

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

CRIMINAL REVISION APPLICATION NO.147 OF 2022

Roma Anand Wagh ... Applicant
Versus
Anand Dinkar Wagh and Anr. ... Respondents

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Mr. Ashok K. Goel, Advocate for the petitioner.

Ms. C.Bocarro i/by Mr. Vivek Sharma, Advocate for Respondent No.1.

Mr. A. R. Patil, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 26th SEPTEMBER, 2022.

PER COURT:

1. The applicant and respondent No.1 performed marriage on 1st January, 1992. Out of wedlock they have a daughter aged around 21 years. The applicant had initiated divorce proceedings on 21st November, 2011 before the family Court at Bandra vide Petition No. A-2718 of 2011. The respondent No.1 filed written statement and counter claim, and also sought decree of divorce on the ground of cruelty. The applicant filed proceedings under the Protection of Women from Domestic Violence Act (hereinafter referred to as 'DV Act'). On 25th November, 2011 before the Court of learned Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai being C.C. No.57/DV/2011.

2. On 18th July, 2016, the applicant filed affidavit of examination-in-chief along with documents in the petition for divorce. The list of documents is annexed to this application.

3. The applicant filed her affidavit of examination-in-chief along with photo copies of documents before the Court of learned Magistrate in the proceedings under the DV Act. The documents filed before the Court of Magistrate were photo copies of original documents filed in divorce petition.

4. The applicant preferred interim application before the Court of learned Metropolitan Magistrate in the proceedings under the DV Act seeking various reliefs. Vide order dated 17.01.2013, the application was partly allowed. The respondent No.1 was directed to pay interim maintenance at the rate of 7,000/- per month to the applicant from the date of filing the original application. The prayers for restraining the respondent No.1 to enter in the house, removing household articles and protection from the Police Station were rejected.

5. The applicant and respondent No.1 filed Criminal Appeal No.155 of 2013 and Criminal Appeal No.417 of 2013 respectively before the Sessions Court. Vide common order dated 07.08.2017,

the learned Sessions Judge disposed of both the appeals. The respondent - husband was directed to pay interim maintenance of Rs.17,000/- per month to the applicant wife as household expenses and Rs.8,000/- per month as maintenance to child from the date of application till application under Section 12 of the DV Act is finally disposed off. The maintenance was in addition to the order of maintenance passed by Family Court.

6. According to applicant, the respondent No.1 did not comply the order dated 17.01.2013 and 07.08.2017 passed by learned Additional Chief Metropolitan Magistrate and Sessions Court. The applicant preferred application before the Court of learned Magistrate for issuance of distress warrant against respondent No.1. The respondent No.1. preferred Criminal Revision Application No.585 of 2017 challenging order dated 7th August, 2017 passed in Criminal Appeal No.155 of 2013. The revision application came up for hearing before this Court on 13.02.2020. Vide order dated 13.02.2020 this Court directed the learned Magistrate to decide the application without granting unwarranted adjournments to either of the parties. All the pending applications were to be decided within three months from the date of the receipt of the order. Pendency of distress warrant shall not be an

impediment to decide the main application i.e. Criminal Case No.57/DV/2011 and the proceedings to be expedited and in any case to be concluded by 30.08.2020.

7. According to the applicant there were arrears of maintenance remained unpaid by respondent No.1. On 03.08.2021 the applicant preferred an application before the learned Additional Chief Metropolitan Magistrate, praying for issuance of arrest warrant against respondent No.1 for non compliance of order of maintenance and for directions to respondent No.1 to pay arrears of maintenance.

8. The respondent No.1 preferred interim application No.613 of 2022 in Criminal Revision Application No.585 of 2017 seeking direction that the applicant shall proceed with her cross examination in the DV complaint and for stay of order of Sessions Court dated 07.11.2017. This Court vide order dated 09.03.2022 directed the applicant to submit herself for cross examination and also directed the trial Court to dispose off the proceedings under the DV Act by 15.05.2022.

9. The applicant preferred an application Exhibit – 52 for passing appropriate orders in her application for issuance of arrest

warrant against respondent No.1 as he had failed to comply with order passed by the Court and the arrears of around Rs. 30,00,000/-. The respondent No.1 filed say opposing the said application and contended that the application is contrary to the order of the High Court. The interpretation of the order of the High Court is that the distress warrant shall not be issued against respondent No.1.

