

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1521 OF 2020

1. Nayan s/o Govindrao More
 2. Govind s/o Rambhau More
 3. Vijaya w/o Govindrao More
 4. Amruta d/o Govindrao More
(Amruta @ Switi w/o Vijay Maskar)
- ... Petitioners**

Versus

Chaitali w/o Nayan More **... Respondent**

.....
Mr. M. V. Salunke, Advocate for petitioners.

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 17-12-2020

PRONOUNCED ON : 18-01-2021

ORDER :

1. Heard learned Advocate appearing for the petitioners.
2. Petitioners intend to challenge the order passed below Exhibit-4 dated 07-09-2020 in Criminal Miscellaneous Application No.69 of 2019 by learned Judicial Magistrate First Class, Ambajogai. The said application has been filed by the present respondent under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the said Act'). The order has been passed under Section 23 of the said Act directing the petitioner No.1 to pay maintenance at the rate of Rs.25,000/- per month.

3. A preliminary objection will have to be raised regarding the maintainability of the writ petition, when Section 29 of the said Act makes a specific provision for an appeal. The learned Advocate appearing for the petitioners then submitted that it was the interim order that was passed and there is no specific provision and it cannot be said to have been included in Section 29 of the said Act. The constitutional jurisdiction of this Court is always open and, therefore, the writ petition is maintainable. However, in the alternative, the learned Advocate for the petitioners also submitted that if this Court comes to the conclusion that the appeal under Section 29 of the said Act is the only appropriate remedy, then he be allowed to withdraw the writ petition with liberty to file appeal under Section 29 of the said Act before the appropriate Court.

4. The said point has been considered by the Principal Bench of this Court in *Abhijit Bhikaseth Auti Vs. State of Maharashtra and Another, (2009 Cri. L. J. 889)*. The question that arose for consideration in the said petition was :-

(i) Whether an order passed on an application made under Section 23 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as “the said Act”) is appealable under Section 29 of the said Act?

(ii) Whether an appeal will lie under Section 29 of the said Act against every order passed by the learned Magistrate in proceedings initiated on the basis of an application made under Section 12 of the said Act?

(iii) What is the scope of an appeal under Section 29 of the said Act?

5. After having dealt with all the concerned provisions, the conclusions have been summarised as under :

(i) An appeal will lie under Section 29 of the said Act against the final order passed by the learned Magistrate under sub-section 1 Section 12 of the said Act;

(ii) Under sub-section 2 of Section 23 of the said Act, the learned Magistrate is empowered to grant an ex-parte ad-interim relief in terms of sections 18 to 22 of the said Act. The power under sub-section 1 is of granting interim relief in terms of sections 18 to 22 of the said Act. Before granting an interim relief under sub-section1, an opportunity of being heard is required to be granted to the respondent.

(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 or refusal of interim relief.

(iv) An appeal under Section 29 will not be maintainable against purely procedural orders which do not decide or determine the rights and liabilities of the parties.

6. Therefore, when this Court has already dealt with the point that there is no necessity for this Court, in absence of contrary material produced before this Court, to take different view. Further, it will not be out of place to mention that in ***Jallarapu Laxman Rao and Ors. Vs. Jallarapu Pedda Venkateswarlu and Ors., (MANU/AP/0778/2017)*** and in ***Fulchand Motiram Yadav and 1 Vs. State of Gujarat and 1***, Special Civil Application No.11471 of 2014 decided by Gujarat High Court on 06-08-2015, similar view has been taken. In ***K.Rajendran Vs. Ambikavathy***, Criminal Revision Case (MD) No.482 of 2012 and M. P (M. D.) No. 1 of 2012 decided on 8 January, 2013 by learned Single Judge of Madras High Court it has been held that, “*In the instant case, obviously, the Petitioners have not filed any petition seeking alteration, modification or revocation of the order passed by the Learned Judicial Magistrate in D.V.O.P. No.29 of 2012 dated 21.09.2012 without seeking alteration, modification or revocation of the order so passed in D.V.O.P. No.29 of 2012 dated 2.09.2012 by the Learned Judicial Magistrate and also not filing the Statutory Appeal under Section 29 of the Act, the Petitioners have directly approached this Court by filing the instant Criminal Revision petition under Section 397 and Section 401 of Cr.P.C. Only when a Revision is filed as against the judgment or order passed by the Court of Session in Appeal as per Section 29 of the Act, then only, the right of availing the procedural facility of filing the Revision is available to the Petitioners, in the considered opinion of this Court.*”

When a statutory right of filing an Appeal is provided to the Petitioners (as per Section 29 of the Act), then this Court is of the considered view that the Petitioners cannot invoke the Revisional Jurisdiction of this Court under Section 397 read with 401 of the Code". Thus, the substantial right under appeal under Section 29 of the said Act has been given importance. Therefore, no case is made out to exercise the constitutional powers of this Court under Articles 226 and 227 of the Constitution of India, when alternative efficacious remedy is available.

7. The alternative prayer of the learned Advocate for the petitioners is required to be accepted. The writ petition stands disposed of as withdrawn with liberty to the petitioners to approach appropriate Court under Section 29 of the said Act. Needless to say that the concerned Court would take into consideration while deciding point of limitation, the time consumed by the petitioners before this Court.

[SMT. VIBHA KANKANWADI, J.]

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