

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Pronounced on: 2nd May, 2022**

+ **CRL.M.C. 2227/2020, CRL.M.A. 15819/2020 (for stay)**

ROHIT KUMAR AND ANR

..... Petitioner

Through Mr. Deepak Vashisht, Mr.
Rupendev Sharma and Mr. S.P.
Yadav, Advs. with petitioners-in-
person.

versus

VARSHA

..... Respondent

Through Mr. C.M. Thapliyal, Adv.

**CORAM:
HON'BLE MS. JUSTICE ASHA MENON**

J U D G M E N T

1. The petition has been filed under Article 227 of the Constitution of India read with Section 482 Cr.P.C. for setting aside the orders dated 24th September, 2020 passed by the Learned Principal District and Sessions Judge, North Rohini, New Delhi dismissing the appeal filed by the petitioners against the orders of the Learned Metropolitan Magistrate, Mahila Court-01, (North) Rohini, dated 17th January, 2020.

2. The facts as are relevant for the disposal of this petition are that the respondent herein had filed an application under Section 23 of the Protection of Women from Domestic Violence Act, 2005 ('DV Act' for

short), seeking interim maintenance @ Rs. 20,000/- per month from the petitioner No.1 for herself and the minor child. Vide the order dated 17th January, 2020, the learned MM concluded that the income of the petitioner No.1 could be assessed at Rs.30,000/- per month and dividing the income equally amongst the family members with an extra portion to the petitioner No.1, granted a sum of Rs.15,000/- per month to the respondent and the child of the petitioner No.1 and the respondent, with effect from 26th August, 2018 till they were legally entitled to receive the same or till the final disposal of the case.

3. Being aggrieved by the said order, the present petitioners filed an appeal under Section 29 of the DV Act, which the learned Appellate Court dismissed vide the impugned order dated 24th September, 2020, holding that the well-reasoned order of the Learned Mahila Court called for no interference.

4. Before this Court, it was argued by Mr. Deepak Vashisht, learned counsel for the petitioners, that the impugned order of the Learned Appellate Court as well as the order of the Learned Mahila Court suffered from infirmity, as they had failed to factor in many material facts. It was submitted that the respondent had been employed till the birth of the child and, therefore, was capable of earning. It was argued that the learned courts had refused to set off a sum of Rs.3,50,000/- which the petitioners had paid to the respondent on 16th August, 2018. It was also submitted that the bank account statements filed by the respondent before the learned Trial Court itself revealed that there were regular payments that were being credited into her account which indicated a regular source of income and

which was again overlooked by the learned Courts below. On the other hand, the Learned Appellate Court also overlooked the fact that the income of the petitioner No.1 was assumed to be Rs.30,000/- per month which was on the higher side, with no material to justify such an assumption. It was urged that the petitioner No.1 had also to discharge the loan of Rs.3,50,000/- for purchase of a car, in respect of which EMIs were also remaining to be paid. Moreover, the Covid-19 lockdown had also adversely affected his salary which had been now reduced to a mere Rs.10,000/- per month. In these circumstances, it was submitted that the orders of the Learned Mahila Court as well as the Learned Appellate Court be set aside.

5. Mr. C.M. Thapliyal, learned counsel for the respondent, on the other hand, submitted that in exercise of the jurisdiction under Section 482 Cr.P.C. or even Article 227 of the Constitution of India, the court could not re-consider the facts. It was submitted that there was no perversity in the impugned orders calling for any interference by this Court. Furthermore, it was submitted that the fact that the respondent had been employed at some point of time, would not justify a denial of maintenance to her, as the capacity of the wife to earn and the question whether she was actually earning were different from each other. Reliance has been placed on the decision of the Supreme Court in *Shailja v. Khobbana* (2018) 12 SCC 199. It was further submitted that the petitioner No.1 was in arrears of maintenance to the tune of more than Rs.5,00,000/-. It was also submitted that the sum of Rs.3,50,000/- had been paid by the petitioners in lieu of the

jewelry articles belonging to the respondent and could not be set off against maintenance. Thus, it was prayed that the petition be dismissed.

6. The scope of the powers of the court under Section 482 Cr.P.C. as also under the Article 227 of the Constitution of India is not co-extensive with appellate powers. As has been held by a Division Bench of this Court in **Anur Kumar Jain v. Central Bureau of Investigation**, 2011 SCC OnLine Del 1574 :-

“33. ...(e) The exercise of power either under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India should be sparingly and in exceptional circumstances be exercised keeping in view the law laid down in Siya Ram Singh (supra), Vishesh Kumar (supra), Khalil Ahmed Bashir Ahmed (supra), Kamal Nath (supra) Ranjeet Singh (supra) and similar line of decisions in the field.

(f) It is settled law that jurisdiction under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India cannot be exercised as a “cloak of an appeal in disguise” or to re-appreciate evidence. The aforesaid proceedings should be used sparingly with great care, caution, circumspection and only to prevent grave miscarriage of justice.”

7. Thus, this Court cannot enter into the question of facts as to whether the assumption of the salary of the petitioner No.1 by the learned Mahila Court was not correct as per the record or the mere proclamation of the petitioner No.1 that because of Covid-19, his income had shrunk to Rs.10,000/- p.m. be accepted at face value. Even the plea that regular income had been flowing into the accounts of the respondent would be a question of fact.

8. However, on a perusal of these documents placed on the record as Annexure P-3 (Colly), it is clear that these relate to the years of 2016/2017 except for a few pertaining to the year 2018 but which are not regular. It would be a matter of trial as to from where these irregular payments were coming from. It is the case of the respondent that after having delivered the baby, on 28th November, 2017, she was expelled from her matrimonial home. And thereafter she had not been able to seek any employment on account of the infancy of their child. It is more than apparent that, the regular income prior to November, 2017, would, therefore, be irrelevant to determine whether the respondent was an earning member and, therefore not entitled for maintenance. As noticed above, the credits for the year 2018 will be explained by her in the course of her testimony before Court. There is nothing on the record to show that the courts below had not considered all materials to reach the conclusions they have.

9. With regard to the payment of Rs.3,50,000/-, the courts below have rightly concluded that the said payment was in lieu of the jewelry that was not returned by the petitioners to her. Under no circumstance could that amount have been adjusted towards maintenance payments. Therefore, the rejection of this argument of the petitioners by both the courts below was just and proper.

10. The petition being completely devoid of any merit, is dismissed with costs of Rs.10,000/- to be paid to the respondent before the learned Trial Court.

11. The petition, along with the pending application, stands disposed of.

12. The copy of this judgment be sent to the learned Trial Court. Nothing contained in this order shall be a reflection of the merits of the case.

13. The judgment be uploaded on the website forthwith.

**(ASHA MENON)
JUDGE**

MAY 02, 2022/ak

