

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1600 OF 2019

NILESH S/O. ATMARAM MALI AND OTHERS
VERSUS
NITA @ NIKITA W/O. NILESH MALI AND ANR

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Advocate for Petitioners : Mr. Y. K. Bobade
Advocate for Respondents : Mr. D. D. Pande

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CORAM : R.M. JOSHI, J

DATE : JULY 03, 2023

PER COURT :

1. This Petition takes exception to the order dated 31st October, 2018 passed by Additional Sessions Judge, Dhule in Criminal Appeal No. 41/2011.

2. Petitioners contend that Respondents have filed an application before learned JMFC, Shirpur for seeking order of maintenance. The said application came to be allowed by order dated 18th April, 2011 passed in M.A. No. 127/2009. By said order the Respondents were directed to be paid maintenance of Rs. 1,000/- and Rs. 500 respectively. Against the said order, both Petitioners as well as Respondents filed Appeal before Sessions Court, Dhule being Criminal Appeal Nos. 40 & 41 of 2011.

3. Learned Counsel for the Petitioners submits that after passing of said order by learned JMFC in January, 2014 both Petitioner No. 1 and Respondent No. 1 resumed their cohabitation in their matrimonial home. It is further contended that since they resumed cohabitation on the basis of compromise between them, pursuant to the said compromise the Appeal filed by the Petitioner being Appeal no. 40/2011 came to be withdrawn. At that time, Respondent No. 1 also withdrew the execution proceedings but continued with Appeal No. 41/2011.

4. It is contended that matrimonial relations between Petitioner No. 1 and Respondent No. 1 continued till 2017 and thereafter, again they got separated. It is his contention that under bonafide belief that Respondent No. 1 has withdrawn Criminal Appeal No. 41/2011, he did not pursue the same and therefore, the said appeal proceeded ex-parte and resulted into passing of order dated 31.10.2018.

5. Learned Counsel for the Respondents submits that there is no error committed by the learned

Additional Sessions Judge in deciding the Appeal ex-parte as notice of the said appeal was duly served upon Respondents/Petitioners herein.

6. Material placed on record clearly indicates that there was resumption of cohabitation between Petitioner No. 1 and Respondent No. 1 in January, 2016 as a result of which, Petitioner No. 1 has withdrawn Criminal Appeal No. 40 of 2011 filed by him. It was rightly expected by the Petitioners that the Respondent no. 1 would withdraw the Appeal filed by her against the order passed by learned JMFC. The said belief of Petitioner cannot be said misplaced one.

7. It is then contended by learned Counsel for the Petitioners that there is suppression of fact on the part of the Respondent No. 1 of purchase of flat in December, 2014 was not brought to the notice of the said Court and which has resulted into not considering the relevant facts before determination of amount of maintenance. The document placed on record clearly indicates that in December, 2014 flat was purchased by the Petitioner No. 1 on loan. There are also documents to indicates that monthly installment is deducted from

salary of Petitioner No. 1 towards repayment of loan. This aspect is relevant for decision of quantum of maintenance. This aspect is completely missed by Appellate Court for the reason that the same was not brought to its notice. For whatever reason, the relevant aspect of legitimate deductions from the salary of Petitioner No. 1 is not considered and hence, such order determining maintenance cannot sustain.

8. Learned Counsel for the Petitioners state that a sum of Rs. 1,50,000/- has been deposited pursuant to the directions of this Court. In such circumstances, the interest of the Respondents is protected at least to some extent. Hence, the Petition is allowed. Impugned order dated 31.10.2018 passed by the learned Additional Sessions Judge, Dhule in Criminal Appeal No. 41 of 2011 is hereby set aside. Respondent No. 1 is permitted to withdraw a sum of Rs. 50,000/- from the amount deposited by the Petitioners before learned JMFC. Entitlement of the remaining amount shall depend upon the decision of the Criminal Appeal. Parties to appear before the Sessions Court at Dhule on 25th July, 2023. No separate notice shall be issued of the

proceedings to the parties. All issues are kept open for consideration of the Appellate Court on merits.

(R.M. JOSHI, J.)

Malani