

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2456 OF 2022

Shaikh Mohammad Abdul Jabbar s/o
Shaikah Mohammad Abdul Sattar
Age- 40 years, Occ- Nil,
R/o. Bismillah Colony, Plot No. C-03/2,
Makai Gate Road, Aurangabad.

Petitioner

Versus

1. Syeda Bushra W/o Sk Mohd Abdul Jabbar
Age- 34 years, Occ- Household,
2. Aayesha D/o Sk. Mohd. Abdul Jabbar
Age- 6 years, Occ- Ni.
3. Mohd. Hamzla S/o Sk. Mohd. Abdul
Jabbar
Age- 2 years, Occ- Nil,
Both Minor, Through their Legal Guardian
Mother Syeda Bushra W/o Sk. Mohd. Abdul
Jabbar,
All residing at House No. 268, Near Market
Committee, Badnapur, Tq. Badnapur,
Dist. Jalna.

Respondents

Mrs. Saie Joshi h/f. J.P. Legal Associates, for Petitioner.
Mr. Yogesh D. Kale, Advocate for respondent No. 1 to 3.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 24th AUGUST, 2023

JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard finally
with the consent of parties.

2. By this petition, filed under Article 227 of the Constitution of India, petitioner/husband challenges the order passed by learned Judge, Family Court, below Exhibit-12, in A-Petition No. 21/2021, thereby granting interim maintenance in favour of respondent/wife.

3. Civil Application No. 7681/2023 is filed by the petitioner contending that respondent No. 3/minor child has expired during the pendency of proceeding, therefore, interim maintenance awarded to him be set aside.

4. Husband filed petition for restitution of conjugal rights under section 281 of Mulla's Principles of Mahomedan Law. In the said proceeding, after appearance respondent/wife filed interim maintenance application which was titled as 'Interim Maintenance Application Under Section 125 of Cr.P.C.', wherein she prayed for interim maintenance at the rate of Rs. 20,000/- each for herself and two sons/respondents. She also claimed Rs. 2,000/- towards litigation expenses. Said application is opposed by husband by filing say. Both the parties were directed to file their affidavit of income and liability, which were filed on record. After hearing the parties, Family Court partly allowed the application and awarded an amount at the rate of Rs. 8,000/- to

respondent No. 1 and Rs. 4,000/- each to two minor children i.e. total amount of Rs. 16,000/- towards interim maintenance from the date of application till the decision of proceeding. This order is impugned in the present petition.

5. Heard the learned advocate for the petitioner and learned advocate for the respondents. Perused the memo of writ petition, annexures thereto and the impugned order.

6. Learned advocate for the husband assailed the impugned order mainly on the ground that the application filed under section 125 Cr.P.C. in the proceeding filed by husband for restitution of conjugal rights was not maintainable and same ought to have been rejected at threshold. She submits that there is nothing on record to show that the petitioner has refused to maintain the wife. On the contrary, filing of restitution proceedings itself shows that he was always ready and willing to maintain the wife and children. Further submission is since the husband has resigned from his job, he is not in a position to pay exorbitant amount of maintenance and this aspect is ignored by the Family Court, while awarding interim maintenance. It is also urged that husband has purchased the house in the name of wife, but the wife has disputed this fact and has stated that the

said house is purchased in her name by her father. The impugned order therefore is cannot be sustained and same is liable to be quashed and set aside.

7. Learned advocate for the respondent on the other hand supports the impugned order. He submits that section 125 is applicable equally in case of Hindus and Muslims and no fault can be found with the order impugned in the present petition.

8. There is no substance in the contention of the petitioner that application under section 125 of Cr.P.C. was not maintainable for claiming interim maintenance in the proceeding filed by the husband for restitution of conjugal rights under Muslim Personal Law. Family Court has treated the said application as application for interim maintenance and considered it as such.

9. It is well settled that merely because wrong provision is mentioned in the order, that by itself does not render the order invalid, if the authority passing the order has power to pass such order.

10. In Mohammed Anis Ul Haq s/o Manzul Ul Haq vs. Asma Anjum Anis Ul Haq, 2010 (6) Mh.L.J. 326, similar issue

was considered in the facts that, in a petition for restitution of conjugal rights filed by the husband under Mohammedan law, wife was granted interim maintenance. It was contended that talaq was given to wife before two witnesses and so she could not claim maintenance. Family Court rejected the said contention and awarded interim maintenance. Petition was filed challenging the order on the ground that only final maintenance could be granted after adjudication that too in accordance Mohammedan law and not on the ground of justice or equity.

Learned Single Judge of this Court by relying on *Savitri w/o Govind Singh Rawat vs. Goind Singh Rawat*, 1986 B.C.I. 150(S.C.), held that, "every Court has power to possess all necessary powers to make an order effective on principle of *ubi aliquid conceditur i.e. when law requires a thing to be done and it is found impossible to do that thing unless something not authorised in express terms is also to be done then that something else can be procured and this power is supplied by necessary intendment. The Court which has power to grant main relief has also power to grant interim relief (Rajesh Nanaji Morghade vs. Darshana Rajesh Morghade, 1993 (3) Bom.C.R.99(N.B). Section 9 of CPC also empowers a Civil Court to grant interim maintenance and same power is available to*

Family Court.” Hence, this Court refused to interfere in the interim maintenance order passed in favour of wife holding that, “Here, though the parties are Mohammedan, the maintainability of proceedings is not in dispute and hence till the question of entitlement to final relief remains pending for adjudication, Case before the Family Court is not for recovery of maintenance and, it has jurisdiction and power to award interim maintenance to the respondent – wife during restitution proceedings. The Family Court has correctly appreciated the law on the point.”

