

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 131 OF 2022

Sarah Asif Kadawala

...Applicant

Versus

1. Asif Faruk Kadawala

2. State Of Maharashtra

...Respondents

....

Mr. Ali Kaashif Khan Deshmukh a/w Ms. Riya Jain, Mr. Shubham Shingade and Ms. S. A. Sayed, Advocate for the Applicant.

Mr. Jatin Sehgal a/w Ms. Devna Soni with Mr. Pradhuman Chauhan i/by Mr. Ashish Singh, Advocate for Respondent No.1.

Mr. Arfan Sait, APP for the Respondent No.2 – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 28th JUNE, 2022.

PER COURT:

1. Heard both sides for final disposal.
2. The applicant is aggrieved by order dated 24th December, 2021 passed by Sessions Court in Criminal Appeal No. 115 of 2021 setting aside order dated 18th August, 2021 passed by Metropolitan Magistrate, 66th Court Andheri, Mumbai In C. C. No. 28/DV/2020 below interim application Exh-3 directing Respondent No.1 to pay amount of Rs. 75,000/- per month to the aggrieved person (applicant) as interim maintenance from date of filing application

i.e. 18th January, 2020 till disposal of main petition and Rs. 35,000/- per months as rent to aggrieved person from date of filing application till disposal of main petition.

3. The applicant filed application under Section 12 of Protection of Women from Domestic Violence Act (herein after referred to as D.V. Act) against respondent No.1 and others. The applicant had prayed for reliefs under sections 17, 18, 19, 19(1) (a) (b) (c) (d) (e) (f), 19 (2), 19(8), 20, 21, 22 and 23 of the Act. In the said application the applicant has stated that, respondent No. 1 is her husband. Nikah was solemnized on 18th January 2007. They have four daughters. They are in custody of respondent No.1. The applicant has referred to harassment and violence caused to her by respondents therein. The application was filed on 18th January 2020. The applicant also filed affidavit in support of application under Section 12 of D.V. Act. Interim application under Section 23(1) for reliefs under Section 18, 19, 19(1) (a) (b) (c) (d) (e) (f), 19 (2), 19(8), 20, 21 and 22 of the Act. She filed affidavit under Section 23(2) of D.V. Act. The respondent No.1 resisted the application by filing say and denied the allegation. The learned Magistrate partly allowed the interim application under order dated 18th August 2021. The respondent No.1 was directed to pay

amount of Rs.75,000/- p.m. to the applicant as interim maintenance from filing application i.e. 18th January 2020, till disposal of main petition. He was also directed to pay Rs.35,000/- p.m. as rent to applicant from the date of application i.e. 18th January 2020 till disposal of main petition. The said order was challenged by respondent No.1 by preferring appeal. Vide order dated 24th December 2021, the appeal was allowed and order dated 18th August 2021 passed by Magistrate was set aside.

4. Learned Advocate for the applicant submitted that the learned Sessions Judge has committed an error in allowing the appeal preferred by Respondent No.1. The appellate Court has failed to consider the fact that there is prima facie evidence against the Respondent. The proceedings under the D.V. Act are pending before the trial Court. The learned Magistrate had granted interim maintenance. The discharge application preferred by Respondent No.1 was rejected on the ground that there is prima facie evidence against him. The appeal preferred by Respondent No.1 was dismissed by the Sessions Court wherein he challenged the order refusing discharge. The Sessions Court has relied upon disputed question of fact refusing maintenance. The applicant had lodged FIR No. 386 of 2020 under Section 498-A, 406 read with 34 of the

Indian Penal Code on 28th July 2020 against respondent and his family. The respondent No.1 sent his friend Abrar Yusuf Pandrowala to destroy applicant's life. He acted on instructions of respondent No.1. He started getting close to applicant. The said person blackmailed her. He committed grave offence of rape. The applicant filed FIR No. 44 of 2020 under Sections 376, 354-B, 506, 354-D, 447, 354 of Indian Penal Code against Abrar on 21st February 2020. The applicant has not admitted that she is in live in relationship with Abrar. The learned Sessions Judge has erroneously considered the said fact for refusing maintenance. The alleged evidence relied upon by respondent No.1 is yet to be proved. The Restaurant "Tavaa" at Bandra, Mumbai is managed by respondent No.1 and his father. The affidavit of assets and liabilities filed by respondent shows his luxurious lifestyle. The learned Magistrate has taken into consideration the claim of interim maintenance. There was no reason to interfere in the said order. Bare reading of section 125 (4) makes it clear that, 'express if she is living in adultery' conveys present continuous tense. Even if wife had lived in adultery in the past, the husband cannot refuse maintenance.

5. Reliance is placed on following decisions:-

- (i) Md. Abdul Sattar Vs. State of Assam and other¹;
- (ii) Anupam Gupta Vs. Sumeet Gupta decided by Delhi High Court on 30.05.2011²;
- (iii) Pradeep Kumar Sharma Vs. Ratna Sharma decided by Delhi High Court on 03.07.2009³.

6. The learned Advocate for respondent No.1 submitted that the learned Sessions Judge has rightly allowed the appeal preferred by the Respondent No.1. The applicant was not entitled for maintenance. Applicant was living with one Abrar Pandrowala in live-in-relationship. She was indulging in adultery. On this count she was not entitled for maintenance. The respondent no.1 is looking after his four daughters. The learned Magistrate had granted maintenance more than what was claimed. The respondent No.1 has placed on record list of documents viz. copy of reply filed to applicant under Section 12 of D.V. Act, Identity proof, Marriage Certificate, Birth Certificate of daughters, Discharge application, reply to discharge application, statement under Section 164 of Cr.PC. in FIR No. 44 of 2020, Adulterous Photographs in sealed cover, Adulterous videos in a sealed cover and CDR details. It is submitted that the applicant had admitted that she was in

1 MANU/GH/0694 of 2008

2 CM (M) 1718/2014

3 MANU/DE/0921/2009

relationship with Abrar. There is no infirmity in the order passed by the Sessions Court. Applicant had filed a false First Information Report of rape against Abrar. In these circumstances, Respondent No.1 cannot be compelled to pay maintenance. There are no documents to establish the income of Respondent No.1. The calculation of the assets of Respondent No.1 is imaginary. The applicant is earning and she has suppressed her income.

