

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

**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO.1081 OF 2019**

**SHAIKH HUSAIN YASIN**

**)...PETITIONER**

**V/s.**

**1) BASHIRA WD/O. YASIN SHAIKH**

**)**

**)**

**2) STATE OF MAHARASHTRA**

**)...RESPONDENTS**

Mr.Niranjan Mundargi i/b. Ms.Sapana Rachure, Advocate for the  
Petitioner.

Ms.Saba Khan, Advocate for Respondent No.1.

Mr.R.M.Pethe, APP for the Respondent – State.

**CORAM : A. M. BADAR, J.**

**DATE : 18<sup>th</sup> FEBRUARY 2020**

**ORAL JUDGMENT :**

1            This is a petition by respondent - son of respondent  
no.1 herein/original aggrieved person challenging the appellate  
order passed by the learned Additional Sessions Judge, Greater

Mumbai. By this appellate order, the learned Additional Sessions Judge was pleased to allow the appeal filed by the aggrieved person and set aside the impugned order dated 27<sup>th</sup> July 2018 passed by the learned Metropolitan Magistrate, 61<sup>st</sup> Court, Kurla, Mumbai, partially. The petitioner herein/original respondent no.1, by this appellate order, is restrained from creating any third party interest in the shop till decision of the application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as Domestic Violence Act for the sake of brevity). In addition, the original respondent no.1/petitioner herein is directed to pay an amount of Rs.13,500/- to the appellant therein/respondent no.1 herein/aggrieved person as her share in the rent of the Shop no.A-17. In addition, the petitioner herein/original respondent is also directed to pay an additional amount of Rs.6500/- towards maintenance to the aggrieved person.

2                      Rule. Rule made returnable forthwith. Heard finally by consent of parties.

3           The learned counsel appearing for the petitioner herein/original respondent no.1 has argued that parties were not residing jointly. He further argued that there was domestic relationship between the aggrieved person and the original respondents i.e. mother and son duo. Therefore, according to the learned counsel for the petitioner herein/original respondent, the interim application was not maintainable and consequently, the impugned judgment of the learned Additional Sessions Judge needs to be quashed and set aside. In addition, the learned counsel for the petitioner herein/original respondent argued that the aggrieved person was residing in a flat in Kinara Co-operative Housing Society, Kalpak. Apart from this, she is having two 1 Bedroom-Hall-Kitchen flats. She is also having one 1 Room Hall Kitchen. She is joint owner of Shop No.A-17 along with the petitioner herein/original respondent. In this view of the matter, the learned counsel for the petitioner herein/original respondent submits that the appellate order, which is devoid of any reason, needs to be quashed and set aside.

4           The learned counsel appearing for the respondent no.1 herein took me through the relevant provisions of the Domestic Violence Act and argued that the finding regarding commission of domestic violence is not challenged. She further argued that the respondent no.1 herein/original applicant/aggrieved person is having liability of maintaining two widowed daughters and therefore, the learned Appellate Court has correctly decided the appeal. In her submission, lease of the shop is totally illegal. The shop belongs to respondent no.1 herein/original aggrieved person and area of the shop is incorrectly mentioned in the lease document. With this, the learned counsel appearing for the respondent no.1 herein/aggrieved person prays for dismissal of the petition.

5           I have considered the submissions so advanced and also perused the pleadings of the parties as well as the original order passed by the learned trial Magistrate and the appellate order, which is impugned in this petition.

6           The scope of jurisdiction of the appellate court while dealing with an appeal under Section 29 of the Domestic Violence Act is crystallized by this court in the matter of **Abhijit Bhikaseth Auti vs. State of Maharashtra**<sup>1</sup>. Paragraph 25(iii) of that judgment reads thus :

“25(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 of refusal of interim relief.”

It is, thus, clear that the appellate court is not required to interfere with exercise of discretion by the learned trial Magistrate unless and until it is found that the discretion so exercised is arbitrary, capricious and perverse.

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1 Criminal Writ Petition No.2218 of 2007 decided on 16<sup>th</sup> September 2008

7           Let us test the validity of the impugned order on this touchstone.

8           The application for interim relief filed by the respondent no.1 herein/aggrieved person contains a prayer for injuncting the original respondent from commission of domestic violence. By this interim application, the aggrieved person had asked for payment of Rs.5 lakh as interim measure for repayment of loan. She also prayed for restraining the original respondent/petitioner herein from collecting monthly license fee of Shop No.A-17. Last prayer was to direct the original respondent/petitioner herein to pay an amount of Rs.1 lakh per month as maintenance.