10. The learned Magistrate vide order below Exhibits 1 and 52 directed the applicant to proceed with exhibiting documents and cross examination on the next date and on failure to proceed with the cross on next date, the application would stands disposed of.

11. The D.V. complaint came for hearing on 21.03.2022. The applicant preferred application Exhibit – 53 for treating the xerox copies of the documents submitted along with her evidence as secondary evidence. In the application it was contended that the applicant had filed an application for getting certified copies of original documents in the family Court on 08.03.2022. The Advocate has visited family Court for certified copies however the documents were misplaced. The copies were not made available for various reasons. Some of the documents are in possession of

the respondent No.1. Several other documents are lying in the family Court. It is not possible to get original documents from the possession of the respondent or from the family Court. Hence, xerox copies of documents in the list filed by the applicant may be taken on record. The application was opposed by the Advocate for respondent No.1 by filing say. The learned Magistrate vide order dated 21.03.2022 rejected the said application. The learned Magistrate however passed another order on 21.03.2022 that though the application was rejected the applicant was ready to lead evidence and willing to cross examined by respondent and in this background the order that on failure to proceed with the cross, on the next date, the application stands disposed of is vacated.

12. The Respondent No.1 has filed affidavit-in-reply dated 09.07.2022 opposing the reliefs sought in this application. The applicant has filed rejoinder affidavit dated 6th July, 2022.

13. learned Advocate for the applicant submitted that the impugned order dated 15.03.2022 below Exhibits – 1 and 52 and order dated 21.03.2022 below Exhibit – 53 are contrary to law. The Respondent No.1 is in arrears of maintenance. He cannot be allowed to avoid payment of maintenance. There are huge arrears

of maintenance. This Court has never indicated that, order granting maintenance is stayed. The order of this Court is misinterpreted by respondent No.1 and the Court of learned Magistrate. Although the proceedings were expedited and it was observed by this Court that pendency of an application for issuance of distress warrant would not be an impediment to proceed with the trial Court proceedings, there was no stay to the order of maintenance. The order of maintenance is in force, it has to be implemented. The learned Magistrate has erroneously rejected the application for treating xerox copies of list of documents as secondary evidence. Some of the documents are in possession of respondent No.1 and some of the original documents are before the family Court. The learned Magistrate failed to consider Section 66 of the Indian Evidence Act. The applicant in compliance with order dated 05.04.2022 has filed affidavit listing out the original documents produced in the family Court. Hence, the impugned order be set aside.

14. Learned Advocate for respondent No.1 submitted that there is no infirmity in the impugned orders. This Court vide order dated 13.02.2020, directed the learned Magistrate to decide the application expeditiously. The said order was passed considering

the fact that the application under DV Act is pending for 9 years. All the applications were directed to be decided within three months. Pendency of distress warrant shall not be an impediment to decide the main application. The Court also directed that the proceedings be concluded by 30.08.2020. The said order would indicate that the trial Court shall proceed with the case. Thereafter, again vide order dated 09.03.2022 this Court directed the trial Court to proceed with the matter the applicant was refused to proceed with cross examination. Hence, the learned Magistrate has rightly proceeded with the trial. The applicant is delaying the proceedings. Xerox copies cannot be substituted in evidence. The applicant is required to prove the documents by following due process of law. There is illegality in order dated 21.03.2022 passed below Exhibit – 53. The applicant is not complying order of this Court. The applicant had adopted excuses for entering into the witness box pursuant to orders of this Court. The respondent has paid more than 18 Lakhs as maintenance. The applicant is a vice-principal of a college. The applicant had not given full disclosure of her assets. The applicant owns shares. The order passed by this Court is misinterpreted by applicant.

15. Perused the documents. The applicant had initiated the

proceedings under DV Act which are pending since long. The applicant had preferred interim application for maintenance and other reliefs. Vide order dated 17.01.2013 interim application was partly allowed. Respondent was directed to pay interim maintenance at the rate of 7,000/- per month to the applicant from the date of filing of the original application i.e. from 25.11.2011. The aforesaid order was challenged by both the sides by preferring appeal. The learned Sessions Judge vide order dated 07.08.2017 directed respondent No.1 to pay Rs.17,000/- per month to the applicant-wife as household expenses and Rs.8,000/- per month as maintenance to child from the date of application till the application under Section 12 of the DV Act is finally disposed of. For non compliance of the aforesaid orders, the applicant preferred an application for distress warrant against respondent No.1. Thereafter, the respondent No.1 preferred criminal revision application No.585 of 2017 before this Court challenging the aforesaid orders. It is pertinent to note that the order of maintenance has not been set aside by this Court. Criminal Revision Application No.585 of 2017 was disposed of vide order dated 13.02.2020. From the tenor of the said order it can be seen that there is no stay to the order of maintenance passed by the trial

