

Santosh

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

WRIT PETITION NO. 1276 OF 2019

Anil Bhatia & ors. ...Petitioners

Versus

Kashish Bhatia & anr. ...Respondents

Ms. Chanda Solanki, a/w Niranjan Prahan, i/b H.H. Nagi &
Chaula Solanki for Nagi and Asso., for the Petitioners.

Mr. Raju Maruti yamgar, for Respondent no.1.

Ms. Anamika Malhotra, APP for the State.

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CORAM: N. J. JAMADAR, J.

DATED : 20th APRIL, 2022

PC:-

1. The challenge in this petition is to the order passed by the learned Sessions Judge dated 17th January, 2019, in Criminal Appeal No.584 of 2018, whereby the learned Sessions Judge dismissed the appeal preferred by the petitioner and affirmed the order passed by the learned Metropolitan Magistrate restoring CC No.250/N/2011 to the file of the Court by setting aside the order dated 11th April, 2018, dismissing the said complaint for default on the part of the complainant in adducing evidence.

2. Petitioner no.1 is the husband of respondent no.1. Their marriage was solemnized on 26th February, 2003. In the wake of marital discord, proceedings were initiated. The respondent

no.1 filed an application under Section 23 of the Protection of Women from Domestic Violence Act, 2005 (“the Act, 2005”), being CC No.250/N/2011. During the course of the said proceedings, it seems, a number of applications were preferred. Certain orders passed therein were subject matter of challenge before the Appellate and this Court as well.

3. On 5th July, 2017, the learned Magistrate recorded that, *inter alia*, the parties were not cooperating in deciding the application under Section 12 of the Act and instead were submitting several applications and thereby prolonged the matter. The Magistrate was thus persuaded to direct the applicant to adduce evidence. It was further directed that all applications filed by the parties would be decided along with original application on merit. The said order made it clear that if the applicant failed to adduce evidence, the Court would proceed in accordance with law. It seems the applicant did not adduce evidence, as ordered.

4. Petitioner no.1 filed a pursis on 1st October, 2017 agitating the said facts. By order dated 19th December, 2017, the learned Magistrate directed the applicant to adduce evidence on the next date and, in the event of default, the application would stand dismissed. The said order was challenged in appeal by the

applicant, respondent no.1 herein, in Criminal Appeal No.1 of 2018. By a judgment and order dated 15/2/2018, the learned Additional Sessions Judge dismissed the said appeal as it was filed against a direction to proceed with the matter expeditiously.

5. On 11th April, 2018, when the application was listed before the Court, the learned Magistrate gave opportunity to the applicant to lead evidence. When the applicant sought time, the learned Magistrate asked the applicant to furnish pursis/undertaking that evidence would be led on the next date. As the applicant did not furnish such undertaking, the learned Magistrate was ultimately persuaded to dismiss the complaint in default. It was observed that the Magistrate was satisfied that the complainant was intentionally and deliberately prolonging the matter without any reasonable cause and excuse.

6. The applicant preferred miscellaneous Application No.115/N/298 for restoration of the said application purportedly under Order IX of Rule 4 read with Section 151 of the Code of Civil Procedure ("the Code") and Section 28 (2) of the Act, 2005. The said application came to be allowed by the learned Magistrate by the judgment and order dated 6th August, 2018. The learned

Magistrate held that the application for restoration of an application dismissed in default was maintainable and the applicant had shown sufficient cause for non-prosecution of CC No.250/N/2011 when it was called out for hearing.

7. Being aggrieved, the petitioner preferred appeal being Criminal Appeal No.54 of 2018 before the learned Sessions Judge. By the impugned order dated 17th January, 2019, the learned Sessions Judge dismissed the appeal and affirmed the order of restoration of the application passed by the learned Magistrate. Being further aggrieved, the petitioner has invoked the writ jurisdiction of this Court.

8. I have heard Ms. Solanki, the learned Counsel for the petitioner and Mr. Yamgar, the learned Counsel for respondent no.1.

9. Taking the Court through the various proceedings and orders passed therein, the learned Counsel for the petitioner made an endeavour to draw home the point that the applicant had not proceeded with the application with an oblique motive and continued to file interim applications seeking directions in the nature of order for interim maintenance, enhancing the quantum of maintenance and rent ordered to be paid by the learned Magistrate. Laying emphasis on the conduct of

respondent no.1 – applicant, as reflected from the record, the learned Counsel would urge that neither there was a sufficient cause made out in the application for restoration nor such sufficient cause is evident from the record. In such circumstances, the learned Magistrate could not have restored the application especially when the order dated 19th December, 2018 records the circumstances in which the learned Magistrate was constrained to pass the order of dismissal.