9           The application came to be replied by contending that the original applicant/respondent herein was never in domestic relationship with the answering respondent. It is further pleaded in the reply that the applicant/aggrieved person is receiving an

amount of Rs.8,000/- as rent for alternate transit accommodation so also license charges of Rs.10,000/- per month for leasing out Flat No.42 at first floor of Kapadia building. It is further pleaded that she is getting an amount of Rs.2,000/- per month as pension from ICICI Prudential Fund, and thus, she is earning an amount of Rs.30,000/- per month.

10           The learned trial Magistrate considered pleadings of parties and has held thus in paragraph 8 of the order dated 27<sup>th</sup> July 2018 deciding the application for interim maintenance. It reads thus :

“8           The applicant submitted that, she is old, living with two widow daughters, having no income source. However, perusing the record that, it is very clear that, applicant is having one room premises in Kurla which she gave on Leave & License for monthly license fee Rs.10,000/-. Further, applicant was paid Rs.10,000/- each month as a share of his shop at Kalpak Estate by respondent of which respondent received Rs.27,000/- for license fee. It was submitted by applicant that, this documents are false. However,

no such prima facie evidence. So it is very clear that, applicant getting income. Further, dispute is only for property and more income. At present at interim stage only to see whether in emergency applicant requires amount for her daily livelihoods or medical treatment or residence. But is very clear that, she is getting enough amount. This was not specifically denied by this applicant. Applicant did not produce any record to show from whom she borrowed the amount and for what purpose. So, I do not found any substance at this stage in argument that, applicant is required to pay loan amount of Rs.5,00,000/-. However, the applicant is director in company and having equity as well as preference shares. If the company is not paying then applicant can very well approach to appropriate forum for payment of her profit in the company. However, at present it is clear that, applicant getting enough income. Further applicant did not stated why she is claiming maintenance or amount from respondent and why not from other son. That is also very material.”

11           The learned trial Magistrate injuncted the original respondent from committing any domestic violence and awarded

cost of Rs.500/- of the application. No other relief came to be granted to the original applicant.

12           Dissatisfied by this virtual rejection of the application for interim relief, the aggrieved person preferred an appeal under Section 29 of the Domestic Violence Act and the learned Additional Sessions Judge by allowing the appeal partly, had restrained the original respondent no.1 from creating any third party interest apart from awarding half of the license fees i.e. Rs.13,500/- for Shop No.A-17 of the appellant. Similarly, an amount of Rs.6500/- came to be awarded additionally towards maintenance.

13           When one goes to the reasoning part of the impugned appellate order then it is seen that the same is bereft of any reasoning. The learned Appellate Court has not considered and examined whether the impugned order of the learned trial Magistrate suffers from perversity and arbitrariness. Reasoning in one line can be found in paragraph 10 of the impugned order.

The reason which can be gathered for allowing the appeal partly is mentioned in one line by the learned Appellate Court :

“10 .....Considering the requirement of a human being to lead life in these hard days, the status of the parties and their source of income the appellant needs to be given maintenance in terms of the following order.”

Thus, the entire order of the Appellate Court is bereft of any reason. The same, therefore, cannot be sustained. However, at the same time, it needs to be kept in mind that the aggrieved person is undisputedly the joint owner of Shop No. A-17 which is leased out to a third party at the rate of Rs.27000/- per month as license fees. In this view of the matter, at the most, it can be said that the respondent no.1 herein i.e. original aggrieved person is entitled for an amount of Rs.13,500/- per month as her share in the license fees of Shop No.A-17. The learned counsel appearing for the petitioner herein/original respondent has fairly accepted the burden of paying maintenance charge of that shop. In this view of the matter, the following order:

**ORDER**

- i) The writ petition is partly allowed.
- ii) The impugned appellate order, to the extent it awards an amount of Rs.6500/- towards interim maintenance, is quashed and set aside.
- iii) Rest of the order of the Appellate Court is maintained.
- iv) The writ petition is disposed off accordingly.
- v) Rule is made absolute in above terms.

**(A. M. BADAR, J.)**

Arti V.  
Khatate

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signed by Arti  
V. Khatate  
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