Court or the Sessions Court. On the contrary the submission of the Advocate for respondent No.1 before this Court in Criminal Revision Application No.585 of 2017 is that to expedite the trial in case No.57/DV/2011. This Court noted that the proceedings are pending since nine years. The learned Magistrate was directed to decide the application without granting unwarranted adjournments and to decide all the pending applications in three months from the date of receipt of the order. It was also observed that pendency of distress warrant shall not be an impediment to decide the main application i.e. C.C. No.57/DV/2011 and the proceedings to be concluded by 30.08.2020. It is pertinent to note that the said order cannot be interpreted to the extent that the order of maintenance is set aside or that distress warrant shall not be issued against respondent No.1 for non compliance of order of maintenance. The applicant preferred an application for deciding her application for issuance of distress warrant and for issuance of distress warrant against respondent No.1. The respondent No.1 preferred Criminal Application No.613 of 2022 in Criminal Revision Application No.585 of 2017. This Court vide order dated 09.03.2022 observed that the proceedings were expedited by this Court. The Court recorded submissions of Advocate for respondent No.1 and the

applicant. The grievance of respondent No.1 was that there was restraint by the applicant to proceed with cross examination. On behalf of the applicant it was submitted that the application was filed on 30.08.2021 for issuance of arrest warrant against respondent No.1 for recovery of Rs.29,29,166/-. The Court however observed that there was no effort made by the applicant to prosecute the said application. It was also observed that this Court in particular facts of this case had observed that the application seeking distress warrant shall not be an impediment for proceedings with the trial. It was further observed that in the eventualities the Court observed that the original applicant is not willing to subject herself to cross examine, the learned Magistrate shall pass an order to that effect as to no cross or that the cross has been refused by the applicant and proceed with the DV application. The learned Magistrate was directed to dispose of the application by 15.05.2022.

16. The learned Magistrate vide order dated 15.03.2022 passed below Exhibit Nos.1 & 52 rejected the application for arrest warrant and directed the applicant to proceed with exhibiting documents and cross examination on the next date and on failure to proceed with the cross, the application would dispose of. I do

not find that the orders dated 13.02.2022 or 09.03.2022 has disturbed the order of maintenance in any manner or stayed the execution of the distress/arrest warrant. Merely on the ground that this Court has expedited the proceedings it cannot be interfered that the respondent No.1 is free to not comply the order of maintenance. The said order is still in force. The learned Magistrate has therefore committed an error in rejecting the application for issuance of distress warrant. There is no restraint for the trial Court to issue distress/arrest warrant for non-compliance of the order of maintenance. As far as order dated 21.03.2022 rejecting the application for treating xerox copies of listing of documents as secondary evidence cannot be set aside. I do not find any infirmity in the said order. The contention of the applicant is that some of the documents are in possession of respondent No.1. The applicant shall follow the due process of law to prove the documents. The applicant has also contended that the original documents are in custody of the family Court. The applicant is at liberty to get the certified copies from the said Court. In these circumstances the order dated 15.03.2022 passed by the learned Magistrate below Exhibit – 1 and 52 deserves to be set aside and no interference is called for in order dated 21.03.2022

passed by the learned Magistrate below Exhibit – 53. Hence, I pass the following order :

ORDER

- i. Criminal Revision Application No.147 of 2022 is partly allowed;
- ii. Impugned order dated 15.03.2022 passed by learned Additional Chief Metropolitan Magistrate 9th Court, Mumbai in C.C.No.57/DV/2011 below Exhibit – 52 is quashed and set aside;
- iii. The learned Magistrate shall decide the application for issuance of distress/arrest warrant expeditiously and in accordance with law;
- iv. No interference is required in the impugned order dated 21.03.2022 passed below Exhibit – 53 rejecting the prayer for treating xerox copies of list of documents as secondary evidence;
- v. Criminal Revision Application is disposed off accordingly.

(PRAKASH D. NAIK, J.)