11. In **Samaun Khan vs. Roshni Parveen**, 2010(4) ADJ 282, Division Bench of Allahabad High Court has held;

"23. Hon'ble Supreme Court in a case reported in AIR 1966 SC 1899 (V 53 C 384) M/s. Ram Chand and Sons Sugar Mills Private Ltd. Barabanki (U.P.)v. Kanhayalal Bhargava and Ors., held that the court is competent to make suitable order under Section 151 of the CPC as may be necessary for ends of justice or to prevent the abuse of process of court. There is nothing in Order 29 of the Code of Civil Procedure which expressly or by necessary implication precluded the exercise of the inherent power of Court under Section 151 of the Code of Civil Procedure.

24. In one another case reported in 2004 (4) SCC 468, Vikas Aggrawal v. Anubha their Lordship of Hon'ble Supreme court held that inherent powers of the Court under Section 151 of Code of Civil Procedure can always be exercised to advance interests of justice and the technicalities will have no place in such matters. Order 39 of the Code does not expressly or by necessary implication preclude the exercise of inherent power by the court under Section 151 of the CPC. Court may pass appropriate suitable order to meet out the ends of justice.

25. In one another case reported in MANU/SC/0410/2004: 2004(6) SCC 378, *Vareed Jacob v. Sosamma Geevarghese and Ors.* their Lordship of Hon'ble Supreme Court reiterated the aforesaid principle and held that in appropriate matter court may pass appropriate order to meet out the ends of justice. It has been held that inherent power of the court is to do justice in addition to and complementary to powers conferred under CPC, expressly or by implication.

26. Thus, while granting maintenance in the case filed for restitution of conjugal rights by a person governed under the Muslim Personal Law, the court may pass appropriate orders for grant of maintenance as well as for payment of cost of litigation.

27. Nothing has been brought on record nor pointed out by learned Counsel for the appellant that grant of maintenance or payment of cost of litigation, shall be violative of some statutory provisions. In the absence of statutory bar, the order passed by Family Court, cannot be faulted with.

28. Apart from above, there is one another aspect of the matter. Right to life and the right to livelihood are fundamental rights guaranteed under Article 21 of the Constitution of India as settled by Hon'ble Supreme Court in *Catena* of judgments.

The meaning of the word "LIFE" interpreted by Hon'ble Supreme Court from time to time. In *Kharak Singh v. State of U.P.* MANU/SC/0085/1962: AIR 1963 SC 1295: 1964 (1) SCR 332, it was held that the term "life indicates more than mere animal existence. [See also: *State of Maharashtra v. Chandrabhan Tale* MANU/SC/0396/1983: AIR 1983 SC 803: 1983 (3) SCR 337: (1983) 3 SCC 387]. The inhibitions contained in Article 21 against its deprivation extends even to those faculties by which life is enjoyed. In *Bandhua Mukti Morcha v. U.O.I.* MANU/SC/0051/1983: AIR 1984 SC 802: 1984 (2) SCR 67: 1984 (3) SCC 161, it was held that the right to life under Article 21 means the right to live with dignity, free from exploitation. In case, the wife is suffering from paucity of funds or is unable to maintain herself or she has got no sufficient means for livelihood, then, the court in a pending suit for restitution of conjugal rights, has got ample powers to direct for payment of maintenance in pursuance to the powers conferred by Section 152 of the

Code of Civil Procedure. Needless to say that right to life and livelihood does not mean animal living but a quality of life suiting to the status of the person concern.

29. Analogy may also be drawn from the Protection of Women from Domestic Violence Act, 2005 where the Parliament on its wisdom, deals with the situation with regard to plight of women without differentiating on the basis of caste, creed or religion. The statutory protection granted by Parliament is to meet out the requirement of Article 21 of the Constitution of India. Accordingly, even if there is no statutory provision, temporary injunction may be granted or an order may be passed by the Family Court for the payment of maintenance including cost of litigation without discriminating the ladies of the country on the basis of caste, creed or religion."

12. In the light of aforesaid ratio, argument of the petitioner that Family Court had no jurisdiction to award interim maintenance to Mohammedan wife is liable to be rejected.

13. Another argument of learned advocate for the petitioner that petitioner has resigned from the job and said fact is ignored by the Family Court is devoid of merit. It is well settled that able bodied person is duty bound to maintain his wife and children. In this view of the matter, merely because husband has resigned from the job, it cannot be said that the interim maintenance should not be awarded to the respondent/wife and children.

14. In the impugned order submission of wife is recorded that the petitioner is engineer and he has constructed a house at

Bsimilla Colony and he is getting rent of Rs. 40,000/- from the said house. The, said aspect is denied by the husband.

15. It is not necessary to go into the disputed question as to who has purchased the house in the name of wife. The same will have to be considered by the Family Court, at the time of final adjudication of the matter.

16. Considering the facts of the case, status of parties and earning capacity of the petitioner, Family Court has rightly awarded reasonable amount of interim maintenance at the rate of 8,000/- to the wife and 4,000/- each to the children i.e. total Rs. 16,000/-. There is no illegality or perversity in the order impugned in the present petition. Family Court has not committed any jurisdictional error or error of law while awarding the interim maintenance. No case is made out by the petitioner to warrant interference in the extra ordinary writ jurisdiction. Writ petition being devoid of merit is dismissed. There shall be no order as to costs.

Rule is discharged.

[NITIN B. SURYAWANSHI, J.]