessions Judge, Ahmednagar dated 20-08-2018 thereby confirming the judgment and order passed by the learned Judicial Magistrate First Class, Court No.3, Ahmednagar in Criminal Misc. Application No.319 of 2013 dated 21-04-2017 thereby allowing the application under Section 12 of the Protection of Women from Domestic Violence Act and granting maintenance to present respondent No.1-original applicant.

2. Heard learned Advocate Mr. Sahikh Mazar A. Jahagirdar for petitioner and learned Advocate Mr. A. D. Aghav for respondent No.1. Name of respondent Nos.2 and 3, who were original opponent Nos.2 and 3, has been deleted by virtue of order passed by this Court on 17-10-2019.

3. It has been vehemently submitted on behalf of the petitioner that the point that the petitioner intends to raise is that petitioner No.1 is not residing with opponent Nos.2 and 3. The notice of the proceedings before the learned Judicial Magistrate First Class was sent on the given address, however, it was not received by opponent No.1. The notice was

given through post i.e. R.P.A.D. and the perusal of the said packet would show that there was tick mark on refused as well as gone away. Therefore, the learned Magistrate ought to have, in fact, re-issued the notice and ought to have get the notice properly served on opponent No.1. Since the notice was not properly served on him, he did not remain present. Opponent Nos.2 and 3 had filed the say and opponent No.2 had entered the witness box. He had specifically stated that because of the mental condition of the applicant, opponent No.1 felt that he was harassed. Applicant No.1 used to attack on the person of all the opponents as well as her own son as a result of which opponent No.1 left the house and then he has given Talak to the applicant. Therefore, when a proper opportunity to contest the matter was not available to opponent No.1, he prays for setting aside the orders passed by both the Courts below and prayed for the directions that he be allowed to contest the matter.

4. Per contra, learned Advocate for respondent No.1 submitted that though the packet containing the notice to opponent No.1 had tick marked on refused as well as gone away, yet, there is a specific endorsement in writing as refused on the said envelope. This specifically shows that he had refused the postal envelope. The trial Court was

justified in accepting it as a proper service. Further, there was every opportunity for opponent Nos.2 and 3 who are the parents of opponent No.1 to inform about the proceedings and call opponent No.1 to remain present in the matter. They cannot come with a case that they were not in touch with opponent No.1. The evidence on record, especially the cross of opponent No.2 would show that he was very much in touch with opponent No.1. A detailed and reasoned order has been passed by the learned trial Court while granting maintenance to the applicant which requires no interference at all. The learned Additional Sessions Judge also has appropriately considered that the present petitioner has not challenged the finding of the trial Court regarding the quantum of maintenance. Therefore, there is absolutely no necessity to set aside both the orders and remit the case for trial by giving an opportunity to opponent No.1 to contest the matter.

5. At the outset, it can be said that main contention of the present petitioner is that he was not served with the notice of the proceedings before the learned Judicial Magistrate First Class. It has been specifically stated in the judgment of the learned Magistrate that in spite of proper service of the notice, opponent No.1 has not caused his appearance

and therefore, the matter has proceeded *ex parte* against him. Original opponent Nos.2 and 3 are the parents of opponent No.1. They had appeared in pursuant to the notice given to them and filed their say at Exhibit-16. It is their contention that since the marriage of the applicant with opponent No.1, they were residing separately. Applicant used to behave in a weird manner. She used to give physical and mental harassment to them also and for that purpose, they had lodged report with the police station many times. Applicant used to pick up quarrel, used to sleep even in day time, not doing any work, not even cook food at times and to go to her parental house without informing them. Many times they had tried to bring settlement by informing the behavior of the applicant to her parents and relatives. The applicant used to pick up suspicion over the character of opponent No.1, used to give threat to kill him or ablaze herself and even used to beat him. In spite of these things, he was cohabiting with her. Applicant No.1 started attacking and therefore, for the fear of his life, opponent No.1 left the house and then applicant went to her parental house. When opponent No.1 had gone to bring her back for cohabitation, she refused and told him that he should give Talak to her. Therefore, he had given her Talak on 27-07-2010. Applicant had then lodged criminal proceedings under Section 498-A of Indian Penal Code in Parner Court. It

was compromised and amount of Rs.2,00,000/- was given to the applicant. In spite of that, she did not compromise and compound the said case. It was also contended that opponent No.1 is not residing now-a-days with them, but then they are maintaining the son of opponent No.1. Thus, taking into consideration the contents of the say, it can be seen that opponent Nos.2 and 3 never came with the case that opponent No.1 is not in touch with them. It also appears that they have intentionally not given the address where opponent No.1 was residing. The learned Additional Sessions Judge has specifically observed that though the tick mark is given by the postal authorities on the stamp of refused as well as gone away, but there is specific endorsement in writing as “refused referred to sender”. This shows that there might be a mistake in placing tick mark, yet, when it is specifically written by hand that the packet is refused and it is referred to the sender, that carries more importance and not the tick marks. The learned trial Court was justified in taking that endorsement as refusal to accept the notice. The learned trial Court was further justified in proceeding the matter *ex parte* against opponent No.1. The present opponent No.1 has not blamed opponent Nos.2 and 3 for not informing him about the proceedings. He cannot only blame the applicant or the Court record for that purpose. No doubt, opponent Nos.2 and 3 cannot be

said to be legally bound to inform opponent No.1 about the pendency of the proceedings, yet, we are required to consider it factually also whether it would have been possible that till the decision by the learned Magistrate; opponent no.1, by any source of information, had no knowledge about such a proceedings filed by the applicant. The present petitioner has failed to place those facts on record which would show that in spite of his diligent efforts, he had not received any information about the pendency of the application against him. On this count, there is absolutely no necessity to remit the matter back to the trial Court for giving an opportunity to opponent No.1 to contest the matter.

6. As the opponent No.1 has not contested the matter and the learned trial Court has rightly held that even if it is considered that there is a valid Talak between opponent No.1 and the applicant, yet, the application under Section 12 of the Domestic Violence Act was maintainable and the applicant was entitled to get maintenance. In order to prove the income of opponent No.1, it appears that the applicant had produced on record about ten 7/12 extracts at Exhibit-24 to Exhibit-34. Further the contention of the applicant that opponent No.1 is running a workshop at Parner has gone unchallenged on record and taking into consideration the said evidence,

the maintenance had been granted at the rate of Rs.7,000/- per month. It appears to be a reasonable amount as compared to the income of opponent No.1. Under such circumstance, there is no case is made out to invoke the powers of this Court under Article 226 and 227 of the Constitution of India to interfere with the judgments and orders passed by both the Courts below. There is no merit in the present writ petition. It deserves to be dismissed. Accordingly, it is dismissed.

[SMT. VIBHA KANKANWADI, J.]

SCM