10. It was further submitted that the order passed by the learned Magistrate suffers from a manifest error in law as the provisions contained in Section 28 of the Act, 2005, which make the provisions of the Code of Criminal Procedure, 1973 applicable to the proceedings under the said Act, were lost sight of. The learned Magistrate was in error to restore the application dismissed in default. A distinction was sought to be made between the dismissal of a proceeding for default in appearance and for failure to give evidence.

11. In opposition to this, the learned Counsel for respondent no.1 would urge that the controversy as regards the competence of the Magistrate to restore the application which came to be dismissed in default is no longer *res intergra*. In support of this submission, the learned Counsel placed reliance on a judgment

in the case of *Mrs. Maria Mercy Suzana Fernandes vs. Mr. Francisco Monte Piedde Cruz and naother, Criminal Writ Petition No.10 of 2018, dated 20th February, 2018*, wherein this Court had ordered the restoration of an application under the Act, 2005, which was dismissed in default by the learned Magistrate.

12. I have considered the rival submissions.

13. I am afraid to accede to the submissions on behalf of the petitioner that the learned Magistrate could not have exercised the power to restore the application dismissed in default. The analogy drawn by the learned Magistrate with regard to the proceedings under Section 125 of the Code is justifiable. Even otherwise, it is now fairly well settled that the proceedings under the Act, 2005, are of *quasi* civil nature. Undoubtedly Section 28 makes the provisions of the Code of Civil Procedure, 1973, applicable to the proceedings under the said Act. At the same time, sub-section (2) vests the power with the Magistrate to adopt the procedure as may be found expedient in the given case.

14. A profitable reference in this context can be made to a Full Bench judgment of this Court in the case of *Nandkishor*

Pralhad Vyawahare vs. Mangala w/o Pratap Bansar¹, wherein the Full Bench *inter alia* considered the following question:

“Whether or not the proceedings under the Protection of Women from Domestic Violence Act, 2005 are in the nature of criminal proceedings?”

And answered the same as under:

“Proceedings under the Protection of Women from Domestic Violence Act, 2005 are predominantly of civil nature and it is only when there is a breach of the protection order as is contemplated under Section 31 and failure or refusal to discharge duty without any sufficient cause by the protection officer as contemplated under section 33, the proceedings assume the character of criminality.”

15. Since the proceedings are of *quasi* civil nature, the learned Magistrate committed no error in proceeding to exercise the power to restore the application.

16. On the merits of the exercise of power to restore the application, the learned Magistrate, has ascribed justifiable reasons. It was noted in paragraph 14 of the impugned order that a writ petition was pending before this Court when the said application came to be disposed of. The learned Additional Sessions Judge has also considered the circumstances in which the application came to be restored. As the Courts below have exercised jurisdiction, which advances the cause of substantive

1 2018(3) Mh.L.J. 913.

justice by promoting the decision of the lis on merits, I am not inclined to exercise the extraordinary writ jurisdiction.

17. The learned Counsel for the petitioner submitted that even if the application is restored to file, the applicant – respondent no.1 may resort to dilatory tactics and ultimately the petitioner would suffer. The record indicates that the application was filed in the month of December, 2011. Period of more than 10 years has elapsed. In the circumstances of the case, especially the fact that there have been multiple rounds of litigation between the parties, it would be expedient in the interest of justice that the main application is finally decided as expeditiously as possible. The Court is informed that the presiding officer, on whose file the application is pending, is on leave.

18. In the circumstances of the case, while dismissing the petition I deem it appropriate to pass the following directions.

- (i) The parties shall appear before the learned Magistrate on 6th June, 2022.
- (ii) The applicant shall file her affidavit of evidence before the Court on 6th June, 2022.
- (iii) The learned Magistrate shall make an endeavour to complete the recording of evidence and pass final order after giving an opportunity of hearing to the

parties, within a period of six months from 6th June, 2022.

- (iv) The parties shall cooperate the learned Magistrate in deciding the application and shall not seek adjournment except for exceptionally unavoidable circumstances.

Subject to aforesaid directions, the petition stands dismissed.

[N. J. JAMADAR, J.]