7. The Advocate for respondent No.1 has relied upon several decisions on the issue of wife living in adultery is not entitled for maintenance; wife having independent income or capable of earning cannot claim maintenance; Assets of family members of husband cannot be taken into consideration for maintenance; Admissibility of Electronic Evidence and Adverse Inference. Reference can be made to some of the decisions:-

- (i) Rohtash Singh Vs. Ramendri and others⁴;
- (ii) Kusum Bhatia Vs. Sagar Sethi⁵;
- (iii) Amit Khanna and Anr. Vs. Priyanka Khanna and Ors. decided by Delhi High Court⁶;
- (iv) R. M. Malkani Vs. State of Maharashtra⁷;

4 AIR 2000 SC 952

5 MANU//1675/2019

6 2010 (119) DRJ 182

7 AIR 1973 SC 157

(v) Chaturbhuj Vs. Sita Bai⁸.

8. I have perused the application under Section 12 of the Domestic Violence Act, interim application, documents on record, order passed by learned Magistrate and the order passed by Sessions Court. The main application under section 12 of D. V. Act is pending before Court of Learned Magistrate. The applicant had filed application for interim maintenance. The learned Magistrate heard both sides and passed order dated 18th August 2021. The learned Magistrate had analysed the facts, submissions of both sides, documents on record and passed the order. The learned Magistrate also referred to precedents of law relied upon by the respective advocates. In paragraph 43 of the order, it is observed that, the aggrieved person contended that, she has no fixed running source of income. According to respondent Restaurant “Tavaa” is owned by his father. It is not the case of respondent No.1 that he is residing separately from his parents. Therefore, Restaurant “Tavaa” appears to be family business of respondent Nos.1 to 3. The income from Restaurant is not available on record. Prima facie, the family of respondent Nos. 1 to 3 appears to be earning sufficiently from Restaurant “Tavaa”. The respondent No.1 admitted that he is receiving rent from Agsa Residency. Considering overall family

⁸ (2008) 2 SCC 316

income, status of parties, the amount earned by aggrieved person is not sufficient to maintain her. Respondent No.1 is taking care of daughters. Hence interim maintenance of Rs. 75,000/- per month is necessary. To grant interim compensation, the right to reside in a shared household and protection order is necessary. She is residing separately. She has right to claim alternate accommodation or rent. The learned Magistrate considered the decisions relied by respondents relating to electronic evidence and held that the decisions are not applicable in this Case. The learned Sessions Judge while allowing appeal observed that, the aggrieved person has admitted in her application that she is earning Rs.38,000/- per month by working as hairstylist at Bangalore. There is no document to show that wife needs Rs.1,50,000/- as claimed by her. The aggrieved person atleast earns Rs.25,000/- per month. The appellant (respondent No.1) in his affidavit of income and assets stated that he is earning Rs. 85,000/- per month (Rs. 65,000/- from rent and 10% share in partnership of Mini Mill). He is spending money for electricity bills of Acqua Residency and school fees of daughters. The Restaurant stands in name of father of appellant. The applicant has admitted in FIR registered at Bangalore that she was in live-in-relationship with accused in that First Information Report. In her statement recorded under Section 164 of Cr.PC., it is

recorded that she was in relationship with Abrar Pandrowala, the accused in her complaint. The Sessions Court in paragraph 21 and 22 gave finding that aggrieved person was admittedly in a live in relationship. She loses her right to claim maintenance in the light of Section 125(4) of Cr.P.C. Prima facie wife is subjected to Domestic Violence at the hands of appellant. She was in live in relationship with Abrar.

9. The learned Sessions Judge ought to have considered that the main application was pending before the Court. The Sessions Judge gave premature findings that there is no domestic violence, aggrieved person was in live in relationship and wife has earning. The question which would also fall for consideration, whether interpretation of Section 125(4) referred by learned Sessions Judge would debar aggrieved person from maintenance, assuming that she was in adulterating in past. The respondent has placed sealed envelopes allegedly containing adulterous video and photographs. It is not necessary to see the same by the envelopes be handed over to concerned advocate who produced it. The learned Sessions Judge has also apparently considered electronic evidence wife is entitled to live in similar status. The learned Sessions Judge has not considered the income from Restaurant “Tavaa” since it is in name

of respondent's father. The learned Magistrate had observed that the respondent had not denied that he is living with family. The Court should take note of the fact that it should not be a case that one spouse lives in a life of comfort and luxury while the other spouse lives in deprivation. The order of Sessions Court is unreasonable and required to be set aside. It is pertinent to note that the learned Magistrate has rejected the application of respondent No.1 for dropping the proceedings against him. The Sessions Court by order dated 24th December 2021 confirmed the said order.

10. Considering the aforesaid circumstances, the case is made out for setting aside the order passed by the Sessions Court. Hence, I pass the following order.

ORDER

- i) Criminal Revision Application No.131 of 2022, is allowed, and disposed of accordingly;
- ii) The impugned order dated 24th December, 2021, passed by the Sessions Court Dindoshi in Criminal Appeal No.115 of 2021 is set aside.

(PRAKASH D. NAIK, J.)